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Dear reader,

This is the thirtieth issue of *Juridica International*. The first was published back in 1996, and, in general, one issue has been published each year since then. While 2007, 2008, 2014, and 2017 saw the publication of two issues each, no year has failed to feature. Though serving as a journal of the University of Tartu, *Juridica International* is also the only peer-reviewed legal journal published in Estonia to enjoy broad international distribution. Thus, for 26 years, it has been the calling card of Estonian jurisprudence on the world stage. However, it has been more than that. The involvement of foreign authors is just as important as the aim of providing Estonian authors with an opportunity to participate in international scientific discussion. There is every reason to be proud of the fact that the journal's 30 issues have featured authors from 25 other countries: Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Finland, France, Georgia, Germany, United Kingdom, Hungary, Italy, Kazakhstan, Latvia, Lithuania, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Sweden, Ukraine, and the USA. Among the authors are many who are in the uppermost echelon of the world's leading professors in their field.

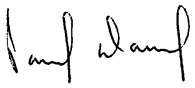
In its first years, one of the main goals for *Juridica International* was to introduce and analyse the legal reforms carried out in Estonia, which were of vital interest to foreign readers as well; however, this has not been the case for a long time now. Today, the primary focus is on participation in international legal discussion, wherein, alongside the development of national law, great emphasis is placed on European Union law and other cross-border regulation whose reach extends between countries. That said, the purpose of introducing the development of Estonian law and legal thinking at international level has not been discarded. After all, Estonia is still highly noteworthy as a country of successful reforms, not least legal reforms. Therefore, a matter of ongoing interest is whether this country, which has succeeded so well with groundbreaking reforms, can be as successful in a stable situation across the board. The range of topics covered in the 30 issues of *Juridica International* is very wide; no important area of law has been neglected, and listing all of them would take too long. What could be highlighted above all are topics related to European Union law and the Constitution of Estonia, but also crucial are the writings on many issues related to aspects of the law of obligations, property law, company law, penal law, competition law, personal data protection, media law, medical law, international law, and several other fields. Significant attention has been paid to the possibilities for harmonisation of law and mutual interactions, both between countries and between distinct branches of law. Likewise, the writings have considered key general issues of law, such as its interpretation, the effect of justice policy on legislative drafting, and the protection of the fundamental rights and freedoms of individuals.

The ability to publish a journal – and a reason to do so – exists only if readers are interested in that journal. What makes me the happiest is that, over the years, readers' interest has increased and the geographical area within which people read *Juridica International* has grown. Most certainly, the fact that for quite some time the journal has been available online has contributed to this. A big 'thank you' to all of the readers!

I also want to thank every one of the authors, the members of the editorial board, and my colleagues who have made it possible to publish 30 quality issues of *Juridica International*. I especially wish to highlight the contribution of the foreign members

of the editorial board – professors Christian von Bar, Werner Krawietz (1933–2019), Erik Nerep, and Thomas Wilhelmsson – whose participation in the board's work has played an important role in securing the solid international reputation of the journal.

I hope for continued enthusiasm on the writers' part and interest among readers for the next 30 issues!



Paul Varul
Editor-in-Chief, 1996–2015

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Zehn Jahre gemeinsame rechtswissenschaftliche Seminare Tartu-Konstanz – eine Erfolgsgeschichte!

Im Sommer des Jahres 2020 jährte sich der Beginn der Zusammenarbeit unserer Universitäten zum 10. Mal. Die enge rechtswissenschaftliche Kooperation mit gemeinsamen Seminaren von Professoren, Studierenden und Doktoranden nahm im Juni 2010 mit dem ersten vom DAAD geförderten Seminar in Tartu seinen Anfang – ins Leben gerufen von den Professoren Paul Varul, Rainer Hausmann und Astrid Stadler. Für mich war es die erste Reise nach Estland und es sollten noch einige in dieses kleine, aber faszinierende Land folgen. Das erste Seminar wurde unter dem Obertitel „Die Harmonisierung des Europäischen Privat- und Verfahrensrechts" abgehalten und bot auch für die Gruppe von deutschen Studierenden erstmals die Gelegenheit, Estland und einer der ältesten ehemals deutschsprachigen Universitäten in Europa kennenzulernen. Wie auch später waren wir alle vom Charme der Stadt und der Universität begeistert und unsere Studierenden machten die für viele überraschende Entdeckung einer gemeinsamen Geschichte und rechtlichen Tradition.

Es folgten in fast jährlicher Abfolge weitere Seminare, die abwechselnd in Konstanz und Tartu bzw. Tallinn (Konferenzsprache überwiegend Englisch) abgehalten wurden und von dem „Kern" Irene Kull, Merike Ristikivi, Marju Luts-Sootak, Astrid Stadler und den jeweiligen Nachfolgern auf dem Konstanzer Lehrstuhl von Rainer Hausmann, zunächst Christoph Althammer, dann ab 2014 Michael Stürner und dem Konstanzer Rechtshistoriker (bis 2020) Matthias Armgardt durchgeführt wurden: im Frühjahr 2011 in Konstanz unter dem Titel „Die schwächere Partei – ein wechselvolles Konzept des Privatrechts"; 2013 in Tartu/Tallinn („Handelsbeziehungen in Europa: die Perspektive des Privatrechts und Internationalen Privatrechts"); im Herbst 2014 in Konstanz („Neue Wege zur Harmonisierung des Privatrechts in Europa – Lehren aus dem Einheitlichen Europäischen Kaufrecht und künftige Herausforderungen"); im Dezember 2016 in Konstanz („Privatrecht im Zeitalter der Digitalisierung"); im November 2017 in Tartu/Tallinn („Vergleichendes Privatrecht und EU- Recht"); im Dezember 2018 in Konstanz („Vertrag und Delikt") und zuletzt im Winter 2019 in Tartu/Tallinn („Personen und persönliche Freiheit im Privatrecht"). Die Veranstaltung im Oktober 2014 wurde ausnahmsweise in größerem Format und unter Beteiligung weiterer Professoren (Burckhard Hess, MPI Luxemburg; Soazick Kerneis, Paris; Nils Janssen, Münster; Pascal Pichonnaz, Fribourg) durchgeführt – wie es sich für das große Thema der Harmonisierung des europäischen Privatrechts gehörte. Die für den Herbst 2020 in Konstanz geplante Jubiläumsveranstaltung war schon genau geplant, wurde aber bedauerlicher Weise wie so vieles in 2020 ein Opfer der Covid19-Pandemie. Die Veranstaltung kann hoffentlich schon in 2021 nachgeholt werden.

Die Seminare waren für die deutschen Teilnehmer immer ein großer persönlicher und wissenschaftlicher Gewinn, da sich immer schnell ein freundschaftliches Miteinander der Seminarteilnehmer einstellte und die Gastfreundschaft der Kollegen überwältigend war. Manche Doktoranden beider Seiten begegneten sich in den Seminaren wiederholt und wir konnten miterleben, wie sie zu erfolgreichen jungen Wissenschaftlern und Wissenschaftlerinnen heranwuchsen. Abgerundet wurden die Veranstaltungen stets auch von Vorträgen der beteiligten Professoren mit aktuellen Einblicken in deren Forschungsaktivitäten. Thematisch waren die Seminare bewusst breit angelegt und erlaubten Präsentationen zu hochaktuellen Themen mit innovativen Ideen der jeweiligen Studierenden und Doktoranden. Dies bot gerade den deutschen Studierenden, deren engmaschiges Studium bis zum Staatsexamen sich in einem eher traditionellen Kanon von Themen und Fächern bewegt, schon in einer frühen Phase ihres Studiums interessante Einblicke in neue und gesamteuropäische Entwicklungen. Themen wie die Digitalisierung, die heute in aller Munde sind, waren dank der Vorreiterrolle Estlands in diesem Bereich schon früh auch ein Thema in den Seminaren, ebenso wie alle rechtlichen Probleme rund um Bitcoins, smart contracts etc., aber auch methodischen Fragen der Rechtsvergleichung und europäischen Harmonisierung. Neu war für die deutschen Teilnehmer/innen insoweit häufig der völlig andere und offenere Blick eines Landes wie Estland auf die Harmonisierungsbemühungen in der Europäischen Union. Sie erfuhren, dass man in Estland aufgrund der wechselvollen Geschichte und einer noch eher jungen Tradition autonomer Rechtssetzung nach Loslösung von der Sowjetunion, deren Teil die Estnische Sozialistische Sowjetrepublik von 1940–1991 gewesen war, viel aufgeschlossener ist gegenüber neuen Ideen und einer Harmonisierung als in Deutschland, wo häufig der Reflex in Wissenschaft und Politik überwiegt, das lieb gewonnene BGB zu bewahren. Ebenso konnten sie darüber staunen, dass es in einem Land wie Estland ohne weiteres möglich war, schon als junge/er Rechtswissenschaftler/in an landesweiten Kodifikationsprojekten mitzuarbeiten und Universität, Gerichte und Ministerien generell einen engen personellen Austausch pflegen und Wissenschaft und Praxis viel enger verbunden sind als in Deutschland.

Die Kooperation mit Tartu ist für den Fachbereich Rechtswissenschaft der Universität Konstanz die längste und traditionsreichste Beziehung zu einer ausländischen Universität. In deren Mittelpunkt stehen zwar die gemeinsamen Seminare, aber darüber hinaus besteht auch ein reger Austausch durch Forschungsaufenthalte und wissenschaftliche Vorträge zu verschiedenen Anlässen. Die über die Jahre gewachsenen freundschaftlichen Beziehungen zu den Kollegen und Kolleginnen in Tartu sind eine einzigartige Basis, aufgrund derer sich den Studierenden an beiden Universitäten Möglichkeiten bieten, die sie sonst nicht wahrnehmen könnten. Dies alles wäre nicht möglich gewesen, ohne den enormen persönlichen Einsatz von Irene Kull, Marju Luts-Sootak und Merike Ristikivi, aber auch nicht ohne die stets wohlwollende finanzielle und organisatorische Unterstützung des DAAD und unserer beider Universitätsverwaltungen, insbesondere dem International Office der Universität Konstanz. Ihnen allen sei an dieser Stelle ganz herzlich gedankt – auch im Namen aller Kollegen und Studierenden. Am Fortbestand der Kooperation, die auf beiden Seiten auch von den jüngeren Kollegen mit großem Engagement getragen wird, besteht kein Zweifel und wir freuen uns auf den weiteren Austausch.

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Ten Years of Tartu–Konstanz Co-operation

Joint Seminars on Private Law and Successfully Defended Doctoral Theses in the Faculty of Law of the University of Tartu

1. Introduction

The co-operation of the law faculties of the University of Tartu and University of Konstanz in organising joint seminars on private law from 2010–2020 is a remarkable success story. The presentations and research projects discussed at the seminars in the past ten years reflect well the challenges and opportunities of private-law research in Estonia in recent decades.

In 2021, thirty years will have passed since the re-independence of the Republic of Estonia, which brought about extensive reforms in both legislation and legal education.[*1] The reorganisation of Estonian private law took place remarkably rapidly when one considers the possibilities for a small country that had just become independent. The laws in the field of private law that make up the Civil Code were developed and adopted in a relatively short span of time, between 1993 and 2002.[*2] More profound scientific analysis and research in private law began after the enactment of new laws, once law studies had been completed by fresh flights of students who had acquired their legal education in the post-independence era. The problems of Estonian private law have been examined in more detail in doctoral theses defended at the University of Tartu[*3]. Doctoral dissertations in particular involve studies in which scientifically substantiated solutions to questions of current Estonian law or legal history have been proposed.[*4]

In the development of Estonian law, and the content and form of legal education, the German legal tradition has played a major role. On the one hand, the remarkable influence of German law is rooted in

1 On the development of legal education at the University of Tartu, see Age Värv, '21. sajandi õigusharidus rahvusülikoolis' ['21st-Century Legal Education at a National University'] (2019) 6 Juridica 398 (in Estonian). With regard to the impact of foreign countries on legal education, see Irene Kull, Merike Ristikivi, and Aleksei Kelli, 'Transplants in Estonian Legal Education: Influences from the US Legal System' in Susan Bartie and David Sandomierski (eds), *American Legal Education Abroad: Critical Histories* (New York University Press 2021) 189.

2 The beginning of the creation of a new private-law system can be connected to the preparations already started in 1988 for adoption of the necessary legislation for the transition to the new legal order. For details, see Paul Varul, 'Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia' (2000) 5 Juridica International 104.

3 In Estonia, only the University of Tartu has the right to organise doctoral studies and grant a doctoral degree in law.

4 Marju Luts-Sootak, 'Eesti õigusteadus 2019. aasta vaates' ['Estonian Legal Studies As They Are in 2019'] (2019) 6 Juridica 397 (in Estonian).

historical traditions; on the other hand, co-operation with German legal and research institutions started soon after the restoration of independence in the development of new Estonian legislation.[*5] Along with other German universities, the University of Konstanz became one of the most important co-operation partners of the University of Tartu, in a relationship that began much earlier, when the project of joint seminars of the faculties of law of the two universities was established. Namely, already in 2000, the universities of Tartu and Konstanz signed a partnership programme[*6] agreement within the framework of which several professors and lecturers with both law faculties, as well as doctoral and master's students, have made mutual study and research visits over the years. For example, among the current and former professors and doctoral students of the University of Tartu, long-term research at the University of Konstanz has been carried out by Urve Liin, Irene Kull, Merike Ristikivi, Janno Lahe, Kalev Saare, Eerik Kergandberg, Ene Andresen, Arsi Pavelts, Ragne Piir, Heili Püümann, and Liina Reisberg, with several others paying the partner institution shorter visits.

On the basis of good personal experiences of co-operation, Professor Paul Varul from the University of Tartu and Professor Rainer Hausmann from the University of Konstanz, nearly 15 years ago, came up with the idea of also starting to organise seminars on private law, involving postgraduate students from both universities. Over the years, professors Irene Kull, Merike Ristikivi, Marju Luts-Sootak, and Karin Sein too have been involved in organising seminars. The arrangers of the seminars on the part of the colleagues at the University of Konstanz have been professors Astrid Stadler, Michael Stürner, Matthias Armgardt, and Christoph Althammer.

The focus of this article is on the contribution of doctoral students of the Faculty of Law of the University of Tartu to the joint seminars, and on the format of the seminars for presenting the results of the research. The article also provides an overview of the doctoral theses defended by the alumni of the seminar series at the Faculty of Law of the University of Tartu.

2. Seminar format and presentations

Over the past decade, young researchers from the faculties of law in Tartu and Konstanz have given more than 200 presentations on their research at joint seminars. Approximately a dozen young people from each university have participated in each seminar. In total, 50 students from Tartu have participated in the joint seminars, with many doctoral students participating in several seminar events. Some students started to take part in seminars during their master's studies, either as interested discussants or speakers, and many of them have continued their research as doctoral students. After defending their doctoral dissertation, many seminar alumni have started working as lecturers at the Faculty of Law and have remained involved with the seminar series as organisers, moderators, or speakers.

As a rule, the week-long Tartu–Konstanz joint seminars have included presentation days and working time at the library, supplemented with time to get acquainted with local sights. For each seminar, a topical issue or wider-relevance legal problem has been chosen as the main theme, with the intent being to address as many doctoral students as possible. In addition to the speakers, other interested participants among the doctoral students, the master's students, and the lecturers have taken part in the discussion at the seminars.

The first Tartu–Konstanz joint doctoral seminar took place from 8–13 June 2010 in Tartu[*7]. The second joint seminar took place in Konstanz, and since then the seminars have taken place by turns in Tartu and Konstanz.

The theme-based title of the first joint seminar was 'Private Law Modernization in the Context of National Legal Systems'. The focus of the presentations was on the impact of EU consumer law (directives, principles of the *acquis*, and the 2008 proposal for a consumer-rights directive) and the Draft Common

5 See e.g. Marju Luts-Sootak, 'Private Law of the Baltic Provinces As a Patriotic Act' (2000) 5 Juridica International 157; Irene Kull, 'Legal Integration and Reforms – Innovation and Traditions' (2000) 5 Juridica International 119; Matthias Weckerling, 'Zehn Jahre Deutsche Stiftung für internationale rechtliche Zusammenarbeit: Rechtsstaatsaufbau, Rechtsreformen und Rechtsangleichung in Mittel, Ost- und Südosteuropa' (2002) 10 Zeitschrift für Rechtspolitik 446 (in German).

6 The University of Tartu has bilateral partnership agreements with 72 partner universities, from 26 countries; see <www.ut.ee/en/international/international-partners/partner-universities> accessed 15 July 2021.

7 The main venue of the seminars in Estonia has been Tartu, but, since the Faculty of Law also has facilities in Tallinn, some days' seminar events have taken place in the Tallinn study building of the Faculty of Law.

Framework of Reference (DCFR) on Estonian and German private law, and the possibility of taking into account national legal developments. The presentations also analysed the most important institutes of modern consumer and business law in a comparative manner.

In preparation for the first seminar, a format was developed according to which the seminar presentations were prepared in co-operation among the students of the two universities. For the discussion of each narrower topic, a presentation was prepared by both Estonian and German students. In consultation with each other, they selected several issues they considered to be the most important in harmonising private law, co-ordinated the content of their presentations, and prepared a thorough analysis of the differences and similarities between Estonian and German law.

A similar seminar format, in which students from both universities contributed to discussing specific topics, was followed at the second joint seminar, which took place in Konstanz from 27 April–2 May 2011. The general theme of the seminar was 'the weaker party' as a changing concept in private law. The students' presentations discussed the concept of the weaker party in procedural law, consumer law, and general contract law, as well as ways to protect the weaker party. The presentations examined unfair standard terms, the possibilities afforded by international and domestic procedural law, the protection of the weaker party in private international law, and the specific problems of lease and sale contracts.

After both universities had organised one seminar, the question arose as to whether such a joint seminar project could continue in the future and what the topics and format might be. Although no seminar took place in 2012, preparations were made for subsequent co-operation. The third seminar was held, again in Tartu, from 16–20 June 2013, and its general-topic title was 'Commercial Transactions in Europe: Perspectives of Private Law and Private International Law'. Since 2013, the topics of the students' presentations have not been fixed in advance; rather, a recommendation has been given to formulate the title of the presentation on the basis of the general topic of the seminar. The third seminar focused on the proposal published by the European Commission in 2011 on the Common European Sales Law (CESL[*8]). Thus, the links between the CESL and international sales law, European consumer law, private international law, and civil procedure law were examined. Also, Estonian and German private law were analysed in comparison with the CESL. Several presentations dealt specifically with issues of private international law.

The fourth seminar took place from 27 October–1 November 2014 in Konstanz on the topic 'A New Approach to the Harmonization of Private Law in Europe? Lessons from the CESL and Future Challenges'. The lessons learned from the CESL, the European harmonised sales law as an attempt to harmonise EU contract law, were addressed in the presentations on filling gaps, the seller's right to remedy and the buyer's right to require performance, and the buyer's right to require reimbursement of repair costs for defective goods under the CESL. Also, seminar presentations were devoted to the possibilities for harmonisation in various areas of private law, such as contract law (tenancy and provision of services of general interest), private international law (defining the law applicable to intellectual property and the distinction between property and non-contractual claims), and tort law (liability for unwanted pregnancies or births). The seminar also examined non-pecuniary damages under German law and the historical development of assignment. Several presentations provided a comparative analysis of private-law issues (*laesio enormis* in German and Austrian private law, suretyship in Estonian and Finnish law) and addressed new legal challenges related to digitisation (the digital embassy) and procedural-law issues (protection of individuals in insolvency proceedings and the links between civil and criminal proceedings).

The fifth seminar was held from 28 September–2 October 2015 in Tartu on the topic of the concept of unfairness in private law. The reports examined unfair commercial practices (unfair commercial practices in retail supply chains), unfair standard terms (unfair standard terms in English law, control of the content of standard terms in English law as compared to German law, the battle of terms in German and English law, applicable law and jurisdiction for claims by consumer associations for termination of application of unfair standard terms, and unfair standard terms in mobile-phone service contracts), judicial control of the content of contracts (the impact of judicial control on private law from Estonia in 1920–1934 and difficulties in performing the contract as a basis for amending the contract), use of standard terms in the IT procurement contracts, and private autonomy in concluding a contract in Italian law. Several presentations were focused on specific issues of private international law, such as joint ownership of intellectual property

[8] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' COM (2011) 635 final – 2011/0284 (COD). Available at <eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011PC0635&qid=1626025786246&from=EN> accessed 15 July 2021.

rights, law applicable to the FIS (*Fédération Internationale De Ski*) rules, and the law applicable to the European Company (*Societas Europaea*).

The sixth seminar was held in Konstanz from 5–10 December 2016 with the topic 'Private Law in the Digital Age' and focused on the issues of the relationship between information technology and law. In particular, the presentations examined the legal issues related to the 2015 proposal for an EU directive on the supply of digital content. Thus, the presentations examined claims for damages for non-performance of contracts for supply of digital content, the conclusion of a contract in the digital environment, the regulation of contracts for supply of digital content in English and German law, the regulation of contracts for digital content in the English Consumer Rights Act (2015), the protection of consumers in the provision of payment services by PayPal, remedies for consumers in relation to the concept of providing digital services against another counter-payment than money in the CESL, informed consent in digital service contracts on the example of 23andMe, legal regulation of blockchain technology, cloud services and safeguarding digital continuity, the attribution of personality rights to an autonomous artificial agent, the digital inheritance, the exhaustion of copyright in the digital age, and the impact of the digital age on employment relationships. Some of the presentations were devoted also to general topics such as corporate opportunities in corporate groups, usury in German law, and the concept of *res judicata* in German law.

The seventh seminar, which took place from 13–18 November 2017 in Tartu, was dedicated to comparative law under the general theme 'Comparative Private Law and EU Law'. The main purpose of the seventh Tartu–Konstanz seminar was to discuss the importance and functions of comparative law and both its role among the various research methods and its relationship with EU law. Even if comprehensive comparative studies pave the way to legal harmonisation in constantly expanding spheres and the Court of Justice of the EU (CJEU) has developed sophisticated comparative methodology for filling lacunae and interpreting Union law, there are tendencies toward diminishing relevance of comparative law for the European project. Presentations in that seminar offered an opportunity for discussion, in the framework of very different legal fields, about the importance of comparative law, its challenges, and the future of the relationship between comparative law and European law.

The eighth joint seminar was held from 3–8 December 2018 in Konstanz with the general topic 'Contract and Tort as Legal Institutions in Comparative Perspective'. The presentations discussed the illegal use of copyrighted content in language technology, the interaction between decisions related to banking supervision, the restriction of the participation of debtor-related persons in bankruptcy proceedings, joint and several liability of the joint owners, claims for breach of a shareholder's voting obligations, producer development risks under the Product Liability Directive, protection of consumers' collective interests under Estonian law, comparison of consumer protection in German and Brazilian law, the legal presumption of ownership by the possessor in EC case law, the law applicable to cross-border genetic research, the historical development of alternative causality, the legal regulation of smart contracts in Estonian law, the delimitation of contractual and non-contractual liability from a historical angle, the contract as an instrument for deviation from the principle of universal succession, and the role of the commercial courts in Germany.

The general topic of the ninth Tartu–Konstanz seminar, which took place from 1–7 December 2019 in Tartu, was 'Persons and Personal Freedom in Private Law'. The presentations of the seminar participants examined persons and personal freedom from very different aspects. Thus, the papers discussed the extent to which digital development affects employment relationships (work 4.0) and the constitutionality of the minimum wage. The presentations also focused on consumer law, when examining the consumer's right to withdraw from a contract (C-681/17), the legality of Amazon's Dash Button, the class action for damages, and a means of access to justice in cases of class action waiver in US law. In the field of family law, presentations focused on freedom of marriage between the two world wars, the right of same-sex marriage, and the administration of joint property of spouses. Of the contractual relations, the introduction of rent control in Germany and the possibilities for controlling the amount of rent under Estonian law were examined. In the field of compensation for damage, the practice of compensation for non-pecuniary damage was examined from a comparative-law point of view, as were the rules for taking into account the risks prior to the occurrence of damage in compensating for personal injury. In the field of data protection, the transparency of research and data protection, liability according to Article 82 of the General Data Protection Regulation, the concept of data embassies and digital identity, and standard terms regulating the use of data in contracts concluded with Estonian mobile-phone service providers were examined. The presentations also discussed international commercial tribunals, the jurisdiction of acts related to the single resolution mechanism, the

regulation of termination under standard terms, changes in the functions of trademarks, contractual freedom in limiting the content of a surety agreement, and the importance of the right to own property. Issues of private international law were addressed in presentations examining changes to the choice of jurisdiction in relation to Brexit, the application of the Brussels I Regulation in determining the law applicable to the conclusion of a contract, and air-passenger rights to compensation under EU law.

In response to the COVID-19 pandemic and the accompanying restrictions, the tenth-anniversary seminar planned for 2020 has not been held. *In spe*, there will be an opportunity to gather again in 2022 in Konstanz for a joint seminar and discussion of doctoral students' presentations.

The working language of the seminars has been English from the beginning. This has provided students from both universities with the opportunity to practise a foreign language. This seminar series has been the first forum for many doctoral students to give a presentation to specialists, present the results of their research, and receive in-depth feedback. It must be emphasised that there is always enough time in the seminar programme to discuss the presentations, so that the doctoral students can substantiate their views, listen to feedback, and develop a discussion. Seminars form part of doctoral studies; therefore, the opportunity for doctoral students to receive feedback on their theses and initial research results in the process of preparing a doctoral thesis has been considered. Over the years, the seminar format has brought in not only preparing and listening to presentations but also thorough 'opposition' of the seminar presentations by a fellow doctoral student, as a precondition for passing the respective subject. Thus, the joint seminars have become an additional forum for doctoral students from both universities, where they can address the validity of their views, the thoroughness of the analysis, the importance of their research questions, and the relevance of the methodology chosen.

The Tartu–Konstanz joint seminars are also an opportunity for the teaching staff. At each seminar, professors and lecturers from both participating universities have also given presentations. Professor Rainer Hausmann from the University of Konstanz; professors Paul Varul, Marju Luts-Sootak, and Irene Kull from the University of Tartu; and Supreme Court Judge Villu Kõve spoke at the first seminar in 2010. Rainer Hausmann provided critical analysis of regulations in the German Civil Code (BGB), Paul Varul spoke about the impact of harmonisation of private laws of the member states, Irene Kull introduced problems pertaining to legal transplants in Estonian law, and Marju Luts-Sootak gave an overview of the history of Estonian private law in the context of developments in European law. The principle of abstraction discussed in Villu Kõve's presentation was also at the focus of the analysis in his doctoral dissertation[*9] defended in 2009. Serving as the opponent of this doctoral dissertation was Professor Astrid Stadler from the University of Konstanz, who had studied this principle in her habilitation work[*10]. At the following seminars, from the Estonian side, presentations were given by Irene Kull on the Common Frame of Reference, on the draft directive on the Common European Sales Law, and on the influence of digitalisation on private law and on judicial review of B2B contracts under Estonian law. Marju Luts-Sootak analysed the historical development of Estonian private law also at subsequent seminars. Karin Sein contributed to the seminars with presentations about Estonia as a test country for the Common European Sales Law, the consumers' right to a printed bill under mobile-phone contracts, rules applicable to smart consumer goods in the Digital Single Market, and private autonomy under the new digital consumer contract law package. Piia Kalamees spoke about unfair contract terms in car-leasing contracts under Estonian law, Helen Eenmaa-Dimitrieva about responsibility under corrective justice and a legitimate distributive system, Hent Kalmo about an evolutionary history of public policy exceptions in international economic law, Age Värv about comparative method in drafting unjustified-enrichment rules in Estonian law, Martin Ebers on a need to provide legal personhood for artificial intelligence, and Hesi Siimets-Gross about disconnection of politics from the history of law on the basis of the person's status. From the University of Konstanz, the following presentations were provided: Astrid Stadler presented discussion about conflict-of-laws issues and the scope of application of the CESL and about the nature and future of collective redress. Matthias Armgardt presented comparison between Roman and European sales law and causation in law, and Doris Forster discussed methods in

9 Villu Kõve, *Varaliste tehingute süsteem Eestis* [System of proprietary transactions in Estonia]. Dissertationes iuridicae Universitatis Tartuensis 22 (Tartu University Press 2009), from work under the supervision of Irene Kull (in Estonian).

10 Astrid Stadler, *Gestaltungsfreiheit und Verkehrsschutz durch Abstraktion. Eine rechtsvergleichende Studie zur abstrakten und kausalen Gestaltung rechtsgeschäftlicher Zuwendungen anhand des deutschen, schweizerischen, österreichischen, französischen und US-amerikanischen Rechts* (Mohr Siebeck 1996) (in German).

comparative law. Michael Stürner's presentations were dedicated to migration of legal concepts and corporate social responsibility in private international law.

As the format of the co-operation described above requires travelling between Estonia and Germany, the Faculty of Law, the Dora Plus programme[*11], MIDOK Doctoral School in Economics and Innovation[*12], and the partnership programme of the universities of Tartu and Konstanz have provided very important support over the years both for conducting seminars in Tartu and for organising the mobility of doctoral students and professors.

3. PhD students and doctoral theses

The seminars have become a very important and highly valued opportunity for young researchers to experience international research co-operation. Many of the presentations made at the seminars have formed the subject of articles in *Juridica International* and other academic journals. As of today, 13 doctoral students who have participated in the joint seminars have successfully defended their theses, accounting for a quarter of all doctoral theses defended at the Faculty of Law of the University of Tartu over the last decade.[*13] There are even more doctoral students among the alumni of the joint seminars whose dissertations are still being written and will be defended in the next five years.

In 2011, a doctoral thesis by Urmas Volens was defended. He analysed the issues of liability based on reliance interest[*14]. In the same year, Signe Viimsalu defended her dissertation, on insolvency proceedings[*15]. In the work defended in 2013, Age Värv examined the condiction of expenditures, i.e. the compensation for expenditures incurred for another person's property[*16]. Piia Kalamees defended her doctoral dissertation on the use of price reduction as a contractual legal remedy in the same year[*17]. In his doctoral dissertation defended in 2016, Olavi-Jüri Luik examined the protection of policyholders in the Baltic States on the basis of the principles of EU insurance contracts[*18]. In 2017, Arsi Pavelts defended his doctoral dissertation, in which he examined filing a claim for damages instead of specific performance in cases of a sales contract[*19]. In her doctoral dissertation defended also in 2017, Dina Sõritsa analysed the claims made for compensation against health-care providers for damage caused by an unwanted pregnancy with or birth of a disabled child[*20]. In 2019, two doctoral dissertations were defended: that of Mari Schihalejev, who

11 Dora Plus is an Estonian government programme initiated with the aim of improving Estonia's visibility and attractiveness as a destination for studying and research; see <http://haridus.archimedes.ee/en/dora-plus-programme> accessed on 19 July 2021.

12 In addition to doctoral students in the field of law, the Doctoral School includes doctoral-level students in economics and political science. The Doctoral School is financed by the European Regional Development Foundation. More information about the school's events and activities is available at <https://sisu.ut.ee/doktorikool.midok/home-page?lang=en> accessed 15 July 2021.

13 For a list of all doctoral theses defended at the Faculty of Law of the University of Tartu since regaining of independence (1991–2021), see <https://oigus.ut.ee/en/research/doctoral-theses> accessed 15 July 2021.

14 Urmas Volens, *Usaldusvastutus kui iseseisev vastutussüsteem ja selle avaldumisvormid* ['Liability Based on Reliance As an Independent System of Liability and Its Forms of Appearance'] (Dissertationes iuridicae Universitatis Tartuensis 31, Tartu University Press 2011), from work under the supervision of Paul Varul (in Estonian).

15 Signe Viimsalu, *The Meaning and Functioning of Secondary Insolvency Proceedings* (Dissertationes iuridicae Universitatis Tartuensis 38, Tartu University Press 2011), from work under the supervision of Paul Varul and Bob Wessels.

16 Age Värv, *Kulutuste kondiktsioon: teise isiku esemele tehtud kulutuste hüvitamine alusetu rikastumise õiguses* ['Condiction of Expenditures: Compensation of Expenditures on Another Person's Property in Unjustified-Enrichment Law'] (Dissertationes iuridicae Universitatis Tartuensis 49, Tartu University Press 2013), from work under the supervision of Martin Käerdi (in Estonian).

17 Piia Kalamees, *Hinna alandamine õiguskaitsevahendite* süsteemis ['Price Reduction in the System of Remedies'] (Dissertationes iuridicae Universitatis Tartuensis 47, Tartu Ülikooli Kirjastus 2013), from work under the supervision of Karin Sein and Kalev Saare (in Estonian).

18 Olavi-Jüri Luik, *The Application of Principles of European Insurance Contract Law to Policyholders of the Baltic States: A Measure for the Protection of Policyholders* (Dissertationes iuridicae Universitatis Tartuensis 59, Tartu University Press 2016), from work under the supervision of Villu Kõve.

19 Arsi Pavelts, *Kahju hüvitamise nõue täitmise asemel ostja õiguste näitel* ['A Claim for Damages in Lieu of Performance Based on the Example of the Buyer's Rights'] (Dissertationes iuridicae Universitatis Tartuensis 62, Tartu University Press 2017), from work under the supervision of Karin Sein (in Estonian).

20 Dina Sõritsa, *The Health-Care Provider's Civil Liability in Cases of Prenatal Damages* (Dissertationes iuridicae Universitatis Tartuensis 65, Tartu University Press 2017), from work under the supervision of Janno Lahe.

studied the protection of creditors in a situation wherein a debtor-related creditor participates in insolvency proceedings[*21], and Ragne Piir, whose work focused on mandatory norms in Estonian and EU international contract law concerning consumers and posted workers[*22].

In addition, four doctoral theses on IT law have been defended in the last two years. Kärt Pormeister studied the processing of genetic data for research purposes[*23]. Liliia Oprysk's dissertation addressed reconciling the material and immaterial dissemination rights under the EU copyright *acquis*[*24]. Taivo Liivak investigated liability for damage caused by the operation of self-driving vehicles[*25] and the topic of recent dissertation presented by Anne Veerpalu was the treatment of distributed-ledger technology by Estonian and EU legislators[*26].

4. Summary

Over the years, the joint seminars of Tartu and Konstanz have inspired many professors and students of the Faculty of Law. In addition to meaningful presentations at the seminars, the reciprocal visits have been a good opportunity to do individual-level library research, get acquainted with current legal issues in other countries, and find good friends and colleagues with whom close contacts have been maintained. At this point, we would like to thank everyone who has contributed to the seminars, not only in substance but also technically.

"The outlook for the future is also optimistic too – by the time this article is published, two more doctoral students who have participated in the seminar series will have submitted their doctoral dissertations. We also hope also that the project of joint seminars will not be bounded by the tenth-anniversary issue but continue successfully for the next ten years.

21 Mari Schihalejev, *Debtor-related Creditors' Claims in Insolvency Proceedings* (Dissertationes iuridicae Universitatis Tartuensis 73, Tartu University Press 2019), from work under the supervision of Andres Vutt.

22 Ragne Piir, *Mandatory Norms in the Context of Estonian and European International Contract Law: The Examples of Consumers and Posted Workers* (Dissertationes iuridicae Universitatis Tartuensis 74, Tartu University Press 2019), from work under the supervision of Gaabriel Tavits and Karin Sein.

23 Kärt Pormeister, *Transparency in Relation to the Data Subject in Genetic Research – an Analysis on the Example of Estonia* (Dissertationes iuridicae Universitatis Tartuensis 76, Tartu University Press 2019), from work under the supervision of Irene Kull, Jaak Vilo, Katrin Õunap, and Barbara Evans.

24 Liliia Oprysk, *Reconciling the Material and Immaterial Dissemination Rights in the Light of the Developments under the EU Copyright Acquis* (Dissertationes iuridicae Universitatis Tartuensis 78, Tartu University Press 2020), from work under the supervision of Karin Sein, Aleksei Kelli, Raimundas Matulevičius, and Lucie Guibault.

25 Taivo Liivak, *Tort Liability for Damage Caused by Self-driving Vehicles under Estonian Law* (Dissertationes iuridicae Universitatis Tartuensis 80, Tartu University Press 2020), from work under the supervision of Janno Lahe, Irene Kull, Giovanni Sartor, and Mark Fišel.

26 Anne Veerpalu, *Regulatory Challenges to the Use of Distributed Ledger Technology: Analysis of the Compliance of Existing Regulation with the Principles of Technology Neutrality and Functional Equivalence* (Dissertationes iuridicae Universitatis Tartuensis 81, Tartu University Press 2021), from work under the supervision of Martin Ebers, Anna-Maria Osula, and Alexander Horst Norta.

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Are Class Actions Finally (Re)conquering Europe?

Some Remarks on Directive 2020/1828

1. Cornerstones of the development

The somewhat murky origins of class actions can be found in the European Middle Ages where Anglo-Saxon and Norse legal traditions allowed a plaintiff to bring an action on behalf of a larger group of claimants. Its original rationale that this would 'serve the interests of judicial economy by minimizing duplicative litigation' is still valid.[*1] However, amid political and economic turmoil beginning in the 15th century, group litigation ceased to exist in England by 1850.[*2] The rise of class actions on the other side of the Atlantic Ocean began more or less at the same time in 1842 with the enactment of Rule 48 of the Federal Equity Rules – the predecessor of the famous Rule 23 of the Federal Rules of Civil Procedure. Over a span of decades, US-style class actions conquered Canada[*3] and Australia[*4], but their way back to Europe – at least in a modified form – was long and cumbersome.

A few scholars in Europe became interested in US class actions in the 1970s[*5], but Europe-wide debate about implementing similar procedural instruments did not start before the 2000s when the union's DG Competition borrowed the idea of class actions for the private enforcement of European competition law in a Green Paper (2005[*6]) and a White Paper (2008)[*7]. This was also the starting signal for a highly controversy-laden debate and the business sector's steadfast warnings against a US-style litigation industry, blackmail strategies of greedy lawyers, and entrepreneurial litigation in general. Anecdotal evidence of frivolous US class actions against European companies with extensive media coverage did not fail to impress politicians in Europe. Even within the European Commission, it took another five years and several attempts to find a

1 John Coffee, *Entrepreneurial Litigation: Its Rise, Fall, and Future* (Harvard UP 2015) 95. – DOI: https://doi.org/10.4159/9780674287075.

2 Levin Papantonio, 'History of Class Action Lawsuits' <www.levinlaw.com/history-class-actions> accessed 2 January 2021.

3 With the exception of Prince Edward Island, all of Canada's provinces have implemented class actions, per Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press 2018) 4.

4 In Australia, class actions exist at the federal level and in the state court systems of New South Wales, Victoria, Queensland, and Western Australia. See Vince Morabito, 'An Evidence-based Approach to Class Action Reform in Australia: Competing Class Actions and Comparative Perspectives on the Volume of Class Action Litigation in Australia' (11 July 2018) 8. – DOI: https://doi.org/10.2139/ssrn.3212527.

5 For example, cf Harald Koch, *Kollektiver Rechtsschutz im Zivilprozess- die class action des amerikanischen Rechts und deutsche Reformpläne* (Metzner 1976); Richard M Buxbaum, *Die private Klage als Mittel zur Durchsetzung wirtschaftspolitischer Normen* (Müller 1972).

6 European Commission, 'Green Paper: Damages Actions for Breach of the EC Antitrust Rules' COM (19 February 2005) 672.

7 European Commission, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules' COM (2 April 2008) 165.

coherent approach for competition and consumer law.[*8] With respect to terminology, there was a remarkable shift in the debate from 'class actions' to 'collective redress' so as to avoid any connotations of the US instrument, but the discussion was nevertheless dominated by the negative aspects of class actions and the attempts expressed by US legislation[*9] to fight against entrepreneurial excesses and lawyer-driven actions. The fact that the undeniable downsides of US class actions are a result of the famous 'toxic cocktail' of contingency fees, punitive damages, jury trials, the American rule of cost, and a generally low threshold to extensive and expensive pretrial discovery – all unique features of US law – often became lost in the noise of the debate.[*10]

In 2013, the Commission devised a political trade-off in the form of a non-binding instrument – a recommendation on common principles for injunctive and compensatory collective redress mechanisms in the EU.[*11] The Recommendation text contained guiding principles for the member states but also many safeguards against the misuse of collective redress. It started from a broad horizontal approach of application and also a broad concept of legal standing (encompassing individuals, legal entities such as consumer associations, and public regulators), but it largely ignored the main problem plaguing mass litigation: funding. All in all, it was considered a half-hearted attempt to harmonise collective redress instruments in Europe[*12], and the two-year period for implementation elapsed without a single Member State adopting the recommendation as a whole.

One reason for the Recommendation document's failure to inspire fundamental reform activities was its late appearance, in 2013. At that time, the member states in considerable numbers had already passed legislation on new collective redress instruments and some of them, including France, which had taken the position of an ally in Germany's resistance against any collective instrument for many years, were in the middle of a reform process.[*13] A first wave of national reform to collective redress instruments such as (opt-out) group actions had taken its origins in the Nordic countries (Sweden 2003, Finland 2007, Norway 2008, and Denmark 2008) and the Netherlands (with the 2005 Act on Collective Settlements[*14]). Italy (2007) and Poland (2010) followed, whereas in Germany only test-case litigation in securities law had been implemented by 2005, along with disgorgement proceedings in competition law (which were not a real success in practice). With the second wave of national reforms, from 2013–2019, the United Kingdom implemented opt-out group actions in competition law, collective settlement procedures, and a couple of 'enhanced consumer redress measures' strengthening the position of public regulators. France and Belgium implemented representative actions by consumer associations from 2014–2016 with a broad scope of application, and the Netherlands enacted a true group-action mechanism in 2019. Similar developments took place in Lithuania (2015), Slovenia (2018), and Scotland (2020), and even Switzerland came up with a proposal for a form of representative action, in 2018. All of these instruments were only loosely connected with the above-mentioned Recommendation. Again, only Germany did not have the courage to move forward. It was not until the Volkswagen 'Dieselgate' emissions scandal put considerable political pressure on the German government to improve the situation of deceived car-owners that a representative action for declaratory relief in consumer law (the *Musterfeststellungsklage*)[*15] came into force, in 2018. Still, this was heavily criticised from the beginning, because consumer associations were not allowed to bring actions for damages, but only for a declaratory judgment based on which consumers have to pursue their damage

8 See the 2011 public consultation document 'Towards a More Coherent European Approach to Collective Redress' COM (2010), 135 final, of 31 March 2010.

9 Private Securities Litigation Act 1995; Class Action Fairness Act 2005.

10 For more details, see Astrid Stadler, 'Kollektiver Rechtsschutz – Chancen und Risiken' (2018) 182 Zeitschrift für das Gesamte Handelsrecht und Wirtschaftsrecht 623, 635 et seq.

11 Recommendation 2013/396/EU, 11 June 2013.

12 Cf Christopher Hodges, '"Collective Redress": A Breakthrough or a Damp Squib?' (2014) 37 Journal of Consumer Policy 67. – DOI: https://doi.org/10.1007/s10603-013-9242-0; Astrid Stadler, 'Die Umsetzung der Kommissionsempfehlung zum kollektiven Rechtsschutz' [2015] Zeitschrift für die gesamte Privatrechtwissenschaft 61; Stefaan Voet, 'European Collective Redress: A *Status Quaestionis*' (2014) International Journal of Procedural Law 97 et seq.

13 For a detailed comparative survey of the situation of collective redress in the member states, see the write-up of the British Institute of International and Comparative Law, 'Collective Redress Study for the European Commission' (BIICL 2018) <www.collectiveredress.org/newsitem/6045> accessed 2 January 2021.

14 Wet collectieve affwickling massaschade (WCAM) arts 1013–18 Dutch Civil Procedure Code; Dutch Civil Code, Book 7, Title 14.

15 See German Civil Procedure Code, pp 606–13.

claims individually against the defendant. The *Musterfeststellungsklage* fell far short of complying with the 2013 EU Recommendation.

Together, the fact that the non-binding Recommendation of 2013 failed to achieve the aim of harmonising the instruments of collective redress in the member states and the political pressure in the aftermath of the Volkswagen emission scandal united policymakers in an effort to develop a binding EU instrument. The image of US class actions was polished up for once, by the early US settlements with Volkswagen in California: European car-owners and consumer associations envied the swift and satisfying agreement in favour of US diesel-car-owners.[*16] In Europe, in contrast, consumers faced lengthy proceedings against Volkswagen, which, for a long time, had absolutely no inclination to settle the cases.[*17] Finally, a Commission proposal for a European group action was published, in April 2018[*18], and Germany, fighting a losing battle, could not prevent the European legislative process from ultimately resulting in the adoption of the new Directive 2020/1828, 'on representative actions for the protection of the collective interests of consumers'.[*19] Now the member states have time to adopt and publish regulations to comply with the directive, until 25 December 2022, and the new instruments must apply from 25 June 2023.[*20]

2. Guidelines provided by Directive 2020/1828

The directive provides a minimum harmonisation threshold for the enforcement of consumer rights. The member states may adopt or keep in force procedural instruments of collective redress in their national law. According to Article 1 of this directive, at least one procedural mechanism must comply with said directive and allow qualified entities to bring representative actions for both injunctive relief and redress measures. A 'qualified entity' is any organisation or public body representing consumers' interests that has been designated by a Member State (Article 3 No 4). These entities may bring actions as a claimant party (in their own name) in the interest of consumers who do not become party to the proceedings themselves. If the qualified entity seeks injunctive measures against the defendant, individual consumers are not required to express their wish to be represented by the claimant party (no opt-in but equally no opt-out is necessary). In cases of a representative action for redress measures (compensation, repair, replacement, etc.[*21]), the situation is different: Article 9's paragraph 2 requires the member states to provide rules on whether and at which stage of the proceedings consumers shall opt in or opt out ('explicitly or tacitly express their wish […] to be represented or not by the qualified entity […] and to be bound or not by the outcome of the representative action'). Thus, a key issue that has been very much debated over the years is left to be decided by each the member states. Only a few Member States have so far implemented group actions or representative actions based on a (US-style) mechanism for opting out.[*22] Irrespective of the fact that consumers might stay passive in the event of a small individual loss and are unlikely to bother to opt in, most of the collective redress

16 For details on the settlement, see the information provided on the Web site of the US District Court for the Northern District of California at <www.cand.uscourts.gov/judges/breyer-charles-r-crb/in-re-volkswagen-clean-diesel-mdl/final-2-0-l-settlement/> accessed 2 January 2021.

17 In Germany, Volkswagen settled individual cases in mounting numbers so as to avoid a decision by the Federal High Court. In February 2020, the German umbrella consumer organisation Verbraucherzentrale Bundesverband (vzbv) entered into a settlement with Volkswagen AG for approx. 250,000 car-owners who had registered for the 'Musterfeststellungsklage' action of the vzbv. The settlement bypassed safeguards such as court approval of the settlement terms as provided for by the German Civil Procedure Code, by establishing only a framework for individual settlements between consumers and Volkswagen. Again, the settlement was dictated by time pressure, because both parties wanted to settle the dispute before the Federal High Court issued a basic decision on Volkswagen's tort liability, due in May 2020. For a critical review of the settlement procedure, see Astrid Stadler, 'Pyrrhussieg für den Verbraucherschutz – vzbv umgeht durch Vereinbarung mit VW gesetzliche Sicherungsmechanismen' [2020] Verbraucher und Recht 163–65.

18 'Proposal for a Directive on representative actions for the protection of the collective interest of consumers, repealing Directive 2009/22/EC' COM (2018) 184 final, of 11 April 2018.

19 Directive 2020/1828/EC [2020] OJ L409/1, of 4 December 2020.

20 Directive 2020/1828/EC, art 24.

21 Redress measures are defined in the directive's art 3 (under No 10).

22 Belgium (Code de droit économique, art XVII: opt-in in case of personal injury, moral damages; Bulgaria (art 379-388 Civil Procedure Code); England/Wales (Sec. 47A Competition Act [11] [b], on non-UK residents); Portugal (law 83/95, art 12 (No 84/96) and art 13); Spain (Ley Enjuiciamiento Civil, art 6 (7), 7 (2), 11, 13, 15, and 221). Also, according to the Dutch WCAM, the opt-out mechanism applies for mass settlements too.

mechanisms in the EU express preference for the opt-in model.*[23] Lately, there has been a tendency to conclude that whether an opt-in *or* an opt-out *modus* applies should be decided on a case-by-case basis by the court seised.*[24] Also, the directive adopts the idea that consumers who are not habitually resident in the Member State where the court seised is located must explicitly join the action by an opt-in declaration. This follows national examples in Belgium and the UK*[25], and it is suggested also in the collective-redress-related part of the ELI/UNIDROIT project on Model Rules for European Civil Procedure 2020*[26].*[27]

With this directive, there is no longer a provision for lower-value claims. Recommendation 2013/396 allowed an exception to the opt-in mechanism for this type of claim, and the 2018 Draft Directive document (in its Article 6, para. 3, lit. b) went even further and suggested a mandatory opt-out scheme without distribution of the compensation to the affected consumers. The amount is to be directed instead to a public purpose.*[28] In fact, such disgorgement proceedings are the more adequate solution in cases wherein the distribution of small amounts of compensation would be disproportionate. The money could also be used to establish and feed an 'access-to-justice fund' for the financial support of future mass litigation (see subsection 3.3 below).

On the basis of the mechanism that had already been used in the Injunctions Directive 2009, the member states may designate qualified entities in accordance with the criteria established in Article 4 of the directive. The member state may distinguish among entities qualified for the purpose of bringing domestic representative actions, cross-border representative actions*[29], and both (see Article 4, para. 2).

A list of entities qualified for cross-border representative actions shall be published and communicated to the Commission (per Article 5, para. 1). The list must be accepted in each of the member states as proof of the legal standing of the qualified entities (under Article 6, para. 3), and member states must ensure that the entities listed can indeed bring representative actions before their courts or administrative bodies (per Article 6, para. 1). Where consumers in several member states are affected by a mass-harm event, the member states must allow several qualified entities, from different member states, to bring a (joint) action. With regard to the international jurisdiction of courts, the directive does not provide any specific rules but simply refers to the application of the Brussels Ia Regulation instead (see Article 2, para. 3).

Finally, a lesson learned from the German handling of the Volkswagen Dieselgate affair and the German *Musterfeststellungsklage* is reflected in Article 9 paragraph 6. The member states must ensure that consumers benefit from the remedies sought in the representative action without having to bring a separate (individual) action.

3. What has changed over the years

The drafts and ideas for a harmonised collective redress instrument in Europe have changed considerably over the years.

23 France (art L.423-5, on the opt-in system applied after a court judgment on liability has been rendered); Denmark (Administration of Justice Act, § 254e (2)); Finland (Class Action Act (444/07), s 8); Lithuania (Civil Procedure Code, art 441–3); Sweden (Group Proceedings Act 2003, s 14. Also, cf the regulations in Italy (Consumer Code 2009, art 140bis; Law No 244 2007, amended 2009 and 2012), Poland (the law of 17 December 2009), and Scotland (since July 2020). The same position has been taken under Recommendation 2013/396 (No 10–11 and 21) and the Commission's relevant report, COM (2018) 40 final) p 13–15.

24 Belgium (Code de droit économique, art XVII.43, s 2, No 2); Denmark (Administration of Justice Act, s 254e (8)); England/Wales (CAT Rules, rule 79 [1], 79.3); Norway (Disputes Act, s 35-7); Slovenia.

25 Belgium (Code de droit économique (art XVII.38, s 1, no 2); England/Wales Competition Act, s 47A [11] [b], on non-UK residents); Commission Report COM (2018) 40 final, p 13–14.

26 For more information on the project, consult the Model European Rules of Civil Procedure <www.europeanlawinstitute.eu/projects-publications/completed-projects-old/completed-projects-sync/civil-procedure/> accessed 15 July 2021.

27 Rule 215 of the European Civil Procedure Rules (ECPR). The English-language version and an unofficial German translation of the collective-redress-related portion of the ECPR are available at <www.jura.uni-konstanz.de/typo3temp/secure_downloads/90161/0/1d54b518ac0d5638005f871d5dab2d607586b14f/Deutsche_U__bersetzung_Part_XI_CR.pdf> accessed 2 January 2021.

28 Its art 6 states in para 3, lit. b, that 'Paragraph 2 shall not apply in the cases where: [...] consumers have suffered a small amount of loss and it would be disproportionate to distribute the redress to them. In such cases, the member states shall ensure that the mandate of the individual consumers concerned is not required. The redress shall be directed to a public purpose serving the collective interests of consumers'.

29 For a definition, see art 3 of the directive, No 7.

3.1. Scope of application

Beyond the shift in terminology already mentioned (from 'collective redress' to 'group or class action'), the European Commission's proposal underwent major changes related to the scope of application and legal standing. Whereas the 2013 Recommendation took a non-sectorial approach and, hence, showed broad scope for application, the final Directive 2020/1828 is restricted to addressing violations of consumer law, and its Annex I provides a list of 66 directives and regulations of Union law substantiating the scope of application defined in Article 2.*[30] The change is most likely to be due to the fact that the Commission did not want the question of jurisdiction to be raised and therefore declared the new directive to be a further development of the Injunctions Directive 2009. The Volkswagen emission scandal showed, however, that small and medium-sized enterprises too may need to benefit from a representative action with one claimant party. Furthermore, cartel-damages actions by direct purchasers serve as another example attesting to the practical importance of pooling claims by companies. They will still have to resort to the services of special-purpose vehicles ('Rechtsverfolgungsgesellschaften'), which operate on an assignment model (see Subsection 3.3 below).

3.2. Legal standing

Also, the new directive adopts a much stricter attitude toward legal standing than does the Recommendation of 2013. This could have a negative impact on the directive's use in practice. According to the Recommendation document, legal standing to bring a representative action on behalf of a group of tort victims or consumers was to be granted also to individual members of the group, not merely to representative entities or public bodies. Directive 2020/1828 requires the member states to give legal standing only to 'qualified entities' as defined in Article 4, however. Under Article 4 para 2, this includes only entities that can demonstrate 12 months of actual public activity in consumer protection and have a statutory purpose of protecting consumer interests. Therefore, *ad-hoc*-founded interest groups or entities that would represent only the victims of a particular mass-harm event are not within the scope of application of the directive. The directive concedes only that member states may allow such entities to bring a particular domestic representative action; there is no mutual obligation to grant legal standing for cross-border litigation.*[31]

Qualified entities must have a non-profit-making character and fulfil certain criteria with respect to their funding and the transparency of their organisational, management, and membership structure.*[32] Existing consumer organisations normally have limited personnel and financial resources, often depend on public funding by the state, and will not be able to deal with all cases.*[33] In some member states and in sectors such as securities law, there are, in simple terms, no associations that are willing and able to represent hundreds or thousands of consumers in court.*[34]

3.3. Funding of representative actions

Legal standing and funding are closely related issues. The directive's main deficiency is that it does not provide a clear framework for the funding of mass litigation. An earlier draft's provision requesting the member states to take care of sufficient funding of the qualified entities*[35] did not survive the legislative process, for

30 The list focuses on consumer law. It does not address, for example Directive 2014/104/EU, on certain rules governing actions for damages under national law for infringement of the competition-law provisions of the member states and the EU, so it does not protect consumers who are victims of price-fixing cartels. It does, however, include directives on securities and investments and, thereby, may protect small-scale investors.

31 Directive 2020/1828, art 4, para 6.

32 Directive 2020/1828, art 4, para 3.

33 For a more detailed review, see Astrid Stadler, 'Kollektiver Rechtsschutz quo vadis?', Juristenzeitung (JZ) 2018, 793, 793 et seqq. – DOI: https://doi.org/10.1628/jz-2018-0235.

34 In Germany, there are a couple of associations for the protection of small shareholders, but the activities of these bodies are restricted to representing shareholders in stockholders' meetings, conducting information campaigns, and providing support for individual actions. They have neither the staff nor the financial capacity to conduct mass litigation.

35 Article 15 of the proposal COM (2018) 184 final stipulates: 'Member States shall take the necessary measures to ensure that procedural costs related to representative actions do not constitute financial obstacles for qualified entities to effectively

reason of the – non-surprising – resistance of the member states. Instead, there is now a 'soft law' provision in Article 20, para. 1: 'Member States shall take measures aiming to ensure that the costs of the proceedings related to representative actions do not prevent qualified entities from effectively exercising their right to seek the measures referred to in Article 7.' This is no funding guarantee for qualified entities, but public funding is not the optimal solution in any event. Qualified entities, which more or less exclusively depend on public funding, may become subject to political influence with their enforcement policy.[*36] In addition, however, the directive provides no guarantee of qualified entities' access to third-party funding. Instead, Article 10 builds on national legislation, and only where national law allows third-party funding does the directive provide additional safeguards against conflicts of interest and require a certain level of transparency.

In most member states, there is no legal framework for commercial litigation funding. In Germany, the Federal High Court (Bundesgerichtshof), in a rather surprising decision from 2018[*37], stated that consumer associations that use litigation funding companies will lose legal standing to bring actions that address skimming off illegally gained profits from companies violating competition rules (see § 10 of the Unfair Competition Act). The main argument was that there is a considerable risk that profit-seeking by funders will prevail over consumer interests and that consumer associations will no longer be independent in selecting cases for litigation. The decision reflects the strong resistance against commercial funders and the fear of a litigation industry developing in Germany. Despite considerable criticism[*38] in legal writings, the court confirmed its position in 2019.[*39] If the legislature does not overrule these decisions, defendants will certainly try to apply this case law to representative actions under the new directive, and it cannot by precluded that the Federal High Court will confirm such an approach. Therefore, funding the new representative actions might become extremely difficult. Without the possibility of seeking support from third-party funders, the directive will prove useless for consumer associations, and one could only hope for the European Court of Justice to intervene someday on the basis of a 'effet utile' argument.

In response to the inability of German consumer associations to pick up all mass-harm events and the lack of an efficient instrument for collective redress in German civil procedure law, a new market for legal services has emerged in recent years. Legal-tech companies and special-purpose vehicles (the abovementioned *Rechtsverfolgungsgesellschaften*) are the new entrepreneurs in the mass litigation market, and they bring in a considerable share of the attractive proceedings. Their business models are based on the pooling of claims by assignment under substantive law. They also offer litigation funding by acting on the basis of success fees of 25–30%. In this respect, they benefit from a legal gap in German law. Whereas tight restrictions exist on lawyers' entry into contingency-fee arrangements or offering of litigation funding[*40], no corresponding prohibition is imposed for debt-collection companies, even if they are run by lawyers. Cartel-damages actions are very often brought by such collection companies, and, even in consumer law (Dieselgate is again a good example), legal-tech companies such as myRight and similar start-ups offer legal services to risk-averse individuals who do not want to litigate at their own procedural risk.

The Federal High Court has confirmed the business model of legal-tech-domain debt collectors in principle[*41], but numerous questions are still open and lawyers complain harshly that there is not a level playing field. Recently, the German government published a proposal according to which lawyers will be allowed to

exercise the right to seek the measures referred to in Articles 5 and 6, such as limiting applicable court or administrative fees, granting them access to legal aid where necessary, or […] providing them with public funding for this purpose.'

36 For examples of such development in the US, see Richard Marcus, 'Revolution and Evolution in Class Action Reform', (2018) 96 North California Law Review 903, 914. In Germany, some authors (Herbert Woopen, 'Kollektiver Rechtsschutz – Ziele und Wege', Neue Juristische Wochenschrift (NJW) 2018, 133, 136) and actors in the business sector also (Stellungnahme Deutsche Kreditwirtschaft (materials from 31 May 2018) 7 <https://die-dk.de/media/files/180531_DK-Stgn_Musterfeststellungsklage_FINAL.pdf> accessed 2 January 2021) argued in favour of the exclusive legal standing of public regulators when the *Musterfeststellungsklage* was established in 2018 – 'evil to him who evil thinks'.

37 Bundesgerichtshof (BGH) I ZR 26/17, 13 September 2018, per NJW 2018, 3581.

38 For critical assessment of the decision, see Astrid Stadler, 'Sittenwidrigkeit der Prozessfinanzierung eines gemeinnützigen Verbraucherschutzverbandes', Juristenzeitung (JZ) 2019, 198; Michael Loschelder, 'Prozessfinanzierung bei Gewinnabschöpfungsansprüchen unzulässig' GRUR-Prax 2018, 534; Axel Halfmeier, 'Anmerkung zu BGH: Rechtsmissbrauch durch Prozessfinanzierung bei Gewinnabschöpfungsklage', WuB 201927.

39 BGH I ZR 205/17, 9 May 2019 ('Prozessfinanzierer II'), Neue Juristischen Wochenschrift (NJW) 2019, 2691.

40 Federal Code for the Legal Profession, s 49b.

41 BGH VIII ZR/285/18, 27 November 2019 ('wenigermiete.de I'), BeckRS 2019, 30591; BGH VIII ZR 130/19, 8 April 2020 ('wenigermiete.de II'), BeckRS 2020, 8218.

ask for contingency fees in cases involving small amounts (up to 2,000 euros) and for out-of court activities.*[42] That proposal may be an important, albeit very cautious, step toward bringing lawyers onto a level playing field with expanding and innovative legal-tech companies. However, the success of this attempt to strengthen the position of consumers seeking legal advice depends also on how the German government will implement Directive 2020/1828. If consumer association do not have the opportunity of obtaining external funding, because of the applicability of the above-mentioned case law, numerous cases will be left to legal-tech companies, with consumers being able to obtain compensation for the violation of their rights only upon giving a considerable portion of the indemnity to these companies as a success fee.

National legislatures in Europe should therefore consider an alternative way of funding mass litigation: by establishing the so-called access-to-justice fund that can offer financial support to qualified entities or individual claimants acting on behalf of a group of consumers.*[43] Such a fund should be able to fill the gap when no other funding sources are available. Third-party funders, for example, are interested only in certain types of cases, particularly those with high amounts at stake and actions that are for monetary relief from which they can deduct their success fee. Directive 2020/1828, however, covers proceedings that will not be attractive for commercial funders. Besides injunctive measures (Article 8), it covers redress measures of all kinds, such as compensation, repair, replacement, price reduction, contract termination, and reimbursement of the price paid (Article 9). Third-party funders will not be interested in taking up all these kinds of actions; therefore, state-run funds at the national or the European level to which consumer associations or individuals (if given legal standing by national law) may apply for funding are very important for the success of Directive 2020/1828. Whereas such funds already exist in Canada*[44], legislatures in EU Member States have been very reluctant to establish these vehicles so far, because of the lack of seed money. There are several options for feeding such funds, though: Where mass litigation is successful and ends in a settlement, the compensation funds often are not claimed in their entirety by the group members. This is particularly true in cases of small individual losses. The residues should not be returned to the defendants*[45] but be directed to such a fund as a kind of *cy-près* solution.*[46] Administrative fines in antitrust cases could be another source of funding or monetary penalties, with one example being the billion-euro fine imposed on Volkswagen in 2019 for using the emissions-cheating device in their diesel cars.*[47] Moreover, defendants in many member states have to pay administrative fines for violating cease-and-desist orders in competition or consumer law. These fines too could be used to establish and run a fund for future cases of mass harm.

Access-to-justice funds have additional advantages: Funding normally gets granted only upon application to an independent board managing the fund. Unmeritorious or frivolous claims therefore have no chance of proceeding, and thereby the fund is, similarly to third-party funders' due diligence, an important safeguard against the misuse of collective redress actions.

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42 *Gesetz zur Förderung verbrauchergerechter Angebote im Rechtsdienstleistungsmarkt* (20 January 2021) <www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Rechtsdienstleister.html> accessed 15 July 2021. The new rules will come into force on 1 October 2021.

43 The idea is not new; cf the proposal by Gerhard Wagner, *Verhandlungen des 66. DJT, Vol. II* (2006) A 14ff; H-W Micklitz and Astrid Stadler, *Unrechtsgewinnabschöpfung* (Nomos 2003) 129; H-W Micklitz and Astrid Stadler, 'Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft' [2005] Gutachten BMVEL 1142; Stadler, 'Kollektiver Rechtsschutz quo vadis?' (n 33) 801–802; Karl-Heinz Fezer, 'Zweckgebundene Verwendung von Unrechtserlösen und Kartellbußen zur Finanzierung der Verbraucherarbeit' (27 February 2019) <https://kops.uni-konstanz.de/handle/123456789/23103> accessed 15 July 2021; Stefaan Voet, 'Cultural Dimensions of Group Litigation: The Belgian Case' (2013) 41 Georgia Journal of International & Comparative Law 433, 469; J Buchner, *Kollektiver Rechtsschutz für Verbraucher in Europa* (Vandenhoeck & Ruprecht 2015) 202. – DOI: https://doi.org/10.14220/9783737004343; Caroline Meller-Hannich, *Gutachten 72. DJT* (C.H. Beck 2018) p A 60, A 88.

44 For Quebec, see 'Fonds d'aide aux recours collectifs' (29 December 2020) <www.farc.justice.gouv.qc.ca/> accessed on 15 July 2021; for Ontario, see 'Access to Justice Funds (29 December 2020) <www.lawfoundation.on.ca/what-we-do/access-to-justice-fund-cy-pres/> accessed on 15 July 2021.

45 Reversion of the leftovers to the defendant is not only included in many settlements but also a statutory rule in some states: Australia Federal Class Action Part IV A, s 33ZA (5); Victoria Supreme Court Act 1986, Part 4A, s 33ZA (5); Ontario Class Action Act, s 26 [10]; British Columbia Class Action Act, s 34 (5) (c). Also, the new Slovenian Law on Group Actions, from March 2018 [ZkolT] states the same rule in its art 46, para 3; however, ss 47C (5–6) of the Competition Act for England/Wales clarifies that the awards not claimed shall be directed to charity.

46 *Cy-près* has its origin in US common law and describes use of settlement residues in a manner that comes as close as possible to compensation of the group members in a class action; cf Rachel Mulheron, *The Modern Cy-près Doctrine: Application and Implications* (2006).

47 The Office of the Public Prosecutor in Braunschweig imposed on Volkswagen a fine of five million euros and issued a disgorgement order for 995 million euros.

3.4. Collective settlements

The 2018 draft Directive document included a proposal for a standalone mechanism for obtaining court approval for out-of-court mass settlements and for a declaration upon which they become binding for all victims. This idea is rooted in the 2005 Dutch collective settlement act (WCAM), which turned out to be quite successful for settling big international cases. Where settlement negotiations between a representative entity and a prospective defendant succeed without the initiation of contentious court proceedings, this is a much faster and less expensive way to settle a mass dispute. Such mechanisms can be found today in a couple of member states.[*48] Nevertheless, the directive does not provide any suggestions in this respect. Article 11 applies only to redress settlements accomplished in a situation wherein a representative action is already pending. This is an unnecessarily narrow approach. Practical experience with the Dutch WCAM tells us that a company that has caused a global mass-harm event might be willing to settle the dispute with its European victims without court proceedings (e.g. after a US class-action settlement for victims in the United States).[*49] This requires only a mechanism for declaring a settlement binding for all victims on the basis of court approval of the settlement terms. In purely domestic or European mass-harm events, there might also be incentives for the accountable companies to settle the whole dispute without mass litigation (e.g. in the wake of a test-case decision or a declaratory judgment against the defendant). Despite the lack of a relevant provision in the new directive, the member states should therefore consider establishing such a standalone mechanism for mass settlements, based on joint application by the parties negotiating the out-of-court settlement. This approach has been taken by the ELI/UNIDROIT project on Model Rules for European civil procedure.[*50]

Also, the parties negotiating a mass settlement – irrespective of whether it is an out-of-court settlement or a settlement entered into while a representative action is already pending – should be aware of the fact that the Brussels Ia Regulation does not guarantee a preclusive effect of the settlement in cases wherein individual consumers bound by a mass settlement nevertheless file an individual action for (a greater amount of) damages against the defendant in another member state. Article 59 of the latter regulation allows only cross-border enforcement of settlements (as defined in Art. 1, para. 2, lit. b[*51]); it does not mention recognition in other member states. Mutual recognition as stipulated in Article 36 Brussels Ia, in turn, refers only to judgments.[*52]

4. Conclusions

Group actions will be available in the near future in all member states, but they follow a completely different pattern than US class actions. The rise of 'private enforcement' in European consumer law is occurring simultaneously with class actions' practical importance hitting rock bottom in the US. *John Coffe*e, one of the leading experts in US class-action law, describes the situation in his 2015 book on 'entrepreneurial litigation' as follows: class actions are 'much like a grape in the sun drying slowly into a raisin', in conditions where 'the class action may be dying the death of the one thousands cuts'.[*53] Some of the most important cuts came from the US Supreme Court, which drew a line on a few highly controversial class-action issues in recent years: (1) the court approved class-action waivers in consumer- and labour-law contracts[*54], (2) it set

48 England/Wales: Consumer Rights Act 2015, s 49B; Competition Act 1998 and s 49C of the Competition Act 1998 (on approval of redress schemes by the CMA); CAT Rules, Rule 96. Slovenia: ZKolT 2018, arts 12–25; see also the Swiss Tentative Draft of March 2018, arts 352a–52k; Swiss Civil Procedure Code, Recommendation 2013/396, no 26; Commission Report COM (2018) 40 final) p 14–15.

49 For a study of the WCAM settlements, see Ianika Tzankova and Deborah Hensler, 'Collective Settlements in the Netherlands: Some Empirical Observations' in Christopher Hodges and Astrid Stadler (eds), *Resolving Mass Disputes* (Edward Elgar 2013, Chapter 5. – DOI: https://doi.org/10.4337/9781782546917.00011.

50 ERCP on Collective Settlements outside Collective Proceedings, rules 229–32.

51 Article 1's para 2 states, in lit. b, that 'court settlement' refers to a settlement that has been approved by the court of a Member State or 'concluded before a court of a Member State in the course of proceedings'. Therefore, it is no longer an option to argue that a court-approved settlement is not a settlement but a judgment.

52 For more details, see Astrid Stadler, 'Grenzüberschreitende Wirkung von Vergleichen und Urteilen im Musterfeststellungs verfahren(NJW) 2020, 265 et seq.

53 Coffee (n 1) 130 and 132.

54 *AT&T Mobility LLC v Concepcion* 563 US 333 (2011); *National Labor Relations Board v Murphy Oil USA, Inc.* 16-307, 21 May 2018.

strict benchmarks for product-liability-related mass settlements[*55], and (3) it decided in favour of a strict interpretation of the commonality requirement of Rule 23 of the Federal Rules of Civil Procedure[*56].[*57] As they implement the new directive, the member states will be well advised to take a closer look at these tendencies if they wish to avoid making the same mistakes.

Notwithstanding (and probably unaware of) this development in the US, the European legislature has, first of all, adopted a completely different concept of legal standing, for purposes of avoiding excessive entrepreneurial litigation. Giving legal standing only to consumer associations follows a certain tradition in civil-law countries and can be considered an aspect of a 'European-style class action'. That said, reform efforts tend to pile more and more tasks on consumer associations and impose a snowballing burden on them to enforce consumer rights in connection with all manner of mass-harm events without providing adequate options for financing the enforcement. The member states will have to handle the ambivalence of Directive 2020/1828 and try to balance the safeguards against misuse, on the one hand, with the efficiency of the new mechanism, on the other. In the worst-case scenario, representative actions will not be used at all or will be employed to only a small extent, because there is either no consumer association willing to take the case or very few consumer associations can afford expensive mass litigation. Particularly complex cross-border cases may, accordingly, fall by the wayside. Even the Injunctions Directive of 2009, which forms the basis for Directive 2020/1828, was not a real success for handling of cross-border violations of consumer rights, and prospects are not much brighter today, in that redress measures are much more difficult to litigate for a large number of consumers and they involve considerably higher procedural risks.

All in all, Directive 2020/1828 is a step in the right direction since it imposes an obligation on the member states heretofore reluctant to put into effect a basic model of representative actions in consumer law. Nevertheless, it takes more to ensure that collective redress instruments are effective, unfold a preventive effect, and regulate the behaviour of the markets. the member states should expand legal standing for representative actions to organisations founded *ad hoc* and individual consumers, allow third-party funding within some rough legal framework, and provide additional funding options by establishing access-to-justice funds for mass litigation.

55 *Anchem Products, Inc. v Windsor* 521 US 591 (1997); *Ortiz v Fibreboard Corp.* 527 US 815 (1999).

56 *Comcast v Behrend* 569 US 27 (2013); *Wal-Mart Stores, Inc. v Dukes* 131 S.Ct. 2541 (2011).

57 For more detailed analysis of the development, see Marcus (n 36) 903f; Stadler, 'Kollektiver Rechtsschutz – Chancen' (n 10) 623et seq.

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The Applicability of the Digital Content Directive and Sales of Goods Directive to Goods with Digital Elements[*1]

1. Introduction

There is an ongoing trend to develop more and more inter-connected or 'smart' consumer goods such as smart cars, smartphones, smart watches, wearables, laptops, or smart devices such as Amazon Echo. It is characteristic to these goods that they either contain digital content (e.g. software) or use digital services for certain of their functions (e.g. the navigation system of a smart car). Adoption of the new Digital Content Directive[*2] (hereinafter DCD) and Sales of Goods Directive [*3] (hereinafter SGD) in late spring 2019 has raised a question as to the delimitation of the scopes of the directives: are 'smart goods' – or 'goods with digital elements' as the directives[*4] call them – subject to the Digital Content Directive, instead to the new Sales of Goods Directive, or possibly to both? The question is evident as, for example, a smartphone is a good, i.e. a tangible object[*5], which suggests that it should lie within the scope of the SGD. The operating system of it is, however, digital content, which leads to the applicability of the DCD.[*6]

This delineation question has emerged due to the approach used in the Digital Content Directive, which creates a new contract law regime for a specific legal object: digital content/service. As this specific legal object can be integrated into another legal object (a good) or inter-connected with it, one component of a product – digital content – can be subject to a legal regime different from that applicable to the rest of the product.[*7] Traditionally, the civil codes in European countries as well as the European contract law instruments are based on specific contract types (characterised by specific obligations of the parties) and

1 The research leading to this article was supported by the Estonian Research Council's grant PRG124.

2 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1.

3 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods [2019] OJ L 136/28.

4 See SGD art 2(5) and DCD art 2(3).

5 See SGD art 2(5).

6 See DCD art 2(1) and 3(1).

7 Karin Sein, 'What Rules Should Apply to Smart Consumer Goods? Goods with Embedded Digital Content in the Borderland Between the Digital Content Directive and "Normal" Contract Law' (2017) 8 (2) JIPITEC 97; Karin Sein and Gerald Spindler, 'The New Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1' (2019) 15(3) ERCL 269. – DOI: https://doi.org/10.1515/ercl-2019-0016.

not on the objects of the contracts. As stated by Professor Florian Faust, we have sales contracts, rental contracts, and contracts on services, not contracts on cars, contracts on fridges, or contracts on Kinder Surprise eggs.[*8] Yet, after the adoption of the DCD, we do have specific consumer contract law on digital Kinder Surprise eggs – be it sales, rental, or creation of them. Surely, the Digital Content Directive has raised the level of consumer protection in the European Union, setting forth mandatory consumer contract norms for all types of digital-content-related consumer contracts. On the negative side, however, it has created a situation where determination of the scopes of the directives has become very complicated, concentrating the problems exactly in the area of goods with digital elements.

The most complicated one of these problems involves the so-called multi-party situations – that is, situations of goods with ancillary digital services (such as smart TVs including Netflix and YouTube applications, smart cars with digital navigation systems, or app-controllable Christmas lights) where the consumer buys the tangible good from a seller but concludes an additional licensing contract with the digital content provider for using the digital services.[*9] Do problems with Netflix entitle the consumer to terminate the sales contract or to a reduction in the price of a new smart TV? And what about apps not functioning properly on the smartphone or the navigation system of a smart car?

2. Delineation between the DCD and SGD in cases of goods with digital elements

2.1. The notion of goods with digital elements and the main policy choice

The delineation between the DCD and SGD is defined in Article 3(4) DCD and Article 3(3) SGD and the corresponding recitals.[*10] According to these provisions, goods with digital elements are within the scope of the new Sales of Goods Directive. 'Digital elements' within the meaning of the directive include both embedded digital content and ancillary digital services: according to Article 2(5) SGD and the corresponding Article 2(3) DCD, goods with digital elements are defined as tangible movable items that incorporate, or are interconnected with, digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions. These goods fall within the scope of the SGD (Article 3(3) SGD) and are exempted from the scope of the DCD.[*11]

Here we see that the main policy solution of the directives has been to make the seller of the good – and not the digital service provider – liable for defects both in hardware and embedded digital content and in the inter-connected digital services.[*12] From the perspective of a normal consumer, subjecting goods with embedded digital content such as firmware of a computer to the consumer sales rules makes perfect sense: a smart good is still a good, even if it's smart. If the anti-lock software of a car brake does not function, this clearly constitutes a lack of conformity of the car and the car's seller should be liable for it even if he has not produced the software himself. The situation here is no different from a situation where a lack of conformity

8 Florian Faust, *Digitale Wirtschaft – Analoges Recht. Braucht das BGB ein Update? Gutachten zum 71. Juristentag* (C.H. Beck 2016) 9.

9 On the situation before the adoption of the new directives and suggestion to employ the concept of connected contracts, see Piia Kalamees and Karin Sein, 'Connected Consumer Goods: Who Is Liable for Defects in the Ancillary Digital Service?' (2019) 8(1) EuCML 13ff; Ivo Bach, 'Server- und Infrastrukturzugänglichkeit als Qualität' in Martin Schmidt-Kessel and Malte Kramme (eds), *Geschäftsmodelle in der digitalen Welt* (JWV2017) 233ff and three possible regulation models suggested by C Wendehorst, 'Hybride Produkte und hybrider Vertrieb. Sind die Richtlinienentwürfe vom 9. Dezember 2015 fit für den digitalen Binnenmarkt?' in Christiane Wendehorst and Brigitta Zöchling-Jud (eds), *Ein neues Vertragsrecht für den digitalen Binnenmarkt – Zu den Richtlinienvorschlägen der Europäischen Kommission vom Dezember 2015* (MANZ 2016) 60ff.

10 Recitals 21 and 22 DCD and recitals 13, 15, and 16 SGD.

11 Article 3(4) DCD provides: 'This Directive shall not apply to digital content or digital services which are incorporated in or inter-connected with goods within the meaning of point (3) of Article 2, and which are provided with the goods under a sales contract concerning those goods, irrespective of whether such digital content or digital service is supplied by the seller or by a third party'. Also see Klaus Tonner, 'Die EU-Warenkauf-Richtlinie: auf dem Wege zur Regelung langlebiger Waren mit digitalen Elementen' (2019) VuR 367.

12 Sein and Spindler (n 7); Dirk Staudenmayer, 'Kauf von Waren mit digitalen Elementen – Die Richtlinie zum Warenkauf' (2019) NJW 2889.

is caused by another (a non-digital) part of the good: the seller cannot escape liability just because the defective part of the product sold was manufactured by someone else.[*13]

While it is more or less evident what constitutes embedded digital content – broadly speaking, it is software that is integrated into the good – the notion of inter-connected or ancillary digital services needs a bit more explanation. The recitals of the Sales of Goods Directive cite the following examples of such inter-connected digital services: applications of a smart TV, standardised pre-installed applications of a smartphone, software-as-a-service solutions offered in a cloud computing environment, the continuous supply of traffic data in a navigation system, and the continuous supply of individually adapted training plans in the case of a smart watch.[*14] In these cases, it is also usually not the seller of the good but rather a third party (a digital content provider, often a software producer) who is providing the digital services to the consumer. However, here the consumer often concludes a separate licence agreement with the digital service provider and sometimes also pays a fee for these services.

Yet the point of departure for the directives is that the seller of the good is liable also for the defects of such ancillary/inter-connected digital services, provided that two cumulative conditions are met: a) the digital service is inter-connected with the good in such a way that the absence of that digital service would prevent the good from performing its functions (Article 2(5)(b) SGD) and b) the digital service is provided with the good under the sales contract (Article 3(3) SGD). The following subsections analyse these two pre-conditions more closely.

2.2. Condition 1: Absence of the ancillary digital service would prevent the good from performing its functions

The first condition for the seller's liability involves the functionality of the good: whether or not the good is able to perform its functions without the digital service. It should be noted that the directive does not require that 'main functions' of the good be affected:[*15] defective performance of any functions of the good is sufficient. The first question is how to determine the functions of the smart good, as certain functionality (for example, using a YouTube application on a smart TV) presupposes the existence of a digital service.

In the first step, must-have functions of the smart good are determined by the contract (i.e. subjective conformity criteria). According to Article 6(a) SGD and Article 6(5) CRD, this depends on the pre-contractual information on the good as well as the contract provisions. If the smart TV is advertised on the home page of the seller as having 'webOS 3.5', 'Alexa Built-in' and 'Google Assistant integrated', then the seller is liable for the operating system as well as for the functioning of Alexa and the Google Assistant service. Regarding Netflix, the same advertisement states: 'Smart functionality gives you access to your favorite apps and content' and 'Internet connection and Netflix subscription are required'. Hence, the seller is liable only for Netflix connectivity and not for the functioning of Netflix itself.

Similarly, where an advertisement for a Nokia smartphone declares that 'Android One ensures that your phone keeps on getting better with time thanks to 2 years of monthly software updates and two free Android number updates, with Google Android ai', then the seller is liable not only for a certain operating system but also for the promised updates (Article 6(d) SGD).[*16]

In the second step, these contractual functionality agreements must be tested against the objective conformity criteria; ie one must ask what kinds of functions are normal in a smart good of the same type that the consumer may reasonably expect (Article 7(1) SGD) and whether the contractually agreed functionality deviates from them. Application of the objective functionality test here is complicated, however, as digital products are developing and changing very rapidly. This makes development of objective conformity

13 This argument is also brought out by Staudenmayer (n 12) 2889.

14 Recitals 14 and 15 SGD.

15 See n 13 of the Commission's Proposal of the SGD, which still used the notion 'main functions'. Moreover, defining main functions in the case of a smart good (or indeed in the case of many smart goods) is often complicated as well: is only the possibility of making phone calls the main function of the smartphone or, rather, the possibility of using the Internet? See Sein (n 7) 98.

16 On the updating obligation of the seller, see Staudenmayer (n 12) 2890-2891; Christiane Wendehorst, Aktualisierungen und Andere digitale Dauerleistungen in: Johannes Stabentheiner, Christiane Wendehorst, Brigitta Zöchling-Jud (Hrgs*), Das neue europäische Gewährleistungsrecht: zu den Richtlinien (EU) 2019/771 über den Warenkauf sowie (EU) 2019/770 über digitale Inhalte und digitale Dienstleistungen* (Manz 2019) 120 et seq.

standards in case law nearly impossible:[*17] it is not easy to determine which functions a reasonable consumer may expect from a smart car, a smart TV, or a smart fridge. The same problem arises with contractually promised updates, which under Article 7(3) SGD must not stay below the standard of updates that can be reasonably expected by the consumer under the objective conformity criteria.[*18] It is hard to imagine that case law could develop unified standards as to how a reasonably expected number of updates should be determined.

2.3. An inter-connected digital service provided with the good under the sales contract

The second condition for the seller's liability for an inter-connected digital service is that the digital service be 'provided with the good under the sales contract'[*19], or – put simply – that the good and the digital service be 'sold together'. Article 3(3) SGD provides an interpretation rule in case of doubt as to whether the supply of an inter-connected digital service forms part of the sales contract or not: the digital service shall be presumed to be covered by the sales contract. Putting the first and the second condition together, we get a legal presumption that the seller of the smart good is liable not only for the tangible good and embedded digital software but also for the inter-connected digital services even if the consumer concludes an additional licensing contract with the digital service provider in order to benefit from the digital service.[*20] Carvalho brings up an example wherein the consumer buys a car with an already installed GPS application: here, also the GPS application (including later updates promised by the seller) is covered by the sales contract and thus subject to the SGD.[*21]

At first glance, this seems to create a rather harsh liability regime for the sellers, who often do not have any control over the actions of the digital content provider. However, a deeper look at the recitals of the directives shows that there is much room left for party autonomy, with a consequence that exactly the opposite might become true in practice.

First, recital 15 SGD stresses that whether or not an inter-connected digital service forms part of the sales contract depends on the content of the sales contract. Moreover, if the consumer concludes a contract for the supply of digital content or a digital service that does not form part of the contract pertaining to the sale of goods with digital elements, that contract should be considered to be separate from the contract for the sale of the goods, even if the seller acts as an intermediary of that second contract with a third-party supplier, and could fall within the scope of the DCD.[*22] Again in the example brought up by Carvalho, if the consumer buys a car with no GPS application installed and then 'buys' the latest version of a GPS application over the Internet, there are two contracts, one (on the car) covered by the SGD and the other (for the GPS application) by the DCD.[*23] Recital 15 of the DCD also cites an easily understandable example where the consumer downloads a game application from an app store onto a smartphone: here the contract for the supply of the game application is separate from the contract for the sale of the smartphone itself. Consequently, the SGD is applicable only to the sales contract related to the smartphone, while the supply of the game application could fall under the DCD, if the conditions of that directive are met. I see no objections to this solution: clearly, a local electronics shop selling a smartphone should not be liable for apps downloaded later under a separate contract and potentially against a separate fee. Just one argument: the seller has no opportunity to control or assess at the time of the delivery of the smartphone what kind of apps the consumer decides to download and which risks are associated with them.[*24]

17 See Michael Grünberger, 'Verträge über digitale Güter' (2018) 218 AcP 259. – DOI: https://doi.org/10.1628/acp-2018-0011.

18 Karin Sein and Gerald Spindler, 'The New Directive on Contracts for Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2' (2019) 15(4) ERCL 370. – DOI: https://doi.org/10.1515/ercl-2019-0022.

19 See SGD art 3(3).

20 Recital 15 SGD.

21 Jorge Morais Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771' (2019) 8(5) EuCML 197.

22 Recital 16 SGD.

23 See Carvalho (n 21) 197.

24 The situation would be different for pre-installed apps as they should be considered sold and delivered together with the phone itself. In this sense, see also Carvalho (n 21) 197.

However, the story gets more complicated with the other example cited in recital 16 SGD. The recital describes a situation where it is expressly agreed that the consumer buys a smartphone without a specific operating system and the consumer subsequently concludes a contract for the supply of an operating system from a third party. According to the recital, in such a case the supply of the separately bought operating system would likewise not form part of the sales contract. Therefore, it would not fall within the scope of the SGD but could fall within the scope of the DCD, if the conditions of the DCD are met. This shows that whether and to what extent the sale of, for example, a smartphone falls within the scope of the SGD and, consequently, whether and to what extent the seller is liable for the operating system of the phone depend very much on the content of the sales contract. The directives thus allow for business models where sellers sell only the hardware part of the good and lead the consumer to conclude a licensing contract with a separate digital content provider after the delivery. Such models already exist for goods such as smart cars[*25] but can be – and are – developed also for other goods with digital elements.

For example, if the seller of a smartphone expressly provides in the sales contract that it does not supply the operating system or the Google Assistant service and the consumer has to obtain it separately from Google, then the seller's liability for these digital services is excluded even if a normal consumer may usually expect the seller to be liable for the whole smartphone, including the operating system. The same would be true for a situation where the pre-contractual information on the smartphone (which will become part of the sales contract under Article 6(5) CRD[*26]) contains a statement 'Manage your life with the dedicated Google Assistant button – requires a separate subscription with Google'. The example in recital 16 SGD of the operating system of a smartphone shows that express agreement in the sales contract may override reasonable consumer expectations: a normal consumer would usually expect that he is not buying only the plastic or metal case of the smartphone or smart TV but also its operating system, as the plastic/metal case is totally non-functional without the operating system.[*27] Furthermore, a clause excluding the liability of the seller for an operating system of a smartphone cannot be declared unfair and non-binding under the Unfair Terms Directive[*28], as it reflects mandatory contract law provisions and is thus exempted from the scope of the Unfair Terms Directive.[*29]

In order to protect the reasonable expectations of the consumer, the courts should set high standards for 'express agreement' excluding the liability of the seller for the inter-connected digital service, especially in cases where such exclusion would come as a surprise for a reasonable consumer.[*30] Although 'express agreement' within the meaning of recital 16 SGD is probably something less than 'expressly and separately accepting the deviation' within the meaning of Article 7(5) SGD, just declaring the seller not liable for the operating system in the standard terms and conditions should not, in my view, meet the test of 'expressly'. Similarly, von Westphalen has argued, within the context of the proposal for the SGD, that the requirement of 'expressly accepted' calls for more than simply taking note of the content of general terms of contract; rather, it requires an individually negotiated contract clause.[*31] In any case, we must avoid a solution where the consumer is left without any legal protection. If the consumer has remedies only against the digital content provider (e.g. Google) for a defective operating system under the DCD, then exercising them against big digital players outside the European Union often proves to be impossible due to practical hurdles. Moreover, even if the liability of the digital content provider were to be established, using termination or price reduction against him would bring nothing to the consumer as the digital content provider has received no

25 E.g. the Mercedes MeConnect service, at <www.me.mercedes-benz.com/passengercars/being-an-owner/mercedes-me-connect/mercedes-me-connect-services.module.html>.

26 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L 304/64.

27 In this sense, see also Klaus Tonner, 'Die EU-Warenkauf-Richtlinie: auf dem Wege zur Regelung langlebiger Waren mit digitalen Elementen' (2019) VuR 367. Another example would be a washing machine where the washing programmes are stored in a cloud of a digital content provider. See Christiane Wendehorst, 'Hybride Produkte und hybrider Vertrieb. Sind die Richtlinienentwürfe vom 9. Dezember 2015 fit für den digitalen Binnenmarkt?' in Christiane Wendehorst and Brigitta Zöchling-Jud (eds), *Ein neues Vertragsrecht für den digitalen Binnenmarkt – Zu den Richtlinienvorschlägen der Europäischen Kommission vom Dezember 2015* (MANZ 2016) 54.

28 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29.

29 Article 1(2) of the Unfair Contract Terms Directive.

30 See Sein and Spindler (n 7) 19.

31 Friedrich Graf von Westphalen, 'Some Thoughts on the Proposed Directive on Certain Aspects Concerning Contracts for the Sales of Goods' (2018) 7(2) EuCML 70.

payment from the consumer, so there is nothing that the consumer could claim back from the digital content provider under the DCD.

3. Smart goods with free and open-source software as a digital element

The situation becomes even more complicated in cases where the 'digital element' of the good (e.g. the operating system of a smart TV or of a smartphone) is free and open-source software.[*32] Recall that recital 16 SGD allows express agreement that the digital element is not part of the sales contract but could be subject to the DCD if the conditions for its applicability are met. However, free and open-source software[*33] is excluded from the scope of the DCD if the consumer does not pay a price and the personal data provided by the consumer are exclusively processed by the trader for the purpose of improving the security, compatibility, or interoperability of that specific software (Article 3(5)f DCD). In these cases, the 'separately bought' digital content does not even fall within the scope of the DCD[*34], with the result that the seller is not liable for the digital content under the SGD and the digital content/service provider too is not liable for it under the DCD.

While the Android OS – although operating on an open-source model[*35] – most probably is not excluded from the scope of the DCD as Google does not process the personal data exclusively for purposes of improving the security, compatibility, or interoperability of that specific software[*36], the situation might be different for other digital elements. It could therefore happen that in certain cases consumers will be even worse off after the transposition of the directives: whereas currently the courts would tend to view a smartphone with a defective operating system as a defective good also in cases where the operating system is based on free and open-source software, it is possible that under the directives consumers can be left without any remedies whatsoever. If the seller has made clear in the contract that he would be liable only for the hardware of the phone and not for the operating system, as recital 16 SGD allows, then the consumer has no remedies against the operating system provider since free and open software does not fall within the scope of the DCD.

4. Legal consequences of 'digital elements' falling under the Sales of Goods Directive

This section analyses the legal consequences for the seller in cases where the digital elements of the good sold fall within the scope of the SGD. First, of course, the seller becomes generally liable for the good, including the obligation to update.[*37] But subjecting digital elements of the good to the SGD has other specific legal consequences also, starting with the fact that assessment of their conformity has to be carried out in accordance with the SGD and not the DCD rules. Frankly, it is not easy to explain why conformity of a digital service should be assessed differently just because it is inter-connected with a good. Application of the Sales of Goods Directive to the inter-connected digital service would mean, for example, that the principles of privacy by design and by default as objective conformity criteria are not applicable. This can be illustrated by way of practical example: if a consumer buys a text processing software that violates his privacy, that would be considered a lack of conformity under the DCD[*38] with the consequence that in

32 For in-depth material on open-source software, see Till Jaeger and Axel Metzger, *Open Source Software. Rechtliche Rahmenbedingungen der Freien Software* (5th edn, C.H. Beck 2020).

33 Recital 12 DCD defines this as software where the source code is openly shared and users can freely access, use, modify, and redistribute the software or modified versions thereof.

34 This legal relationship is subject to the applicable national law – which may allow for agreements detrimental to consumers.

35 See <https://source.android.com/>.

36 See Google's Privacy Terms, stating that they use data to 'build better services', 'maintain & improve our services', 'develop new services', 'provide personalized services, including content and ads', and 'measure performance'. See <https://www.gstatic.com/policies/privacy/pdf/20191015/9ad23b47/google_privacy_policy_en_eu.pdf>.

37 Articles 10(1) and 7(3) SGD.

38 Recital 48 DCD. Applying 'privacy by design' and 'privacy by default' as objective conformity criteria in the DCD was suggested by the European Law Institute; see 'Statement on the European Commission's proposed directive on the supply of digital content to consumers' COM (2015) 634 final.

serious cases the consumer can terminate the contract and claim back the amount paid for the software. However, if his new smart TV would be found spying on him, then this is not *expressis verbis* considered a lack of conformity as there is no recital in the SGD comparable to recital 48 of the DCD – although one can surely argue that such a good is not in line with the consumer's reasonable expectations under Article 7(1) d SGD and thereby reach the same result.

In contrast against the maximum harmonisation DCD, which forbids any notification obligation in the national law[*39], Article 12 SGD leaves the notification obligation to the discretion of the member states. Thus, if the inter-connected digital service is subject to the SGD, in some member states the consumer may exercise remedies only if having notified of the defect.[*40] This creates legal uncertainty especially in cross-border situations as neither consumers nor traders are sure as to whether the possibility of exercise of the consumer's remedies in cases of defective smart goods depends on a previous notification or not.

There are also other options left to the member states that may create different treatment of digital elements of a smart good under different national laws.[*41] For example, Article 10(6) SGD allows member states to foresee that, in the case of second-hand goods, the seller and the consumer can agree to a shorter liability period than otherwise applicable, provided that said shorter period is not less than one year. It is important to bear in mind that Article 10(6) SGD refers also to Article 10(2) SGD, meaning that derogations are possible also for the continuous digital services (e.g. an app for a fitness tracker or a car's navigation system). The member states also have an option to foresee longer liability periods than two years[*42] or to apply the doctrine of hidden defects (*vices cacher*).[*43]

If goods rules are applicable to the embedded digital content / ancillary digital services, then the trader has no right to modifications under Article 19 DCD.[*44] Consequently, if the app of a fitness tracker falls under the goods rules, the trader is obliged to deliver updates under Article 7(3) SGD but is not entitled to make modifications to the app. However, here the member states might provide for such a rule in national law.

If digital elements are subject to the Sales of Goods Directive, then the seller may also face a longer reversal of the burden of proof, as the member states are allowed to prolong it to up to 2 years.[*45] True, this would apply only to the embedded digital content and not to ancillary digital services (i.e. where the sales contract provides for the continuous supply of the digital content or digital service over a period of time), because for the latter there is a different rule, stating that the relevant period is the whole contract period.[*46]

Finally, in order to ensure a uniform starting point for the liability periods – for the physical component as well as for the digital element of the good – the liability period and the period of the reversed burden of proof start upon delivery of the digital content (and not on the earlier delivery of the good itself) also for defects in hardware.[*47] Recital 39 SGD explains that the seller should also make the digital content or digital service available or accessible to the consumer in such a way that the digital content or digital service, or any suitable means for downloading or accessing it, has reached the sphere of the consumer and no further

39 Recital 11 DCD.

40 Estonian law, for example, obliges consumers to notify the seller within 2 months after they have discovered the defect. On that, see Paul Varul, Irene Kull, Villu Kõve, Martin Käerdi, and Karin Sein, *Võlaõigusseadus II. Kommenteeritud väljaanne* (Juura 2019) 114.

41 See also on this Kåre Lilleholt, 'A Half-built House? The New Consumer Sales Directive Assessed as Contract Law' (2019) Juridica International 3. – DOI: https://doi.org/10.12697/ji.2019.28.01; see Klaus Tonner (n 27) 367. This is critical in particular with regard to the sales directive. Ivo Bach, 'Neue Richtlinien zum Verbrauchsgüterkauf und zu Verbraucherverträgen über digitale Inhalte' (2019) NJW 1711.

42 Article 10 (3) SGD. True, this is also possible under art 11(2) DCD and – pertaining to hidden defects – art 3 (10), recital 12 sentence 3.

43 Article 3 (7) SGD. On the liability periods in cases of smart goods, see also Carvalho (n 21) 199.

44 On this, see Ignace Claeys and Jonas Vancoillie, 'Remedies, Modifications of Digital Content and Right to Terminate Long-Term Digital Content Contracts' in Ignace Claeys and E Terryn (eds), *Digital Content and Distance Sales* (Intersentia 2017) 220. – DOI: https://doi.org/10.1017/9781780686035.

45 Article 11(2) SGD.

46 Article 11(3) SGD. Here the crucial question is how to qualify one-off supply of digital content and the inter-connected digital service. Is the operating system of a smartphone or a smart TV embedded digital content and hence a one-off contract (art 11(2) SGD) or a service providing for the continuous supply over a period of time (art 11(3) SGD)? I would argue for the first, but in some cases delineation becomes very complicated. Smart TV software is i considered continuous supply of digital content or digital service by Jasper Vereecken, Jarich Werbrouck, Goods with Embedded Software: Consumer Protection 2.0 in Times of Digital Content? (2019) 30 Indiana International and Comparative Law Review 76. – DOI: https://doi.org/10.18060/25064.

47 Article 11(1) and recital 39 SGD. See also Staudenmayer (n 12) 2892.

action is required by the seller so as to enable the consumer to use the digital content or digital service in accordance with the contract (for example, by providing a link or a download option). Here the crucial question is when the digital content is delivered to the consumer – i.e. when it has 'reached the sphere of the consumer and no further action is required by the seller in order to enable the consumer to use the digital content or digital service'.*[48] Has the operating system of a smart TV reached the sphere of the consumer when he takes home the new smart TV even if he still needs to accept the EULA later on? Is there still something required on the seller's part? Most probably no action is required of the seller anymore and, hence, the period of the reversed burden of proof commences upon the delivery of the good. However, it is important to assess the whole set-up process for the smart good to determine whether the correct set-up really depends only upon the consumer (and his Internet connection etc.) or there is indeed action required on the seller's part. If the seller*[49] still has to, for instance, activate an account, then the delivery happens only at that point, also for purposes of considering scratches on the TV screen.*[50] All in all, this means that if the set-up process of a smart good requires some action from the seller, then the seller runs a risk of the consumer postponing the set-up and hence also the delivery point and consequently the end to the reversed burden of proof as well as the liability period.

In sum, not only the general liability itself but also all the legal consequences described clearly incentivise sellers to exclude the digital elements from the sales contract. Through doing so, defects of digital elements would not entitle the consumer to a reduction in the price paid for the smart good or to terminate the contract. One might of course ask whether a defect in a digital element leading to the termination of a digital content contract may have some impact on the sales contract under national law if national law treats the sales contract and the inter-connected digital service contract as economically connected/linked contracts. However, as the DCD and SGD are maximum harmonisation directives*[51] and explicitly foresee only the liability of the digital content provider in these cases, there should be no room for possible additional liability of the seller under any national law concept.*[52]

Should, however, a seller be liable also for the digital elements of the good, lack of conformity of the digital element may entitle the consumer to a reduction in the contractual price*[53] and even to termination of the whole sales contract, provided that this lack of conformity is not minor in the overall context of the sales contract.*[54] Before price reduction or termination the seller usually has a right to repair, although in certain serious cases immediate use of these remedies is possible.

5. Contracts for the supply of both goods and digital services where the digital service forms the main subject of the contract

Finally, the scope issue arises also in situations where a consumer contract provides for the supply of both goods and digital services and where the digital service is the principal subject of the contract. An example could be a contract under which a telecom provider promises to supply both a very inexpensive TV box (a tangible good) and digital-TV service.*[55] In such a contract, the digital-TV service is clearly the principal subject of the contract. Were we to apply the test developed by the CJEU in the *Schottelius* case, the whole contract would fall outside the scope of the directive. In the *Schottelius* case, a renovation contract for a swimming pool that included the delivery of a water pump was qualified as not being even partly covered

48 As stated in recital 39 SGD.

49 The directive does not clarify whether the notion of seller here also includes the digital service provider. The language used in recital 39 SGD stressing that 'the seller should also make the digital content or digital service available or accessible to the consumer' suggests an affirmative answer.

50 If the seller also provides installation, then the relevant point of time is the end of the installation. See Staudenmayer (n 12) 2893.

51 At least in principle; see Article 4 DCD and Article 4 SGD.

52 See Sein and Spindler (n 7) 19.

53 Article 13(4) and 15 SGD.

54 Article 13(5) SGD.

55 The digital television service clearly falls within the scope of the DCD; see recital 31 DCD.

by the 1999/44 consumer sales directive but, rather, subject to national contract law, because the sale of the goods was merely ancillary in comparison with that provision of services.[*56] However, if we look at recital 33 of the DCD, it explicitly addresses situations where digital television service and equipment are offered under the same contract:

> *Digital content or digital services are often combined with the provision of goods or other services and offered to the consumer within the same contract comprising a bundle of different elements, such as the provision of digital television and the purchase of electronic equipment. In such cases, the contract between the consumer and the trader includes elements of a contract for the supply of digital content or a digital service, but also elements of other contract types, such as sale of goods or services contracts. This Directive should only apply to the elements of the overall contract that consist of the supply of digital content or digital services. The other elements of the contract should be governed by the rules applicable to those contracts under national law or, as applicable, other Union law governing a specific sector or subject matter.*

Hence, in cases where the contract covers the supply of both goods and digital services and where the digital service forms the main subject of the contract, both directives are applicable: the digital-TV service part of the contract is governed by the DCD and the TV-box part by the new Sales of Goods Directive notwithstanding the fact that the sale of a TV box can be seen as being merely ancillary when compared with the digital-TV service. Consequently, the test developed in the *Schottelius* case[*57] cannot be applied anymore to cases where one part of the contract consists of the supply of digital content or digital services.

6. Conclusions

The adoption of the new consumer contract law package in 2019 has aroused a question about the delimitation of the scopes of the directives: are 'goods with digital elements' within the scope of the Digital Content Directive or the new Sales of Goods Directive, or even both? As a starting point, the rules of the directives create a legal presumption that the seller of the smart good is liable not only for the tangible good and embedded digital software but also for the inter-connected digital services. This should be so even if the consumer concludes an additional licensing contract with the digital service provider in order to benefit from the digital service. However, a deeper look into the directives shows that there is much room left for party autonomy, with a consequence that exactly the opposite might become true in practice. The recitals of the directives show that express agreement in sales contract may limit the liability of the seller even for the operating system of a smart good and thus override the reasonable consumer expectations. To avoid such a result, the courts should set high standards for such 'express agreement' between the consumer and the seller.

The situation becomes even more complicated for the consumer when the 'digital element' of the good is free and open-source software. In these cases, the 'separately bought' digital content does not even fall within the scope of the DCD, with the result that the seller is not liable for the digital content under the SGD and the digital content provider is not liable for it under the DCD. The consumer is then left without any remedies under the directives. All in all, the sellers of goods with digital elements are clearly incentivised to exclude the digital elements from the sales contract. By doing so, they may avoid liability for the digital elements; ie the consumer would not be able to claim a reduction in the price paid for the smart good or terminate the sales contract if there is a defect in the digital content or services. As the new directives are maximum harmonising and explicitly foresee only the liability of the digital content provider in these cases, the seller cannot be held liable under national law (e.g. under the concept of linked contracts) either. Therefore, the new contract law package does not raise the level of consumer protection as much as it initially seems to do.

Finally, the scope issue arises also in situations where a consumer contract provides for the supply of both goods and digital services and where the digital service is the principal subject of the contract. Recital 33 of the DCD suggests that the test developed in the *Schottelius* case cannot be applied in these cases, with the result that the SGD is applicable to the tangible part even if it can be seen as being merely ancillary relative to the digital services.

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56 Case C-247/16, *Heike Schottelius v Falk Seifert* [2017] 44–46.

57 See Carvalho (n 43). Further on this, see Lorenzo Bertino, 'Service Contracts and EU Directive 1999/44 on Consumer Sales' (2018) EuCML 211ff.

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Roboter als Rechtssubjekte – Der Streit um die E-Person

1. Der Mensch und autonome Agenten

Die rasanten Fortschritte bei der Entwicklung künstlicher Intelligenz haben sog. autonome Agenten längst in den Fokus der juristischen Debatten gerückt. Autonom agierende Maschinen, die über Intelligenz verfügen, das heißt lernen und ihre Verhaltensregeln dadurch selbst ändern können, sollen in der Zukunft menschenähnlich mit der Fähigkeit ausgestattet sein, „Entscheidungen zu treffen und diese in der äußeren Welt unabhängig von externer Steuerung oder Einflussnahme umzusetzen".[*1] Anders als bei den bisher lediglich automatisierten Systemen, der schwachen KI, wären die Entscheidungen und das daraus resultierende Verhalten der Maschine mit starker KI dann aufgrund der Komplexität der zugrundeliegenden Algorithmen nicht unbedingt vorhersehbar und demzufolge nicht mehr steuerbar.

Die technische Transformation führt dazu, dass die gesellschaftliche Trennlinie zwischen Mensch und Maschine mitunter verwischt. Bereits seit über einem Jahrhundert ist die Vermenschlichung von Maschinen ein beliebter Topos in Film, Kunst und Kultur.[*2] Technikerinnen und Konstrukteure benutzen ihre Phantasie, um diese möglichen künstlichen Agenten humanoid zu gestalten, Maschinen erhalten menschliche Stimmen und Namen wie Alexa; Roboter stecken in der Hülle menschenähnlicher Körper. Die Philosophie hinterfragt, inwieweit es „künstliche Agenten" überhaupt geben kann: Können Maschinen selbstbestimmt denken und handeln, können sie als autonome Subjekte geradezu menschenähnlich oder analog einem Tier gesehen werden? Die Rechtswissenschaft begegnet wirtschaftspraktischen Bedürfnissen: Wer zahlt für die durch diese Agenten neu entstehenden Risiken und Schäden? Und auch hier scheinen die Grenzen zwischen Mensch und Maschine zu verschwimmen, wenn teils als Novum vorgeschlagen wird, die Maschine selbst zum Haftungssubjekt zu machen und ihr die Qualität eines Rechtssubjekts zu verleihen. So hat 2017 das Europäische Parlament die Europäische Kommission aufgefordert, in einer neuen Robotik Richtlinie autonomen Robotern den Status einer E-Person zu geben.[*3]

Diese Entwicklung gibt Anlass, den Rechtsubjektbegriff und die Einordnung der durch die starke KI entstehenden autonomen Agenten *de lege lata* und *de lege ferenda* zu überprüfen. Der Begriff des (autonomen) Roboters wird vorliegend im Sinne einer autonom handelnden Maschine mittels starker KI verwendet.[*4]

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1 Europäisches Parlament, „Zivilrechtliche Regelungen im Bereich Robotik" (Entschließung), P8_TA (2017) 0051 AA.

2 Der Name „Roboter" stammt aus dem tschechischen Theaterstück „R.U.R." von 1921. Die Bezeichnung war ein zufälliger Einfall des Bruders des Machers, Josef Čapek, für eine intelligente Maschine, der sich von dem tschechischen Ausdruck „robota" für Fronarbeit ableitet: Svetlana Efimova, „Der ‚Roboter' wird 100. Über eine (nicht nur) literarische Utopie." <https://geschichtedergegenwart.ch/der-roboter-wird-100-ueber-eine-nicht-nur-literarische-utopie/> abgerufen am 11.02.2021.

3 Ibid.

4 Ein einheitliches Begriffsverständnis für KI ist bis heute nicht erreicht: Martin Ebers, in Martin Ebers and others (Hrsg.) *Künstliche Intelligenz und Robotik* (C.H. Beck 2020) § 3, Rn. 4 – 7. – DOI: https://doi.org/10.17104/9783406769818; Susanne Beck, „Grundlegende Fragen zum rechtlichen Umgang mit der Robotik" (2009) JR 225, 226. – DOI: https://doi.

2. Potentielle Lückenschließung im Zivilrecht durch die E-Person

Die geltenden Regeln des BGBs wurden im analogen Zeitalter geschaffen. Eine Lücke im geltenden Recht könnte die E-Person im Bereich des Vertragsschlusses und der Haftung füllen. Schon heute wird eine Vielzahl von Rechtsgeschäften ohne menschliche Beteiligung abgeschlossen. Beim „Hochfrequenzhandel" bestimmt ein Algorithmus über Zeitpunkt, Anzahl und Volumen des Auftrags und ob ein Mensch ausnahmsweise den Auftrag übernehmen soll.[*5] Eine „Maschinenerklärung" kennt das BGB hingegen nicht. Eine Willenserklärung setzt grundsätzlich menschliches (Vor)Verhalten voraus. Mögliche Anknüpfungspunkte nach dem BGB für die Zurechnung des autonomen Roboterhandelns wären lediglich eine Botenstellung des Roboters, doch mangelt es hierfür schon an einer fremden Willenserklärung, wenn der Roboter selbst die Erklärung erzeugt.[*6] Stuft man den Roboter als Stellvertreter ein,[*7] wird das Festlegen des Vertretungsumfangs problematisch, da der Roboter sein Handeln selbst bestimmt. Überschreitet er die Vertretungsmacht, entsteht in Anbetracht einer fehlenden Haftungsmasse eine Haftungslücke nach § 179 BGB.[*8] Im Rahmen der Zurechnung nach den allgemeinen Grundsätzen der Rechtsgeschäftslehre stellt im Einzelfall ein sehr hoher Grad an Autonomie die Zurechnung der Willenserklärung zum Verwender in Frage.[*9]

Würde die Maschine über eine Subjektqualität verfügen, wäre sie selbst der eigentliche Urheber einer „Maschinenerklärung", eine mit den Regeln des BGB nur mühsam zu bewältigende Zurechnung wäre nicht mehr erforderlich. Die Maschine würde aus dem Vertrag berechtigt und verpflichtet, was allerdings wiederum zu komplexen Folgefragen führen würde.

Im Bereich des geltenden Haftungsrechts stellt sich bei der Produkthaftung die Frage, ob ein lediglich aus Software bestehender Roboter in den Anwendungsbereich des Produkthaftungsgesetzes fällt, wenn durch ihn Schäden entstehen.[*10] Besteht der Roboter aus mehreren Teilen einer zusammengesetzten Software, ergeben sich zudem Beweisprobleme für den Geschädigten beim Nachweis des Kausalverlaufs.[*11] Im Rahmen einer Nutzerhaftung gem. § 823 I BGB zeigen sich Schwierigkeiten ein eigenes Verschulden des Nutzers zu begründen, da dieser bei autonom agierenden Robotern keine Einfluss- und Kontrollmöglichkeit hat.[*12] Auch ein Rückgriff auf die Gefährdungshaftungstatbestände, insbesondere auf die Tierhalterhaftung gem. § 833 BGB, stellt mangels Analogiefähigkeit der Gefährdungshaftung keine Alternative dar.[*13]

org/10.1515/juru.2009.225; Maximilian Herberger, „'Künstliche Intelligenz' und Recht" (2018) NJW 2825, 2826; Thomas Riehm und Stanislaus Meier, „Künstliche Intelligenz im Zivilrecht" in Veronika Fischer, Peter Hoppen und Jörg Wimmers (Hrsg.), *DGRI Jahrbuch 2018* (Verlag Dr. Otto Schmidt 2019), 1, 37. – DOI: https://doi.org/10.9785/9783504386757-002. Das Europäische Parlament hat daher auch zur Schaffung einer einheitlichen Begriffsdefinition aufgefordert: Europäisches Parlament (Fn 1).

5 Mario Martini, *Blackbox Algorithmus – Grundfragen einer Regulierung Künstlicher Intelligenz* (Springer 2019), 143. – DOI: https://doi.org/10.1007/978-3-662-59010-2.

6 Luisa Specht und Sophie Herold, „Roboter als Vertragspartner? – Gedanken zu Vertragsabschlüssen unter Einbeziehung automatisiert und autonom agierender Systeme" (2018) MMR 40, 43; Olaf Sosnitza, „Das Internet der Dinge – Herausforderung oder gewohntes Terrain für das Zivilrecht?" (2016) CR 764, 766. – DOI: https://doi.org/10.9785/cr-2016-1124; Christiane Wendehorst und Julia Grinzinger in Martin Ebers (Fn 4) § 4, Rn. 32.

7 So Jan-Erik Schirmer, „Rechtsfähige Roboter?" (2016) JZ 660, 664. – DOI: https://doi.org/10.1628/002268816x14615987983565.

8 Christiane Wendehorst und Julia Grinzinger (Fn 6) § 4, Rn. 32.

9 Peter Bräutigam und Thomas Klindt, „Industrie 4.0, das Internet der Dinge und das Recht" (2015) NJW 1137, 1138; Malte Grützmacher und Jörn Heckmann, Autonome Systeme und KI – vom vollautomatisierten zum autonomen Vertragsschluss?" (2019) CR, 553, 555. – DOI: https://doi.org/10.9785/cr-2019-350907; Gunther Teubner, „Digitale Rechtssubjekte? – Zum privatrechtlichen Status autonomer Softwareagenten" (2018) AcP, 155 179f. – DOI: https://doi.org/10.1628/acp-2018-0009. Die Vergleichbarkeit mit Blankett-Erklärungen ablehnend: Friedemann Kainer und Lydia Förster, „Autonome Systeme im Kontext des Vertragsrechts" (2020) ZfPW 275, 290f.

10 Als Produkt i.S.d. § 2 ProdHaftG wird grundsätzlich ein beweglicher, körperlicher Gegenstand gefordert. Christian Förster in Beck'scher Onlinekommentar zum ProdHaftG (56. Aufl. 2020), § 2 Rn. 4; Gerhard Wagner, „Robot, Inc.: Personhood for Autonomous Systems?" (2019) 88 Fordham L. Rev. 591, 604. Für eine Anwendung auf bloße Software: Gerhard Wagner in Münchener Kommentar zum BGB, Band 7 (8. Auflage, C.H. Beck 2020), § 2 ProdHaftG, Rn. 26f.; Jan Eichelberger in Ebers (Fn 4) § 5, Rn. 45; a.A. Jürgen Oechsler in Staudinger (Sellier de Gruyter 2018), § 2 ProdHaftG, Rn. 65f.

11 Wagner (Fn 10) 603.

12 Ibid 607.

13 Die Analogiefähigkeit ablehnend bereits RGZ 78, 171 (172) sowie BGHZ 55, 229 (234) wegen des Ausnahmecharakters der Gefährdungshaftung. Ebenso Christian Förster in BeckOK zum BGB (56. Aufl. 2020), § 823 Rn. 78; Gerhard Wagner in MüKoBGB (Fn 10) Vorb § 823, Rn. 25f. aA Zulässigkeit der Einzelanalogie bei Johannes Hager, in Staudinger (Sellier de

Wäre hingegen die Maschine das Haftungssubjekt, müsste sie für den durch sie verursachten Schaden einstehen. Die finanziellen Mittel kämen bspw. aus einer Pflichtversicherung oder aus einem Haftungsfonds in den der Produzent und der Betreiber einzahlten.[*14] Doch auch diese Lösung stellt kein Allheilmittel dar: in bestimmten Fällen, sei die „KI" nicht zu lokalisieren, ein Umstand, der auch nicht durch ein Maschinenregister ohne weiteres beseitigt werden könne. Die Idee eines Haftungsfonds sei ebenfalls kein zuverlässiger Schutz des Geschädigten vor dem Insolvenzrisiko.[*15]

3. Umsetzungsmöglichkeiten des Rechtssubjektstatus für KI im BGB

Für die Umsetzung des Rechtssubjektstatus von autonomen Robotern würden verschiedene Lösungen in Betracht kommen. Eine Möglichkeit ist es, den Roboter ausschließlich mit Geschäftsfähigkeit auszustatten. Doch führt die Integration dieses Ansatzes in das BGB zu grundlegenden Systembrüchen. Das BGB setzt die Rechtsfähigkeit voraus, um Geschäftsfähigkeit gewähren zu können. Wer kein Träger von Rechten und Pflichten ist, kann auch nicht wirksam Rechtsgeschäfte tätigen.[*16] Eine vollkommene Abstraktion von Rechts- und Geschäftsfähigkeit wie im römischen Recht ist dem BGB fremd.[*17]

Eine Alternative stellt die Verleihung der vollen Rechtsfähigkeit dar, sodass der Roboter umfassend mit Rechten und Pflichten ausgestattet wird. Damit werden Roboter und Menschen in ihrer Behandlung gleichgestellt. Das führt nicht nur aus moralischer Sicht zu Schwierigkeiten, sondern auch rechtspraktisch ergeben sich Folgeprobleme: Soll ein Roboter auch das Recht zur Heirat oder Erbfähigkeit bekommen? Bedarf er des Schutzes vor körperlichen Schmerzen, wenn die KI keinen biologischen Körper hat?[*18] Es zeigt sich: Eine absolute Gleichstellung von Mensch und KI ist weder erforderlich noch würde sie der anthropozentrischen Ausrichtung des Grundgesetzes gerecht werden. An dieser Stelle muss daher zwischen Mensch und Roboter differenziert werden. Zwar soll der Roboter eingeschränkt Rechte und Pflichten erhalten, die zu einer Verbesserung des Umgangs mit Robotern im rechtlichen Alltag führen. Dies ist notwendig, da der Roboter kein lebloses Objekt ist, sondern eigenständig kommuniziert und agiert. Allerdings geht die Gewährung von vollständiger Rechtsfähigkeit zu weit.

Eine weitere Möglichkeit wäre, eine neue Gesellschaftsform in Form einer „E-GmbH" zu gründen.[*19] Diese haftet, verbunden mit einem Haftungsfonds, für Schäden, die der Roboter verursacht. Vorteilhaft an dieser Lösung ist, dass sich die Debatte, ob ein Roboter eine Rechtspersönlichkeit erhalten kann, nicht stellt, sondern dass vielmehr mit den bestehenden Konzepten der natürlichen und juristischen Person gearbeitet werden kann. Allerdings ist diese Lösung lediglich eine dogmatische Konstruktion, um den Roboter nicht an die Subjektstellung heranzurücken. Anstatt die Haftung direkt an den Roboter zu knüpfen, wird ein künstlicher Umweg über eine elektronische Gesellschaft gewählt. Dieser führt zu einer erhöhten Komplexität anstelle einer Vereinfachung, da sich zusätzlich gesellschaftsrechtliche Probleme ergeben.

Gruyter 2017), Vorb § 823, Rn. 29. Herbert Zech, „Künstliche Intelligenz und Haftungsfragen" (2019) ZfPW 198, 214f hält de lege lata § 833 BGB analog für KI für möglich, lehnt diese aber wegen § 833 S. 2 BGB und der mangelnden Beherrschbarkeit von KI bei privaten Nutzer im Ergebnis ab. *De lege ferenda* ist § 833 BGB als Alternative umstritten. Zustimmend Peter Bräutigam und Thomas Klindt (Fn 9), 1139; Olaf Sosnitza (Fn 6) 772; zurückhaltend Susanne Horner und Markus Kaulartz, „Haftung 4.0. Rechtliche Herausforderungen im Kontext der Industrie 4.0" (2016) InTeR, 22, 24. Ablehnend jedoch: Georg Borges, „Rechtliche Rahmenbedingungen für autonome Systeme" (2018) NJW 977, 981; Malte Grützmacher, „Die deliktische Haftung für autonome Systeme – Industrie 4.0 als Herausforderung für das bestehende Recht" (2016) CR, 695, 698. – DOI: https://doi.org/10.9785/cr-2016-1015.

14 Susanne Beck „Über den Sinn und Unsinn von Statusfragen – zu Vor- und Nachteilen der Einführung einer elektronischen Person" in Eric Hilgendorf (Hrsg.) Eric Hilgendorf (Hrsg.), *Robotik und Gesetzgebung* (Nomos Verlag 2013), 256; Europäisches Parlament (Fn 1) AI. 58.

15 Martin Ebers (Fn 4) § 3 Rn. 76-80.

16 Steffen Wettig und Eberhard Zehender, „A legal analysis of human and electronic agents" (2004) Artif Intell Law, 111, 123f. – DOI: https://doi.org/10.1007/s10506-004-0815-8.

17 Ibid 127.

18 Susanne Beck (Fn 14) 255.

19 So ein Vorschlag von Christiane Wendehorst, „Ist ein Roboter haftbar?" (2020), 1 Forschung und Lehre. Der Lösungsweg über das Gesellschaftsrecht findet sich auch hinsichtlich amerikanischer Gesellschaften (LLC) bei Shawn Bayern, „The Implications of Modern Business-Entity Law for the Regulation of Autonomous Systems" (2015) 19 Stan. Tech. L. Rev. 93.

Vor dem Hintergrund der fortschreitenden Entwicklung der Technik erscheint es sinnvoll, neue Regelungen zu schaffen, die an den Roboter selbst anknüpfen, anstatt den Roboter in bestehende Konstruktion zu „pressen", um auch auf zukünftig auftretende Fragen flexibler reagieren zu können. In diesem Sinne wäre der Ansatz, den auch das Europäische Parlament gewählt hat, sinnvoll: die Schaffung eines Sonderstatus der elektronischen Person.[*20] Diese Lösung ließe sich systematisch in das BGB integrieren, indem der zweigliedrige Aufbau der Rechtssubjekte (natürliche und juristische Personen) um eine dritte Kategorie (elektronische Person) erweitert wird. Die Schaffung einer Sonderkategorie hätte den Vorteil, dass die bisherigen Kategorien nicht neu interpretiert oder erweitert werden müssen. Die neue Kategorie werde stattdessen spezifisch auf die Probleme im Umgang mit Robotern zugeschnitten.[*21] Die Teilrechtsfähigkeit des Roboters geht nur soweit, wie dies sinnvoll und erforderlich ist. Der Roboter wird also spezifisch mit Rechten und Pflichten ausgestattet, die notwendig für den Umgang mit Robotern im Rechtsverkehr sind.[*22] Auf diese Art könnte eine eigene Roboterhaftung für durch den Roboter verursachte Schäden geschaffen werden. In den Fällen, bei denen eine menschliche Haftung ausgeschlossen ist, wird so eine Haftungslücke vermieden.[*23] Zusätzlich könnte der Roboter mit Geschäftsfähigkeit ausgestattet werden, sodass er wirksam rechtsgeschäftlich handeln kann, um die Probleme beim Vertragsschluss zu lösen.

4. Maschinen als Rechtsubjekte

Unabhängig davon, ob die E-Person eine sinnvolle vertrags- oder haftungsrechtliche Lösung bietet, stellt sich jedoch die grundlegende Frage, ob eine Erweiterung des Rechtssubjektbegriffs auf Maschinen rechtlich zulässig ist oder aber bspw. eine verfassungsrechtliche Unzulässigkeitsentscheidung sie verhindere. Verliert der Mensch als herausgehobenes, würdetragendes Rechtssubjekt seine exklusive Stellung, könnten Kritiker und Kritikerinnen dies als Paradigmenwechsel und Vorstufe zum „Posthumanismus" verwerfen.

4.1. Rechtshistorische Sicht

Die Einordnung von Maschinen als Rechtssubjekte mag aus der heutigen Sicht befremden, da in unserer Rechtsordnung einzig der Mensch als frei denkendes und moralisch handelndes Individuum als Träger von Rechten und Pflichten anerkannt wird. Ein Blick in die antike Rechtsgeschichte zeigt die zeitliche Wandelbarkeit dieser Annahme.

Grenzüberschreitungen und -verwischungen zwischen dem Menschen und nichtmenschlichen Lebewesen finden sich auch in der griechischen Antike. Hier sind es nicht die humanoiden Maschinen, es sind anthropomorphe Tiere, zu denen sich der Mensch in Beziehung setzt, andererseits abgrenzt.

Aristoteles entwarf ein sehr konkretes Tierbild: Er billigte den höher entwickelten Tieren eine Art Verstandeskraft zu (phrónesis), mit der sie aus Erfahrungen lernen und sich situationsgerecht verhalten können. Sie müssten also Gedächtnis, Vorstellungskraft und Entschlussfähigkeit besitzen. Die Sonderstellung des Menschen rechtfertigt Aristoteles durch seine besondere Geisteskraft (noûs): Sie ermögliche allein dem Menschen an der göttlichen Vernunft teilzuhaben, Überlegungen anzustellen und rational zu planen.[*24] In der griechischen Antike wurde anerkannt, dass Tiere lernfähig sind und ihr Verhalten dementsprechend anpassen können.[*25] Das Tierbild steht damit der heutigen Definition von Autonomie auffällig nahe. Der Umgang mit Tieren im Recht und vor allem im Prozess war ein gänzlich anderer als heute. Im antiken Griechenland waren Tierprozesse üblich. In Athen wurden Haustiere bestraft, wenn sie für die Götter bestimmte Opfergaben anrührten.[*26] Ein Gesetz auf Salamis bestimmte, dass einem Schwein, das fruchttragende Felder verwüstete,

20 Europäisches Parlament (Fn 1) AI. 59.

21 Susanne Beck (Fn 14) 255.

22 Gunther Teubner (Fn 9) 182.

23 Gregor Fitzi, „Roboter als „legale Personen" mit begrenzter Haftung. Eine soziologische Sicht", in Eric Hilgendorf (Hrsg.) (Fn 14) 393. – DOI: https://doi.org/10.5771/9783845242200-377.

24 Thomas Macho, „Einführung" in Hartmut Böhme (Hrsg.), *Tiere: Eine andere Anthropologie*, Band 3 (Böhlau 2004), 73, 75.

25 Aristoteles, Historia animalium I.1.488b, 24-27; Martin F. Meyer, „Aristoteles über die Natur des Menschen" in Marko J Fuchs und Annett Wienmeister (Hrsg.), *Funktion und Normativität bei Darwin und Aristoteles,* Band 23 (University of Bamberg Press 2016), 79, 103

26 Plutarch, de sollertia animalium, c 2.

zur Strafe die Zähne ausgebrochen werden.[*27] Auf der anderen Seite wurden Tiere für gute Taten auch öffentlich belohnt.[*28] Tiere waren als Parteien im Prozess vertreten. Sie konnten in den Tierprozessen öffentlich angeklagt werden und wurden in diesem Sinne als Rechtssubjekte behandelt.[*29]

Für das archaische römische Recht ist nicht eindeutig belegt, ob es wie in Griechenland Tierprozesse gab. Teils wird in der Literatur angenommen, etwa noch von Mommsen oder aktueller Kaser, dass ursprünglich im römischen Recht bei Tierschäden das Tier als Täter angesehen wurde. Immer wenn das Tier einen Schaden verursacht habe, sei es der ihm innewohnende Tierdämon, der dafür verantwortlich sei.[*30] Diese archaischen Vorstellungen vom Tier als Täter und Tierdämonen wurden in der römischen Klassik überwunden. Die klassische römische Jurisprudenz fand mittels der *actio de pauperie* (Klage aus Tierschaden) einen beeindruckenden Ausgleich zwischen Tradition einerseits und einem Haftungsrecht, das sich durch eine Verantwortungsallokation beim Tiereigentümer im Sinne eines effektiven Opferschutzes auszeichnet andererseits. Im klassischen römischen Recht finden wir kaum aussagekräftige Hinweise auf eine Subjektivierung der Tiere.[*31] Tierprozesse sind allerdings nicht in der Antike ausgestorben. Sie waren im Mittelalter und in der frühen Neuzeit in Europa weit verbreitet. Kirchliche Prozesse richteten sich gegen Herden wilder Tiere oder solcher Arten, die gemeinhin als Plagen oder Schädlinge klassifiziert wurden, wie Ratten, Mäuse, Maulwürfe, Raupen, Schnecken, Schlangen, Kröten und Läuse. Diese Prozesse wurzelten in der Vorstellung, dass diese Tiere von Dämonen besessen wären. Die säkularen Prozesse in dieser Zeit kamen zur Anwendung, wenn ein Tier einen Menschen getötet oder verletzt hat. Erste Kritiker wie Philipp de Beaumanoir merkten an, dass die Bestrafung des Tieres durch die öffentliche Hinrichtung sinnlos sei, da das Tier keinen Verstand habe, um es als spezifische Bestrafung für sein Handeln zu begreifen.[*32]

In der griechischen Antike gab es nicht nur Tierprozesse. Auch gegen Sachen wie Flüsse und Säulen wurden Prozesse geführt. Wurde ein Mensch z.B. durch einen herabfallenden Gegenstand getötet, so wurde der Prozess gegen den Gegenstand geführt und der Gegenstand außer Landes gebracht.[*33] Im ionischen Thasos wurde ein Mensch durch eine umfallende Säule getötet. Die Hinterbliebenen des Opfers führten sodann einen Prozess gegen die Säule.[*34] Ein anderes Beispiel ist ein Verfahren gegen eine Naturgewalt: im jonischen Kleinasien kam es durch einen Fluss zu Überschwemmungen, woraufhin die geschädigten Grundbesitzer sodann einen Prozess gegen den Fluss führten. Die Geldstrafe, die der verurteilte Fluss zahlen musste, wurde aus den Überfahrtgeldern finanziert.[*35] Aristoteles erklärte den Gegenstand, der den Erfolg verursacht hat, für verantwortlich, wenn ein menschliches Verschulden ausgeschlossen war. Der Gegenstand musste zur Verantwortung gezogen werden.[*36]

Zur Zeit Roms waren Sachprozesse ausgestorben. Der Fall der Grenzverletzung mit einem Pflug, welcher verlangte, den Täter samt Pfluggespann den Göttern zu opfern, stellte einen Einzelfall dar und

27 Aelianus, de natura animalium, 5, 45.

28 Rudolf Düll, „Zum Anthropomorphismus im antiken Recht“ (1944) ZRG 346, 347. – DOI: https://doi.org/10.7767/zrgra.1944.64.1.346.

29 Rudolf Düll, „Archaische Sachprozesse und Losverfahren“ (1941) ZRG 1-10. – DOI: https://doi.org/10.7767/zrgra.1941.61.1.1.

30 Max Kaser, *Das Römische Privatrecht*, Erster Abschnitt (2. Auflage 1971), 165. So auch: Heinrich Honsell, *Römisches Recht* (7. Auflage, Springer 2010), 164. – DOI: https://doi.org/10.1007/978-3-642-05307-8. Wolfgang Lorenz, *Die Gefährdungshaftung des Tierhalters nach § 833 S. 1 BGB – Die funktionale Struktur der Gefährdungshaftung für die Risikoverteilung im Tierschadensrecht* (Duncker und Humblot 1992), 66. – DOI: https://doi.org/10.3790/978-3-428-47470-7.

31 Zur *actio de pauperie*: Milena Polojac, *Actio de pauperie and liability for damage caused by animals in Roman law* (Dosije 2003); Maria V Giangrieco Pessi, *Ricerche sull'Actio de pauperie: Dalle XII tavole ad Ulpiano* Vol. 45 (Casa editrice dott. Eugenio Jovene 1995).

32 Rapahel Sealey, „Aristotle, Athenaion Politeia 57.4: Trial of Animals and Inanimate Objects for Homicide“ (2006) The Classical Quarterly 475, 481-482. – DOI: https://doi.org/10.1017/s0009838806000474.

33 Demosthenes 23,76.

34 Paul S Bermann, „An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects" (1999) Yale Journal of Law & the Humanities 1, 22; – DOI: https://doi.org/10.2139/ssrn.159329; Rudolf Düll (Fn 29) 13.

35 Strabon 12,8,19. Eine moderne Parallele stammt aus Neuseeland. Dort wurde am 20. März 2017 der Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 erlassen. Darin wird Te Awa Tupua – darunter wird der Whanganui River sowie seine physischen und metaphysischen Elemente verstanden – in den Status einer „legal person“, also eines Rechtssubjekts, gehoben mit den daraus resultierenden Rechten und Pflichten. In der Rechtspraxis wird der Fluss als eine Art juristische Person behandelt. Hintergrund dieser Entscheidung war der Schutz der Rechte der dort ansässigen Maori Stämme, für die der Whanganui River ihr Lebensraum darstellt. Erin O'Donnell und Julia Talbot-Jones, „Creating legal rights for rivers: lessons from Australia, New Zealand, and India” (2018) Ecology and Society, 1.

36 Aristoteles, Athenaion politeia, 57, 4.

entspricht nicht einem Sachprozess im strengen Sinne. Die Vorschrift hat sakralen Charakter und wird den frühen römischen Königsgesetzen zugeordnet.[*37]

Auf der anderen Seite zeigt uns die rechtshistorische Perspektive, dass nicht zwangsläufig jeder Mensch stets als Rechtssubjekt behandelt wurde. So wurden Sklaven im römischen Recht als Sachen klassifiziert. Sie waren nicht rechts- und vermögensfähig, sie konnten grundsätzlich keine Verträge in ihrem eigenen Namen abschließen, für ihre Delikte haftete ihr *dominus*, der Sklaveneigentümer (sog. Noxalhaftung). Ein Grundsatz, der für sämtliche *alieni iuris,* also auch Hauskinder, galt. *Alieni iuris* hatten grundsätzlich kein eigenes Vermögen, weshalb sie keinen Schadensersatz leisten konnten.[*38] Der verurteilte Herr konnte wählen zwischen Schadensersatz oder Weggabe des Sklaven. Dieses Wahlrecht im Rahmen der Rechtsfolge ähnelt der Haftung des Tiereigentümers bei der *actio de pauperie*. Die Ursprünge der Noxalhaftung werden allgemeinhin im Racherecht vermutet. Die Auslieferung des Täters sollte dazu dienen, dass das Opfer an ihm Vergeltung üben konnte.[*39]

4.2. Rechtssoziologische Sicht

Stimmen für die Öffnung der Rechtssubjektdefinition finden sich in der Soziologie. Luhmann betrachtet in seiner Systemtheorie soziale Systeme anstelle von menschlichen Individuen, die aus Kommunikationen und deren Zurechnung als Handlungen bestehen.[*40] Kommunikation versteht er als Selektionsprozess, bei dem jeweils eine Auswahl hinsichtlich Information, Mitteilung und Verstehen getroffen wird. Erst bei Vorliegen des Verstehens existiere die Kommunikation, die dann zum Bestehen eines Systems führt. Dieses System müsse in der Lage sein, autopoietisch aus Kommunikation weitere Kommunikation zu produzieren.[*41] Obwohl Luhmann seine Systemtheorie auf menschliche Individuen in Form sozialer Systeme ausgerichtet hat, lässt sich der Gedanke auf nicht-menschliche Entitäten übertragen.[*42] Erfüllen autonome Roboter die Anforderung des Kommunikationsbegriffs, so wäre es möglich, sie als soziales System zu verstehen.

Latour hingegen setzt sich direkt mit der Einordnung von nicht-menschlichen Entitäten auseinander und schafft dafür den Begriff des „Aktanten", um einen Ausweg aus der zwingenden Klassifikation als Subjekt oder Objekt zu schaffen.[*43] Durch die Schaffung einer eigenen Kategorie für nicht-menschliche Entitäten soll verhindert werden, dass weder Subjekte verdinglicht noch Objekte vermenschlicht werden.[*44]

Während Latour den Aktantenbegriff damit auf eine Vielzahl von Objekten ausdehnt, fasst Teubner den Begriff enger und versteht unter Aktanten nur solche nicht-menschliche Entitäten, die in der Lage sind, sich an ihre Umwelt anzupassen.[*45] Um als (Teil-)Rechtssubjekte anerkannt zu werden, müssten die Aktanten autonom sein.[*46] Dafür seien drei Voraussetzungen zu erfüllen: Intentionales Handeln, Fähigkeit zur Kommunikation mit der Umwelt und Fähigkeit zur Entscheidung unter Ungewissheit. Da bereits automatisierte Roboter mit der Umwelt kommunizieren sowie zielgerichtet handeln können, seien dies lediglich notwendige, jedoch keine hinreichenden Voraussetzungen. Zur Feststellung der Autonomie sei die Fähigkeit des Roboters zur Entscheidung unter Ungewissheit erforderlich. Diese sei vorhanden, wenn die Entscheidung eines Roboters, der zwei Möglichkeiten zur Auswahl hat, vom Entwickler des Roboters nicht nachvollzogen werden kann und dieser keine Aussagen über den Ausgang einer weiteren Entscheidung in der Zukunft treffen kann. Ist dieses Maß an Autonomie erfüllt, müsse die Gesellschaft dem Roboter eine (Teil-)Rechtsfähigkeit zusprechen, um das damit einhergehende Autonomierisiko zu würdigen. Entwickelt man diesen

37 Rudolf Düll (Fn 29) 1, 5.

38 David Deroussin, *Histoire du Droits des Obligations* (2. Auflage, Economica 2012), 774.

39 Ibid; Max Kaser (Fn 30) 163-164; Wolfgang Kunkel, Paul Jörs und Leopold Wenger, *Römisches Recht: Römisches Privatrecht, Abriß des Römischen Zivilprozeßrechts* (3. Auflage, Springer 1978), 269; Milena Polojac (Fn 31) 93; Feliciano Serrao, „La Responsabilità per fatto altrui in diritto romano" (1963) 66 Bullettino dell'Istituto di Diritto Romano Vittorio Scialoja 19, 29.

40 Dazu Niklas Luhmann, *Soziale Systeme – Grundriß einer allgemeinen Theorie* (7. Auflage Suhrkamp 1999), 194-240.

41 Niklas Luhmann, *Organisation und Entscheidung* (3. Auflage VS-Verlag 2011), 388. – DOI: https://doi.org/10.1007/978-3-531-93042-8.

42 So auch Gunther Teubner, „Elektronische Agenten und große Menschenaffen: Zur Ausweitung des Akteurstatus in Recht und Politik" (2006), ZfRSoz, 5, 14f. – DOI: https://doi.org/10.1515/zfrs-2006-0103.

43 Bruno Latour, *Das Parlament der Dinge – Für eine politische Ökologie* (Suhrkamp 2001), 108f.

44 Ibid 114f.

45 Gunther Teubner (Fn 42) 19.

46 Dazu im Folgenden Gunther Teubner, „Digitale Rechtssubjekte? – Zum privatrechtlichen Status autonomer Softwareagenten" (2018) AcP, 155, 173-177. – DOI: https://doi.org/10.1628/acp-2018-0009.

Gedanken konsequent weiter, bedeutet dies, dass aus rechtssoziologischer Perspektive die Erhebung des Roboters zu einem Rechtssubjekt durchaus möglich, ja sogar erforderlich ist, wenn ein bestimmtes Maß an Autonomie des Roboters vorliegt.

4.3. *De lege lata*

Im BGB wird systematisch zwischen Rechtssubjekten (natürliche und juristische Personen) und Rechtsobjekten (alle Gegenstände wie Sachen, Tiere und Rechte) unterschieden. Soziologische Ansätze bzgl. der Definition von Subjekten finden im BGB keine Ausprägung. Roboter sind als Sachen *de lege lata* als Rechtsobjekte einzuordnen.[*47] Der moderne Begriff des Rechtssubjekts hat seine Wurzeln vielmehr in den Lehren Kants und Savignys. Nach Kant unterscheidet das Bewusstsein über das „Ich" sowie die damit einhergehende Würde den Menschen von Sachen und Tieren.[*48] Für den Status als Subjekt ist zudem ausschlaggebend, ob die Entität frei hinsichtlich moralischer Gesetze handeln kann.[*49] Aus diesen Anforderungen an ein Subjekt ergeben sich hinsichtlich von Robotern grundlegende Fragen: Haben autonome Roboter ein menschliches Bewusstsein? Können autonome Roboter moralisch handeln?[*50] Sofern diese Fragen nicht deutlich bejaht werden können, ist aus Kant'scher Perspektive der Subjektstatuts auf Menschen beschränkt und kann nicht Robotern zuteilwerden.

Aus der historischen Perspektive von Savigny zeigt sich, dass die Rechtspersönlichkeit untrennbar mit dem Menschsein verbunden ist, denn Voraussetzung für den Status eines Rechtssubjekts ist der freie Wille.[*51] Bezogen auf die Gewährung einer Rechtspersönlichkeit für Roboter ergeben sich nach dieser Definition Probleme. Zunächst ist der Roboter nicht menschlich, sondern bleibt ein animiertes, vom Menschen geschaffenes Objekt, egal wie hoch die Ähnlichkeit mit dem Menschen ist. Zudem stellt sich die Frage, ob ein Roboter einen freien Willen haben kann? Dies ist eindeutig nicht der Fall. Ein Roboter existiert nicht *eo ipso*, sondern wird vom Menschen geschaffen durch Bau und Programmierung. Selbst wenn man dem Roboter das höchstmögliche Maß an Autonomie zugesteht, also seine Entscheidungen nicht vorhersehbar sind, beruht die grundsätzliche Entscheidungsmacht des Roboters auf menschlicher Programmierung, ist also determiniert anstelle von frei.[*52] Nach Savignys Konzeption erfüllen Roboter trotz ihrer Autonomie nicht die Anforderungen für den Status als Rechtssubjekt.

Schließlich stellt sich die Frage nach den verfassungsrechtlichen Grenzen der Rechtsubjektqualität. Das Grundgesetz ist als objektive Wertentscheidung Maßstab für alle Rechtsgebiete.[*53] Es ist durch die über allem stehende Garantie der Menschenwürde in Art. 1 I GG anthropozentrisch ausgerichtet.[*54] Daher genießt der Subjektstatus des Menschen besonderen Schutz.[*55] Nach einer Ansicht folge daraus die Ausschließlichkeit des menschlichen Subjektstatus. Tiere bspw. könnten hingegen keine Rechte haben.[*56] Nach einer anderen Auffassung gewährt Art. 1 GG keinen exklusiven Status des Menschen.[*57] Der Schutz der Menschenwürde besagt nur, dass der Mensch nicht zum Objekt gemacht werden darf (sog. Objektformel[*58]).[*59]

47 Steffen Wettig und Eberhard Zehender (Fn 16) 127.

48 Immanuel Kant, *Anthropologie in pragmatischer Hinsicht* (Dürr 1899), 1.

49 Immanuel Kant, „Einleitung in die Metaphysik der Sitten" in Königlich Preußische Akademie der Wissenschaften (Hrsg.), *Kant's gesammelte Schriften*, Band 6 (Georg Reimer 1914), 223.

50 Daran knüpft auch die Frage im Strafrecht nach der Schuldfähigkeit von Robotern an. Siehe dazu ausführlich bei Eric Hilgendorf, „Können Roboter schuldhaft handeln?" in Susanne Beck (Hrsg.), *Jenseits von Mensch und Maschine,* (Nomos Verlag 2012), 119-132. – DOI: https://doi.org/10.5771/9783845237527-119; Monika Simmler und Nora Markwalder, „Roboter in der Verantwortung – zur Neuauflage der Debatte um den funktionalen Schuldbegriff" (2017) ZSTW, 20-47; Gerhard Seher, „Intelligente Agenten als ‚Personen' im Strafrecht?" in Sabine Gless und Kurt Seelmann (Hrsg.), *Intelligente Agenten und das Recht* (Nomos Verlag 2016), 45-60. – DOI: https://doi.org/10.5771/9783845280066-45.

51 Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, Band 2 (1840), 2. – DOI: https://doi.org/10.1515/9783111443348.

52 Siehe zu der Inkompatibilität von freiem Willen und Determinismus auch Peter van Inwagen, The Incompatibility of Free Will and Determinism (1975), Philosophical Studies 27, No 3, 185ff. – DOI: https://doi.org/10.1007/bf01624156.

53 BVerfGE 7, 198; Michael Sachs in Sachs-Kommentar zum GG (8. Auflage, C.H. Beck 2018), Vorb. Abschnitt I, Rn. 32.

54 Christian Hillgruber in Beck'scher Onlinekommentar zum GG (42. Aufl. 2019), Vorb. Art. 1; Matthias Herdegen in Maunz/Dürig-Kommentar zum GG (90. EL, C.H. Beck 2020), Art. 1 I, Rn. 2.

55 Christian Hillgruber (Fn 54) Art. 1, Rn. 13.

56 Rupert Scholz in Maunz/Dürig-Kommentar zum GG (90. EL, C.H. Beck 2020), Art. 20a, Rn.75.

57 Jens Kersten, „Menschen und Maschinen – Rechtliche Konturen instrumenteller, symbiotischer und autonomer Konstellationen" (2015) JZ 1, 7. – DOI: https://doi.org/10.1628/002268814x14151859100293.

58 st. Rspr: BVerfGE 45, 187 (228); BVerfGE 115, 118 (153); BVerfGE 144, 20 (207).

59 Utz Schliesky, „Digitale Ethik und Recht" (2019) NJW 3692, 3696.

Mit der Schaffung der juristischen Person wurde von der engen Ausrichtung auf den Menschen abgewichen. Die Abweichung ist nicht so deutlich, wie sie auf den ersten Blick scheint, denn die Stellung der juristischen Person ist eng mit den natürlichen Personen verbunden. Dies zeigt sich einerseits in der Gewährleistung der Bildung von Gesellschaften in Art. 9 I GG, die dazu beitragen soll, dass natürliche Personen ihre Persönlichkeit in organisierten Gruppen entfalten können.[*60] Andererseits wird im Rahmen von Art. 19 III GG bei der Anerkennung der Grundrechtsfähigkeit die Lehre vom personalen Substrat herangezogen, bei der die Grundrechtsfähigkeit der juristischen Personen vom BVerfG per Durchgriff auf die dahinterstehenden Menschen rückgekoppelt und den juristischen Personen nicht *eo ipso* zugesprochen wird.[*61] Allerdings weicht das BVerfG selbst von der Lehre des personalen Substrats ab, da es die Grundrechtsfähigkeit von Stiftungen bejaht,[*62] die über kein personales Substrat verfügen, sondern bei denen vielmehr das Stiftungsvermögen im Vordergrund steht.[*63]

Diese Abweichung von der engen Ausrichtung auf den Menschen lässt das Grundgesetz auch in Bezug auf Tiere zu, indem Art. 20a GG den Tierschutz verfassungsrechtlich gewährleistet und eine ausschließlich anthropozentrische Auslegung des Art. 20a GG nicht zwingend ist.[*64] Vielmehr sei der Tierschutz in Art. 20a GG pathozentrisch ausgerichtet.[*65] Daraus wird teils abgeleitet, dass es im Rahmen der Verfassung möglich sei, Tieren eine Rechtspersönlichkeit zu verleihen.[*66] Bereits vor der Einführung des Art. 20a GG wurde diskutiert, dass Tieren zwar keine Pflichten, jedoch aber Rechte gewährt werden müssten.[*67] Alternativ wird Art. 20a GG als bloße objektiv-rechtliche Garantie verstanden, die für Tiere keine eigenen Rechte begründet.[*68]

Es lässt sich festhalten, dass das Grundgesetz von der absoluten Ausrichtung auf den Menschen Ausnahmen ermöglicht, wenn es soziale, rechtliche oder ökonomische Gründe erfordern.[*69] Daher ist auch die Anerkennung von Robotern als Rechtssubjekte im Rahmen des Grundgesetzes trotz seiner anthropozentrischen Ausrichtung möglich und nicht *per se* verfassungswidrig.[*70]

5. Resultat und Ausblick

Zusammenfassend zeigt dieser Überblick, dass autonome Roboter – basierend auf der Ansicht *Savignys* – *de lege lata* zu den Rechtsobjekten zählen. Eine Erhebung in den Subjektstatus *de lege ferenda* wäre nach dem Grundgesetz nach einer Ansicht zulässig und aus rechtssoziologischer Sicht sogar geboten.

Die Frage nach dem rechtlichen Umgang mit autonomen Robotern wird durch den Fortschritt der Technik immer bedeutsamer. Dies hat das Europäische Parlament erkannt und darauf mit seiner Entschließung zur Teilrechtsfähigkeit reagiert. Die Verleihung der Qualität einer E-Person ist *de lege ferenda* möglich und in Grenzen zulässig. Doch ist die Tragweite der Entscheidung hinsichtlich der Zukunft des unserem Rechtssystems zugrundeliegenden Menschenideals beachtlich. Eine Überhöhung der Sachautonomie stünde in der Traditionslinie der griechischen Antike und dem Glauben an hybride Mischwesen. Davon rückten schon die Römer ab. Die Grenze zwischen Mensch und Maschine sollte weiterhin konstitutiv bleiben.

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60 BVerfGE 38, 281 (303); Rupert Scholz in Maunz/Dürig-Kommentar zum GG (92. EL, C.H. Beck 2020), Art. 9, Rn. 11; Wolfram Höfling in Sachs-Kommentar (Fn 53) Art. 9, Rn. 3.

61 St. Rspr: BVerfGE 21, 362 (369f.); BVerfGE 61, 82 (101); BVerfGE 143, 246 (313).

62 BVerfGE 75, 138 (160).

63 Jens Kersten (Fn 57) 7; Birgt Weitemeyer in Münchener Kommentar zum BGB, Band 1 (8. Auflage, C.H. Beck 2018), § 80, Rn. 1.

64 Dietrich Murswiek in Sachs-Kommentar (Fn 53) Art. 20a, Rn. 23.

65 Carolin Raspé, *Die tierliche Person* (Duncker Humblot 2013), 221. – DOI: https://doi.org/10.3790/978-3-428-53972-7; Johannes Caspar und Martin Geissen, „Das neue Staatsziel ‚Tierschutz' in Art. GG Artikel 20a GG" (2002) NVwZ, 913; Dietrich Murswiek (Fn 64) Art. 20a, Rn. 31b; BT-Drs. 14/8860, S. 3.

66 So Jens Kersten (Fn 57) 7. Eine ausführliche Untersuchung zur Frage nach der Subjektstellung für Tiere findet sich bei Saskia Stucki, *Grundrechte für Tiere* (Nomos Verlag 2016), 173ff. – DOI: https://doi.org/10.5771/9783845271774 (ausgehend vom Schweizer Recht) sowie bei Carolin Raspé (Fn 65) 281ff.

67 Eisenhart v Loeper und Wasmut Reyer, „Das Tier und sein rechtlicher Status: Zur Weiterentwicklung von Transparenz und Konsequenz des Tierschutzrechts" (1984) ZRP 205, 208f.; Heinrich Freiherr von Lersner, „Gibt es Eigenrechte der Natur?" (1988) NVwZ 988.

68 Rupert Scholz in Maunz/Dürig-Kommentar zum GG (Fn 56) Art. 20a, Rn. 76.

69 Jens Kersten (Fn 57) 7.

70 So auch ibid.

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Qualification of Consumer Contracts for the Supply of Digital Services under Estonian Law[*1]

1. Introduction

On 1 January 2022, the harmonised rules of the new EU Digital Content Directive[*2] (hereinafter referred to as 'the Directive') will become applicable. This Directive is unique among EU contract law directives in that it is not just applicable to a single type of contract but, rather, to all contracts between consumers and traders for the supply of digital content or digital services[*3] where consumers pay a price or provide personal data. According to its Recital 12, the Directive does not determine the legal nature of contracts for the supply of digital content or digital services, and the question of whether such contracts constitute, for instance, a sales, service, rental, or *sui generis* contract is left to national law. It was a conscious choice not to qualify the legal nature of contracts in the Directive,[*4] with the broad scope of application intended to allow for rules that are technology-neutral, future-proof[*5], and difficult to circumvent.[*6]

While the Directive provides for overarching regulation and does not differentiate among particular types of contracts, digital content or digital services are supplied under a specific contract, in practice. The legal nature of these contracts under Estonian law must be identified since the Directive regulates only

1 The research leading to this article was supported by the Estonian Research Council's grant PRG124.

2 Directive (EU) 2019/770 of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and digital services.

3 According to art 2 point 1, 'digital content' means data that are produced and supplied in digital form. According to art 2 point 2, a 'digital service' is a service that allows the consumer to create, process, store, or access data in digital form or allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service.

4 K Sein and G Spindler, 'The New Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1' [2019] 15(3) European Review of Contract Law 260. – DOI: https://doi.org/10.1515/ercl-2019-0016; D Staudenmayer, 'Die Richtlinien zu den digitalen Verträgen' [2019] Zeitschrift für Europäisches Privatrecht 663, 668.

5 Recital 10 of the Directive, Commission proposal COM(2015) 634 final 11. Commission Staff Working Document Impact Assessment Accompanying the document Proposals for Directives of the European Parliament and of the Council (1) on certain aspects concerning contracts for the supply of digital content and (2) on certain aspects concerning contracts for the online and other distance sales of goods 46; J Vanherpe, 'White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content' [2020] (2) European Review of Private Law 255.

6 D Staudenmayer, 'Auf dem Weg zum digitalen Privatrecht – Verträge über digitale Inhalte' [2019] NJW 2497.

certain aspects of contract law. The remainder of the contractual relationship is determined by national law, such as that addressing the obligations of consumers and the legal remedies available to traders,[*7] and these rules may differ on the basis of the contract type involved. More broadly, this distinction is important for an understanding of how the Directive ties in with Estonian law and how pre-existing rules function in conjunction with the rules set forth in the Directive.

The aim behind this article is to analyse how contracts for the supply of digital content or digital services can be qualified under Estonian law. The more specific focus of the piece is on contracts for digital services: whereas it is not significantly problematic or controversial to consider a contract for the supply of digital content as a sales contract[*8], the distinction becomes more complicated where digital services are offered over the Internet, as in the case of storage in a cloud service (e.g. OneDrive[*9] or Dropbox[*10]) or use of Web-based software (e.g. Microsoft Office 365[*11]). It is not entirely clear whether the underlying contracts should be qualified as some type of contract for use (*kasutusleping*) or, instead, some type of contract for provision of services (*teenuse osutamise leping*)[*12].

Among contracts for use, contracts for the supply of digital content and digital services could be considered either as a lease contract (*üürileping*) or as a usufructuary lease contract (*rendileping*). As for contracts for provision of services, the supply of digital content and digital services might be qualified as falling under either a contract for work (*töövõtuleping*) or a contract for services (*käsundusleping*)[*13].

The article examines the characteristics distinctive of these different types of contract, such as the possible object of the specific type of contract involved and the main obligations of the parties, to ascertain whether they are suitable for the supply of digital services. The analysis is anchored in a comparison of Estonian and German law.

2. The object of a contract for the supply of digital services

2.1. The object of a contract for use

Pursuant to Section 271 of the Law of Obligations Act (hereinafter LOA)[*14], the object of a lease contract must be a thing[*15] – i.e. a corporeal object in the sense of Subsection 49(1) of the General Part of the Civil Code Act (hereinafter GPCCA)[*16]. Neither digital content nor digital services are themselves things. Therefore, the supply of digital content or of digital services may be regarded as the object of a lease contract only if the digital content is stored on or the service is linked to, some medium that meets the requirements for classification as a thing. For example, this is the case where the consumer visits a video store and leases

7 Sein and Spindler (n 4) 260.

8 Pursuant to sub-s 208(3) LOA, the object of a sales contract can be, in addition to things, also rights and other objects, which may include digital content. German law takes the same approach. Under s 453 BGB, the provisions for the purchase of things apply, with the necessary modifications, to the purchase of rights and other objects. The possibility of selling digital content has been recognised also by P Kalamees and others, *Lepinguõigus* (Juura 2017) 28; M Käerdi and S Kärson in P Varul and others (eds), *Võlaõigusseadus II, Kommenteeritud Väljaanne* (Juura 2019) 42. For references related to German law, see, for example, F Faust in W Hau and R Poseck (eds), *Beck´scher Online Kommentar*, on BGB s 453, marginal note 24; C Berger in R Stürner (ed), *Jauernig Bürgerliches Gesetzbuch Kommentar*, on BGB s 453, marginal note 11. A sales contract is possible foremost where content is provided in a single act of supply or a series of individual acts of supply, such as when a video file is downloaded or a new e-magazine is provided to the consumer each month.

9 A description of the services offered under the OneDrive brand is available online at <www.microsoft.com/en/microsoft-365/onedrive/online-cloud-storage> accessed 28 February 2021.

10 A description of the Dropbox services can be found at <www.dropbox.com/individual?cid=f88a8ef732099541d96f30491c25a82fL> accessed 28 February 2021.

11 Various possibilities exist for using Microsoft Office online, detailed at <www.microsoft.com/en/microsoft-365/buy/compare-all-microsoft-365-products?market=af#> accessed 28 February 2021. The Web-based service referred to in the article is a yearly subscription.

12 Microsoft Office 365 is used as an example for the possible qualification of contracts also by Sein and Spindler (n 4) 260.

13 It is important also to note that, since the object of a contract for the supply of digital content or digital services is usually protected by copyright, a licensing agreement too must be concluded with the consumer for use of the digital content or service. This contract is concluded in parallel with the contract for the supply of digital content or digital services. See G Lepik in *Võlaõigusseadus II, Kommenteeritud Väljaanne* (n 8) 465; Kalamees and others (n 8) 256.

14 RT I 2001, 81, 487; RT I, 04.01.2021, 19.

15 K Paal in *Võlaõigusseadus II, Kommenteeritud Väljaanne* (n 8) 237, 239.

16 RT I 2002, 35, 216, RT I, 23.05.2020, 4.

a DVD or CD, which are things in the meaning of the GPCCA and are used to store a film, series, etc., which are digital content in the meaning of the Directive. However, this business model is no longer commonplace. With digital services such as the provision of cloud services and software-as-a-service contracts, the consumer can use the cloud or software but, in the strict sense, does not use a thing as such.

In Germany, several authors have affirmed that the rules of lease agreements should apply in relation to digital content and services. For example, Grünberger points out that both lease and usufructuary lease agreements are classic ways to allow for the temporary use of a thing.[*17] Schmidt-Kessel is of the same view and agrees that it is possible to allow someone to use digital content for a limited time. This is normally the situation seen under the software-as-a-service model, wherein the digital content that is the object of the contract is typically stored in the cloud. In both cases, the consumer is granted only the opportunity of using the digital content for the agreed period of time.[*18] Metzger holds that the rules applicable to lease contracts may be applied where the supply is of long duration and/or a price is paid periodically.[*19] In their articles on digital content and services, these authors do not, however, address how lease-contract rules might be applicable where no tangible object is supplied to the consumer. It is also worthy of note that the draft law[*20] for transposing the Directive into German law, by amending the German Civil Code (*Bürgerliches Gesetzbuch,* hereinafter BGB)[*21] through the addition of a Section 548a, contains a proposal clearly stating that the rules applicable to lease agreements are applicable for the leasing of digital products.

The rationale for this solution can be found in the practice of the German courts. Already in 2007, the German Federal Court of Justice (*Bundesgerichtshof,* hereinafter BGH) held that an application-service-providing (hereinafter ASP)[*22] contract is to be considered a lease agreement for the use of Web-based software over a specific span of time. As for the requirement that the object of a lease agreement be a thing, the BGH held that it suffices for the software to be stored on some medium (*dass das Computerprogramm auf einem Datenträger verkörpert ist*); in this case, it was stored on the provider's server[*23].

When one considers that the definition of a lease agreement is, in essence, the same under Estonian and German law[*24], as they both regulate the use of a thing, the question arises of whether the same conclusion could be drawn under Estonian law.

In principle, using any digital environment or software over the Internet requires some sort of physical basis. Storing digital content in a cloud environment depends on it being stored somewhere on a server that physically exists. This is why German authors have found that specific physical resources are designated for virtual components; this setting fulfils the condition that the object be a corporeal thing.[*25] That view is not without its critics, though, since use of specific hardware or software has no meaning if the physical computer resources involved are presented only virtually.[*26] Accordingly, it would be more correct to say

17 M Grünberger, 'Verträge über digitale Güter' (2018) 218 Archiv für die civilistische Praxis (AcP) 213, 237. – DOI: https://doi.org/10.1628/acp-2018-0011.

18 M Schmidt-Kessel and others, 'Fokus. Die Richtlinienvorschläge der Kommission zu Digitalen Inhalten und Online-Handel – Teil 2' [2016] (2) Zeitschrift für das Privatrecht der Europäischen Union 54, 62. – DOI: https://doi.org/10.9785/gpr-2016-0204.

19 A Metzger, 'Verträge über digitale Inhalte und digitale Dienstleistungen: Neuer BGB-Vertragstypus oder punktuelle Reform?' (2019) 12 (74) Juristen Zeitung, 578.

20 'Referentenentwurf eines Gesetzes zur Umsetzung der Richtlinie über bestimmte vertragsrechtliche Aspekte der Bereitstellung digitaler Inhalte und digitaler Dienstleistungen' BGB s 548a. Available online at <www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Bereitsstellung_digitaler_Inhalte.html> accessed 28 February 2021.

21 'Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002' (BGBl. I S. 42, 2909; 2003 I S. 738), with the most recent amendments having been made pursuant to art 13 of the law published on 22 December 2020 (BGBl. I S. 3256) available in German at <www.gesetze-im-internet.de/bgb/BJNR001950896.html#BJNR001950896BJNG000102377> accessed 28 February 2021.

22 Used for offering Web-based software services.

23 [2007] NJW 2394, 'BGH: Rechtsnatur der Softwareüberlassung im Rahmen eines ASP-Vertrags'.

24 The definition of a lease contract is set out in s 535 of the BGB, which refers to the leased property (*die Mietsache* in German). The commentary on the LOA cites that section of law as one source of inspiration for s 271 of the LOA. See *Võlaõigusseadus II, Kommenteeritud Väljaanne* (n 8) 237.

25 In German, *werden die virtuellen Komponenten einer physischen Ressource zugeordnet, sodass die Voraussetzungen der Körperlichkeit der Sache letztlich erfüllt sind*. 'Bericht der Arbeitsgruppe „Digitaler Neustart"' (presented at Der Konferenz der Justizministerinnen und Justizminister der Länder 2017) 142 <www.justiz.nrw.de/JM/schwerpunkte/digitaler_neustart/zt_bericht_arbeitsgruppe/bericht_ag_dig_neustart.pdf> accessed 28 February 2021.

26 S Kirn and C Müller-Hengstenberg, 'Überfordert die digitale Welt der Industrie 4.0 die Vertragstypen Des BGB?' [2017] NJW 433, 435.

that the rules applicable to lease contracts are applied to software irrespective of the fact that software is not a thing.[*27]

I am among those who are rather sceptical in this regard. Even if there is a physical medium somewhere in the real, physical world where the digital content is stored, no thing is supplied to the consumer. The consumer receives digital content or a digital service only virtually. It is, therefore, questionable whether under a lease contract the connection to use of an actual physical thing could be so remote. In such a case, the benefit received by the consumer is not the use of a thing[*28], and neither is the object of the contract a thing.

Another contract for use regulated in the LOA that might be suited to the supply of digital services is the usufructuary lease contract as defined in Section 339 of the LOA. Since the object of a usufructuary lease contract can be any object (not restricted to a thing) in the meaning of Section 48 GPCCA, one thus can overcome the initial problem that arises when qualifying contracts for the supply of digital content or digital services as lease contracts. At the same time, according to Section 339 LOA, the object of a usufructuary lease contract must be an object that gives rise to fruit.[*29] Similarly, it has been held in the German literature that the possibility of receiving fruit is the distinguishing characteristic for the legal qualification of a contract; this element cannot be excluded without the contract losing its primary legal nature.[*30]

Since, as demonstrated above, the object of a contract for the supply of digital content or services is not normally a thing, the possibility of receiving civil fruit may arise. Under Subsection 62(3) GPCCA, 'civil fruit' means income that an entitled person receives from a right pursuant to the purpose of the right, and income received from the right arising from a legal relationship. When we examine the use of a cloud service such as OneDrive or Dropbox, it is evident that the consumer does not receive anything that could be qualified as fruit. The same conclusion holds true for software-as-a-service models such as that behind Microsoft 365 for the Web. When using the service, the consumer receives the advantages of use, but it cannot be said (at least in general terms) that doing so constitutes receipt of fruits. Qualifying such contracts as usufructuary lease contracts is therefore problematic. And, indeed, German authors have not qualified contracts for the supply of digital content as usufructuary lease contracts. Neither are there any references to usufructuary lease contracts in the German draft law for transposing the Directive.

Even if one were to construct hypothetical cases wherein the receipt of fruit could be imagined (e.g. income from blog posts[*31]), the wording of Section 339 LOA refers to fruit as something received from the object of the usufructuary lease contract under the rules of regular management. Whether a person can be considered a consumer if earning income in his own right from using a digital application is debatable. This is important because the scope of the Directive is limited to contracts between traders and consumers[*32], so a contract whose other party is not a consumer would fall beyond the scope of the rules in question.

2.2. The object of a contract for provision of services

Under a contract for work as provided for by Section 635 LOA, the contractor undertakes to manufacture or modify a thing or to achieve some other agreed result by providing a service (work). The object of the contract is achieving some result or progress.[*33] Contracts for work are characterised by a great variety of ways in which the contract may be performed. For example, the object might be intangible work (e.g. conducting an analysis, mounting a theatre production, or providing transportation)[*34]; accordingly, it is possible to be

27 T Heydn, 'Software as a Service (SaaS): Probleme und Vertragsgestaltung' *MMR*, 7 (2020) 437.

28 It should be noted also that the consumer would not receive possession of the thing in this case because the server might be located in another country, halfway around the world. While s 271 LOA mentions not transfer of possession of a thing but, rather, granting use of a thing – and these two cannot be considered to be exactly the same – the rules governing lease contracts nevertheless contain provisions that refer to possession (see ss 291 and 334 LOA). Also, in practice, under a lease contract, possession of the thing too is transferred in most cases.

29 Kalamees and others (n 8) 227; Varul and others, *Võlaõigusseadus II, Kommenteeritud Väljaanne* (n 8) 381.

30 J D Harke in FJ Säcker and others (eds), *Münchener Kommentar Zum BGB 8. Auflage* (2020) on BGB s 581, marginal note 3.

31 K Saarmann, 'Digisisu lepingutingimustele vastavus direktiivi 2019/770 järgi ja vastavuskriteeriumite ülevõtmine Eesti õigusesse' (master's thesis, University of Tartu 2020) 22.

32 See art 3(1) of said directive.

33 This is true also under German law. See J Busche in *Münchener Kommentar Zum BGB* (n 30) s 631, marginal note 1.

34 On Germany, see Busche (n 33) s 631, marginal note 2; the same is true with regard to Estonia, per Varul and others, *Võlaõigusseadus III Kommenteeritud Väljaanne* (Juura 2009) 38.

obliged to deliver non-corporeal results.[*35] For this reason, supply of digital content or digital services can be the object of a contract for work, and no similar problems arise with regard to the object of the contract as in the case of lease contracts.

In addition to contracts for work, some contracts for supply of digital services may be qualified as contracts for services under Section 619 LOA. The object of a contract for services is performance of a particular activity – i.e. the provision of a service as a process.[*36] If a specific result is not achieved but the service provider has performed all obligations as required and has done all that is reasonably possible in pursuit of the specified result, there is no breach of the contract.[*37]

In the German literature, Grünberger has concluded with regard to digital content and digital services that the supply of digital services can primarily be qualified as a contract for work where achievement of a result is important.[*38] Likewise, Schmidt-Kessel has stated an opinion with regard to the supply of various services that under German law these are best qualified as contracts for work, and he has cited streaming services and social media as examples.[*39] The same approach is found in the draft law to transpose the Directive in Germany, which features a proposal to amend Section 650 BGB by specifying that the application of rules for contracts for work extends to digital products, so that these rules encompass the supply of digital content and digital services.[*40]

I tend to agree that, while the supply of digital services would be possible under a contract for services or some similar form of contract[*41], most digital services are directed toward a particular result. Also, cloud services and software-as-a-service applications, which are the focus of this article, are result-oriented. The consumer has the expectation that his photos and documents stored in iCloud, Dropbox, etc. will continue to be stored there and remain available to him from there or proceeds from the understanding that he will be able to use the relevant Web-based software under the agreed conditions at any time. What is important is the specific result in the form of ability to use the cloud entity or software, not that the trader makes his best effort toward this end. If there is no possibility of using the cloud service, breach of contract has occurred.[*42] Hence, it would be conceivable to treat contracts of this nature as contracts for work.

If, then, these contracts are qualified as contracts for work, a question arises as to the degree to which the achievement of the desired result is under in the control of the obliged party.[*43] In practice, there is generally some third party between the consumer and the trader, such as an Internet service provider, whose actions determine whether the service reaches the consumer. Bearing this in mind, Article 5(2) of the Directive obliges the trader to ensure that any means suitable for accessing or downloading the digital content be made available or accessible to the consumer (such as a link) or that the digital service has been made available or accessible to a physical or virtual facility chosen by the consumer for that purpose. According to the Directive, this is sufficient for regarding the obligation of the trader to supply the service as fulfilled.[*44] In my opinion, in the context of a contract for work, one should interpret these terms to mean that the trader has to perform the obligations that are under the control of the trader in such a way that the possibility of achieving the specific result is guaranteed. The provisions of Article 5(2) limit the obligations of the trader such that the actions of any third parties are separate from them. That is, if any problems caused by a third party (e.g. with the consumer's Internet connection) are resolved, achievement of the specific result is ensured.

35 H-P Mansel in *Jauernig Bürgerliches Gesetzbuch Kommentar* (n 8) s 631 (preliminary remark), marginal note 2.

36 P Varul in *Võlaõigusseadus III Kommenteeritud Väljaanne* (n 34) 1,35.

37 P Varul in *Võlaõigusseadus III Kommenteeritud Väljaanne* (n 34) 4.

38 Grünberger (n 17) 237.

39 Schmidt-Kessel and others (n 18) 62.

40 'Referentenentwurf eines Gesetzes zur Umsetzung der Richtlinie über bestimmte vertragsrechtliche Aspekte der Bereitstellung digitaler Inhalte und digitaler Dienstleistungen' (n 20) BGB s 650.

41 One example would be using the services of Airbnb or Booking.com wherein the trader performs the contract by selecting appropriate offers and showing them to the consumer and cannot guarantee a result in the form of the most suitable hotel or accommodation.

42 Other examples can be presented on the basis of the same logic. For example, a trader offering digital television or a streaming service has to ensure access to the films or television programmes. The trader must, in the case of Web-based messaging applications, ensure that the consumer can send messages to and receive messages from other consumers or, in relation to a Web-based game, has to ensure that the consumer can actually play the game. It is not enough that the trader act with care in pursuit of these objectives.

43 W Voit in *Beck'scher Online Kommentar* (n 8) on BGB s 631, marginal note 6.

44 Recital 41.

2.3. Interim conclusions

From the standpoint of the object of the contract, qualifying contracts for the supply of digital services as lease contracts under Estonian law is problematic because the object of a lease contract must be a thing, a corporeal object. In the case of a usufructuary lease, the object of the contract may be an incorporeal object, but obtaining fruit from the use of the digital service is seldom possible.

As to the different contracts for the provision of services, the object of the contract does not pose similar problems. Digital content and services can be the object of a contract for the provision of services under Estonian law. In most cases, the orientation toward achieving a specific result leads to qualifying such contracts as contracts for work.

Since digital content and digital services are relatively new phenomena, ones not foreseeable when the provisions of the LOA were initially drafted, one could ask whether the fact that the object of a lease contract is restricted to being a thing in the meaning of the GPCCA should be considered to point to a gap in the law. If the most suitable type of contract for handling such supply under the LOA, or the closest analogue, is a lease contract, one then may ask whether this gap could be filled by analogy or, instead, the legislator should amend the law when transposing the Directive, to allow digital content to be deemed the object of a lease contract. The answer depends on the possibility of qualifying such contracts for the supply of digital content or services as other contract types under Estonian law. If other possibilities are available, there would be no need to apply the rules on lease contracts.

The analysis presented below is centred mainly on the characteristic obligations of the parties under lease contracts and contracts for work. The aim is to determine which of these two contract types is more suitable for regulating contracts for the supply of digital services. Thereby, the analysis should aid in determining whether it is necessary to apply the rules on lease contracts also in cases wherein the object of the contract is not a thing.

3. Characteristic obligations of the parties to contracts for the supply of digital services

3.1. Obligations of the trader

According to Section 271 LOA, the lessor is obliged to deliver a thing to the lessee. Subsection 276(1) LOA further specifies that the lessor is required to deliver a thing, together with its accessories, to the lessee by the agreed time and in suitable condition for use in accordance with the contract and also that the lessor must ensure that the thing is maintained in said condition throughout the duration of the contract. Under a contract for work, as is noted above, the contractor is obliged to achieve a certain result pursuant to Section 635 of the LOA.

With regard to using a cloud service or some other software on the Internet, the obligation to deliver the thing under a lease contract could, in theory, be translated as making it available for use – that is, rendering it accessible to the consumer in some way. The trader can keep the software in such condition that it can be used as agreed in the contract. However, considerable doubt remains as to whether these actions are characteristic of leasing or, rather more, some type of supply of services.

In the legal literature, the distinction between lease contracts and other contracts for the supply of services has been articulated on the basis of the objectives pursued by the parties. This has been assessed primarily with regard to traditional 'tangible' benefits, such as the use of machinery or automobiles together with personnel to operate them. If the choice of the automobile is what is most important and this is entirely determined by the customer, then the example represents a lease contract. If, however, the work owed by the other party and the achievement of a specific result are important, this is an example of a contract for work.[*45]

In my view, the foregoing logic is difficult to transfer to the context of using Web-based software, and differentiating between the objectives may be somewhat artificial. This is because, while the consumer indeed

[45] V Emmerich, C Rolfs, and B Weitemeyer (eds), *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2, Recht der Schuldverhältnisse*, ss 535–562d: 'Verordnung über Heizkostenabrechnung (Mietrecht I)' 15, marginal note 37; M Häublein in *Münchener Kommentar Zum BGB* (n 30) introductory note to s 535, marginal note 23.

has an opportunity to use the software, ensuring access to the software can simultaneously be viewed as a specific result derived from the trader's performance. The trader provides the consumer with access to the cloud service and maintains this accessibility for the consumer for the duration of the contract's validity. The obligation to maintain the thing requires a performance on the trader's part, which has a specific result in the form of maintaining the object of the contract in such a condition that it is suitable for use under the contract.

Although, as noted above, the German BGH has deemed ASP contracts to be lease contracts, it also has, on the other hand, applied the rules applicable to contracts for work to a contract that had as its substance creating a personal Web site for the customer and maintaining it on the Internet[*46]. Such an obligation, by which the Web site must be accessible to third parties via the Internet under the usual conditions at all times, is an obligation under a contract for work. Unlike in the case of ASP contracts, this entails not merely providing access to a particular possibility for storing data; rather, what the trader promises to the consumer is in some sense a specific result.[*47] I agree that such contracts are likely to be contracts for work, yet comparing them to ASP contracts leads to the question of whether maintaining permanent access to a Web site is comparable to maintaining permanent access for the consumer to a cloud environment or a piece of Web-based software.

German legal literature has suggested that software-as-a-service contracts may indeed be oriented toward achievement of a specific result even though the contractor does not normally perform any work that is specific to the user, instead maintaining access to the cloud environment for the consumer only as a standardised act that is not normally active.[*48] The foregoing arguments are understandable, yet if these criteria are taken as a basis, a question naturally arises as to whether contracts involving streaming (as with Spotify or Netflix) could be considered to fall under work contracts *versus* lease contracts. Under such contracts, access to specific music or other content is ensured for consumers in a particular geographical area, and making a particular piece of music by a particular artist available to be played by the consumer on some device is likewise a rather standardised act. Yet contracts for streaming applications have been treated as contracts for work in the German literature[*49] and should be qualified as contracts for work under Estonian law too, in my opinion.

While, as was noted above, the possibility of entering into a lease contract for the supply of digital content and services is recognised under the prevailing view in Germany, this stance has been criticised. For example, some critics have pointed out that the associated situation involves not just a temporally limited right to use a digital application but also the use of several services, by which various of the customer's economic objectives are fulfilled.[*50]

In the Estonian legal literature meanwhile an opinion has been expressed that software-as-a-service contracts entail provision of a service with the assistance of software. Generally, the contract is for work such as word-processing, accounting services, storage and processing of data, or the like, although in any specific case the form might involve a lease contract, usufructuary lease contract, or mixed contract.[*51] Thus, the definitive qualification of such contracts is left open, although the authors appear to lean toward favouring the application of rules governing contracts for work.

Analysis of the trader's obligations reveals that qualifying these obligations under either a contract for lease or one for work is not clear-cut. The performance of the trader could, in principle, be viewed both as allowing the consumer to use software and as providing a service with a specific result. I tend to see this more as providing a service, for the reasons outlined above. To examine the possible qualification of contracts for the supply of digital services in greater depth, one must assess the obligations of the consumer as well.

46 *Internet-System-Vertrag* in German.

47 [2010] NJW 1449, 'BGH Qualifizierung eines Internet-System-Vertrags als Werkvertrag'.

48 'Bericht Der Arbeitsgruppe „Digitaler Neustart"' (n 25) 143.

49 Schmidt-Kessel and others (n 18) 62.

50 Kirn and Müller-Hengstenberg (n 26) 435.

51 Kalamees and others (n 8) 259.

3.2. Obligations of the consumer

Under Section 271 LOA, the lessee undertakes to pay a fee to the lessor. Under Subsection 276(2), the lessee is obliged also to use the thing with care and in accordance with the intended purpose that forms the basis for the lease. The obligation of the lessee to return the thing to the lessor upon expiry of the contract is set out in Subsection 334(1) of the LOA.

Paying a fee or using the object of the contract with care in accordance with its intended purpose are not problematic for the contract's qualification as a lease contract. What is problematic is application of the rules that are to be applied upon expiry of the term of contract. Under Section 334 LOA, the lessee must return the thing to the lessor upon expiry of the contract's validity. The commentary to the Law of Obligations Act specifies that this is one of the main obligations of the lessee.[*52] In addition, there are rules specifying the condition in which the thing must be returned. No such moment comes to pass, however, when one is using a cloud service, as the server space as such is not returned. At some point, the consumer loses access to storage space in the cloud or to a computer program hosted in the cloud, but the consumer does not perform any act, he does not vacate any premises, and he does not return anything to the lessor in a manner that would be comparable to a transfer of possession of a thing. Consequently, the rules set forth in Section 334 on the condition of the thing being returned and the accompanying liability, due to their nature, would not be applicable. In consequence, these issues, which are of such great importance in leasing of a corporeal thing and which can give rise to a number of problems in practice[*53], are not at all characteristic of digital services. This aspect of the matter is bound up with the question analysed above, of what can be the object of a lease contract.

In the case of contracts for work, in turn, the main obligation of the customer under Section 635 LOA is to pay remuneration for the work. This does not pose a problem with regard to qualifying the contract at issue as a contract for work. The remaining obligations of the customer, such as those under Section 638 (the obligation to accept the work) and Section 652 (the obligation of the contractor to co-operate as necessary for performance of the contract), are accessory obligations.[*54] They pose no obstacles to qualifying the supply of digital services as carried out under a contract for work.

Therefore, one can conclude that problems in assessing the obligations of the consumer in the context considered here arise with lease contracts but not with contracts for work.

3.3. Supply of digital services as a continuing obligation

Digital services can be supplied through a single act of supply in the meaning of Article 11(2) of the Directive, with one example being the translation of a document by means of an online software application.[*55] Many digital services, however, primarily involve continuous supply over some span of time in the sense of Article 11(3) of the Directive, on the basis of which the trader is liable for a lack of conformity that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the contract. Contracts for cloud services and software as a service are among those that involve continuing obligations.

Contracts for the supply of cloud services or other, similar digital services could therefore be easily qualified as lease contracts, since lease contracts involve continuing obligations[*56]. In contrast, the qualification of contracts for the supply of digital services that entail continuous or repeated supply as contracts for work is more complicated in this respect.

In both Estonian and German legal literature, the opinion has been expressed that, since a contract for work is concluded for the purpose of achieving a result[*57] and although performance under a contract for work may continue over an extended time, the underlying relationship does not normally involve a

52 Varul and others, *Võlaõigusseadus II, Kommenteeritud Väljaanne* (n 8) 237.

53 For example, when a lessee fails to vacate a leased flat after the contract ends.

54 Varul and others, *Võlaõigusseadus III Kommenteeritud Väljaanne* (n 34) 39.

55 C Wendehorst in J Stabentheier, C Wendehorst, and B Zöchling-Jud (eds), *Das Neue Europäische Gewährleistungsrecht – Zu Den Richtlinien (EU) 2019/771 Über Den Warenkauf Sowie (EU) 2019/770 Über Digitale Inhalte Und Digitale Dienstleistungen* (Manz 2019) 115.

56 Varul and others, *Võlaõigusseadus II, Kommenteeritud Väljaanne* (n 8) 236.

57 Varul and others in *Võlaõigusseadus III Kommenteeritud Väljaanne* (n 34) 35.

continuing obligation.[*58] This is only a general rule, however. In contrast, the commentary on the Estonian Law of Obligations Act points to the example of a contract for work as creating a continuing obligation when a trader orders a service for maintenance of hardware and software used in that trader's business from a third party. Here, the conforming result is the smooth operation of the hardware and software for the trader's business activities.[*59] Also, a German commentary expresses the view that the determining factor in qualifying a contract as a contract for work is not whether an act under the contract should be performed once, which would indicate a contract for work, as opposed to continuously, which would indicate a contract for services. Such a distinction is not provided for in Section 631 BGB and therefore cannot serve as the basis for distinguishing between distinct types of contracts.[*60]

In my view, contracts for work can involve continuing obligations. Electronic-communications contracts or contracts for daily cleaning services would also be appropriate examples here. Consequently, the continuous nature of certain digital services, among them the provision of cloud services, should not rule out the qualification of any specific contract as a contract for work under Estonian law.

4. Conclusion

This article presented an analysis of the qualification of contracts for the supply of digital content and digital services under Estonian law. Particular focus was placed on cloud services contracts and software as a service contracts.

As the object of a lease contract has to be a thing, concluding a lease contract is certainly a possible form for the supply of digital content or digital services where the digital content is stored on some physical medium and this medium is delivered to the consumer under the lease contract. Furthermore, German court practice qualifies cloud-services contracts as lease contracts even if no thing is delivered, as long as the software is stored somewhere on some physical medium. To my knowledge, no similar court practice exists in Estonia, and, therefore, the question arises of whether granting use of a thing could also be interpreted so broadly under Estonian law. It is my opinion that the benefit the consumer receives under such a contract is not the use of a thing and the connection to an actual physical thing (for example, a server) cannot be so remote.

In the case of a usufructuary lease contract, the object of the contract can be an incorporeal object. Yet another distinguishing characteristic of a usufructuary lease contract, under Estonian law and under German law as well, remains: the element of obtaining fruit. This requirement excludes the possibility of qualifying such contracts as usufructuary lease contracts.

The supply of digital content and digital services, including the provision of cloud services, is normally oriented toward achievement of a result. This orientation is characteristic of contracts for work; therefore, contracts for the supply of digital services should be qualified as contracts for work rather than contracts for services, in practice. Said qualification is not precluded by the continuous supply of digital services, as contracts for work may well involve continuing obligations. Likewise, this conclusion should not be affected by the fact that providing the digital service may be linked also to actions of third parties, such as the consumer's Internet service provider.

Whether the obligations of the trader are rather more characteristic of work or of lease is difficult to ascertain precisely. On the one hand, the consumer has the opportunity to use software, but, on the other hand, the obligation to ensure continuous access can be seen as a specific result that is dependent on the actions of the trader. At the same time, unlike in the case of lease contracts, when one applies the rules pertaining to contracts for work, the supply of digital content or digital services presents no difficulties related to the object of the contract or in relation to subjecting the obligations of the consumer to the rules on contracts for work. Therefore, cloud-services contracts and software-as-a-service contracts should be qualified as contracts for work, not as leasing contracts, under Estonian law. Accordingly, there is no need to apply the rules on lease contracts by way of analogy.

58 Busche in *Münchener Kommentar Zum BGB 8. Auflage 2020* (n 30) s 631, marginal note 1.

59 Varul and others in *Võlaõigusseadus III Kommenteeritud Väljaanne* (n 34) 37.

60 Mansel in *Jauernig Bürgerliches Gesetzbuch Kommentar* (n 35) s 631 (preliminary remark), marginal note 3.

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Online Hearings in Proceedings before International Commercial Courts[*1]

1. Introduction

Over the last six years, several jurisdictions, across Europe, have established international commercial courts or chambers for international commercial matters. This article focuses on the possibility of online hearings via videoconferencing in proceedings before international commercial courts in Europe. The possibility of using video technologies enables the lawyers, parties, and witnesses to follow the proceedings from different locations and, accordingly, saves time and money on otherwise necessary travel. In these times of the COVID-19 pandemic, the topic is more relevant than ever.

For this purpose, the article provides a brief descriptive overview of the key features of the international commercial courts and chambers in Europe, including the possibilities for using communications technology to conduct online proceedings. Based on these findings, the current measures and developments in the context of the coronavirus pandemic are described. Furthermore, opportunities for using videoconferencing techniques in the context of the cross-border taking of evidence are discussed, with the relevant portion of the paper focusing on the EU Regulation on cooperation between the courts of the member states in the taking of evidence. The final part deals with the question of whether the recast of that regulation is going to simplify the cross-border taking of evidence by means of videoconferencing in practice.

2. International commercial courts in Europe

Notwithstanding the fact that there is no universally accepted definition for an international commercial court, some characteristics can be identified: The international commercial courts and chambers presented in the following discussion are, in fact, national courts or chambers and therefore part of their national court systems that express an international dimension by dealing with the settlement of international commercial disputes. As much as they differ in their details, they all have in common that they combine elements of traditional court litigation and arbitration – in particular, through the introduction of English as the language of proceedings, in order to increase the attractiveness of the respective domestic civil-justice systems. For this reason, the Commercial Court of England in Wales, located in London and established already in 1895, is not considered in this article. Rather, the focus is on the newly established chambers and courts in Germany, France, and the Netherlands.

[1] This article is based on my PhD thesis, defended in July 2021.

2.1. Germany

2.1.1. Projects in several German states

In 2010, several district courts in the German state of North Rhine-Westphalia started a model project and established special international chambers offering the parties the option of choosing English as the language of the oral proceedings. The conditions for the jurisdiction of these special chambers were the existence of a corresponding agreement between the parties, a waiver of the right to an interpreter, and an international connection of the facts.[*2] This option has hardly ever been used in practice.[*3]

In 2016, the 'Justice Initiative Frankfurt' was launched, under the leadership of Burkhard Hess, Thomas Pfeiffer, Christian Duve, and Roman Poseck, with the aim of strengthening the attractiveness of Frankfurt as a dispute-resolution centre.[*4] A combination of various measures was envisaged, particularly the provision of a well-equipped court and experienced judges with good language skills coupled with a modern process design to enable a practical, user-friendly framework for the settlement of international commercial disputes.[*5]

In the implementation of these proposals, an English-speaking chamber was established within the Frankfurt am Main District Court in early 2018.[*6] This chamber is composed of one professional judge (as presiding judge) and two honorary judges as so-called commercial judges. The chamber is competent for the settlement of international commercial disputes under the following conditions: it has jurisdiction if the case pertains to an international commercial matter, and, in addition, before the deadline for the statement of defence passes, the parties have to declare that they would like to plead in English during the oral hearings and waive the right to have an interpreter.[*7] There are no additional court fees for proceedings before this chamber.

Since 1 May 2018, the Hamburg District Court too has offered the option of hearing cases in English with regard to civil law cases in the areas of private international law, patent and trademark law, as well as for disputes unfair competition law, by mutual consent of the parties.[*8]

In November 2020, the German state of Baden-Württemberg established two (on-demand) English-speaking commercial courts as part of the district courts of Mannheim and Stuttgart.[*9] In contrast to the chamber at the district court of Frankfurt, the parties may choose whether to have their case heard by the civil chamber with its three professional judges or, alternatively, by the chamber for commercial matters, comprising one professional judge and two commercial judges.[*10] The commercial court in Stuttgart is competent for disputes in connection with the acquisition of companies or shares of companies, disputes resulting from mutual commercial transactions with a value in dispute of at least €2 million, and corporates disputes.[*11] The jurisdiction of the Mannheim Commercial Court is very similar but is restricted in that it is competent only for hearing disputes with a value in dispute of at least €2 million.[*12] Both courts are staffed with highly qualified and experienced judges who possess excellent skills in the English language.[*13]

2 Johannes Riedel, 'Englisch als Verhandlungssprache vor Gericht' in Mathias Habersack and others (eds), *Festschrift für Eberhard Stilz zum 65. Geburtstag* (C.H. Beck 2014) 502.

3 Christoph A Kern and Georg Dalitz, 'Netherlands Commercial Court und Maritieme Kamer – Englisch als Verfahrenssprache in den Niederlanden' (2016) 21 ZZPInt 119, 121; Riedel (n 2) 503.

4 Burkhard Hess, 'The Justice Initiative Frankfurt am Main 2017' (31 March 2017) <https://conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/> accessed 15 July 2021.

5 Ibid.

6 'Chamber for International Commercial Disputes' <https://ordentliche-gerichtsbarkeit.hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lg-frankfurt-am-main/chamber-international> accessed 15 July 2021.

7 Ibid.

8 'LG Hamburg Zuständigkeiten' <https://justiz.hamburg.de/landgericht-hamburg/zustaendigkeit/> accessed 15 July 2021.

9 'Commercial Court' <www.commercial-court.de/en/> accessed 15 July 2021; see also Patrick Melin, 'Der neue Stuttgart Commercial Court: – eine Antwort auf die Herausforderung, internationale Wirtschaftsrechtsstreitigkeiten vor staatliche Gerichte zu bringen –' [2020] BB 2702.

10 'Commercial Court – Sites' <www.commercial-court.de/en/sites> accessed 15 July 2021.

11 Ibid.

12 Ibid.

13 'Commercial Court' (n 9).

2.1.2. Legislative proposals

Of course, the establishment of commercial courts or chambers for international commercial matters is only a first step toward attracting more economically significant international proceedings to Germany. In addition, there has been discussion of a draft bill providing for the possibility of using the English language without limitation in court proceedings.[*14]

Section 184 of the German Courts Constitution Act (GVG) states that the language of the court shall be German. Exceptions to this are permitted only within strict limits. Section 185 (1) provides that an interpreter shall be called in if persons are participating in the hearing who do not have a command of the German language. In accordance with section 185 (2) an interpreter may be dispensed with if all the persons involved have a command of the foreign language used.

Only under a broad interpretation of section 185 (2) of the GVG, which the projects presented just above make use of, is it possible at all to conduct some steps of the procedures in English.[*15] This possibility is essentially limited to the oral hearing and the submission of documents, while judgements and other court decisions, along with the minutes of the proceedings, must be delivered in German.[*16] In light of the requirements of the German GVG, therefore, only a few procedural steps may actually be carried out in English.

Against this backdrop, corresponding amendment to the above-mentioned provisions of the GVG, particularly its Section 184, is necessary, as provided for in the draft bill on the introduction of Chambers for International Commercial Matters, which has already been introduced on two occasions, in 2010[*17] and 2014[*18], but proved unsuccessful. The prospect of Brexit gave additional impetus to revival of plans to introduce English as an optional court language. In February 2018, the draft was again introduced. It remains to be seen whether this time it is going to be successful.

2.1.3. The possibility of online hearings

Section 128a of the German Code of Civil Procedure (ZPO) allows oral hearings to use image and sound transmission. This provision is, of course, applicable also in proceedings before German commercial courts or chambers for international commercial matters.

Pursuant to section 128a (1) of the ZPO, the court may permit the parties, their attorneys-in-fact, and advisers to stay at another location in the course of a hearing for oral argument and to take actions in the proceedings from there. Section 128a (1) of the ZPO does not require the consent of the parties for this.[*19] However, it is important to note that the parties are always free to appear in the courtroom physically; a digital hearing cannot be forced upon them.[*20] This produces a *de facto* requirement for consent. Under section 128a (2) of the ZPO, the court may permit a witness, an expert, or a party to the dispute, upon a corresponding application having been filed, to stay at another location in the course of an examination. The images and sound of the hearing or examination shall be broadcast in real time to this location and to the courtroom. However, the broadcast images and sound will not be recorded, either in the cases referred to in paragraph 1 or in those specified in paragraph 2. Unlike the parties', the court's presence must always be

14 Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen (KfiHG), Bundestagsdrucksache 19/1717, 18 April 2018.

15 Christian Armbrüster, 'Englischsprachige Zivilprozesse vor deutschen Gerichten?' [2011] ZRP 102; Georg Dalitz, 'Justizinitiative Frankfurt – too little too late?' [2017] ZRP 248; Oliver Sieg, Henning Schaloske, and Daniel Kreienkamp, 'In English, please!: Englisch als Gerichtssprache' [2010] AL 309.

16 Clemens Lückemann, '§ 185 GVG' in Richard Zöller (ed), *Zivilprozessordnung* (33rd edn, Verlag Dr. Otto Schmidt 2020) para 4; Walter Zimmermann, '§ 185 GVG' in Wolfgang Krüger and Thomas Rauscher (eds), *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen: Bd. 3 §§ 946-1117, EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht* (33. Aufl., C.H. Beck 2017) para 2.

17 Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen (KfiHG), Bundestagsdrucksache 17/2163, 16 June 2010.

18 Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelssachen (KfiHG), Bundestagsdrucksache 18/1287, 30 April 2014.

19 Christoph A Kern, '§ 128a ZPO' in Friedrich Stein and Martin Jonas (eds), *Kommentar zur Zivilprozessordnung: Bd. 2 §§ 78-147* (23rd edn, Mohr Siebeck 2016) para 11; Astrid Stadler, '§ 128a ZPO' in Hans-Joachim Musielak and Wolfgang Voit (eds), *Zivilprozessordnung: mit Gerichtsverfassungsgesetz* (17th edn, Verlag Franz Vahlen 2020) para 2.

20 Kern (n 19) para 15; Jörn Fritsche, '§ 128a ZPO' in Wolfgang Krüger and Thomas Rauscher (eds), *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen: Bd. 1 §§ 1-354* (6th edn, C.H. Beck 2020) para 5; Reinhard Greger, '§ 128a ZPO' in Richard Zöller (ed), *Zivilprozessordnung* (33rd edn, Verlag Dr. Otto Schmidt 2020) para 3.

maintained in the courtroom, for compliance with the principle of public hearings.*[21] For this reason, it is not possible for the judge to participate in online proceedings from his or her home desk. Therefore, fully virtual proceedings are not (yet) possible.

2.2. France

As for France, an international division was already established within the Paris Commercial Court in the 1990s. The international division accepts documents and allows hearings in the English language (with the consent of the parties).*[22] However, this possibility received little public attention and has rarely been used in practice.*[23] In March 2018, the Paris Court of Appeal too established an international chamber (hereinafter referred to as the ICCP-CA), for purposes of complementing the existing first-instance chamber.

2.2.1. Rules of procedure

For proceedings before the newly established chamber, the protocol relating to procedural rules applicable to the International Chamber of the Court of Appeal of Paris, or the ICCP-CA protocol, has been created. Under this protocol, the new chamber has jurisdiction to hear appeals of decisions in international commercial and financial disputes (per its Article 1.1). In particular, it will rule on appeals arising from judgements in first instance by the pre-existing International Division of the Paris Commercial Court (per Article 1.3).

The ICCP-CA is composed of judges with expertise in international commerce and the necessary English-language skills. By default, the hearing is held in French, but the parties, witnesses, experts, and foreign lawyers may express themselves in English (under Article 2.4 of the ICCP-CA protocol). In this case, however, simultaneous translation is required (per Article 3.3). In addition, the chamber accepts documents in English without translation (see the ICCP-CA protocol's Article 2.2). While the judgements will be given in French, they may be accompanied by a translation into English by a sworn translator (under Article 7 of the protocol). Regrettably, the numbers of cases heard by the chamber have not been published, thus far. Seventeen cases are reported to have been filed by December 2018.*[24]

2.2.2. The possibility of online hearings

The French Code of Civil Procedure (*Code de procédure civile*) does not provide for the use of videoconferencing in civil proceedings. However, Article L111-12 of the Code of Judicial Organisation (*Code de l'organisation judiciaire*) allows court hearings to take place in several courtrooms directly connected by an audiovisual means of telecommunication that guarantees the confidentiality of the transmission. One or more of these courtrooms may be outside the jurisdiction of the court seised. Accordingly, it is not possible, for example, to conduct a witness examination by means of videoconferencing beyond the premises of a court.

2.3. The Netherlands

In the Netherlands (more precisely, in Amsterdam), the Netherlands Commercial Court opened its doors in January 2019. This court is composed of the first-instance NCC District Court (hereinafter referred to as the NCC) as a specialised chamber of the Amsterdam District Court (the *Rechtbank*), and the NCC Court of Appeal (hereinafter referred to as the NCCA) as a special chamber of the Amsterdam Court of Appeal (the *Gerechtshof*).

21 Kern (n 19) para 18; Stadler (n 19) para 2.

22 Emmanuel Jeuland, 'The International Division of the Paris Commercial Court' [2016] TCR 143, 144. – DOI: https://doi.org/10.5553/tcr/092986492016024004010.

23 For reasons, see Jeuland (n 22); see also Alexandre Biard, 'International Commercial Courts in France: Innovation without Revolution?' [2019] Erasmus Law Review 24, 27. – DOI: https://doi.org/10.5553/elr.000111.

24 Biard (n 23) 25.

2.3.1. Rules of procedure

A special set of rules was created for proceedings before the NCC and also the NCCA, the Rules of Procedure of the Netherlands Commercial Court (NCC Rules). Article 1.3 of the NCC Rules defines the competence of the NCC and the NCCA. Since the NCC is a chamber of the Amsterdam District Court, its jurisdiction must therefore be established first. This can be done either by the parties concluding an (international) choice-of-court agreement in favour of the Amsterdam District Court or, in the absence of a jurisdiction agreement, the Amsterdam District Court having jurisdiction for other reasons. In order to establish the jurisdiction of the NCC within the Amsterdam District Court, there must be a civil or commercial dispute of an international nature. Finally, the parties must agree in writing to be heard in English before the NCC. The NCCA is responsible for appeals against judgements of the NCC of first instance.

Article 2.1 of the NCC Rules states that the language of the proceedings is English. However, not only are the proceedings conducted in the English language, but also, at least in principle, the judgements will be provided in the English language. The proceedings take place before a panel of judges selected for their broad base of expertise in international commercial litigation and their English-language skills.[*25]

Finally, the NCC is to be self-supporting, which is why the NCC charges a court fee that is higher than that for standard civil proceedings.[*26] Only six weeks after its opening, the first case was heard before the NCC, and just a few days later the first judgement was pronounced. So far, the court has heard ten cases.[*27]

2.3.2. The possibility of online hearings

There are no specific provisions in the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) providing for the use of videoconferences. The NCC Rules, however, enable the use of modern communications technology in proceedings before the NCC and the NCCA. Pursuant to Article 3.2.2, the court may direct that communication with the court be done by telephone, videoconferencing, or any other suitable means. The court may also direct that an audio or video recording be made by or on behalf of the court (per Article 7.7.2). In addition, Article 7.8 addresses combined hearings with a closely connected foreign case, which may be held via videoconferencing or any other suitable means.

2.4. The Standing International Forum of Commercial Courts

In 2017, Lord Thomas (former Lord Chief Justice of England and Wales) initiated the establishment of the Standing International Forum of Commercial Courts. The forum aims to promote co-operation and collaboration among commercial courts around the world. The reports from the first two meetings in London and New York attest to an increased need for the use of new technologies in proceedings before commercial courts.[*28] This accentuates even further the growing need for increased use of modern communications technology not only in Europe but worldwide.

3. Recent developments related to the COVID-19 pandemic

The coronavirus pandemic has had an impact on all aspects of private and public life both, not least on the work of the courts. Infection control and health-safety measures require a radical reduction in personal contacts. Most clearly from the end of March 2020, court hearings had to be postponed, and time limits

25 Eddy Bauw, 'Commercial Litigation in Europe in Transformation: The Case of the Netherlands Commercial Court' [2019] Erasmus Law Review 15, 17. – DOI: https://doi.org/10.5553/elr.000110.

26 Ibid; Harriët Schelhaas, 'The Brand New Netherlands Commercial Court: A Positive Development?' in Xandra Kramer and John Sorabji (eds), *International Business Courts: A European and Global Perspective* (Eleven International Publishing 2019) 55–56.

27 'Judgments: Netherlands Commercial Court' <www.rechtspraak.nl/English/NCC/Pages/judgments.aspx> accessed 15 July 2021.

28 Standing International Forum of Commercial Courts, 'Report on the first meeting, London, 4–5 May 2017' <http://sifocc.prod.wp.dsd.io/app/uploads/2018/03/First_SIFOCC_Report_-_FINAL.pdf> accessed 15 July 2021; Standing International Forum of Commercial Courts, 'Report of the Second Meeting, New York, 27–28 September 2018' <http://sifocc.prod.wp.dsd.io/app/uploads/2019/02/Report-of-the-Second-SIFoCC-Meeting-New-York-2018.pdf> accessed 15 July 2021.

needed to be extended. This could not, of course, be a long-term solution. Against this background, the possibility of conducting online proceedings has never been more relevant.

3.1. Germany

Ever since 2002, section 128a of the ZPO (which has been in force in its current version since 2013) has allowed for the possibility of online hearings. So far, however, the relevant provision has received little attention.[*29] This has now changed, on account of the coronavirus pandemic. Since March 2020, the possibility of video hearings under section 128a of the ZPO has been discussed extensively in law journals and blogs.[*30]

In practice, however, the opportunity of video hearings is still not exercised extensively. The experience with online hearings varies significantly between district courts.[*31] While online hearings have already been conducted in remarkable numbers at some district courts, other district courts have not yet recorded a single online hearing.[*32] The reasons for this are manifold and cannot be ascertained with absolute certainty. One factor is most assuredly the fact that many courts simply lack the technical equipment necessary for online hearings.[*33] Moreover, there are cases in which the court or the lawyers are unwilling to conduct online proceedings – complaints have been raised from both the judiciary and the legal profession.[*34] Finally, not all proceedings are suitable for video hearings – for example, in cases wherein personal impressions are essential in the context of a witness examination.[*35] This issue notwithstanding, a phenomenon of increasing awareness of the need for online hearings can be observed, which one hopes will continue after the pandemic.

3.2. France

Because the French Code of Civil Procedure does not make any provisions for conducting proceedings by means of video transmission, such a provision had to be created in the context of the COVID-19 pandemic. The French Government issued, among other orders, an order adapting the rules applicable to the judiciary ruling in non-criminal matters.[*36] Article 7 gives the judge the option of determining that the hearing or examination shall be held via a means of audiovisual telecommunication that makes it possible to verify the identity of the persons participating in it and guarantees the quality of the transmission and the confidentiality of the exchanges between the parties and their lawyers. In the event of the technical or material impossibility to employ such a means, the judge may decide to hear the parties and their lawyers, or the person to be examined, by any means of electronic communication, including telephone, which makes it possible to be assured of their identity and guarantee the quality of transmission and the confidentiality of exchanges.

29 Michaela Balke, Thomas Liebscher, and Richard Helwig, 'Die Coronakrise und der digitale Zivilprozess: Wie die Videokonferenz den Zivilprozess überleben lässt' [2020] AnwBl 366, 367; Philipp Reuß, 'Die digitale Verhandlung im deutschen Zivilprozessrecht' [2020] JZ 1135. – DOI: https://doi.org/10.1628/jz-2020-0360; Benedikt Windau, 'Die Verhandlung im Wege der Bild- und Tonübertragung: Praxisorientierte Überlegungen zu Gegenwartsproblemen des Zivilprozessrechts' [2020] NJW 2753.

30 Martin Fries, 'Die vollvirtuelle Verhandlung – Quo vadis, § 128a ZPO ?' [2020] GVRZ 27. – DOI: https://doi.org/10.9785/gvrz-2020-030217; Reinhard Greger, 'Der Zivilprozess in Zeiten der Corona-Pandemie – und danach' [2020] MDR 509. – DOI: https://doi.org/10.9785/mdtr-2020-740903; Reto Mantz and Jan Spoenle, 'Corona-Pandemie: Die Verhandlung per Videokonferenz nach § 128a ZPO als Alternative zur Präsenzverhandlung' [2020] MDR 637. – DOI: https://doi.org/10.9785/mdtr-2020-741103; Reuß (n 29); Windau (n 29).

31 Mantz and Spoenle (n 30) 641–43; Annelie Kaufmann, 'Gerichte wollen, Anwälte nicht – oder andersrum?' (*Legal Tribune Online*, 16 December 2020) <www.lto.de/recht/justiz/j/video-verhandlungen-128a-zpo-online-verfahren-gerichte-anwaelte-antrag-abgelehnt-ermessen-corona/> accessed 15 July 2021.

32 Kaufmann (n 31).

33 Balke, Liebscher, and Helwig (n 29) 368; Fries (n 30) para 4; Greger (n 30) 513; Reuß (n 29).

34 Kaufmann (n 31).

35 Fritsche (n 20) para 14; Mantz and Spoenle (n 30) 641; Reuß (n 29) 1137; Windau (n 29) 2756.

36 Ordonnance n° 2020-304 du 25 mars 2020 portant adaptation des règles applicables aux juridictions de l'ordre judiciaire statuant en matière non pénale et aux contrats de syndic de copropriété.

3.3. The Netherlands

The Dutch Government adopted a general regulation on the settlement of cases by the judiciary during the pandemic.[*37] Pursuant to its Article 1.2.1, the court or tribunal shall determine whether a hearing is to take place with the parties and other participants in the proceedings physically present or, instead, online. If it is not possible to hear the case physically or online, the hearing may take place by telephone. Also, it is possible to combine these types of proceedings (physical, online, and by telephone).

For proceedings before the Netherlands Commercial Court, hearings may, wherever this is possible and appropriate, be held electronically, via a conference call, or with videoconferencing equipment.[*38] The NCC held its first public hearing using videoconference equipment on 10 April 2020.[*39] Any member of the public wishing to attend a videoconference hearing must register via e-mail to obtain a login link.[*40] The NCC website provides a detailed manual for attending an NCC Skype hearing.[*41]

4. Cross-border online hearings

The measures presented above are limited to the national level, however. If the parties, the witnesses, or experts to be heard are located in a different state than the court, evidence cannot simply be taken abroad. This is because the conducting of an oral hearing and the taking of evidence are fundamentally sovereign acts.[*42] For this reason, a court wishing to perform a sovereign act abroad must – though there are exceptions – rely on the use of mutual legal assistance involving the other state.[*43] The extent to which the use of videoconferencing technologies is possible in this context is examined in the discussion that follows.[*44]

4.1. The Taking of Evidence Regulation[*45]

Within the European Union, the Regulation on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters, or the Taking of Evidence Regulation, applies. This instrument improves and simplifies the co-operation between the courts in the cross-border taking of evidence within the member states for the purpose of the proper functioning of the internal market (see its Recital 2).

The regulation does not contain a definition for 'taking of evidence'. In particular, it is not clear whether the hearing of parties too falls under this term and, thereby, within the scope of the regulation. The latter ambiguity results from the fact that the legal systems of the member states are structured very differently in this respect.[*46] For example, German law strictly differentiates between the position of a witness and the position of a party (the party to a legal dispute can never be a witness in this context), whereas Dutch law

37 Tijdelijke algemene regeling zaaksbehandeling Rechtspraak.

38 'COVID-19: NCC is open for business, but restrictions apply' (25 March 2020) <www.rechtspraak.nl/English/NCC/news/Pages/COVID19-NCC-is-open-for-business-but-restrictions-apply.aspx> accessed 15 July 2021.

39 'The Netherlands Commercial Court and COVID-19: case management, videoconference hearings and eNCC' (27 May 2020) <www.rechtspraak.nl/English/NCC/news/Pages/The-Netherlands-Commercial-Court-and-COVID19-case-management-videoconference-hearings-and-eNCC.aspx> accessed 15 July 2021.

40 'COVID-19: NCC is open for business, but restrictions apply' (n 38).

41 'Manual for attending an NCC Skype hearing' <www.rechtspraak.nl/SiteCollectionDocuments/manual-for-attending-an-NCC-Skype-hearing.pdf> accessed 15 July 2021.

42 Reinhold Geimer, *Internationales Zivilprozessrecht* (8th edn, Verlag Dr. Otto Schmidt 2020) para 120, 442. – DOI: https://doi.org/10.9785/9783504386566; Heinrich Nagel and Peter Gottwald, *Internationales Zivilprozessrecht* (8th edn, Verlag Dr. Otto Schmidt 2020) para 7.35. – DOI: https://doi.org/10.9785/9783504387099.

43 Haimo Schack, *Internationales Zivilverfahrensrecht: mit internationalem Insolvenzrecht und Schiedsverfahrensrecht* (7th edn, C.H. Beck 2017) para 797. – DOI: https://doi.org/10.17104/9783406746437; Geimer (n 42) paras 120 and 442.

44 See General Secretariat of the Counsel, 'Guide on videoconferencing in cross-border proceedings' (2013) <https://op.europa.eu/en/publication-detail/-/publication/bbdbd7f4-7da8-479d-ad83-0b56463d8e32> accessed 15 July 2021.

45 Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L174/1.

46 See Jan von Hein, 'Art. 1 EuBVO' in Thomas Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht: Bd. 2 EG-VollstrTitelVO – EG-MahnVO – Eu-KPfVO – HProrogÜbk 2005 – EG-ZustVO 2007 – EG-BewVO – EG-InsVO* (4th edn, Verlag Dr. Otto Schmidt 2015) para 15.

recognises a party as a valid witness.*[47] Against this background, the term 'taking of evidence' should be defined in a broad sense and encompass the hearing of parties.*[48]

The Taking of Evidence Regulation distinguishes between two forms of request for cross-border taking of evidence in its Article 1 (1): the court of a Member State may either request the competent court of another Member State to take evidence (per Article 10 *et seq.*) or request to take evidence directly in another Member State (under Article 17). In cases wherein evidence is taken by the requested court, the parties and, if any, their representatives, have the right to be present at the performance of the taking of evidence by the requested court, if this is provided for by the law of the requesting court's Member State (see Article 11). The same applies to the presence and participation of representatives of the requesting court (including members of the judicial personnel designated for this purpose by said court), under Article 12. Where necessary, in executing a request the appropriate coercive measures shall be applied by the court that is subject to the request (per Article 13). The request may be refused only for the reasons set forth in Article 14 – e.g. because there exists a right to refuse to give evidence.

In contrast, the direct taking of evidence by the requesting court is unlike taking of evidence by the requested court in that it may take place only if it can be performed on a voluntary basis, without the need for coercive measures (see Article 17 (2)).

Both forms of taking evidence may be carried out using communication technology, such as videoconferences and teleconferences (see Article 10 (4) and Article 17 (4), respectively). However, while a request for the taking of evidence by means of communication technology shall be complied with in the context of the taking of evidence by the court requested to do so unless this is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties, such use is only to be encouraged in the context of the direct taking of evidence by the requesting court. The use of videoconferencing in the context of the direct taking of evidence could hardly be formulated in a more non-binding way. Finally, difficulties may arise from the fact that not all civil courts in each Member State have the necessary equipment in place for conducting videoconferences.*[49] It remains to be seen whether this will change in the wake of the coronavirus pandemic.

4.2. The Hague Convention on the Taking of Evidence Abroad

For the taking of evidence outside the European Union, the Hague Convention on the Taking of Evidence Abroad applies, provided that both the requesting state and the state receiving the request are signatories to the convention. Although the convention does not make any provisions for the taking of evidence by means of videoconferencing, examination by videoconference could be interpreted as a special form of execution of a request for legal assistance within the meaning of Article 9 (2).*[50]

4.3. The recast of the Taking of Evidence Regulation

In November 2020, the Taking of Evidence Regulation was recast, and it will apply in its new form from 1 July 2022.*[51] The aim in this was to improve the effectiveness and speed of judicial proceedings by simplifying and streamlining the mechanisms for co-operation in the taking of evidence in cross-border proceed-

47 Gerhard Wagner, 'Europäisches Beweisrecht – Prozessrechtsharmonisierung durch Schiedsgerichte' [2001] ZEuP 441, 485 and 494.

48 Hans-Jürgen Ahrens, *Der Beweis im Zivilprozess* (1st edn, Verlag Dr. Otto Schmidt 2015) ch 58, para 43, and ch 59, para 44. – DOI: https://doi.org/10.9785/ovs.9783504384395; von Hein (n 46) para 17.

49 Commission, 'Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of the Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters' COM (2007) 769 final, 4.

50 The Hague Conference on Private International Law – HCCH Permanent Bureau, 'Guide to Good Practice on the Use of Video-Link under the Evidence Convention' (2020) para 53 <https://assets.hcch.net/docs/569cfb46-9bb2-45e0-b240-ec02645ac20d.pdf> accessed 15 July 2021; see also Christian Berger, 'Anhang zu § 363 ZPO' in Friedrich Stein and Martin Jonas (eds), *Kommentar zur Zivilprozessordnung: Bd. 5 §§ 328-510c* (23rd edn, Mohr Siebeck 2015) para 55; Stadler (n 19) para 8.

51 Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2020] OJ L405/1.

ings, through, *inter alia*, the digitalisation of procedures (see Recital 3). Accordingly, the recast focuses on innovations in modern communication technology, such as videoconferencing (see Recital 21 *et seq*.).

The possibility of the requested court using communications technology in the taking of evidence has remained unchanged (see Article 12 (4)). However, there is a new provision for the context of the direct taking of evidence by the requesting court. While Article 17 (4) of the (still) current version of the regulation provides for only encouragement of the use of communications technology, Article 20 of the recast now explicitly deals with the direct taking of evidence via videoconferencing or other distance communications technology: Where evidence is to be taken by examining a person who is present in another Member State, and the court requests the taking of evidence directly, that court shall take the evidence by using videoconferencing or other distance communications technology, provided that such technology is available to the court and the court considers the use of such technology to be appropriate in the specific circumstances of the case. The request is made via a standard form, which can be found in Annex I. Per Article 7, requests shall be transmitted through a new decentralised IT system with due respect for fundamental rights and freedoms.

Since the taking of evidence by videoconferencing is a form of direct taking of evidence, its requirements are governed by Article 19. This means that the request for the direct taking of evidence may only be refused on only those grounds laid out in Article 19 (7). The condition must also apply to the direct taking of evidence by videoconferencing under Article 20. The recast thus strengthens the use of communication technologies.

Nevertheless, the recast of the regulation does not change the fact that some member states still lack the necessary technical equipment. Against this background, it remains open to critical questioning whether the recast will actually lead to expanded use of video technologies in the context of cross-border taking of evidence.

4.4. Use of videoconferencing outside mutual legal assistance

There is controversy over whether evidence may be taken by way of videoconference even outside the arena of mutual legal assistance – in particular, without recourse to the procedure laid down in Article 17 of the Taking of Evidence Regulation. This depends on whether that regulation is exhaustive in nature with regard to video examinations.

The existence of Article 17 (4) especially could speak to an exhaustive nature of the regulation with regard to conducting videoconferences in the context of the taking of evidence, because otherwise there would be no need for a provision under the Taking of Evidence Regulation.[*52] Accordingly, video examination of a person residing in another Member State would qualify as taking of evidence within the meaning employed by the regulation.[*53]

In contrast, a cross-border video examination could be considered to be mere gathering of evidence, for which the Taking of Evidence Regulation does not claim any exhaustive effect.[*54] Although Article 17 (4) of the regulation makes provision for the use of communication technologies, such as videoconferencing, this provision states merely that the use of these technologies is encouraged.[*55]

This view is strongly supported by two decisions of the European Court of Justice (ECJ), which argue against the exclusivity of the Taking of Evidence Regulation. In the first of these, the ECJ ruled that the regulation applies as a general rule only if the court of a Member State decides to take evidence in accordance with one of the two methods provided for by said regulation, in which case it is required to follow the procedures related to those methods.[*56] Against this background, the ECJ concluded that the competent court of a Member State has the power to summon as a witness a party residing in another Member State and to hear that party in accordance with the law of the Member State in which that court is

52 Burkhard Hess, 'Kommunikation im europäischen Zivilprozess: Praktische Erfahrungen mit der justiziellen Kooperation in grenzüberschreitenden Zivilsachen' [2011] AnwBl 321, 324; Schack (n 43) para 807.

53 Götz Schulze, 'Dialogische Beweisaufnahmen im internationalen Rechtshilfeverkehr: Beweisaufnahmen im Ausland durch und im Beisein des Prozessgerichts' [2001] IPRax 527, 529; Astrid Stadler, 'Der Zivilprozeß und neue Formen der Informationstechnik' (2002) 115 ZZP 413, 441; Hendrik Schultzky, 'Videokonferenzen im Zivilprozess' [2003] NJW 313, 314; Stadler (n 19) para 8.

54 Oliver L Knöfel, 'Recht eines "Justizflüchtlings" auf grenzüberschreitende Videovernehmung im europäischen Zivilprozess' [2006] RIW 301, 304; Peter Mankowski, 'Auslandszeugen, Prozesstaktik, Videovernehmung und weitere Optionen' [2014] RIW 397, 400.

55 Knöfel (n 54) 304.

56 Case C-170/11 *Maurice Robert Josse Marie Ghislain Lippens and Others v Hendrikus Cornelis Kortekaas and Others* [2012] ECLI:EU:C:2012:540, para 28.

situated.*[57] The outcome that follows naturally from this decision is to be agreed with, although the significance of the decision itself is limited: The parties' procedural obligation to co-operate is generally accepted (at least if international jurisdiction is given).*[58]

With regard to the conduct of videoconferences, the second judgement is even more interesting. It pertains to the taking of evidence by an expert in the territory of another Member State. In this context, the ECJ ruled that a court wishing to order such an expert investigation is not necessarily required to have recourse to the method of taking evidence laid down in Article 1 (1) (b) and Article 17 of the Taking of Evidence Regulation.*[59] However, the ECJ stated, where the investigation affects the powers of the Member State in which it takes place, the method of taking evidence laid down in those portions of the regulation is the only means to enable a Member State's court to carry out such an investigation directly in another Member State.*[60]

From the impression given by the case law outlined above, one could argue that the Taking of Evidence Regulation is not exclusive with regard also to the examination of a person located in a Member State other than that of the court by means of videoconferencing.*[61] If Article 17 (3)'s explicit mention of the taking of evidence by an expert does not have a restrictive effect, the same probably must apply to the mention of the taking of evidence by videoconferencing in Article 17 (4).*[62]

This view can hardly be supported under the recast of the regulation, however. As has already been pointed out, the recast not only encourages the use of videoconferencing technologies (as the current version does) but explicitly includes video examination in the catalogue of measures falling under the regulation by inserting Article 20.*[63] The Article clarifies that if a court intends to take evidence by examining a person who is present in another Member State, that court shall take evidence using videoconferencing. The use of videoconferencing is, therefore, to be regarded in future as the method of choice for the direct taking of evidence.

Against this background, it is no longer possible to consider examining a person by means of videoconferencing to be a mere evidence-gathering measure.*[64] Rather, it constitutes a method of taking evidence and, therefore, falls within the scope of the Taking of Evidence Regulation. In this respect, the regulation must be regarded as exhaustive. Nevertheless, final binding clarification by the ECJ with regard to the video examination of a person who is present in another Member State would be desirable.

As much as the recast is intended to simplify the cross-border taking of evidence through increased use of video technologies, it clarifies that cross-border videoconferencing is possible only in a manner compliant with the procedure provided for by the regulation. This is regrettable, as the use of mutual legal assistance is always time-consuming. The attractiveness of the presented commercial courts and chambers as a forum for the efficient and speedy resolution of disputes would therefore benefit from making cross-border videoconferencing as easy as possible.

5. Conclusion

The extent to which communication technology is exploited for carrying out online hearings varies greatly among the various international commercial courts and chambers. Since the COVID-19 pandemic reached crisis proportions, increased demand for the use of videoconferencing technologies could be observed in all three jurisdictions (Germany, the Netherlands and France). One would hope that the tendency toward increased digitalisation continues after the pandemic has subsided; however, it seems rather doubtful whether the recast of the Taking of Evidence Regulation will actually contribute to this.

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57 Ibid para 37.

58 von Hein (n 46) para 32; Schack (n 43) para 794; Geimer (n 42) para 431.

59 Case C-332/11 *ProRail BV v Xpedys NV and Others* [2013] ECLI:EU:C:2013:87, para 49.

60 Ibid para 47ff.

61 Stefan Huber, 'Der optionale Charakter der Europäischen Beweisaufnahmeverordnung' [2014] ZEuP 642, 660; von Hein (n 46) para 22; Thomas Rauscher, 'Art. 1 EuBVO' in Wolfgang Krüger and Thomas Rauscher (eds), *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen: Bd. 3 §§ 946-1117, EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht* (5th edn, C.H. Beck 2017) para 12; Karl Kreuzer, Rolf Wagner, and Robert Häcker, 'Q. III. Allgemeine Verfahrensfragen' in Manfred A Dauses and Markus Ludwigs (eds), *Handbuch des EU-Wirtschaftsrechts* (50th edn, C.H. Beck 2020) para 47.

62 Huber (n 61) 660–61.

63 Oliver L Knöfel, 'Der Kommissionsvorschlag von 2018 zur Änderung der Europäischen Beweisaufnahmeverordnung' [2018] RIW 712, 715.

64 See Knöfel (n 63) 715 with regard to the Commission's proposal (COM (2018) 378 final).

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The Electronic Seal as a Solution to Prove the Intent of a Legal Entity

1. Introduction

Because the digital environment does not recognise national borders and with transactions increasingly taking place across borders, an electronic environment that affords interoperability is important for the competitiveness of the European Union. Debate about whether the identification of individuals in the digital environment should be a norm and an obligation or, instead, the digital environment should be available as a form of expression of our privacy and anonymity has not waned. Although legal entities act through natural persons, there are solutions available whereby in an electronic environment the e-signature of a natural person may be replaced by an electronic seal (hereinafter 'e-seal') of a legal entity.

The e-seal has been known in Estonian law since 12 January 2009 (with a legislative act being specified as valid upon application of a digital seal to it), when the Act Amending the Digital Signature Act and the Administrative Procedure Act[*2] entered into force. The purpose of the latter legislation, which was based on a draft prepared already in 2007[*3], was to amend the Digital Signature Act (hereinafter 'DAS')[*4] such that companies, institutions, and natural persons all gain the opportunity to use a digital seal. It also laid down the conditions and requirements for the use of a digital seal and those related to the secure-seal-creation device used for affixing that digital seal. The use of such a seal was provided for in Section 4 of the DAS, according to which state and local government agencies, legal persons in public law, and private persons performing public functions are required to keep information available on the possibilities and procedure that exist for using digital signatures and digital seals in public data-communication networks with regard to communicating with individuals. In addition, the above-mentioned amendment to the law supplemented

1 My deep and sincere gratitude to Asso for his continuous and unparalleled love, help, and support. I completed this article in the month Villem was born, and without him I would not have been able to do so.

2 Act Amending the Digital Signature Act and the Administrative Procedure Act, RT I 2009, 1, 3 (4 December 2008) <www.riigiteataja.ee/akt/13096346> accessed 28 February 2021.

3 'Digitaalse allkirja kõrvale on tulemas digitaalne tempel' ['A Digital Stamp Is Coming Next to the Digital Signature'] <www.raamatupidaja.ee/uudised/2007/03/12/digitaalse-allkirja-korvale-on-tulemas-digitaalne-tempel> accessed 5 November 2020; executive agenda of the sitting of the Government of the Republic of Estonia on 24 July 2008 <www.valitsus.ee/et/uudised/valitsuse-24072008-istungi-kommenteritud-paevakord> accessed 5 November 2020.

4 Digital Signature Act, RT I 2000, 26, 150 (8 March 2000) <www.riigiteataja.ee/en/eli/524102016001/consolide> accessed 28 February 2021. Note that the DAS was in force from 15 December 2000 and was repealed in 26 October 2016 when the Electronic Identification and Trust Services for Electronic Transactions Act entered into force, after the 1 July 2016 entry into force of the eIDAS Regulation.

the provisions of the Administrative Procedure Act that pertain to digital signatures by providing for the possibility of adding a digital seal.

Although the general requirements associated with an e-seal were established in Estonian legislation already in 2009 and on EU level via the eIDAS Regulation in 2016, the legal meaning of an e-seal has remained unclear in most EU countries. Notwithstanding the direct applicability of the eIDAS Regulation, it is up to each national legislator to decide which transactions and applications are subject to which formal requirements and to specify the cases in which one may replace the e-signature with an e-seal and thereby ensure legal certainty. Although e-seals are used for transactions, the formal requirements for this kind of use remain non-regulated and, thus far, no court practice has addressed the right of representation and the formal requirements connected with the transaction in question. The purpose of this article is to consider the cases in which the e-seal could have equivalent legal meaning to a hand-written signature or a corresponding e-signature. The article addresses challenges presented by Estonian and EU-level legal acts that have left the legal meaning of the e-seal unclear. As some of the EU's member states have declared a legal meaning for e-seals, the discussion here takes these examples as a basis for making suggestions as to how the Estonian legislator may amend the corresponding private-law acts. This includes offering a proposed wording for amendments that eliminates the gaps in law, which is important since the degree of e-seals' use in Estonia is relatively high.

2. The definition of an e-seal in Estonian and EU legislation

Article 2^1(1) of the DAS, which was in force until 2016, laid out a legal definition of a digital seal, according to which a digital seal is a set of data formed by a system of technical and organisational means used by a digital seal certificate's holder to certify the integrity of a digital document. While Article 3(1) of the DAS provided for the legal meaning of a digital signature (equivalence with a hand-written signature), that legal meaning for a digital seal is limited: a digital seal associates the seal with a document and is a means of certifying the signatory's authority. In 2007, the e-Identity Working Party found that a digital seal neither takes the place of a digital signature nor has the same legal consequences. This is because it is primarily a security tool that ensures the integrity of the document and links the digital document to its issuer; i.e. it enables the recipient to verify that the document originates with the authority that allegedly issued it and that the document was transmitted unaltered.[*5] Even the intervening time before the 2016 entry into force of the eIDAS Regulation did not bring legal clarity or understanding of the legal meaning of the digital seal.[*6]

According to the eIDAS Regulation, an e-seal is proof that the e-document has been issued by a legal entity and should provide certainty as to the origin and integrity of the document.[*7] The eIDAS Regulation states that the issuer of the seal is a legal entity and that the e-seal is electronic data attached to or logically linked to other electronic data in such a manner as to guarantee the origin and integrity of the data.[*8] Per Article 35 of the eIDAS Regulation, an e-seal has legal effect irrespective of its electronic form or correspondence with the characteristics of a qualified e-seal. This means that the data related to the e-seal must have a legal meaning. In the case of a qualified e-seal, the integrity of the data involved and the accuracy of the origin of that data are presumed (under Article 35, Section 2). Although, according to the eIDAS Regulation, an e-seal is proof that the e-document has been issued by a legal entity and is technically equivalent to an e-signature, the e-seal does not have the same legal meaning as the latter. Rather, the purpose of its use is to ensure that the document is linked to the legal person and that the document's content is exactly what the legal person intended to transmit.

5 For more details, see the minutes of the e-Identity Working Party meeting of 4 October 2007 <http://wiki.riso.ee/index.php/EID2007-10-04> accessed 29 October 2017.

6 EITSETA Explanatory Memorandum, 17–18 <www.riigikogu.ee/ru/deyatelnost/zakonoproekty/eelnou/323afaca-cb96-4118-a675-2a2db388141e/E-identimise%20ja%20e-tehingute%20usaldusteenuste%20seadus> accessed 1 February 2021.

7 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] OJ L257/73, Recital 59.

8 Ibid points 3 (24) and 3 (25).

Recital 60 of the eIDAS Regulation gives more thorough guidance for trust-service providers, since they should be able to establish the identity of the natural person representing the legal person to whom the qualified certificate for the e-seal is provided, when such identification is necessary at national level in the context of judicial or administrative proceedings. This leads to a traditional understanding of the legal entities who act through natural persons and is analysed further on. When a transaction requires a qualified e-seal from a legal person, a qualified e-signature from the authorised representative of the legal person should be equally acceptable[*9], and this indeed has been the direction taken by most EU countries where the transactions of legal entities in practice are conducted with an e-signature instead of an e-seal. In addition, it could be argued that the credibility of a legal person arises from other characteristics too (previous contact with the company, its reputation, etc.).[*10] In addition to authenticating the document issued by the legal person, e-seals can be used to authenticate any digital asset of the legal person, such as software code or servers[*11]; this seems to be the most typical way of using e-seals in Estonia.

In conclusion, the usage and legal meaning of an e-seal specified in the eIDAS Regulation could be taken as guidance, but it does not bring any clarification to national law or make it binding for the national legislator to regulate the use and legal meaning of an e-seal. In the Estonian case, an explanation and meaning of the e-seal of the same kind is already covered. Therefore, the article compares other legislative frameworks across the EU to answer the question of whether there need to be amendments in Estonian legislation so as to establish a legally binding meaning for the e-seal.

3. Levels of e-seals used in the European Union and Estonia

3.1. Levels of e-seals to prove the intent of a legal person in the European Union

Compared to e-signatures, which already were defined in the e-Signatures Directive[*12], which entered into force in 1999, e-seals are a new concept at the level of European Union law, for the e-Signatures Directive defined neither the e-seal nor the digital seal. The eIDAS Regulation establishes several levels of e-seal. Differentiation of levels for e-seals is a new concept, and the question arises of whether this affects also the legal consequences. If we start to differentiate among levels, will there be a linkage to a specific statement of intent affecting the legal consequence? If there is no question of validity, should we ask about the credibility of a statement or a transaction when it is handled with a lower level of e-seal than expected? What is more, there is a set of actions, documents, announcements, and statements that separately might not bring legal consequences but together constitute sufficient evidence of the intent behind the given transaction. Therefore, the application of e-seals and of different levels might be sufficient for a certain part of the transaction but, according to legislation, may not be sufficient for stating that the transaction is complete and meets the formal requirements.

As stated above, 'e-seal' is a general term that covers the various levels of e-seal set forth in the eIDAS Regulation. For choosing the most legally appropriate e-seal form, it is necessary to assess, analogously with an e-signature, whether the restrictions on use differ between levels. According to the eIDAS Regulation, the levels of e-seals are:

- a qualified e-seal[*13];
- an advanced e-seal issued with a qualified certificate[*14];

9 Ibid Recital 58.

10 Jos Dumortier, 'Regulation (EU) No 910/2014 on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market (eIDAS Regulation)' (1 July 2016) SSRN Electronic Journal. – DOI: https://doi.org/10.2139/ssrn.2855484.

11 eIDAS Regulation (n 7), Recital 65.

12 Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures [2000] OJ L13/12.

13 eIDAS Regulation (n 7), point 3 (27).

14 Ibid point 3 (30) and art 38.

– an advanced e-seal*[15]; and
– any other e-seal, one that does not comply with the requirements of the eIDAS Regulation.*[16]

The term 'qualified e-seal' as used in the eIDAS Regulation has the same legal meaning as the Estonian legislation's 'digital seal'. Consequently, the term 'digital seal' is applicable only for an e-seal that meets the requirements set for a qualified e-seal under the eIDAS Regulation. It is up to the Member State to decide what the formal requirement is for an electronic transaction or for application in a given situation. This means, for example, that if in one Member State an application can be filed with an advanced e-seal, in another Member State this may not be possible for a similar application if the legislation there requires the use of a qualified e-seal for such a filing. Also, there may be variations within a nation. Hence, while the eIDAS Regulation is directly applicable, it is up to each national legislator to decide which transactions and applications are subject to which formal requirements and specify the cases in which an e-signature may be replaced with an e-seal and which level is sufficient to ensure legal certainty. As a rule, the answers depend on the procedural requirements of the legislator for a particular transaction or application.

3.2. Levels of e-seals to prove the intent of a legal entity in Estonia

Prior to the entry into force of the eIDAS Regulation, e-seals were not differentiated by level in Estonian law, and the legislation predominantly used the term 'digital seal', for a concept corresponding to the qualified e-seal. The term 'qualified e-seal' itself, adopted in the eIDAS Regulation, had not been used before, so the legislator had to choose whether to change the term 'digital stamp', which had become established in Estonia, to 'qualified e-stamp' or, alternatively, create a link between the eIDAS Regulation's definitions and the DAS definitions. Given that the concept is rooted in both legislation and ordinary operations of society, the Estonian legislator found it reasonable to continue the existing practice. To that end, the terms in paragraph 24 (2) of the Electronic Identification and Trust Services for Electronic Transactions Act (also known as EITSETA)*[17] are given links in such a way that the term 'qualified e-stamp' used in the eIDAS Regulation is afforded the same meaning as 'digital stamp'. In consequence, even where the term 'digital stamp' may be used in the legislation, it is not necessary to change the language used there, because Estonian legislation has linked the concepts expressed in the eIDAS Regulation and in the Estonian legal order. However, it should be borne in mind that when 'e-stamp' is used in a legal act, the term is a general one from the time when the eIDAS Regulation entered into force and, hence, covers all levels of e-stamp and may not be in line with the legislator's true intention.

In that distinguishing among levels has not been commonplace at the level of legislation in the case of a e-signatures, even in the years since the eIDAS Regulation entered into force (because only a qualified e-signature has a legal meaning whereby it is equivalent to a hand-written signature), Estonian legislation addressing the case of an e-seal refers to both a qualified e-seal and a digital seal, while also making references to the general concept of e-seals, leaving it up to the user to choose the level. In the discussion that follows, the levels and content of the e-seals addressed in particular legal acts are analysed in pursuit of an answer to the question of whether e-seals of different levels could differ in their legal consequences in Estonian law.

Pursuant to Section 9 of the Government of the Republic regulation titled in English 'Information System Data Exchange Layer'*[18] (hereinafter 'the X-Road Regulation'), which entered into force on 30

15 Ibid point 3 (26) and art 36.

16 According to point 3 (27) of the eIDAS Regulation, a qualified e-seal is an advanced e-seal created by a qualified e-stamp creation tool and based on a qualified e-seal certificate. An advanced seal issued with a qualified certificate differs from a qualified e-seal in that the condition set forth in Article 30 of the eIDAS Regulation is not met; i.e. the means of issuing the e-seal are not certified. In other words, the advanced e-seal meets the same requirements as a qualified e-seal – it is possible to establish a link between the e-sealed document and the creator of the e-seal. However, for the lower level of an advanced e-seal, only the conditions specified in Article 36 of the eIDAS Regulation need be met. In the case of an e-seal that does not comply with the requirements of the eIDAS Regulation, the instrument may be considered an e-seal (the term is a general one) that may be used in certain cases; however, its use must be a conscious choice.

17 Electronic Identification and Trust Services for Electronic Transactions Act, RT I, 25.10.2016, 1 <www.riigiteataja.ee/akt/125102016001> accessed 9 April 2021.

18 Government of the Republic Regulation No 105 of 23 September 2016 'Infosüsteemide andmevahetuskiht' ['The Data Exchange Layer of Information Systems'], RT I, 6.8.2019 <www.riigiteataja.ee/akt/106082019017?leiaKehtiv> accessed 28 February 2021.

September 2016, an obligation is imposed of using an e-seal to identify the connection between the messages exchanged and X-Road members[*19] (public- and private-sector entities). Under clause 2(15) of the X-Road Regulation, an e-seal within the meaning of the eIDAS Regulation consists of a qualified e-seal or an advanced e-seal with a qualified certificate. Accordingly, it is possible to use e-seals with different levels, although differentiating between levels does not lead to different legal consequences at least with regard to the X-Road Regulation. However, Section 9 of that regulation (in Subsection 2) does state a definition of validity for an e-seal formed by X-Road, according to which the e-seal formed by X-Road is valid if the time between the validity confirmation for the certificate employed and the timestamp is not more than eight hours. I conclude that, although such a restriction is technically justified, it is not legally possible to differentiate between e-seals offered by different service providers on the basis of the period of validity and the time seal, while one may do so by considering the levels specified for e-seals under the eIDAS Regulation and its implementing acts. This means that where service providers and their services meet the requirements of the eIDAS Regulation and are on the list of trusted entities[*20], the services provided by these service providers will be available both domestically and for cross-border utilisation, and the imposition of specific national requirements is not in line with the purpose of the eIDAS Regulation.

Other legislative acts tend to use the term 'digital seal'; i.e. they specify that a qualified e-seal must be used. For example, Subsection 36^1 (1^1) of the Non-profit Associations Act[*21] and Subsection 60 (1^1) of the Commercial Code[*22] stipulate that a warning that the company has not submitted its annual report shall not be digitally signed by the registrar but digitally sealed by the Tartu County Court Registry. The Foundations Act[*23] contains a similar provision. The functionality of the e-seal allows documents to be sealed *en masse*, which is why the use of this mechanism is justified in cases wherein, while the document does not require an e-signature, it is still important to ensure the integrity of the document or information. Most of these cases involve e-seals of register extracts, certificates, academic transcripts[*24], or bank statements.[*25] The possibility of using a digital seal is provided for also by the registry departments of courts.[*26] In addition, the digital seal may be used for the electronic submission of documents to the registrar, where the requirement of a physical seal is replaced by one for the digital seal of the institution.[*27]

In the case of e-seals, it is important to specify in addition that the functionality of the e-seal also enables so-called mass sealing. That is, the user does not need to enter the PIN code[*28] associated with the cryptographic token when signing each individual document; the machine does this on behalf of the user. Allowing the use of such tools raises questions in both private and public relations, which are discussed below. In addition, by proceeding from the principle of free movement of goods and services in the internal market, it is possible in Estonia to use e-seals issued by other service providers too. Legally, the various levels of e-seals seem not to differ in their consequences, but if the legislation states that a digital seal is

19 The X-Road® software-based solution X-tee is the backbone of 'e-Estonia'. Invisible yet crucial, it allows the nation's various public- and private-sector e-service information systems to link up. More information is available: 'Interoperability Services' <https://e-estonia.com/solutions/interoperability-services/x-road/> accessed 28 February 2021.

20 More details are provided in Article 22 of the eIDAS Regulation (n 7).

21 Non-profit Associations Act, RT I 1996, 42, 811 <www.riigiteataja.ee/en/eli/528052020003/consolide> accessed 28 February 2021.

22 Commercial Code, RT I 1995, 26, 355 <www.riigiteataja.ee/en/eli/511012021004/consolide> accessed 28 February 2021.

23 Foundations Act, RT I 1995, 92, 1604 <www.riigiteataja.ee/en/eli/514012021003/consolide> accessed 28 February 2021. The Foundations Act states: 'Failure to submit the annual report. (1^1) The warning specified in subsection (1) of this section shall not be digitally signed, but a digital seal of the registry department of the Tartu County Court shall be appended thereto' (sub-s 34^1).

24 For example, the University of Tartu issues certificates with a digital seal to participants in in-service training. Information on this is available on the university's Web site: <https://wiki.ut.ee/pages/viewpage.action?pageId=36539236> accessed 31 October 2017.

25 See the SK ID Solutions AS video 'SA Innove annab digitempliga üle 100 allkirja minutis' [SA Innove provides more than 100 signatures per minute with a digital seal'] (4 April 2014) <www.youtube.com/watch?v=En1yE3UEO7I> accessed 31 October 2017.

26 Regulation No 60 of the Minister of Justice of 19 December 2012 'Kohtu registriosakonna kodukord' ['Rules of Procedure of the Registry Department of the Court'], RT I, 28.12.2012, 10, s 4 (5) <www.riigiteataja.ee/akt/128122012010?leiaKehtiv> accessed 28 February 2021.

27 More examples can be found in various legislative acts. See, for example, sub-s 85 (3) of the Non-profit Associations Act (n 20); sub-s 38 (3) of the Commercial Code (n 22); sub-s 35 (1) of the Land Register Act, RT I 1993, 65, 922 <www.riigiteataja.ee/en/eli/528122020002/consolide> accessed 28 February 2021.

28 See the article 'Digitembeldamine' ['Digital Stamping'] <www.id.ee/artikkel/digitembeldamine/> accessed 7 July 2020.

to be used, a qualified e-seal must be applied. Also, a digital seal may be used by legal entities where the legislation does not provide guidance as to any certain level but the business processes of the company or institution dictate that it is expedient to issue documents that are sealed.

As of 24 September 2013, a digital seal has been added to legislation published in *Riigi Teataja* (the State Gazette). The introduction of this digital seal ensures even greater certainty as to the accuracy of the data, as the user of *Riigi Teataja* can check the correctness of a legal act against the legal act visible on the Web site where the digital seal is affixed, download it, and transmit it.[*29] At the same time, the Riigi Teataja Act[*30] does not provide for any obligation to digitally seal acts when publishing them, so this is to be regarded as a technological solution used to ensure integrity rather than fulfilment of a legal obligation to seal acts digitally.

In conclusion, multiple levels of e-seals are used in Estonia. At national level, when it is stipulated that only a qualified e-seal is to be accepted, the main challenge for the parties is that of knowing whether the tool they are using is appropriate, in accordance with a legal obligation or merely a matter of agreement between the parties. It is important to raise awareness and clarify the differences among the various levels, which is why it is certainly important that service providers comply with the obligation to provide information on the content of the service involved. This allows a more informed decision on the use of a certain level of e-seal, in accordance with the relevant formal requirements where the level for the e-seal is dictated. With the next section, I analyse the legal meaning of the e-seal and the legal consequences of using particular types of e-seals in a transaction.

4. Legal consequences of e-seals' use in transactions by legal entities

The main question considered in this section is whether e-seals could be of the same function as e-signatures and replace them in transactions by legal entities. Recital 58 of the eIDAS Regulation refers to some connection but renders the two equal in the opposite manner, meaning that the e-stamp could be replaced with an e-signature. If service providers act in accordance with Recital 60 of the eIDAS Regulation and implement the measures necessary for an ability to establish the identity of the natural person representing the legal person to whom the qualified certificate for the electronic seal is provided, the use of an e-seal when such identification is necessary at national level in the context of judicial or administrative proceedings could be justified and applicable in a broader sense. Nevertheless, it can be concluded that the eIDAS Regulation does not resolve the issue. Hence, since the framework around transactions is not harmonised at European Union level, this section examines what could be allowed in a legal framework if one is to participate in transactions as a legal entity by using an e-seal and how the Estonian legislative framework currently covers this area, alongside what analogues may be found in the legislative framework for e-signatures. I am of the opinion that rendering an e-seal equal to an e-signature does not guarantee that either the other party to the transaction or a third party understands who is behind the device; however, said party has an opportunity to find this out. In the event of a dispute, the requirement of identifying the certificate-owners involved would aid in resolving the case, and in most cases there is no need to understand who acted as the representative, since it is the legal entity that is the party.

According to the General Part of the Civil Code Act, a legal person is a private legal entity established on the basis of law, which entity enters into transactions pursuant to the law itself or by power of attorney granted to a natural person by authorisation.[*31] A legal entity may be either private or public. Every legal person has legal personality, and the purpose for recognising certain persons or groups of assets as legal persons is to enable them to take part in civil proceedings independently in their own name.[*32] Estonian

29 Teelemari Loonet, 'Seadustele lisataks edaspidi digitempel ja ajatempel' ['A Digital Seal and a Timestamp Would Be Added to the Laws in the Future'] (Postimees, 24 September 2013) <www.postimees.ee/2084014/seadustele-lisatakse-edaspidi-digi-ja-ajatempel> accessed 31 October 2017.

30 Riigi Teataja Act, RT I 2010, 19, 101 <www.riigiteataja.ee/en/eli/502012019004/consolide> accessed 28 February 2021.

31 General Part of the Civil Code Act, RT I 2002, 35, 216, ss 24–25 <www.riigiteataja.ee/en/eli/528052020001/consolide> accessed 28 February 2021.

32 Kalev Saare and others, *Ühinguõigus I. Kapitaliühingud* ['Company Law I: Limited Companies'] (Juura 2015) 41.

private law does not recognise expression of the intention of a legal person as an institution in itself, so transactions are concluded through natural persons, by either analogue or digital means. It is important to note at the same time that the legal personality of a legal person must be distinguished from the legal personality of natural or other legal persons 'behind' it.[*33] Pursuant to Section 24 of the GPCCA[*34], a legal person is a legal entity in private or public law established on the basis of law. If we regard 'person' to refer to a natural person, in the case of a legal person that natural person is replaced by a combination of other persons and/or assets. For identifying a natural person in transactions, various methods are used, in physical and electronic communication, to make sure of the party to a transaction. The same applies to transactions between or with legal persons, for purposes of identifying who they are and whether the purported legal entity exists. Although legal persons enter into transactions by virtue of the law or by exercising the right of representation granted to a natural person, there are characteristics unique to a legal person (as opposed to natural ones) taking part in a transaction. The e-seal is proof that the e-document in question has been issued by a legal entity and should provide certainty as to the origin and integrity of the document.[*35] Technically, the e-signature of a natural person and the e-seal of a legal person are similar.[*36] In practice, problems might arise with using an e-seal in a transaction in that the identification of a legal person might not be sufficient for declaring intent and concluding a contract, because the natural person 'behind' the legal one forms the most integral part of the contract.

In the interests of legal clarity and rationality, the legislator has accorded the legal status of legal representative of a given legal person to the management body of that legal person. If the management board is a collective body in the internal relations of the legal person (especially as a shaper of intention), every member of the management board has a right to represent the legal person.[*37] Article 14 (d) of Directive (EU) 2017/1132 of the European Parliament and of the Council on certain aspects of company law[*38] requires the member states to ensure that, for each company, the persons entitled to manage and represent it are disclosed in the commercial register, with indication of whether those persons have the right to represent the company on their own or instead may do so only jointly. The Supreme Court of Estonia stated in its relevant judgement of 18 December 2015 that the purpose of Section 34 of the GPCCA and Subsection 181(1) of the Commercial Code is to ensure that transactions entered into by persons entitled to represent a company remain valid with respect to third parties notwithstanding the restrictions to the company's internal relations and arrangements.[*39] Restrictions arising from an internal relationship are divided into those for which an entry can *versus* cannot be made in the commercial register. It is legally questionable whether restrictions to the right of representation that cannot be entered in the commercial register may have an effect on the validity of a transaction entered into by a legal representative. Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009[*40] requires the member states to ensure that all transactions performed by the board member are valid.[*41] Representation presupposes a declaration of intent, entry into them on behalf of a legal person, and action within the limits of

33 Ibid 42–43.

34 Paul Varul and others (eds), *Tsiviilseadustiku üldosa seadus. kommenteeriud väljaanne* ['General Part of the Civil Code Act, Commented Edition'] (Tallinn, Juura 2010) 80.

35 eIDAS Regulation (n 7) Recital 59.

36 Commission Implementing Decision (EU) 2015/1506 of 8 September 2015 laying down specifications relating to formats of advanced e-signatures and advanced seals to be recognised by public sector bodies pursuant to Articles 27(5) and 37(5) of Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market [2015] *OJ L235/37*; Commission Implementing Regulation (EU) 2015/1501 of 8 September 2015 on the interoperability framework pursuant to Article 12(8) of Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market (Text with EEA relevance) [2015] OJ L235 Recital 6.

37 Varul (n 34) 121.

38 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 on certain aspects of company law [2017] OJ L169/46.

39 *Tatjana Baraševa & Stanislav Baraševi v Ringvald OÜ & Riho Kalve* [2019] Estonian Supreme Court [46–47].

40 Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent [2009] OJ L258.

41 Saare (n 32) 156.

the right of representation.[*42] A distinction is made here between a legal representative of a legal person and a commercial representative (i.e. the authorised representative). The right of a legal representative of a legal person to transfer rights to a third party for the conclusion of a specific transaction or certain types of transactions arises from Subsection 119(2) of the GPCCA.[*43] As the information about, in contrast, the authorised representative (proceeding from power of attorney) is not available in the Business Register, I am of the opinion that it should not be in cases of an e-seal either and that, rather, there should be a solution for checking the Business Registry to ascertain whether the company has an e-seal, to enable safe reliance on this. The actual natural persons using the seal (or even machines, in cases of 'mass e-sealing') is not important for the third party.

The purpose of a qualified e-seal or digital seal is to confirm the connection of the certificate-holder (legal entity) with the document. Although it is technically in use in Estonia (e.g. in the banking sector, as described above), the provisions for representation set out in the GPCCA still seem to allow only natural persons to express declarations of intent. In other words, a declaration of intent is associated with a natural person who exercises his or her right of representation. The use of the e-seal at European Union level, however, is largely dependent on the concept of the legal person applied, which is not harmonised. Recital 68 of the eIDAS Regulation states that the concept of the legal person under the provisions of the Treaty on the Functioning of the European Union (TFEU) for freedom of establishment leaves undertakings to decide in on the legal form they deem appropriate for carrying on their activities and therefore on what constitutes legal persons within the meaning of the TFEU, under the law of a Member State or governed by the law of a Member State, whatever their legal form. Therefore, it is up to the member states to define the legal entities and the roles they take when acting in a business environment and declaring intent.

Whereas one can conclude that the participation of a legal person in a transaction in Estonia is limited by a declaration of intent made by a natural person on the basis of applicable law, there are countries where the particular natural person through whom the transaction is conducted does not matter and the legal person's electronic means of concluding a transaction is an e-seal. The following discussion examines in which countries this obtains, how these norms have developed, and how a similar approach could be applied in Estonian law.

While there are some countries in the European Union where e-sealing and its use are rather novel (Italy, France, and Germany), in others – Belgium and Spain, for example – there are sector-specific rules for the use of e-seals or legal entities have the option of using e-seals in circulation.[*44] The eIDAS Regulation explicitly permits an approach in which the member states maintain or introduce national rules on trust services in conformity with Union law, provided that the services in question are not fully harmonised by said regulation.[*45] Hence, the member states have the right to add legal meaning to an e-seal, such as treating the e-seal as a signature of a legal entity (i.e. as a mean of ensuring the authenticity and integrity of the document), as a declaration of intent, or as a transaction.[*46]

Because Estonia, Latvia, and Lithuania share the same general principles of electronic identity and e-signature,[*47] I have also analysed the status of an e-seal across the Baltic States. It is worth pointing out that Chapter III of the Law of the Republic of Lithuania on Electronic Identification and Trust Services for Electronic Transactions[*48] defines the legal effect of the e-signature, electronic seal, and timestamp. Its Article 5(1) stipulates that an e-signature that does not meet the requirements for a qualified e-signature provided for by the eIDAS Regulation shall have a legal effect equivalent to that of a hand-written signature, where the users of that e-signature agree, in writing, in advance and where it is possible to store that agreement on a durable medium, and the same applies for electronic seals. In consequence, mostly qualified services are used and parties should agree separately if other levels of services are being used. A qualified

42 Ibid 147.

43 Varul (n 34) 122.

44 Alessio Zaccaria and others, *EU eIDAS Regulation: Article by Article Commentary* (Beck 2020) 281.

45 eIDAS Regulation (n 7) Recital 24.

46 Zaccaria (n 44), 281.

47 There is not room within the confines of this article to discuss this statement further. Some additional information could be obtained via Hille Hinsberg and others, 'Study on Nordic–Baltic Trust Services' (2020) <www.digdir.no/digitalisering-og-samordning/study-nordic-baltic-trust-services/2058> accessed 28 February 2021.

48 Law of the Republic of Lithuania on Electronic Identification and Trust Services for Electronic Transactions 2018, XIII-1120 <https://e-seimas.lrs.lt/portal/legalAct/en/TAD/c5174772ecd011e89d4ad92e8434e309> accessed 21 July 2020.

e-signature of a representative of a legal person shall have a legal effect equivalent to that of a qualified e-seal of a legal person. It is important to note that the requirement to conclude a transaction by using an e-seal should be established either in a special law or during the establishment of the legal entity[*49] (e.g. in the articles of association).

There are countries where the regulation of legal-entity representation has remained unchanged since the entry into force of the eIDAS Regulation. For example, while Italy has not changed its provisions for representation, it has given the e-signature a broader meaning; i.e. Italy does not necessarily link it only to a natural person.[*50] Belgium, in contrast, enacted an amendment in 2001 whereby it stated that a qualified certificate is based on advanced means of e-signature or handled via an e-seal, which is created by a secure means regarded as equivalent to a hand-written signature, whether the procedure is carried out by a natural person or a legal person (a *personne morale*).[*51] We can see, therefore, that it made no difference whether the document is signed by a natural person or, instead, by a natural person representing a legal person (the latter not being visible to third parties, though). However, when the eIDAS Regulation entered into force, the principle was changed: a *personne morale* is to use only an e-seal, which, when certain requirements are met, is equivalent to the hand-written signature of a legal person's representative and is binding on third parties. The rule applies only to transactions carried out by legal persons in Belgium or by persons established in Belgium. It is important to note that this does not mean that the provisions for representation change.[*52] Thus it becomes clear that there are countries in the European Union with a cultural and legal background wherein the involvement of a particular natural person in a legal person's transaction is not relevant and whose systems hence may, *inter alia*, infringe on the privacy of individuals. The use of the e-seal makes it possible to issue a declaration of intent on behalf of a legal entity with that declaration being binding on third parties.

Although some European legal literature expresses views that the national use of the e-seal is not possible without changes to the provisions for representation[*53], I would argue that the substantive law on representation of a legal person that is valid in Estonia does not need to be changed with regard to a situation wherein an e-seal is issued to a legal person, although I do assert that some legal amendments should be made, which are described in the next session. For useful understanding of who has been behind the device involved in electronic transactions of a legal person using an e-seal, however, reference should be made here to Recital 60 of the eIDAS Regulation, according to which trust-service providers issuing e-seals with qualified certificates should take the necessary measures to identify the natural person representing the legal entity to whom the certificate is issued, if such identification is necessary in national law. Therefore, I hold the opinion that qualified e-seals should be used in Estonia; i.e. the choice should be to employ digital seals, which in the event of a dispute would enable identifying the person to whom the e-seal was issued. The right of representation or the absence thereof is a matter of the internal relationships of the relevant legal person, and third parties must retain the possibility of relying on a document or register extract certified by an e-seal.

5. Recommendations for amendments to Estonian legislation

At the same time, the question arises as to whether the Estonian legal space today allows a legal person in private-law transactions to use the e-seal when expressing the declaration of intent for the transaction, and whether the existing substantive law would need to be amended. In Estonian private law, the general principle of freedom of format for transactions is set forth in the GPCCA (§ 77) with the right to determine the mandatory form by law or via an agreement between the parties.[*54] Although the law does not define the

49 Ibid art 5 (4).

50 More details are provided by Zaccaria (n 44) 282.

51 Loi fixant certaines Règles relatives au cadre juridique pour les signatures électroniques et les services de certification (9 July 2001) s 4(4) <www.etaamb.be/fr/loi-du-09-juillet-2001_n2001011298.html> accessed 6 November 2020.

52 Zaccaria (n 44) 284.

53 Further information is provided by Zaccaria (n 44) 291–92.

54 Varul (n 34) 243.

form, the form is in all cases the external manifestation of the transaction – i.e. the external manifestation aimed at achieving a legal effect.[55] The main purpose of any transaction's form is to express the content of the transaction in such a way that the parties to the transaction and third parties can perceive the exchange of statements of intent.[56] Pursuant to the Law of Obligations Act (LOA[57])'s Section 11, Subsection 1, a contract may be entered into orally, in writing, or in any other form if no required format is specified for the contract by law. Consequently, in private-law relations, it is possible to use the e-seal and its various levels in exchanging declarations of intent.

Pursuant to Subsection 67(2) of the GPCCA, a transaction may be unilateral or multilateral. A unilateral transaction is a transaction for which a declaration of intent by one person is required. In the case of unilateral transactions by a legal entity, the use of e-seals should be encouraged, as it also speeds up processes for the legal entity. A distinction must be drawn here between a declaration of intent and an act, which might not have a legal effect. Nonetheless, acts may have consequences for the assessment of the body of facts as a whole and are certainly digital evidence in court proceedings. The most commonly cited example of acts that generally have no legal effect is digitally sealed bank statements, but also invoices, payment orders, confirmations, certificates, and statements may be e-sealed. In the case of an e-seal, the link between the content to be sealed and the sealer might be not through a natural person but through a machine, since it is a security tool that ensures the integrity of the document and links the digital document to its issuer; i.e. it enables the recipient to verify its alleged issuance and that the document was transmitted unchanged. In the case of digital sealing, the so-called mass sealing mentioned above – i.e. sealing of multiple documents or information entities that is performed by means of a machine – can be tolerated, as its main function is to ensure integrity, a purpose for which an automated process is allowed.

Although the law does not regulate the use of the e-seal as a formal requirement for private transactions of a legal person, the transaction may, by agreement of the parties to it, be entered into in any form; if interpreted broadly, this would allow legal persons to use the e-seal. The choice of level for the e-seal should depend on the level of certainty the parties to the transaction want, with particular regard to the functions of the distinct levels of seal and the strength of the probative value. Since, in accordance with Article 35 of the eIDAS Regulation (per Section 2), a qualified e-seal presupposes the integrity of the data involved and accuracy as to the origin of said data, it is appropriate to use a qualified e-seal or digital seal for transactions requiring higher reliability.

However, with use of an e-seal, a question arises as to fulfilling the requirement of written form or an equivalent electronic-form requirement. In its Section 78, the GPCCA states that, to comply with the requirement for written form, a document must contain the hand-written signatures of the parties, and Subsection 80(1) specifies that written form is considered equivalent to electronic form, with the next subsection requiring the transaction to be carried out in a manner that enables permanent reproduction, to consist of the names of the individuals performing the transaction, and to be electronically signed against by the persons involved. In the case of an e-seal, the first condition is certainly met; i.e. the procedure is performed in a way that allows permanent reproduction. The second condition too is met in the case of an e-seal issued by a legal entity, as the requirements for the e-seal specify inclusion of the identification of the issuer of the seal (the name and registry code of the legal entity could be in the metadata of the e-seal). According to Article 36 of the eIDAS Regulation, an enhanced e-seal must meet the requirements that:

- it be related only to the issuer of the seal;
- it make it possible to identify the issuer of the seal;
- it be provided by means of the data necessary for the creation of the e-seal, which can be used by the issuer of the seal to create the e-seal at a high security level; and
- it be related to the data pertaining to it in such a way that any subsequent changes to the data can be identified.

Consequently, amendment would be needed to the GPCCA's Section 80, specifically Subsection 2, point 3, according to which the document must be electronically signed by the persons carrying out the transaction. As the eIDAS Regulation distinguishes the e-signature of a natural person from the e-seal of

55 Karen Kunnas, 'Tehingu Vorm' ['Transaction Form'] (master's thesis, University of Tartu 2005) 9 <http://dspace.ut.ee/bitstream/handle/10062/1134/kunnas.pdf;sequence=5> accessed 19 October 2017.

56 Ibid 34.

57 Law of Obligations Act, RT I 2001, 81, 487 <https://www.riigiteataja.ee/en/eli/512012021002/consolide> accessed 16 June 2021.

a legal person, the GPCCA's point 3 here should be aligned with the eIDAS Regulation and provide thus: '3) be electronically signed or sealed electronically by the persons entering into the transaction.' This would render it possible also to equate a legal entity's e-sealed document with electronic form. Today, this solution is used in practice, but legally it is not a process equivalent to electronic form.

In my opinion, amendment of Subsection 80(3) of the GPCCA should be considered also, in such a way that the e-seal too would be covered, as this subsection supplements the provisions of subsection 2 of the same section of law. Therefore, I propose amending the wording to read as follows: '(3) An electronic signature or electronic seal must be provided in a manner that allows the signature or seal to be linked to the content of the transaction, the person who entered into the transaction, and the time of the transaction. The procedure for assigning an electronic signature or electronic seal to a person and issuing the signature or seal shall be provided by law. (4) An electronic signature is also a digital signature. An electronic seal is also a digital seal.'

However, even in this case a certain contradiction remains between the GPCCA's sections 78 and 80. Since it is seemingly possible to use lower-level e-signatures in the case of electronic form, the document need only be signed by hand in order to fulfil the written-form requirement. However, a qualified e-seal of a legal person cannot be considered equivalent to a hand-written signature. By analogy, one could reason that in the case of a lower-level e-seal, the requirement of a form that can be reproduced in writing is met, in which case, according to the GPCCA's Section 79, a transaction must be conducted in a manner that allows written reproduction and include the names of the persons conducting the transaction, but it need not be signed by hand. However, the last part does not convey any additional information and could be left open for the use of the e-seal. Although the interpretation may be left to case law, I would suggest that, for legal clarity, Section 79 of the GPCCA could be amended and thereby phrased as follows: 'If the law provides for a form that allows written reproduction of a transaction, the transaction must be entered into in a permanent written manner and include the names of the persons entering into the transaction.' In such a case, the use of an e-seal of any level would ensure that a suitable means of complying with the formal requirements for written reproduction has been employed. However, in light of the revision to the legal system, there needs to be assessment of whether, in addition to lower-level e-signatures, also a lower-level e-stamp fulfils the requirements for electronic form – on the basis of the eIDAS Regulation and the GPCCA commentary, the answer should be 'yes', but a grammatical interpretation of the GPCCA's sections 78 and 80 as they exist today would yield the answer 'no'.

If one wishes to analyse the legal consequences of the use of e-seals in private transactions, it is necessary to look at the consequences of the current law connected with the use of an e-seal and compare them with what would follow in a scenario wherein the use of e-seals is regulated in light of the suggestions made above. In private transactions, the legal consequence of non-compliance with the formal requirements for the transaction is nullity of the transaction. According to the GPCCA (Section 83, Subsection 1), a transaction is void upon failure to comply with the form specified for a transaction by law. Likewise, a transaction is void if the form agreed upon between the parties is not followed. According to the GPCCA's Section 84, Subsection 1, such a transaction shall have no legal consequences from the beginning, and, since this is an imperative provision, it does not allow for arrangements between the parties whereby they choose not to follow the form arising from the law. In addition, the provisions made by the LOA (Section 11, Subsection 2) must be taken into account here; according to these, if, pursuant to law or an agreement, contracts must be entered into in a certain form, a contract shall not be deemed concluded until it has been given the prescribed form.

According to the case law of the Supreme Court, the formal requirement is of primarily probative function, but the purpose encompasses also a warning function, an advisory function or a wish to protect the person performing the transaction from ill-considered activities.[*58] There is no case law in Estonia to inform analysis of whether the use of a tool other than that provided by law – i.e. an e-seal – realises the purpose of the formal requirement and speaks to the circumstances of the transaction. Since there are very few private transactions that have a mandatory form (in accordance with the principle of freedom of form), whether non-compliance with the rigours of contractual formality may lead to nullity is important. In the case of an e-seal, the opinion of the authors of the GPCCA commentary could be relied on by analogy. Namely, their comments on the GPCCA clarify that the purpose of the agreed form should be taken

58 *Magero v Raus* [2005] Estonian Supreme Court [8].

into account in deciding on the consequences of a breach of formality, and in cases wherein it serves only a probative function, non-compliance with the formality does not always lead to nullity of the transaction.*[59] If, however, the purpose for the formal requirement is to ascertain and confirm the true intention of the persons, the lower-level e-seal may not be a form of e-seal that expresses it; neither can it be expressed through automatic sealing. Because a legal entity expresses its intention through its representatives, a qualified e-seal should be used in this case; that is, the suitable choice is a digital seal with the certificate having been issued to a specific natural person. However, the use of an e-seal instead of an e-signature or the use of a lower-level e-seal in today's legal space should not lead to nullity of the transaction without there having been an assessment of the circumstances of the transaction as a whole. If the parties do not dispute the fact of concluding a transaction and have already fulfilled their commitments, it is evident that they have expressed their will and the protective purposes of the GPCCA's Section 83 or behind Subsection 1 of the LOA's Section 11 have not been contravened. As the document-verification function has been fulfilled in the case of an e-seal, it can be concluded that non-compliance with the formal requirement does not have to lead to nullity in the case of an e-sealed document.

6. Conclusion

Although the general requirements related to e-seals were established in Estonian legislation already in 2009 and on EU level with the eIDAS Regulation in 2016, the legal meaning of an e-seal has remained unclear in most EU countries, even including Estonia, where the uptake of such a solution is widespread. In this context, this article has examined in which cases the e-seal of a legal entity could be equal in legal meaning to a hand-written signature or an e-signature of a natural person. Thus, the article addresses challenges visible in Estonian and EU-level legal acts that have left the legal meaning of the e-seal unclear. As some of the EU's member states have declared a legal meaning for e-seals (e.g. Belgium, Spain, and Lithuania), the divergences among the regulatory approaches examined lead to issues that erode interoperability and the mutual recognition of e-seals in cross-border transactions, both of which would be expected from a genuine digital single market. Proceeding from the examples of other member states, I have proposed that the Estonian legislator amend the private-law acts and given recommendations for wording that should eliminate the gaps in law.

In private-law transactions, non-compliance with the form requirements provided by law or agreed upon between the parties generally results in the nullity of the transaction. According to the law currently in force, failure to comply with a requirement for a hand-written signature (written form) or with equivalent requirements connected with electronic form as provided for by law – in this context, the use of an e-seal – constitutes non-compliance with a formal requirement. If the GPCCA is changed in accordance with the suggestions presented here, paying attention to its level when using the e-seal it remains crucial. At the same time, it is important to take into account the purpose of the formal requirement, the actual intention of the parties, and the principle of good faith when deciding on the consequences, whether of the current law or of potential changes. When one is using a tool other than the parties' agreement (be it an e-signature or an e-seal), it is important to consider the purpose of the agreement if wishing to determine the parties' actual intention and analyse the legal entity's behaviour and, hence, whether the transaction has been performed.

[59] Varul (n 34) 256.

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Die funktionale Methode bei der Rechtsvergleichung

1. Einleitung

Errungenschaften wie der Personenverkehr mit Flugzeugen, das Internet und nicht zuletzt Containerschiffe[*2], haben unsere Möglichkeiten in Konsum und Lebensgestaltung in den vergangenen 60 Jahren drastisch verändert. Das weltweite Volumen an Exportwaren war im Jahr 2019 fast zwanzigmal höher als 1960.[*3] Die Globalisierung schreitet voran, Menschen werden immer internationaler, die Welt wird immer weiter vernetzt.[*4] Wie kommt dabei die funktionale Methode der Rechtsvergleichung ins Spiel?

Das Recht nur auf nationaler Ebene zu betrachten hilft in vielen Fällen nicht weiter, gerade wenn es um den weltweiten Warenhandel geht. Die Globalisierung hat das Potenzial, dass nationale Grenzen, die beispielsweise durch Rechtssysteme gezogen werden können, an Bedeutung verlieren.[*5] Die Zusammenarbeit, Integration und Vernetzung von Märkten, Gesellschaften und Staaten auf der ganzen Welt wirken sich auch auf die einzelnen Rechtssysteme aus.

Rechtsvergleichung kann dabei helfen, in dieser sich schnell verändernden Welt die Rechtslandschaft globaler zu betrachten.[*6] Die funktionale Methode der Rechtsvergleichung gilt dabei als die grundlegende Methode.[*7] Doch gerade in den letzten 30 Jahren hat sie viel Kritik erfahren (siehe unter 3.) und Rechtswissenschaftler entwickelten modifizierte Ansätze (siehe unter 4.). Ihr Nutzen für die Rechtswissenschaft, sei es für die Rechtsvereinheitlichung, für die Lehre oder als Hilfsmittel für Gesetzgeber, war und bleibt dennoch hoch. Ist die funktionale Methode noch zeitgemäß, die Kritik an ihr berechtigt? Auf diese Fragen soll der Beitrag Antworten geben, indem unterschiedliche Kritikansätze und modifizierte Methoden aufgezeigt werden und im Ausblick eine Einschränkung der Grundannahmen der funktionalen Methode vorgeschlagen wird.

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2 Johanna Lutteroth, 'Container-Revolution' (*Spiegel*, 12.7.2011) <https://www.spiegel.de/geschichte/container-revolution-welterfolg-mit-der-wunderkiste-a-947252.html> zuletzt besucht 21.12.2020.

3 Bundeszentrale für politische Bildung, 'Entwicklung des grenzüberschreitenden Warenhandels' (bpb, 12.10.2020) <https://www.bpb.de/nachschlagen/zahlen-und-fakten/globalisierung/52543/entwicklung-des-warenhandels> zuletzt besucht 21.12.2020.

4 Mathias Siems, *Comparative Law* (1. Auflage 2014) 5.

5 William Twining, *Globalisation and Legal Theory* (1. Auflage 2000) 81.

6 Peter De Cruz, *Comparative Law in a Changing World* (3. Auflage 2007) 522.

7 Ralf Michaels, 'The Functional Method of Comparative Law' in Reinhard Zimmermann and Mathias Reimann (eds), *The Oxford Handbook of Comparative Law* (2. Auflage 2019) 346. – DOI: https://doi.org/10.1093/oxfordhb/9780198810230.013.11.

2. Entstehung und Vorgehensweise der funktionalen Methode

Als man in der früheren Rechtsvergleichung noch dazu neigte, Rechtsinstitute miteinander zu vergleichen, stellte sich heraus, dass äußerlich ähnliche Begriffe selten auch die gleiche Bedeutung haben. Diese sprachlichen Ähnlichkeiten nennt Husa das *false-friends-syndrome*.[*8] Beispielsweise haben der Präsident der USA und der Bundespräsident in Deutschland ganz unterschiedliche Kompetenzen. Somit erfüllt der äußerlich gleiche Begriff „Präsident" in unterschiedlichen Rechtssystemen unterschiedliche Funktionen.

Auch in Abhängigkeit von sozial-kulturellen Unterschieden kann das gleiche Rechtsinstitut in einem anderen Rechtssystem eine andere Funktion erfüllen.[*9] Die funktionale Methode gilt als klassische Methode und als Grundprinzip für viele modifizierte Methoden, die aus ihr entstanden sind.[*10]

Sie setzt den Gedanken voraus, dass Recht eine Funktion hat. Das Recht dient also der rationalen Lösung bestimmter Probleme.[*11] Der Schwerpunkt der funktionalen Methode liegt wegen ihrer anti-formalen Herangehensweise in der Verbindung zwischen Recht und Gesellschaft.[*12] Diese Herangehensweise ist bei der interkulturellen Vergleichung unverzichtbar, da die Vergleichbarkeit in zwei Rechtssystemen schwer zu bestimmen ist.[*13]

2.1. Begründung nach Rabel

Ernst Rabel gilt als Begründer der funktionalen Methode. Der Aufsatz, in dem Rabel die Notwendigkeit der Rechtsvergleichung betont, ist vom beendeten Ersten Weltkrieg geprägt.[*14] Er schrieb, dass die Deutschen während des Krieges feststellen mussten, dass sie zu wenig über das Ausland und dessen Denkart wussten.[*15] Auch bei den Juristen bemängelte er die fehlenden Kenntnisse über die Einstellung ausländischer Juristen gegenüber dem Recht, obwohl es bei Verhandlung von Staatsverträgen, Gerichts- und Schiedsgerichtsverhandlungen mit Auslandsbezug gerade auf diese ankommt. Daher forderte Rabel, „deutsche Juristen [sollten] um die juristische Mentalität des Auslands wisse[n]".[*16] Rabel entschied sich dafür, den Fokus seiner vergleichenden Arbeiten nicht auf Rechtsgeschichte oder -philosophie zu setzen, sondern sie an den Interessen und Bedürfnissen der Rechtspraktiker zu orientieren.[*17] Gerade die Orientierung hin zu praktischen Ergebnissen macht die funktionale Methode in der Rechtsvergleichung so relevant.[*18] Er fokussierte sich in seinen Arbeiten auf die Funktion der Normen in der Praxis, die er untersuchte und wurde damit in der Rechtsvergleichung zum Pionier.[*19]

2.2. Definition und Grundannahmen

In der funktionalen Methode lassen sich drei Grundannahmen erkennen, die jedem Rechtsvergleich vorausgesetzt werden.

Die erste Annahme besagt: Recht ist da, um Lösungen für Probleme zu finden. Man sieht Recht als Instrument, menschliches Verhalten zu steuern und Antworten für die sozialen Bedürfnisse und Interessen

8 Jaakko Husa, *A new Introduction to Comparative Law* (1. Auflage 2015) 119.

9 Max Rheinstein und Reimer v Borries, *Einführung in die Rechtsvergleichung* (2. Auflage 1987) 32.

10 Michaels (Fn 7) 346.

11 Uwe Kischel, *Rechtsvergleichung* (§ 3 1. Auflage 2015) Rn. 7.

12 Giovanni Marini, 'Critical Comparative Contract Law' in Pier Giuseppe Monateri (ed), *Comparative Contract Law* (1. Auflage 2012) 100.

13 Walter Joseph Kamba, 'Comparative Law – A theoretical Framework' [1974] International Comparative Law Quarterly 485, 517. – DOI: https://doi.org/10.1093/iclqaj/23.3.485.

14 Ernst Rabel, 'Aufgabe und Notwendigkeit der Rechtsvergleichung' [1924] Rheinische Zeitschrift für Zivil- und Prozessrecht 279, 296, 298.

15 Rabel (Fn 14) 296, 300.

16 Rabel (Fn 14) 298.

17 Basil Markesinis, *Comparative Law in the Courtroom and Classroom* (1. Auflage 2003) 13.

18 Oliver Brand, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' [2007] Brooklyn Journal of International Law 405, 409.

19 Markesinis (Fn 17) 13f.

des Menschen zu geben.[*20] Recht ist kein von der Gesellschaft losgelöstes Konstrukt, sondern erfüllt eine Funktion für gesellschaftliche oder wirtschaftliche Bedürfnisse.[*21] Die Funktionen des Rechts überschreiten Rechtssysteme, sind nicht an sie gebunden und somit system-neutral.[*22]

Unterschiedliche Gesellschaften werden mit zumindest ähnlichen Problemen konfrontiert. Die eigentliche Funktion von Rechtsinstituten ist sozialwissenschaftlicher Natur. Deswegen nimmt man in der funktionalen Rechtsvergleichung an, dass die Probleme, die den Rechtsordnungen gestellt werden, ähnlich wenn nicht sogar identisch sind.[*23]

Die *praesumptio similitudinis* ist die Vermutung für die Ähnlichkeit praktischer Lösungen.[*24] Sie besagt, dass gleiche Probleme oder Bedürfnisse im Rechtsverkehr in den entwickelten Rechtsordnungen gleich oder sehr ähnlich gelöst werden.[*25] Zwar unterscheiden sich die inländischen Rechte in ihren Herangehensweisen an Probleme und ihrer Technik; die durch sie erlangten praktischen Ergebnisse sind jedoch im Allgemeinen ähnlich.[*26] Diese Annahme kann ein erster Hinweis sein, an welchen Stellen sich in der Herangehensweise an Lösungen fremder Rechtsordnungen Ähnlichkeiten finden lassen.[*27] Außerdem soll die *praesumptio similitudinis* als Kontrollmittel am Ende des Vergleichs dienen. Wenn der Vergleicher am Ende der Untersuchung ähnliche oder gleiche Lösungen gefunden hat, ist dies ein zufriedenstellendes Ergebnis.[*28] Wenn allerdings starke Unterschiede festgestellt werden, muss der Rechtsvergleicher hinterfragen, ob er den funktionalen Begriff der Rechtsfigur richtig definiert hat und an den richtigen Stellen in den Rechtssystemen und allen anderen Bereichen des sozialen Lebens geprüft hat.[*29] Die Lösung eines Problems muss nicht zwangsläufig in einer Rechtsnorm ausgedrückt sein. Sie kann auch in einem Brauch oder einer anderen sozialen Praktik liegen.[*30]

2.3. Vorgehensweise der funktionalen Methode

Zweigert und Kötz bezeichnen die Funktionalität als das methodische Grundprinzip der gesamten Rechtsvergleichung.[*31] Aus ihr ergeben sich alle weiteren Schritte der Methode. Die funktionale Methode gilt als die klassische Form der heutigen Rechtsvergleichung. Ihr wird von den allermeisten rechtsvergleichenden Untersuchungen gefolgt, wenn auch teils unbewusst.[*32] Ihre Grundsätze sind oft Maßstab für die Qualität der rechtsvergleichenden Arbeit.[*33] Doch haben weder Begründer noch Befürworter eine genaue Forschungsstrategie zur funktionalen Methode benannt.[*34] Es fehlen konkrete Ausführungen von Rabel, wie er zu seinen Ergebnissen gelangt ist.[*35] Daher finden sich in rechtsvergleichenden Arbeiten selbst meist Anleitungen, wie der Rechtsvergleich durchgeführt werden sollte.[*36] Zumeist wird nach den folgenden Schritten vorgegangen:

20 Brand (Fn 18) 409.

21 Uwe Kischel, 'Vorsicht, Rechtsvergleichung!' [2005] Zeitschrift für vergleichende Rechtswissenschaft 10, 16.

22 Catherine Valcke, 'Reflections on comparative law methodology – getting inside contract law' in Maurice Adams and Jacco Bomhoff (eds), *Practice and Theory in Comparative Law* (1. Auflage 2012) 48. – DOI: https://doi.org/10.1017/cbo9780511863301.002.

23 Brand (Fn 18) 409.

24 Konrad Zweigert und Hein Kötz, *Einführung in die Rechtsvergleichung* (3. Auflage 1996) 39.

25 Richard Hyland, *Gifts* (1. Auflage 2009) Rn. 109. – DOI: https://doi.org/10.1093/acprof:oso/9780195343366.001.0001; Michaels (Fn 7) 375.

26 Antonios Emmanuel Platsas, 'The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks' [2008] Electronic Journal of Comparative Law 1, 13.

27 Zweigert und Kötz (Fn 24) 3.

28 Zweigert und Kötz (Fn 24) 39.

29 Zweigert und Kötz (Fn 24) 39ff.

30 Jaakko Husa, 'Farewell to Functionalism or Methodological Tolerance?' [2003] Rabels Zeitschrift für ausländisches und internationales Privatrecht 419, 423. – DOI: https://doi.org/10.1628/0033725033631996.

31 Zweigert und Kötz (Fn 24) 33.

32 Kischel (Fn 11) Rn. 3.

33 Kischel (Fn 11) Rn. 3.

34 Kischel (Fn 11) Rn. 10.

35 Markesinis (Fn 17) 22.

36 Vgl. Léontin-Jean Constantinesco, *Rechtsvergleichung* (Band II 1. Auflage 1972) 137ff.; Kamba (Fn 13) 511.

Vor der eigentlichen Rechtsvergleichung werden Länderberichte erstellt, die die Rechtslage im jeweiligen Land widerspiegeln. Dabei kommt es auch darauf an, die spezifische Systematik des Rechtssystems aufzuzeigen und die Rechtslage wertungsfrei wiederzugeben.[*37] Es sollen also neutrale Gutachten zu den Rechtslagen erstellt werden.

Im Zentrum jedes Rechtsvergleichs steht das konkrete Sachproblem.[*38] Die zu vergleichenden Gegenstände sollen zueinander in Bezug gesetzt werden. Die untersuchte Fragestellung ist das *tertium comparationis*, wörtlich das Dritte beim Vergleich.[*39] Das *tertium comparationis* ist das soziale Problem, mit dem sich der Vergleich beschäftigt. Dieses soziale Problem muss frei von systemeigenen Begriffen sein; die Funktion steht im Vordergrund.[*40] Ziel ist es, funktionale Entsprechungen in den verglichenen Rechtsordnungen zu finden.[*41]

Das *tertium comparationis* muss passend formuliert werden. Hierbei soll die Funktion, die ein Rechtsinstitut im jeweiligen Rechtssystem erfüllt, beschrieben werden. Dabei sollen Begriffe, die man aus der heimischen Rechtsordnung kennt, außen vor bleiben. Anstatt beispielsweise allgemein nach den Formvorschriften des ausländischen Rechts bei einem Kaufvertrag zu fragen, stellt man eine konkrete Frage: Wie schützt das ausländische Recht die Parteien vor der Bindung an ein nicht ernstgemeintes Geschäft? Will man Lösungen im ausländischen Recht finden, die dem Wegfall der Bereicherung gemäß § 818 Abs. 3 BGB entsprechen, könnte man fragen: Wie wird in den zu vergleichenden Rechtsordnungen der Interessenkonflikt gelöst, der bei der Rückabwicklung eines fehlgeschlagenen Vertrags entsteht, wenn die zurückzugebende Leistung nicht mehr beim Vertragspartner ist?[*42]

Ob eine kritische Wertung am Ende des Vergleichs als notwendiger Teil der rechtsvergleichenden Arbeit anzusehen ist, ist umstritten. Einerseits wird vertreten, dass ohne sie die Ergebnisse des Vergleichs ungenutzt bleiben würden.[*43] Ob es nach dem Vergleichsprozess zu einer Evaluation der Ergebnisse kommt, hängt nach einer anderen Meinung von der Zielrichtung der vergleichenden Arbeit ab.[*44] Wenn der Vergleich zum Ziel hat, ein fremdes Recht besser zu verstehen, ist eine kritische Bewertung meist nicht notwendig. Soll die vergleichende Arbeit jedoch der Rechtsfortbildung oder Rechtsvereinheitlichung dienen, kann gerade die Bewertung der bedeutendste Teil des Vergleichs sein.[*45] Diese darf sich jedoch nicht auf das Rechtssystem an sich beziehen; sie soll die Wirksamkeit einer Herangehensweise an ein rechtliches Problem im Kontext der kulturellen, wirtschaftlichen und politischen Eigenheiten der untersuchten Rechtsordnung bewerten.[*46]

3. Nutzen der funktionalen Methode

Die funktionale Methode wird in vielen Bereichen der Rechtswissenschaft und der Rechtspraxis genutzt. Sie kann bei Projekten der Rechtsvereinheitlichung helfen und bietet eine Grundlage für das Verständnis für Rechtsvergleichung in der Lehre. Auch im Internationalen Privatrecht findet die funktionale Methode Anwendung, wenn für die Charakterisierung eines ausländischen Rechtsinstituts ein funktionales Äquivalent im eigenen Recht ermittelt werden muss.[*47]

37 Kischel (Fn 11) Rn. 12.

38 Zweigert und Kötz (Fn 24) 33.

39 Stephan Seiwerth, 'Einführung in die Methodik des Rechtsvergleichs' [2016] Juristische Ausbildung 596, 598. – DOI: https://doi.org/10.1515/jura-2016-0124.

40 Oliver Brand, 'Grundfragen der Rechtsvergleichung – Ein Leitfaden für die Wahlfachprüfung' [2003] 1082, 1086.

41 Husa (Fn 8) 119.

42 Zweigert und Kötz (Fn 24) 33.

43 Zweigert und Kötz (Fn 24) 46f.

44 Siems (Fn 4) 22.

45 Siems (Fn 4) 22.

46 De Cruz (Fn 6) 224.

47 Horatia Muir Watt, 'Private International Law' in Jan Smits (ed), *Elgar Encyclopedia of Comparative Law* (1. Auflage 2014) 703f.

3.1. Lehre der Rechtswissenschaft

Die funktionale Methode der Rechtsvergleichung bietet Studierenden die Möglichkeit, Lösungen anderer Rechtsordnungen zu verstehen. Die funktionale Methode befindet sich außerhalb der dogmatischen Zwänge,[*48] die das heimische Recht oft aufweist. Zweigert und Kötz beschreiben diese Notwendigkeit als Befreiung des Juristen von „seinen eigenen juristisch-dogmatischen Vorurteilen".[*49] Das trifft auch auf die Lehre zu. Wenn man sich durch die funktionale Rechtsvergleichung von den sogenannten Systembegriffen der eigenen Rechtsordnung befreit, eröffnet sich dadurch ein neuer Horizont an Lösungsansätzen. Die Erkenntnisse, die durch die Rechtsvergleichung gewonnen werden, sind wichtig, besonders, wenn man sich die internationalen Verflechtungen unseres Rechtssystems vor Augen führt.[*50] Es ist daher wichtig, dass sowohl Studierende der Rechtswissenschaft als auch Praktiker Lehre erhalten, die den Herausforderungen der heutigen Zeit entsprechen.[*51] Ausländisches Recht bekommt in den meisten juristischen Berufen, sei es Anwalt oder auch Richter, eine immer größere Bedeutung.[*52] Daher sind rechtsvergleichende Lehrangebote wichtig, um den Einstieg in ausländische Rechtsgebiete zu ermöglichen beziehungsweise zu vereinfachen.

3.2. Projekte der Rechtsvereinheitlichung

Insbesondere für das Ziel der Rechtsvereinheitlichung kann die funktionale Methode gute Ergebnisse liefern.[*53] Als Beispiel hierfür soll die Entwicklung des *United Nations Convention on Contracts for the International Sale of Goods* (CISG) dienen.

1928 schlug Rabel dem Internationalen Institut für die Vereinheitlichung des Privatrechts in Rom (UNIDROIT) vor, das internationale Warenrecht zu vereinheitlichen.[*54]

Als Vorlage für das kaufrechtliche Vorhaben des Internationalen Instituts für Vereinheitlichung des Privatrechts in Rom (UNIDROIT) diente Rabels 1936 erstmals veröffentlichte Werk „Das Recht des Warenkaufs", bei dem es sich um eine rechtsvergleichende Darstellung des Warenkaufrechts handelt.[*55] Er entwickelte die funktionale Methode auch als Teil des Projektes, eine Lösung für die Vereinheitlichung des internationalen Kaufrechts zu finden.[*56] Die Arbeit von UNIDROIT, ein materielles Einheitsrecht zu verwirklichen, führte 1964 zu den Haager Kaufgesetzen.[*57] Rabels Ziel, die Vereinheitlichung des internationalen Kaufrechts, wurde durch die Haager Kaufgesetze weitgehend durchgesetzt.[*58] Allerdings fanden die Kaufgesetze nur geringen Anklang – sie wurden von nur insgesamt neun Staaten ratifiziert. Die Entstehungsphase war auf Westeuropa fokussiert. Daher fühlten sich sowohl Common-Law-Staaten, als auch sozialistisch geprägte Länder und Entwicklungsländer durch die Haager Kaufgesetze nicht repräsentiert.[*59]

1966 wurde mit UNCITRAL eine weitere UN-Kommission gegründet, die mit der Überarbeitung der Haager Kaufgesetze beauftragt war. Damit sollte die Attraktivität und Akzeptanz für ein Kaufgesetz für Staaten unterschiedlicher Rechts- und Wirtschaftssysteme erhöht werden.[*60] Im April 1980 wurde in Wien das UN-Kaufrecht in Wien verabschiedet.[*61] Inhaltlich baut das CISG auf dem Haager Kaufrechtsüberein-

48 Siems (Fn 4) 5.

49 Zweigert und Kötz (Fn 24) 34.

50 Bernhard Grossfeld, *Macht und Ohnmacht der Rechtsvergleichung* (1984) 15.

51 Esin Örücü, *The Enigma of Comparative Law* (1. Auflage 2004) 65. – DOI: https://doi.org/10.1007/978-94-017-5596-2.

52 Örücü (Fn 51) 65.

53 Kischel (Fn 11) Rn. 20.

54 Kurt Siehr, 'Präambel' in Heinrich Honsell und Christoph Brunner (Hrsg.), *Kommentar zum UN-Kaufrecht* (2. Auflage 2010) Rn. 1.

55 Ernst Rabel, *Das Recht des Warenkaufs* (Band 1 1. Auflage 1964) Vorwort.

56 David Gerber, 'System Dynamics – Toward a Language of Comparative Law' [1998] American Journal of Comparative Law 717, 721.

57 Ulrich Schroeter, 'Gegenwart und Zukunft des Einheitskaufrechts' [2017] Rabels Zeitschrift für ausländisches und internationales Privatrecht 32, 36. – DOI: https://doi.org/10.1628/003372516x14817241954953.

58 Hannes Rösler, '70 Jahre Recht des Warenkaufs von Ernst Rabel' [2006] Rabels Zeitschrift für ausländisches und internationales Privatrecht 793, 801. – DOI: https://doi.org/10.1628/003372506778825250.

59 Schroeter (Fn 57) 36f.

60 UNCITRAL, Yearbook (Volume I 1968) 78f., 99f.

61 Schroeter (Fn 57) 38.

kommen von 1964 auf.[*62] Diesmal waren aber in den vorbereitenden Arbeitsgruppen für das CISG Staaten aus allen Teilen der Welt vertreten.[*63] Dies führte dann auch zu der viel höheren Akzeptanz im Gegensatz zu den Haager Kaufgesetzen. Es gilt mit den heutigen 94 Vertragsstaaten[*64] zu den erfolgreichsten Übereinkommen des Einheitsprivatrechts.[*65] Für den Erfolg, den das Einheitskaufrecht durch das CISG erfahren hat, hat Rabels Werk „Das Recht des Warenkaufs" die entscheidende Grundlage geboten.[*66]

Das BGB wurde im Zuge der Schuldrechtsmodernisierung im Jahr 2002 auch durch rechtsvergleichende Mittel reformiert.[*67] Durch das CISG beeinflusste Rabel auch mittelbar das BGB, besonders stark bei § 280 BGB, dem neuen zentralen Pflichtverletzungstatbestand des BGB seit der Schuldrechtsreform 2001.[*68] Dieser lehnt sich an das einheitliche Konzept der Vertragsverletzung aus dem CISG an.[*69] In der amtlichen Begründung zur Schuldrechtsmodernisierung betonen die Verfasser auch den Beitrag Rabels zum neuen Unmöglichkeitsrecht.[*70] Die funktionale Methode diente also nicht nur diesen Projekten der Rechtsvereinheitlichung, sondern, mittelbar durch die Vorarbeit Rabels, auch der Reform des BGB.

4. Die Kritik an der funktionalen Rechtsvergleichung

Die Kritik an der funktionalen Methode ist vielseitig und umfangreich. Einige Kritikpunkte setzen direkt an den Grundannahmen der funktionalen Methode an;[*71] andere an ihren Zielen und ihrer Wirkung.

4.1. Die Grundannahmen in der Kritik

Wenn man die Annahme, dass Rechtsnormen nur der Funktion der Lösung von Problemen folgen, als gegeben sieht, wird das Recht ausschließlich auf die Funktion reduziert, die in jeder Gesellschaft sehr ähnlich ist. Hierdurch schaut man leichtfertig über kulturelle und symbolische Dimensionen des Rechts hinweg.[*72]

Nicht alle Normen sind funktional mit einem sozialen Zweck verbunden. Sie laufen manchmal jedem erkennbaren Nutzen zuwider.[*73] Manche Normen verfolgen den sozialen Zweck auch nicht vordergründig: Beispielsweise wurde im Jahr 2000 in sehr kurzer Zeit ein Gesetz über den Umgang mit gefährlichen Hunden erlassen. Im Vordergrund dieses Gesetzes stand nicht der soziale Zweck; es ging dem deutschen Gesetzgeber mehr darum, zu zeigen, etwas gegen das Problem zu unternehmen, statt es auch wirklich zu lösen.[*74] Dies würde zu Problemen führen, wenn man die funktionale Vergleichsfrage stellt, wie Rechtssystem X und das deutsche Rechtssystem mit gefährlichen Hunden umgehen.

Nicht alle Normen verfolgen nur eine einzige Funktion. Eine Rechtsnorm kann auch eine Mehrzahl an verschiedenen Funktionen erfüllen. Es kommt dann darauf an, für oder gegen wen die Rechtsnorm ihre Funktion erfüllt.[*75]

Gerade die zweite Annahme schränkt die Praktikabilität der funktionalen Methode ein.[*76] Sie geht davon aus, dass die Probleme in den Gesellschaften verschiedener Rechtssysteme zumindest ähnlich sind. Die Vermutung, dass alle Gesellschaften den gleichen Problemen begegnen, ist nach Michaels ein Hinweis darauf, dass der starke Glauben an die funktionale Grundannahme Beweis tief verbindender Werte

62 Rösler (Fn 58) 801.

63 Schroeter (Fn 57) 37.

64 United Nations, 'Status: United Nations Convention on Contracts for the International Sale of Goods' <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status> zuletzt besucht 21.12.2020.

65 Schroeter (Fn 57) 38.

66 Rösler (Fn 58) 802.

67 Rösler (Fn 58) 805.

68 Rösler (Fn 58) 804.

69 Siehe Art. 45, 61 CISG.

70 *Entwurf eines Gesetzes zur Modernisierung des Schuldrechts*, Drucksache des Deutschen Bundestages 14/6040 vom 14.05.2001, S. 127.

71 Brand (Fn 18) 415.

72 Husa (Fn 8) 125.

73 Brand (Fn 18) 416.

74 Rudolf Wassermann, 'Gesetzgebungsethik?' [2000] Neue Juristische Wochenschrift 2560, 2651.

75 Brand (Fn 18) 416; Kischel (Fn 11) Rn. 7.

76 De Cruz (Fn 6) 230ff.

zwischen Gesellschaften ist.[*77] Die funktionale Methode funktioniert, wenn unterschiedliche Rechtssysteme tatsächlich mit gleichen Problemen konfrontiert sind. Allerdings kann man nicht davon ausgehen, dass sie dies auch immer tun.[*78] Beispielsweise haben Gesellschaften verschiedene Auffassungen über den Ehebruch und behandeln diesen unterschiedlich.[*79]

Die *praesumptio similitudinis*, also die Vermutung, dass Probleme ähnlich gelöst werden[*80], kann bei einem Vergleich zwischen ähnlichen Kulturen gut funktionieren.[*81] Sie kann aber auch in Konflikt mit kulturellen, historischen und auch politischen Eigenheiten von Rechtssystemen geraten.[*82] Dies wird insbesondere bei funktionalen Vergleichen zwischen einer kapitalistischen und sozialistischen Gesellschaft vermutet.[*83] Die Gründung der Vereinten Nationen nach dem Zweiten Weltkrieg führte dann aber unter anderem auch zu internationalen Konventionen, die einheitliches Recht schaffen sollten. Diese wurden von Ländern mit verschiedenen Wirtschaftssystemen unterzeichnet. Dies ist ein Indiz dafür, dass man die sehr unterschiedlichen Systeme doch für vergleichbar hielt.[*84] Mittlerweile nimmt man die Vergleichbarkeit der Normen und Rechtsordnungen zweier Länder unterschiedlicher Wirtschaftssysteme an.[*85]

Trotzdem fällt auf: Wenn man zwei Rechtssysteme vergleicht, deren Kulturen weit voneinander entfernt sind, wird man feststellen, dass manche Probleme anders gelöst werden. Stellt der Vergleich Unterschiede fest, muss nach der *praesumptio similitudinis* das Ergebnis des Vergleichs überprüft werden.[*86] Die funktionale Methode an sich ist jedoch gleichsam anwendbar auf Vergleiche, die Ähnlichkeiten, und solche, die Unterschiede feststellen. Ob das Ergebnis zu Unterschieden oder Ähnlichkeiten führt, kann der Vergleicher zu Beginn nicht entscheiden.[*87] Sobald ein Rechtssystem einem Problem eine andere Rolle zumisst, sind diese nicht mehr ähnlich.[*88]

Bei Anwendung der funktionalen Methode läuft man Gefahr, den Mehrwert eines rechtlichen Instituts eines Rechtssystems falsch zu interpretieren oder, noch gravierender, den Zweck zu übersehen.[*89] Doch solange rechtliche als auch nicht-rechtliche Institute in ihrem jeweiligen Rechtssystem eine ähnliche Funktion erfüllen, sind sie miteinander vergleichbar, auch wenn sie von einer unterschiedlichen Doktrin geleitet werden.[*90]

4.2. Kritik an den Hintergründen und Zielen

„Versuchen Sie zu vergessen, jemals Jura studiert zu haben. Gehen Sie niemals ein Problem an, wie Sie es zuhause angehen würden. Es wäre gut möglich, dass Sie verloren gehen".[*91] Diesen Hinweis gab Rheinstein ausländischen Studierenden an der Universität Chicago. Er macht damit auch auf eine Schwäche der funktionalen Methode aufmerksam. Ein Jurist, der in einem Rechtssystem ausgebildet wird, betrachtet Lösungen in anderen Rechtssystemen voreingenommen.[*92] Wenn man versucht, die Ideen zu verstehen, die hinter einem fremden Rechtssystem liegen, braucht es mehr als nur Literatur über das fremde Rechtssystem. Es bedarf eines Juristen, der in dem fremden Rechtssystem studiert hat und ausgebildet wurde.[*93]

77 Michaels (Fn 7) 365.

78 James Gordley, 'The Functional Method' in Pier Giuseppe Monateri (ed), *Methods of Comparative Law* (1. Auflage 2012) 119. – DOI: https://doi.org/10.4337/9781781005118.00012.

79 De Cruz (Fn 6) 238.

80 Zweigert und Kötz (Fn 24) 39.

81 Brand (Fn 18) 418.

82 Rodolfo Sacco und Jacob Joussen, *Einführung in die Rechtsvergleichung* (1. Kapitel 2. Auflage 2011) Rn. 24. – DOI: https://doi.org/10.5771/9783845259765.

83 De Cruz (Fn 6) 246.

84 Sacco und Joussen (Fn 82) Rn. 25.

85 Sacco und Joussen (Fn 82) Rn. 26.

86 Kischel (Fn 11) Rn. 15.

87 Husa (Fn 8) 123.

88 Brand (Fn 18) 417.

89 Brand (Fn 18) 417.

90 Michaels (Fn 7) 347.

91 Max Rheinstein, 'Comparative Law – Its Functions, Methods and Usages' [1968] Arkansas Law Review 415 421.

92 So schon Josef Kohler, 'Über die Methode der Rechtsvergleichung' [1901] Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart 273, 274.

93 William Ewald, 'The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"' [1998] American Journal of Comparative Law 701, 703f. – DOI: https://doi.org/10.2307/840987.

Der Blick von außen muss aber nicht zwangsläufig nachteilig sein. Wenn es darum geht, versteckte, gewohnheitsrechtliche Annahmen eines fremden Rechtssystems zu entdecken, kann der Blick eines dem System fremden Juristen hilfreich sein.[*94] Die Maxime, die Rheinstein einst seinen Studierenden vermittelte, ist schwer zu erreichen. Man wird jederzeit von dem Recht geprägt sein, das man zuerst umfassend studiert hat.

Alan Watson stellt mit seinem Ansatz der *legal transplants*[*95] in Frage, dass Recht der Lösung von Problemen diene.[*96] Er definiert *legal transplants* als Verschiebung einer Rechtsregel oder eines Rechtssystems von einem Land zu einem anderen oder von einem Volk zu einem anderen.[*97] Das Entleihen fremder Rechtsinstitute und deren Anpassung sei die übliche Art, wie sich Recht entwickelt.[*98] Recht existiert deshalb nach Watson zu einem Großteil losgelöst von der Gesellschaft und der gesellschaftlichen Entwicklung. Es sei auch nicht funktional an die Lebensumstände einer bestehenden Gesellschaft gebunden.[*99] Watson betont die Wichtigkeit der Rechtsgeschichte hinter den Rechtsnormen. In der Rechtsvergleichung solle man die historische Beziehung zwischen Rechtssystemen beachten. Daraus folgt, dass zwischen Rechtssystemen, die historisch keine Beziehung zueinander haben, keine Rechtsvergleichung stattfinden kann.[*100] Damit widerspricht Watson einer Annahme der funktionalen Methode. Funktionen von Rechtsnormen können nach ihm nicht unabhängig von den Rechtssystemen miteinander verglichen werden. Diese Ansicht wurde insbesondere von Legrand kritisiert.[*101] Nach ihm müsste man, um *legal transplants* anzunehmen, Rechtsnormen als autonome Einheit ohne historischen oder kulturellen Einfluss sehen.[*102] Die Funktion einer Rechtsnorm hängt jedoch von den Annahmen desjenigen ab, der sie interpretiert. Diese sind wiederum kulturell und historisch bedingt.[*103] Recht lässt sich ohne den geschichtlichen, politischen, und sozial-ökonomischen Kontext nicht verstehen.[*104]

5. Modifizierte Ansätze der funktionalen Methode

Aus der vielseitigen Kritik an der funktionalen Methode wurden verschiedene modifizierte Ansätze der funktionalen Methode entwickelt, die im Folgenden erläutert werden.

5.1. Strukturelle Vergleichung

In der strukturellen Vergleichung wird in den zu vergleichenden Rechtsordnungen nach ähnlichen strukturellen Elementen gesucht. Nachdem diese gefunden sind, wird der rechtssoziologische Zweck der Strukturen in den Rechtssystemen geprüft.[*105] Die strukturelle Rechtsvergleichung kann man daher als spezielle Anwendung der funktionalen Methode betrachten.[*106]

Hyland schreibt in seinem rechtsvergleichenden Werk *Gifts* über das Phänomen des Schenkens in verschiedenen Rechtssystemen.[*107] Er sieht im funktionalen Vergleich und dem Recht über die Schenkung eine besondere Schwierigkeit. Beim Schenkungsrecht steht zuerst die Frage, welchen Zweck das Schenken

94 Brand (Fn 18) 414.

95 Alan Watson, *Legal Transplants* (2. Auflage 1993) 21.

96 Sarah Piek, 'Die Kritik an der funktionalen Rechtsvergleichung' [2013] Zeitschrift für europäisches Privatrecht 60, 66.

97 Watson (Fn 95) 21.

98 Watson (Fn 95) 7.

99 Michele Graziadei, 'The functionalist heritage' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies* (2003) 121. – DOI: https://doi.org/10.1017/cbo9780511522260.005.

100 Watson (Fn 95) 7.

101 Gudula Deipenbrock, 'Legal Transplants? – Rechtsvergleichende Grundüberlegungen zum technischen Rechtstransfer' [2008] Zeitschrift für vergleichende Rechtswissenschaft 343, 349.

102 Pierre Legrand, 'The Impossibility of "Legal Transplants"' [1997] Maastricht Journal for European and Comparative Law 111, 114. – DOI: https://doi.org/10.1177/1023263x9700400202.

103 Legrand (Fn 102) 114.

104 Örücü (Fn 51) 47.

105 Husa (Fn 8) 127.

106 Husa (Fn 8) 128.

107 Hyland (Fn 25).

an sich verfolgt, bevor man untersuchen kann, welche Normen die Schenkung am ehesten regulieren.[*108] Der sozial-kulturelle Zweck des Geschenks, also Symbol, Zuneigung oder sozialer Druck, muss geklärt werden, bevor man überhaupt zu den Funktionen der Rechtsnormen kommt.

Obwohl Hyland der funktionalen Methode kritisch gegenübersteht, wendet er dennoch eine modifizierte Art der funktionalen Methode an.[*109] Er verbindet die klassische funktionale Denkweise mit der neueren, anthropologischen Rechtsvergleichung. Daher wird die strukturelle Vergleichung auch als funktionale Methode des 21. Jahrhunderts beschrieben.[*110]

5.2. Saccos dynamischer Ansatz

Der dynamische Ansatz, der von Rodolfo Sacco begründet wurde[*111], liegt zwischen der funktionalen und strukturellen Rechtsvergleichung.[*112] Sacco führte die Theorie der rechtlichen Formanten (*legal formants*) ein, die verschiedene Elemente des „lebendigen Rechts" beinhaltet, zum Beispiel gesetzliche Regelungen, wissenschaftliche Kommentare und Lehren sowie Gerichtsentscheidungen.[*113] Um nach Sacco Ähnlichkeiten und Unterschiede in Rechtssystemen herauszufinden, muss neben der Gesetzgebung insbesondere auch die Rechtsprechung herangezogen werden.[*114] Denn: Rechtsnormen zweier Länder können zwar ähnlich oder gleich sein, Gerichte verschiedener Länder können aber auf Basis der Rechtsnormen anders entscheiden. Rechtliche Formanten sind rechtliche Vorschläge, die einen Effekt auf die Lösung eines rechtlichen Problems haben.[*115] Saccos Kernthese ist die Vielfalt statt der Einheit der rechtlichen Regeln einer Rechtsordnung.[*116] Der dynamische Ansatz zeigt die Vielschichtigkeit des Vorgangs der Rechtsfindung auf, die Rechtsvergleichende beachten müssen.[*117]

5.3. Constantinesco: Das 3-Phasen-Modell

Die Methode von Constantinesco beschränkt sich auf die Form der Untersuchung einzelner Rechtsprobleme.[*118] Der Vergleichsvorgang unterteilt sich nach ihm auf drei Phasen: Feststellen, Verstehen und Vergleichen.[*119] In der ersten Phase soll festgestellt werden, wie die zu vergleichenden Rechtsordnungen das untersuchte Rechtsinstitut behandeln.[*120] Im zweiten Schritt der Methode Constantinescos soll das zu vergleichende Element in die betreffende Rechtsordnung eingegliedert werden.[*121] Dafür muss der Rechtsvergleicher sowohl die grundlegenden Elemente der Rechtsordnung kennen als auch die außerrechtlichen, namentlich wirtschaftlichen, sozialen und politischen Aspekte.[*122] In der dritten Phase sollen dann alle Elemente der betrachteten Rechtsinstitute miteinander verglichen werden. Dabei sollen zunächst die Unterschiede und Ähnlichkeiten bestimmt werden, um festzustellen, welche Beziehung die verglichenen Elemente zueinander aufweisen.[*123]

Für Constantinesco bedeutet das von ihm beschriebene Vorgehen der funktionalen Methode eine Vermischung der Rechtssoziologie und Rechtsvergleichung. Erstens kann der außerrechtliche Faktor nicht nur

108 Hyland (Fn 25) Rn. 136.

109 Husa (Fn 8) 125.

110 Husa (Fn 8) 125.

111 Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' [1991] American Journal of Comparative Law 1-34 und 343-401. – DOI: https://doi.org/10.2307/840669.

112 Husa (Fn 8) 132.

113 Günter Frankenberg, 'How to do Projects with Comparative Law: Notes of an Expedition to the Common Core' in Pier Giuseppe Monateri (ed), *Methods of Comparative Law* (1. Auflage 2012) 126. – DOI: https://doi.org/10.4337/9781781005118.00013.

114 Sacco (Fn 111) 23.

115 Husa (Fn 8) 132.

116 Kischel (Fn 11) Rn. 42.

117 Kischel (Fn 11) Rn. 48.

118 Uwe Kischel, *Rechtsvergleichung* (§ 1 1. Auflage 2015) Rn. 32.

119 Constantinesco (Fn 36) 137.

120 Constantinesco (Fn 36) 141f.

121 Kischel (Fn 118) Rn. 34.

122 Constantinesco (Fn 36) 232.

123 Kischel (Fn 11) Rn. 35.

sozialer Natur, sondern auch politisch, moralisch oder ideologisch sein. Zweitens beschäftigt sich Rechtsvergleichung mit der Normativität des Rechts und muss daher vom Rechtssatz oder vom rechtlichen Problem ausgehen.[*124]

5.4. Kontextuelle Rechtsvergleichung

Kischel hält eine universell anwendbare rechtsvergleichende Methode für realitätsfern. Alle besonderen Leistungen bekannter Rechtsvergleicher seien auch durch neue Ideen, die die Methode betreffen, entstanden. Er befürwortet den grundsätzlichen Gedanken der funktionalen Methode. Um den Diskussionen über die funktionale Methode und ihren Assoziationen zu entgehen, könnte es laut Kischel sinnvoll sein, den Begriff des Funktionalen abzulegen, ihren Kerngedanken aber beizubehalten.[*125] Auch bei der funktionalen Methode muss neben der rechtlichen auch die außerrechtliche Ebene beachtet werden, um den Kontext des Sachproblems zu erkennen. Daher schlägt er den Begriff der kontextuellen Rechtsvergleichung vor.[*126] Diese soll die Grundannahmen und Grenzen der funktionalen Methode bestehen lassen, sich aber auf keine Art von Fragestellung beschränken. Ein immer einzuhaltendes Modell lässt sich laut Kischel aufgrund der vielschichtigen, komplexen Realität nicht bereitstellen.[*127] Jede einzelne Fragestellung bedarf einer wiederkehrenden, neuen Analyse und den Einbezug aller relevanten Gesichtspunkte des Kontextes.[*128]

6. Ausblick

Die funktionale Methode besteht mittlerweile in sehr vielen verschiedenen Versionen.[*129] Husa sieht die funktionale Methode nicht als einzige Vergleichsmethode.[*130] Auch nach Hyland kann keine universelle Methode für jeden Rechtsvergleich zufriedenstellend angewandt werden. Für jeden Vergleich muss eine neue oder modifizierte Methode entwickelt werden.[*131] Die funktionale Methode liefert weiterhin gute Ideen und trägt zur Rechtsvereinheitlichung bei. Diese ist mit dem *Common Frame of Reference* auf EU-Ebene und auch dem CISG schon zumindest ein Stück vorangeschritten, wobei man von einer weltweiten Rechtsvereinheitlichung des Privatrechts noch weit entfernt ist.[*132] Auch die vom jeweiligen System befreiten Begriffe sind bedeutsam: Sie fördern die Verständlichkeit und Kommunikation zwischen vergleichenden Rechtswissenschaftlern. Seit Begründung der funktionalen Methode sind schon knapp 100 Jahre vergangen. In dieser Zeit ist der internationale Austausch in vielen Bereichen um ein Vielfaches gewachsen. Flugreisen sind erschwinglich geworden und machen es nicht nur privilegierten Menschen möglich, weit entfernte Länder zu bereisen. Damit steigt auch der rechtswissenschaftliche Austausch an. Austauschprogramme wie Erasmus+ ermöglichen Studierenden der Rechtswissenschaft Einblicke in neue Rechtssysteme. Auch werden Lehrveranstaltungen zur Rechtsvergleichung angeboten. Die veränderten Rahmenbedingungen haben auch die Rahmenbedingungen für die funktionale Methode geändert. Sie ist nicht überholt, sollte aber möglicherweise für jede rechtsvergleichende Arbeit neu bestimmt werden.

Man könnte die Grundannahmen der funktionalen Methode folgendermaßen einschränken:

- Recht dient in den meisten Fällen zur Lösung von Problemen.
- Verschiedene Gesellschaften sehen sich sehr häufig den gleichen Problemen ausgesetzt.
- Gesellschaften kommen häufig zu ähnlichen Lösungen.

Mit diesen drei modifizierten Grundannahmen kann die Methode jeder rechtsvergleichenden Fragestellung individuell angepasst werden. Damit soll der Kontext, in dem die rechtsvergleichende Fragestellung steht, hervorgehoben werden, so wie es auch Kischel vorschlägt.[*133]

124 Constantinesco (Fn 36) 265.
125 Kischel (Fn 11) Rn. 199.
126 Kischel (Fn 11) Rn. 200.
127 Kischel (Fn 11) Rn. 200.
128 Kischel (Fn 11) Rn. 201.
129 Michaels (Fn 7) S. 348–368.
130 Husa (Fn 8) 124f.
131 Hyland (Fn 25) Rn. 113.
132 Kischel (Fn 118) Rn. 42.
133 Kischel (Fn 11) Rn. 201.

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The Legal Meaning of a Detailed Spatial Plan in the Context of the Fundamental Right of Ownership

1. Introduction

It can be stated that the fundamental right of ownership[*1] is one of the most important fundamental rights that is stipulated in the Constitution of the Republic of Estonia[*2] (hereinafter **CRE**). Specifically, it is stipulated in sentence 1 of Section 32 of the CRE that the property of every person is inviolable and is equally protected. The Supreme Court of Estonia (hereinafter **SCE**) has stated that private ownership has an essential meaning in a society that is based on an open market economy and guarantees the functioning of the open market.[*3] The fundamental right of ownership is protected by several international regulations, which are also applicable in Estonia; for example, it is protected by the Charter of Fundamental Rights of the European Union (Art. 17)[*4].

On the other hand, one can also state that the fundamental right of ownership could be considered one of the most limited fundamental rights provided for by the CRE. Under Estonian law, the fundamental right of ownership is limited through various rights and regulations that are governed by private law – for example, neighbourhood rights (under the Law of Property Act, hereinafter **LPA**[*5], §143 *ff*) – and also via various regulations governed by public law.

The aim behind this article is to determine what the legal meaning of a detailed spatial plan (hereinafter **detailed plan**) is within the context of the fundamental right of ownership. In principle, a detailed plan could be understood under Estonian law as a restriction (limitation) of the fundamental right of ownership or, alternatively, it could fall under the legal concept of 'designing the fundamental right of ownership' (in line with the explanation in Section 3). The distinction between these legal concepts is essential, because those concepts fall under two separate and distinct schemes of legal regulation in light of the CRE, which differ from each other substantially. If a detailed plan and the conditions laid down in the latter fall under the legal concept of 'restriction of the fundamental right of ownership', the detailed plan and its conditions must be compliant with the requirements foreseen by the CRE for establishment of a restriction to

1 Also known as the right to private property.

2 The Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*). 03.07.1992. RT 1992, 26, 349.

3 CRCSCd 30.04.2004, 3-4-1-3-04, para 24 (in Estonian).

4 Charter of Fundamental Rights of the European Union. 2012/C 326/02.

5 Law of Property Act (*Asjaõigusseadus*). 01.12.1993. RT I 1993, 39, 590.

a fundamental right. In this case, the restriction of the fundamental right of ownership compassed must have appropriate legal grounds etc (formal requirements)[*6] and it also must be in consistence with the principle of proportionality (material requirements).[*7] On the other hand, if a detailed plan were to fall under the concept of 'designing the fundamental right of ownership', the above requirements would not apply. For example, in the case of the last scenario mentioned, not every term foreseen in the detailed plan has to have legal grounds set forth by law. In this case, the local government has more freedom and wider discretionary power over the establishment of the detailed plan and its conditions. Notwithstanding the fact that the above-mentioned question has a considerable impact on the establishment of a detailed plan and its conditions, this question is still unresolved in Estonian law.

In the context of the present article, some explanation is important at this juncture. Each of the fundamental rights foreseen by the CRE could be, in principle, classed under three wider categories: i) a fundamental right to freedom (in Estonian, *vabaduspõhiõigus*), ii) a fundamental right for performance of the state (in Estonian, *soorituspõhiõigus*), and iii) a fundamental right of equality.[*8] Any one fundamental right, with the fundamental right of ownership (CRE Art. 32) being no exception, might fall under several of these categories.[*9] The importance of this distinction is due to the fact that the general category of a fundamental right dictates the logic (control scheme) for how to determine whether the scope of protection for the relevant fundamental right has been restricted. The fundamental right of ownership is indeed one of those fundamental rights that fall under more than one of the above-mentioned categories.[*10] Taking into account the legal effect and meaning of the detailed plan (see Section 2) and the fact that the article is written from the immovable property owner's viewpoint, the analyses in this article have been guided from the standpoint of the control scheme, or logic, foreseen for the fundamental right of freedom.

If we are to find a solution to the problem raised above, the following questions must be answered: i) what the legal effect and meaning of a detailed plan is; ii) how to determine and define the legal concept of 'restriction of the fundamental right of ownership' and how to distinguish between the latter legal concept and the other, similar legal concepts; and, finally, iii) what the scope of the protection of the fundamental right of ownership is in light of public construction law and what the legal meaning of a detailed plan is in the context of the fundamental right of ownership.

For finding an answer to those questions, the comparative legal method has been employed. In this research, I compared the Estonian legal system with a legal solution that has been used in Germany. The latter legal system was chosen for comparative analysis for reason of the German legal model's history of serving as a model for Estonian regulation related to the fundamental right of ownership and for the country's regulations related to property rights. In addition, taking the German legal model as a yardstick for comparison is justified by the fact that the SCE has explicitly stated that, for interpretation of those provisions in Estonia that have not yet been interpreted by the SCE, one is allowed to refer to settled court practice from the courts of other European countries – for example, Germany's.[*11]

2. The legal effect and meaning of a detailed plan

If undertaking to evaluate what the legal meaning of a detailed plan in the context of the fundamental right of ownership actually is, one must proceed from an understanding of the legal concept of a detailed plan. Evaluation of the legal substance and characteristics of a detailed plan requires considering the fact that, in accordance with established SCE practice, a detailed plan is an administrative act[*12] (per §51 of the

6 CRCSCd 26.11.2007, 3-4-1-18-07, para 35; CRCSCd 01.07.2008, 3-4-1-6-08, para 43; CRCSCd 14.12.2010, 3-4-1-10-10, para 47; CRCSCd 27.02.2015, 3-4-1-54-14, para 47 (in Estonian).

7 CRCSCd 26.03.2009, 3-4-1-16-08, para 28 (in Estonian).

8 M Ernits and others, 'II peatükk (Põhiõigused, vabadused ja kohustused, kommentaar)', *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. 4., täiend. vlj.* ['II Section, Fundamental rights, freedoms and obligations, Executive edition of the Constitution of the Republic of Estonia, 4th edn'] (Tallinn: Juura 2017), para 20 <https://arhiiv-2017.pohiseadus.ee/index.php?sid=1&ptid=12> accessed 31 March 2021) (in Estonian).

9 Ibid.

10 Ibid.

11 CCSCd 12.10.2011, 3-2-1-90-11, para 10 (in Estonian).

12 ALCSCd 01.03.2017, 3-3-1-79-16, para 17 (in Estonian).

Administrative Procedure Act, hereinafter **APA**).[*13] The definition of a detailed plan is given in Section 124 of the Planning Act (hereinafter **PA**)[*14], according to whose Subsection 2 said plan must be considered a document aimed at executing the general plan and establishing a complete spatial solution for the area subject to planning. Subsection 2 of the PA's Section 124 also provides for a detailed plan as determining how the planned area is to be used for construction purposes over the coming years. Additionally, it is noted in court practice that, through a detailed plan, the local authority translates the principles for spatial development of the administrative area and specifies the conditions for sustainable and balanced development, which, in turn, constitute the basis for land-use and construction activities.[*15] Furthermore, the SCE has stated that a detailed plan could and must be understood as a 'social agreement' governed by public law that addresses how to use a certain area.[*16] The substance and legal effect of a detailed plan have been defined in Germany in a similar manner (BauGB, Subsection 5 of §1).

According to statements made in the German legal literature, a detailed plan should be understood as a 'proposal for use of the planning area'. The legal literature of Germany explains that a detailed plan fulfils its legal purpose by determining the planning area and its development principles by way of a 'proposal' as to how a certain area is allowed to be used.[*17] One implication is that the owner of the property (or any other interested party), unless provision is made otherwise, does not have an obligation to enforce the detailed plan that is currently valid; however, the provisions set forth in the detailed plan must be followed in the event that any interested party wishes to use the planning area for construction purposes.[*18] Therefore, a valid detailed plan has quite considerable influence on the nature of the immovable property. For example, the detailed plan determines the property's intended purpose and the associated building rights. It must be emphasised also that a valid detailed plan does not merely 'propose' and foresee how the planning area is allowed to be used; it also precludes the use of the planning area for purposes that are not allowed or foreseen in the detailed plan.

In conclusion, it could be argued that a valid detailed plan in the Estonian context is an administrative act of a kind unto itself. On the one hand, a detailed plan is binding for those who are interested in using the property, when subject to a valid detailed plan. On the other hand, a detailed plan should be understood as a proposal for the use of the planning area too, because nobody has any obligation to enforce the valid detailed plan, except when there are provisions otherwise. Only in cases of the interested party desiring to use the planning area for construction purposes must the provisions set forth in the detailed plan be followed.

3. The legal concept of 'restriction of the fundamental right of ownership'

Finding an answer to the question of the legal meaning of a detailed plan in the context of the fundamental right of ownership requires further groundwork: one must understand the legal concept of 'restriction of the fundamental right of ownership'. Achieving this understanding requires one to differentiate clearly between this legal concept and other alternative concepts that are affecting and designing the fundamental right of ownership. As mentioned above, the applicability of the requirements set forth in the CRE in relation to the protection of fundamental rights depends on whether the detailed plan is seen as a restriction of the fundamental right of ownership or not.

It is explained in pertinent commentary that the mechanism of protection for a fundamental right is applicable only in cases wherein the addressee of the fundamental right (the public authority) has unfavourably influenced activities, characteristics, or the status of a thing or a right that fall within the scope of the

13 Administrative Procedure Act (*Haldusmenetluse seadus*), 01.01.2002, RT I 2001, 58, 354.

14 Planning Act (*Planeerimisseadus*), 01.07.2015, RT I, 26.02.2015, 3.

15 ALCSCd 27.01.2010, 3-3-1-79-09, para 13 (in Estonian).

16 CCSCd 22.03.2006, 3-2-1-5-06, para 22 (in Estonian).

17 Battis and others, BauGB Baugesetzbuch Kommentar ['Executive comments to Building Code'], 13. Aufl. [edn]. 2016, BauGB § 1, Rn. 10-11 (in German).

18 ALCSCd 05.03.2019, 3-13-385/90, para 12 (in Estonian).

fundamental right of ownership.[*19] That kind of negative influence can be characterised as a restriction or limitation of the scope of the fundamental right of ownership.[*20] It is explained also that, in determining the scope of the fundamental right of freedom (including the fundamental right of ownership), one must be guided by a wide approach also known as a modern theory of the restriction of the fundamental right.[*21] Under this theory, the scope of a fundamental right of freedom can be deemed to have been restricted in any case in which the sphere of the entitled person's freedom has been influenced in an unfavourable manner.[*22] The SCE has stated that every unfavourable affecting of a fundamental right's scope of protection may be classed as restriction of that fundamental right.[*23] In Estonian legal literature, it is explained that 'restriction' is a general term covering any prevention, damage, or elimination of the right's sphere of protection for the person entitled to it.[*24] Therefore, in short, it can be argued that the legal instrument of the public authority must be seen as restricting the fundamental right of ownership if it has any kind of negative influence on the sphere of freedom connected with said fundamental right.

Writings on Estonian legal theory grant brief acknowledgement to the concept of designing a fundamental right. While the SCE has not in its practice clearly distinguished this legal concept from the concept of 'restriction of the fundamental right of ownership', it must be noted that the SCE's recent practice indirectly recognised the legal concept denoted as 'designing a fundamental right'.[*25] The final report on the legal analysis of the CRE (conducted by the expert commission) states that one must differentiate the concept of regulation restricting a fundamental right from that of regulation designing a fundamental right.[*26] In cases of the latter, rather than restrict the legal sphere of the fundamental right, the regulation in question creates the right or articulates prerequisites for exercising it.[*27] Any seeming restriction could be considered delimitation or specification of the right. If it is identified that the regulation in question designed the fundamental right, the right has not been restricted thereby, and it is not necessary to justify the regulation in this case.[*28] It follows also that the mechanism for protection of a fundamental right does not apply here.[*29] This means in practice that a regulation falling under the category 'designing the fundamental right of ownership' need not fully meet the requirements (formal and material)[*30] foreseen in the CRE in connection with restrictions to fundamental rights.

Similar legal concepts are addressed in German legal literature. It is explained that not every activity conducted by the state where there is some connection with the fundamental right in question is always

19 M Ernits and others, 'II peatükk (Põhiõigused, vabadused ja kohustused, kommentaar)', Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. 4., täiend. vlj. ['II Section, Fundamental rights, freedoms and obligations, Executive edition of the Constitution of the Republic of Estonia, 4the edn'] (Tallinn: Juura 2017), para 43 <https://arhiiv-2017.pohiseadus.ee/index.php?sid=1&ptid=12> accessed 31 March 2021) (in Estonian).

20 Ibid, para 44.

21 Ibid, para 44.

22 CRCSCd 06.03.2002, 3-4-1-1-02, para 12; CRCSCd 12.06.2002, 3-4-1-6-02, para 9 (in Estonian).

23 SCeb 22.11.2011, 3-3-1-33-11, para 23; CRCSCd 21.01.2014, 3-4-1-17-13, para 26; CRCSCd 15.09.2014, 3-4-1-11-14, para 15 (in Estonian).

24 M Ernits and others, 'II peatükk (Põhiõigused, vabadused ja kohustused, kommentaar), Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. 4., täiend. vlj. ['II Section, Fundamental rights, freedoms and obligations, Executive edition of the Constitution of the Republic of Estonia, 4th edn'] (Tallinn: Juura 2017), para 44 <https://arhiiv-2017.pohiseadus.ee/index.php?sid=1&ptid=12> accessed 31 March 2021) (in Estonian).

25 SCebd 20.10.2020, 5-20-3 p 44, para 77.

26 'Eesti Vabariigi põhiseaduse juriidilise ekspertiisi komisjoni lõpparuanne' ['The Final Report of the Legal Analyses of the Constitution of the Republic of Estonia'] (ordered published by the Ministry of Justice). Kommentaarid II peatüki kohta. [Comments to II Section] 12, clause 4.2.2.2 <www.just.ee/sites/www.just.ee/files/elfinder/article_files/pohiseaduse_2._peatukk._pohioigused_vabadused_ja_kohustused.pdf> accessed 31 March 2021.

27 Ibid 12, clause 4.2.2.2.

28 'Eesti Vabariigi põhiseaduse juriidilise ekspertiisi komisjoni lõpparuanne' ['The Final Report of the Legal Analyses of the Constitution of the Republic of Estonia'] (ordered published by the Ministry of Justice). Kommentaarid II peatüki kohta. [Comments to II Section] 12, clause 4.2.2.2 <www.just.ee/sites/www.just.ee/files/elfinder/article_files/pohiseaduse_2._peatukk._pohioigused_vabadused_ja_kohustused.pdf> accessed 31 March 2021.

29 M Ernits and others, 'II peatükk (Põhiõigused, vabadused ja kohustused, kommentaar)', Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. 4., täiend. vlj. ['II Section, Fundamental rights, freedoms and obligations, Executive edition of the Constitution of the Republic of Estonia, 4th edn'] (Tallinn: Juura 2017), para 43 <https://arhiiv-2017.pohiseadus.ee/index.php?sid=1&ptid=12> accessed 31 March 2021) (in Estonian).

30 CRCSCd 26.11.2007, 3-4-1-18-07, para 35; 01.07.2008, 3-4-1-6-08, para 43; 14.12.2010, 3-4-1-10-10, para 47; 27.02.2015, 3-4-1-54-14, para 47, CRCSCd 26.03.2009, 3-4-1-16-08, para 28 (in Estonian).

qualified as 'restriction of a fundamental right' (*Beeinträchtigung*).[*31] The activity of the state may, alternatively, be favourable in light of the interests of the authorised person – for example, the activity of the state may expand authorised persons' freedom for exercise of the fundamental right.[*32]

In cases in which the action carried out by the public authority does not bring about any restrictive effect, one cannot consider activity of this nature to be restriction of the fundamental right.[*33] It is explained also that a question arises from the regulation dealing with 'restriction of a fundamental right' as to how one should delimit the concepts of 'concretisation of a fundamental right' (*Konkretisierung*) and 'designing a fundamental right' (*Ausgestaltung*) in contrast against the concept of 'limitation of a fundamental right'.[*34] German legal scholars have concluded that it is impossible to define these concepts clearly and that it is reasonable to define them in terms of activities conducted by the public authority that do not fall under 'limitation of a fundamental right' (as a negative concept).[*35] When one considers the fact that, on the basis of the legal position referred to above, the protection mechanisms related to fundamental rights shall apply only in cases wherein the fundamental right has been restricted, damaged, or in some other way influenced in a negative manner[*36], the concept of designing the fundamental right could be understood as an activity of the state that affects the sphere of that fundamental right but at the same time does not limit or exert any other negative influence on the sphere protected by dint of the fundamental right. It could be argued also that the concept of 'designing a fundamental right' should, as a general rule, have a positive influence on the fundamental right (extending the freedom sphere etc).

From the foregoing statements, one could state the following conclusions: The term and legal concept 'affecting a fundamental right' should be understood as covering every activity conducted by the public authority that has any kind of influence on the scope of protection of the fundamental right – the instrument pertains to the fundamental right in some way. The legal term 'affecting a fundamental right' could be considered a general umbrella term encompassing the legal concepts of both 'limitation of a fundamental right' and 'designing a fundamental right'. Estonian legal literature distinguishes between the concept of 'limitation of a fundamental right', which should be understood as referring to an activity conducted by the public authority that has any kind of negative influence on the scope of protection of the fundamental right[*37], and the concept of 'designing a fundamental right', which should be understood as a legal instrument that provides the prerequisites for enforcement of the fundamental right. Also, a legal instrument could fall under the 'designing a fundamental right' category only if it does not restrain execution of the fundamental right. It could be argued that the key question for distinguishing between the above-mentioned legal concepts is whether the legal instrument has any kind of negative influence on the fundamental right or not. The protection mechanism in place for fundamental rights is applicable only in cases in which the legal instrument falls under the 'restriction of a fundamental right' concept.[*38]

31 M Sachs, Verfassungsrecht II. Grundrechte. 3. Auflage (Heidelberg 2017) 128ff (in German).

32 Ibid 128.

33 Ibid 128.

34 Ibid 129.

35 Ibid 129.

36 Ibid 128.

37 CRCSCd 22.11.2011, 3-3-1-33-11, para 23; CRCSCd 21.01.2014, 3-4-1-17-13, para 26; CRCSCd 15.09.2014, 3-4-1-11-14, para 15.

38 M Ernits and others, 'II peatükk (Põhiõigused, vabadused ja kohustused, kommentaar), Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. 4., täiend. vlj. ['II Section, Fundamental rights, freedoms and obligations, Executive edition of the Constitution of the Republic of Estonia, 4th edn'] (Tallinn: Juura 2017), para 43 <https://arhiiv-2017.pohiseadus.ee/index.php?sid=1&ptid=12> accessed 31 March 2021) (in Estonian).

4. The scope of protection of the fundamental right of ownership in light of public construction law and the meaning of a detailed plan in this context

This section is devoted to solutions for two key legal issues. Firstly, what is the scope of protection of the fundamental right of ownership in light of public construction law? Secondly, what legal meaning does a detailed plan have in the latter context when one considers the conclusions presented in sections 2 and 3? Examining the scope of the protection afforded to the fundamental right of ownership in light of public construction law, one finds explanation that the purpose of the fundamental right of ownership is to ensure the sphere of freedom for the beneficiary of the rights in the area of property rights (and that of matrimonial rights that are similar to property rights) and thereby enable the beneficiary to shape his own life at his own risk.[*39] The SCE has explained that the protection of the fundamental right of ownership covers movable and immovable property, as well as monetarily appraisable rights and claims.[*40] Also, it is explained that proprietary rights such as those to things, money, and monetarily appraisable rights and claims are likewise protected as 'ownership' under Section 32 of the CRE.[*41]

The owner's right to use the owner's immovable for construction purposes falls within the sphere of protection of the fundamental right of ownership. In other words, the scope of protection of this fundamental right encompasses the concept we call 'freedom of construction'[*42]. Important provisions that shape the content, meaning, and character of the fundamental right of ownership are found in Section 32 of the CRE and Section 68 of the LPA. Under these provisions, the owner has the right to possess, use, and dispose of a thing and to demand prevention of the violation of these rights and elimination of the consequences of violation by all other persons. Because use of a property for constructional purposes is just one of many possible ways of utilising a property, one could argue that the concept of 'freedom of construction' falls under the sphere of protection of the fundamental right of ownership as well.

Although the principles presented above have been in force already since the 1990s and therefore one could also argue that the concept of 'freedom of construction' too has been applied since then, there is no sign of the Estonian legislator having acknowledged the concept of 'freedom of construction' until 2015. With the explanatory memorandum on the new Building Code (hereinafter **BC**),[*43] the legislator explained that 'it is clear that within the meaning of the CRE, any establishment of rules for the use of immovable property – including for using the immovable property – constitutes a restriction. Following the example of other countries, one can also talk about a so-called concept of freedom of construction, which could be considered a part of the fundamental right of ownership'.[*44] The legislator has defined the concept of freedom of construction as follows: '[U]nder the concept of construction freedom, one must understand the right of the owner of an immovable to improve its immovable and use its property for construction purposes within the frames of valid legislation.'[*45]

In the German legal literature, it has been explained that the concept of freedom of construction is a traditional element protected under the fundamental right of ownership.[*46] The fundamental right of ownership (see *Grundgesetz für die Bundesrepublik Deutschland*,[*47] hereafter **GG**, Art. 14) assures and guarantees for the owner of the property the right to use the property for construction purposes within the

39 M Ernits and others, 'Paragrahv 32 (Omandipõhiõigus) kommentaar', *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. 4., täiend. vlj.'* ['Paragraph 32, Fundamental right of ownership, Executive edition of the Constitution of the Republic of Estonia, 4th edn'] (Tallinn: Juura 2017), para 1 <https://arhiiv-2017.pohiseadus.ee/index.php?sid=1&ptid=37&p=32> accessed 1 April 2021) (in Estonian).

40 CCSCd 17.06.2004, 3-2-1-143-03, para 18; CRCSCd 26.06.2014, 3-4-1-1-14, para 88.

41 SCeb 31.03.2011, 3-3-1-69-09, para 56.

42 Also named as construction freedom.

43 Building Code (*Ehitusseadustik*) 01.07.2015, RT I, 05.03.2015, 1.

44 *Seletuskiri ehitusseadustiku juurde*. SE 555. ['Explanatory memorandum to Building Code' SE 555] 3-4 <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/9e8a422c-beb8-476c-897c-f9b761fb9b92/Ehitusseadustik> accessed 06 January 2020) (in Estonian).

45 Ibid.

46 Maunz and others, Grundgesetz-Kommentar, ['Executive edition to constitution'] GG, art 14 Rn. 164, 165 (in German).

47 Grundgesetz für die Bundesrepublik Deutschland. 23.05.1949.

frames of valid legislation.*[48] It is explained that, in addition to many other rights that are protected under the sphere of the fundamental right of ownership, the concept of freedom of construction too is covered.*[49] It is also clarified that the right of using the immovable for construction purposes is not 'something' (some right) that is granted to the owner of the property by the authorities from 'outside'.*[50] Under the concept of freedom of construction, the right to use one's property for construction purposes is not a right given by the authorities but part of the fundamental right of ownership.*[51] The right to use one's immovable for construction purposes is one of the essential parts of the immovable property and all norms that restrict the latter – in particular, the norms related to planning and construction law – constitute restrictions on the free use of immovable property.*[52]

In conclusion, on the basis of the legal positions addressed above, it can be stated that the concept of freedom of construction is an essential element of ownership protected under the CRE also. The legal concept of freedom of construction should be understood as the right of the immovable's owner to use said immovable property for construction purposes within the frames of the valid legislation.*[53]

Now we can turn to the legal meaning of a detailed plan in the context of the fundamental right of ownership. The legal positions published through Estonian court practice and in the legal literature are unclear and may even be controversial in this regard. The Estonian legislator has stated in the explanatory memorandum on the BA that all of the regulations pertaining to building and planning law should be seen as restriction to the fundamental right of ownership.*[54] It is explained also that, because freedom of construction as an element of the fundamental right of ownership is protected under the CRE, one must note that every change in any legal status of a certain property in the sense of building or planning law is subject to constitutional review (in pursuit of legitimate expectations and legal certainty).*[55] The legal literature clarifies, furthermore, that the most commonly imposed restrictions on the use of immovable property, which have been established by way of an administrative act, are the restrictions that have been established by plans of various sorts.*[56] It could be argued that the opposite position has been presented by the SCE, in that the SCE concluded that a detailed plan cannot be considered to be a restriction provided by the law*[57] (it must be emphasised that this position was expressed in a very particular context). On the other hand, though, the SCE has found in its practice that restriction of the fundamental right of ownership was present when local authorities refused to initiate detailed-plan proceedings.*[58]

Proceeding from the conclusion presented in the argumentation above, one must reason that a valid detailed plan and, moreover, the terms set forth in that detailed plan, must be considered as restricting the concept of freedom of construction – especially when one accounts for the fact that, in accordance with the concept of freedom of construction, the property-owner has, in principle, an unlimited right to use that property for construction purposes (see the first part of §32 of the CRE and the first two items in Subsection 1 of the LPA's §68). A detailed plan and the terms specified therein for the use of the property do restrict the concept of freedom of construction. One can readily argue that a valid detailed plan eliminates the possibility of the property-owner putting the property to use for any purpose other than or in any way other than that provided for by the valid detailed plan. One could argue also that a valid detailed plan precludes the use of the property for possible purposes that are not expressly allowed or foreseen by the detailed plan. For example, in the event that it is allowed per the valid detailed plan for the property-owner to use the property as residential land, it is not possible for the owner to use the plot as industrial land. Also, if

48 Maunz and others, Grundgesetz-Kommentar, ['Executive edition to constitution'] GG, art 14 Rn. 164, 165 (in German).

49 Ibid.

50 Ibid.

51 Battis and others, BauGB Kommentar ['Executive edition to Building Code'], 14. Aufl. [edn]. 2019, BauGB § 1, Rn 10-11 (in German).

52 Maunz and others, Grundgesetz-Kommentar, ['Executive edition to constitution'] GG, art 14 Rn. 164, 165 (in German).

53 *Seletuskiri ehitusseadustiku juurde* SE 555. ['Explanatory memorandum to Building Code'] 3-4 <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/9e8a422c-beb8-476c-897c-f9b761fb9b92/Ehitusseadustik> accessed 6 January 2020) (in Estonian).

54 Ibid.

55 Ibid.

56 U Volens, '"Ses hulluses on siiski järjekindlust" ehk kinnisomandi kitsenduste süsteemi otsimas' ["However, there is consistency in this madness of 'looking for a system of property restrictions'] (2013) VII Juridica 491 (in Estonian).

57 CCSCd 3-2-1-5-06, para 22; CCSCd 3-2-1-48-10, para 28.

58 SCebd, 03.12.2007, 3-3-1-41-06, para 20.

the detailed plan provides that the intended purpose of the property is 'urban park', then the owner's right to put the property to construction-related uses is almost entirely precluded. It must be concluded, then, that the terms foreseen in a detailed plan could be seen as not restricting the fundamental right of ownership only when the terms do not have any negative (restrictive) impact on the further contractual use of the property (i.e. when the terms of the detailed plan just expand the sphere of freedom of the property-owner). Therefore, one could argue that the detailed plan and its terms must be generally understood as restrictions of the fundamental right of ownership.

Because of the inconsistency of the legal positions presented in the legal literature and in Estonian court practice, it would be advisable to evaluate whether the conclusions drawn are supported by German legal literature. In the German legal literature, jurists explain that a detailed plan must be regarded as a restriction of the fundamental right of ownership that does not bring with it an obligation to remedy the damage caused by the establishment of the detailed plan.[*59] It is explained also that, since cases in which a detailed plan exists leave the owner of the property room to exercise freedom of construction only within the frames laid down by the detailed plan, the freedom of construction is indeed restricted by the detailed plan.[*60] Therefore, the conclusion drawn above is supported by the legal positions presented in German legal literature.

In conclusion, it can be stated more generally in light of the discussion above that a detailed plan and, moreover, the terms set forth in the detailed plan should be considered to constitute restriction of the concept of freedom of construction.

5. Conclusions

At the beginning of the article, three questions were raised: i) what is the legal effect and meaning of a detailed plan, ii) how can one determine and define the legal concept of 'restriction of the fundamental right of ownership' and distinguish that concept from similar legal concepts, and iii) what is the scope of the protection of the fundamental right of ownership in light of public construction law – and what is the legal meaning of a detailed plan in the context of the fundamental right of ownership?

We can conclude, firstly, that a valid detailed plan is an administrative act of its own kind. On the one hand, a detailed plan is binding for those persons interested in using the property that is subject to said detailed plan (if valid). At the same time, a detailed plan should be understood as a 'proposal for use of the planning area' because nobody has an obligation to enforce the valid detailed plan (unless provision is made otherwise); it is only when the interested party wants to use the area under planning for construction purposes that the provisions made in the detailed plan must be honoured. Nonetheless, it is clear that a valid detailed plan has a remarkable influence on one's opportunities to use the property in question for construction purposes.

Secondly, one can conclude that the term and legal concept 'affecting a fundamental right' should be understood to cover every activity conducted by the public authority that has any kind of influence on the scope of protection of the relevant fundamental right. The legal concept of 'affecting a fundamental right' could be considered an umbrella one encompassing the legal concepts 'limitation of a fundamental right' and 'designing a fundamental right' as subcategories. Estonian legal literature distinguishes between the concept of 'limitation of a fundamental right', which should be understood as referring to an activity conducted by the state that has a negative influence – of any kind – on the scope of protection of the relevant fundamental right, and the concept of 'designing a fundamental right'. The latter term should be viewed as denoting a legal instrument that forms the prerequisites for enforcement of the fundamental right. Also, a legal instrument may be categorised under a third concept, 'transforming a fundamental right', but only if it does not constrain the exercise of the fundamental right. One could well argue that the key question for distinguishing among the above-mentioned elements is whether or not the legal instrument has any kind of negative influence on the fundamental right.

59 Battis and others, BauGB Baugesetzbuch Kommentar ['Executive comments to Building Code'], 14. Aufl. [edn]. 2019, BauGB § 1, Rn. 123,124 (in German).

60 Battis and others, BauGB Baugesetzbuch Kommentar ['Executive comments to Building Code'], 14. Aufl. [edn]. 2019, BauGB § 1,1 Rn. 7-8 (in German).

Our answers to the main question for this article permit us to state the following. The legal concept of freedom of construction should be understood as referring to an immovable-owner's right to use the immovable property for construction purposes freely within the frames of the valid legislation.[*61] The legal base for the concept of freedom of construction is Section 32 of the CRE, which is aimed at ensuring the sphere of freedom for the beneficiary of those rights within the domain of property rights and matrimonial right similar to property rights, thereby enabling the beneficiary to shape his own life at his own risk.[*62] We have concluded also that a legal instrument falls under the concept of 'designing a fundamental right' only when it does not restrict the exercise of the fundamental right. A detailed plan eliminates the property-owner's opportunity to use the property for any purpose other than that articulated by the detailed plan, and, again, one could argue that a valid detailed plan precludes the use of the property for purposes not specified in the detailed plan. From these conclusions, one can justifiably conclude that a detailed plan and the specific terms set forth therein should be considered to constitute restrictions to the concept of freedom of construction and to the fundamental right of ownership. In fact, the terms specified in the detailed plan **must** be seen as restrictive to the fundamental right of ownership unless the terms established terms therein have no negative influence of any sort on the usage of the property.

What does that mean, and why is this conclusion so important? Because a detailed plan and the terms provided in it must be regarded in general as restricting the scope of the fundamental right of ownership, an administrative organ must follow the requirements set forth by the CRE in relation to establishment of restrictions to the fundamental right of ownership. Hence, the terms foreseen in a detailed plan must have appropriate legal grounds, etc. (formal requirements)[*63], and the established terms must also be in keeping with the principle of proportionality (material requirements).[*64] The principle of proportionality means that the terms foreseen in a detailed plan must have a legitimate purpose (there must be a necessity in light of public interests). It means also that the terms specified in a detailed plan must be suitable, appropriate, and moderate in view of that legitimate purposes for the terms of the detailed plan.

61 Seletuskiri ehitusseadustiku juurde. SE 555. ['Explanatory memorandum to Building Code'] 3-4 <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/9e8a422c-beb8-476c-897c-f9b761fb9b92/Ehitusseadustik> accessed 6 January 2020 (in Estonian); Maunz and others, GG, art 14 Rn. 164, 165.

62 M Ernits and others, 'Paragrahv 32 (Omandipõhiõigus) kommentaar' in Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. 4., täiend. vlj. ['Paragraph 32, Fundamental right of ownership, Executive edition of the Constitution of the Republic of Estonia, 4th edn'] (Tallinn: Juura 2017), para 1 <https://arhiiv-2017.pohiseadus.ee/index.php?sid=1&ptid=37&p=32> accessed 1 April 2021) (in Estonian).

63 CRCSCd 26.11.2007, 3-4-1-18-07, para 35; 01.07.2008, 3-4-1-6-08, para 43; 14.12.2010, 3-4-1-10-10, para 47; 27.02.2015, 3-4-1-54-14, para 47 (in Estonian).

64 CRCSCd 26.03.2009, 3-4-1-16-08, para 28 (in Estonian).

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Zum kollisionsrechtlichen Umgang mit sachenrechtlichen Eigentumsvermutungen aus dem Besitz

1. Einführung

In nahezu jeder Rechtsordnung stellt der Besitz an einer (beweglichen) Sache eine vorteilhafte Rechtsposition für seinen Inhaber dar.[*2] Beispielhaft seien etwa Besitzschutzansprüche (vgl. für Deutschland die §§ 859 ff. BGB; für die Schweiz die Artt. 926 ff. ZGB; für Estland die §§ 40 ff. Law of Property Act) genannt, die dem Besitzer einer beweglichen Sache zustehen.[*3] Die Liste lässt sich freilich fortführen: So kann der bloße Besitz an einer Sache – jedenfalls in der deutschen Rechtsordnung – Gegenstand eines Kondiktionsanspruchs sein. Er stellt ein „erlangtes Etwas" im Sinne von § 812 I 1 BGB dar.[*4] Ferner kann der Besitz deliktische Ansprüche, etwa solche aus § 823 I BGB oder § 823 II BGB in Verbindung mit § 858 BGB, auslösen. Der berechtigte, unmittelbare Besitz wird nämlich als „sonstiges Recht" im Sinne von § 823 I BGB,[*5] die Vorschrift des § 858 BGB als „Schutzgesetz" im Sinne von § 823 II BGB qualifiziert.[*6]

Ein weiteres – besonders bedeutsames – Privileg, das der Besitz an einer beweglichen Sache mit sich bringt, ist die sogenannte *Eigentumsvermutung*. Eigentumsvermutungen aus dem Besitz finden sich in der deutschen Rechtsordnung einerseits in § 1006 BGB sowie andererseits in § 1362 BGB als speziellere Vorschrift für das Familienrecht.[*7] Die Vorschrift des § 1006 I, II, III BGB vermutet – ihrem *Wortlaut*

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2 Vgl. *Wendehorst*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, 8. Auflage 2021, Band 13: Internationales Privatrecht, München 2020, Art. 43 EGBGB Rn. 68 (im Folgenden: *Wendehorst*, in: Münchener Kommentar zum BGB).

3 Vgl. *Wendehorst*, in: Münchener Kommentar zum BGB, Art. 43 EGBGB Rn. 68.

4 So schon RGZ 129, 307, 311; vgl. statt vieler und mit weiteren Nachweisen *Schwab*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, 8. Aufl. 2020, Band 7: Schuldrecht Besonderer Teil IV, München 2020, § 812 BGB Rn. 6.

5 Vgl. nur *Wagner,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, 8. Aufl. 2020, Band 7: Schuldrecht Besonderer Teil IV, München 2020, § 823 BGB Rn. 324 mit zahlreichen weiteren Nachweisen (im Folgenden: *Wagner,* in: Münchener Kommentar zum BGB).

6 Vgl. BGHZ 20, 169, 171; *Wagner,* in: Münchener Kommentar zum BGB, § 823 BGB Rn. 595.

7 Vgl. zum Verhältnis zwischen § 1006 BGB und § 1362 BGB nur *Budzikiewicz*, in: Jauernig, Kommentar zum Bürgerlichen Gesetzbuch, 18. Auflage 2021, München 2021, § 1362 Rn. 1 (im Folgenden: *Budzikiewicz*, in: Jauernig, Kommentar zum

nach – *zugunsten* des aktuellen bzw. ehemaligen (auch mittelbaren, vgl. § 868 BGB) Besitzers einer beweglichen Sache, dass er der Eigentümer der beweglichen Sache ist bzw. während seiner Besitzzeit der Eigentümer der beweglichen Sache war. Demgegenüber vermutet die Vorschrift des § 1362 I 1 BGB – ihrem *Wortlaut* nach – *zugunsten* der Gläubiger eines der Ehegatten, dass die im Besitz eines oder beider Ehegatten befindlichen beweglichen Sachen dem schuldenden Ehegatten gehören. Beide Vorschriften entfalten ihre Wirkung erst im Prozess,[*8] indem sie nach ganz überwiegender Auffassung zu einer *Beweislastumkehr* führen.[*9] Die hiesige Untersuchung wird sich – aus Platzgründen – lediglich auf den kollisionsrechtlichen Umgang mit der sachenrechtlichen Eigentumsvermutung, sprich derjenigen aus § 1006 BGB, beschränken.

Die hier angestellten Überlegungen dürften sich allerdings auch auf das estnische Recht übertragen: Dem estnischen Zivilgesetzgeber diente das deutsche Sachenrecht als Vorbild. Sowohl im deutschen als auch im estnischen Zivilrecht gilt das Trennungs- und Abstraktionsprinzip. Hinzu kommt, dass auch dem estnischen Recht eine ähnlich formulierte sachenrechtliche Eigentumsvermutungsvorschrift bekannt ist (vgl. § 90 Law of Property Act). Letztlich ähneln sich die deutschen und estnischen Kollisionsnormen des Internationalen Sachenrechts (vgl. einerseits Artt. 43 ff. EGBGB sowie andererseits §§ 18 ff. Private International Law Act).

2. Fallbeispiel: LG Darmstadt BeckRS 2016, 130834 / OLG Frankfurt am Main NJW-RR 2018, 803

Zur Veranschaulichung der Problematik soll ein – leicht abgewandelter und verkürzter – Original-Fall, entschieden vom LG Darmstadt[*10] im Jahre 2016 sowie – im Berufungsverfahren – vom OLG Frankfurt am Main[*11] im Jahre 2018, dienen:

> Bei der Klägerin (K), einem Unternehmen mit Sitz in Berlin (Deutschland), bestellte im Jahre 2010 eine Person (A) verschiedene Möbelstücke. Die Zahlung sollte dabei mittels Kreditkarte erfolgen. Die angegebenen Kreditkarten wurden zunächst vom Kreditkartenunternehmen akzeptiert. A beauftragte sodann die Beklagte (B), ein Transportunternehmen mit einer Niederlassung in Darmstadt (Deutschland), mit dem Transport der Möbel von Berlin (Deutschland) nach London (England) per Luftfracht. Zu diesem Zweck übergab K der B die Möbel. Hinterher reklamierte das Kreditkartenunternehmen die Belastungen der Kreditkarten, weil diese nicht gedeckt seien. Deshalb wurden die Möbel von der B zunächst nicht an die angegebene Adresse ausgeliefert. Im Anschluss daran forderte K von B Herausgabe der Möbelstücke. B teilte K – im Jahr 2010 – allerdings mit, dass sich die Möbelstücke nunmehr im Lager der B in Memphis (Tennessee, USA) befinden. Schließlich informierte B die K im Jahre 2013, dass die Möbelstücke nicht mehr auffindbar seien. Deshalb verlangte K von B vor dem LG Darmstadt bzw. OLG Frankfurt am Main Schadensersatz aus § 823 I BGB – wegen Eigentumsverletzung[*12] – in Höhe von 10.000 Euro.

BGB), wonach § 1006 BGB gilt, sofern der nichtschuldende Ehegatte bereits vor der Ehe Besitzer war, vgl. zu letzterem BGH NJW 1993, 935, 936. Siehe aber auch § 1568b II BGB und dazu *Ebbing*, in: Erman Kommentar zum Bürgerlichen Gesetzbuch, 16. Auflage 2020, Köln 2020, § 1006 Rn. 4.

8 Keinesfalls aber nur im Zivilprozess. Die Vorschrift des § 1006 BGB findet ferner im Strafprozess und Verwaltungsprozess Anwendung, vgl. hierzu allgemein *Raff*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, 8. Auflage 2020, Band 8: Sachenrecht, München 2020, § 1006 BGB Rn. 32 (im Folgenden: *Raff*, in: Münchener Kommentar zum BGB) (Verwaltungsprozess). Siehe ferner und aktuell BGH BeckRS 2019, 27820 (Strafprozess).

9 Vgl. zu § 1006 BGB: *Spohnheimer*, in: beck-online (Großkommentar, Hrsg. von Gsell/Krüger/Lorenz/Reymann), Stand: 1.11.2020, § 1006 Rn. 60 (im Folgenden: *Spohnheimer*, in: beck-online [Großkommentar]); *Werner*, Grundprobleme des § 1006 – Juristische Arbeitsblätter (JA) 1983, 617, 620 und 622; siehe aber auch *Raff*, in: Münchener Kommentar zum BGB, § 1006 BGB Rn. 66ff., wonach es sich zumindest bei § 1006 BGB aus praktischer Sicht um eine bloße *Beweiswürdigungsregel* handelt (so schon *Heck*, Grundriss des Sachenrechts, 2. Auflage 1930, Heidelberg 1930, § 33 Rn. 5); vgl. zu § 1362 BGB: *Budzikiewicz*, in: Jauernig, Kommentar zum BGB, § 1362 Rn. 1.

10 Vgl. LG Darmstadt, BeckRS 2016, 130834.

11 Vgl. OLG Frankfurt am Main NJW-RR 2018, 803.

12 Eine Klage aus § 823 I BGB wegen Besitzverletzung hätte von vornherein keine Aussicht auf Erfolg gehabt, weil nur der unmittelbare (vgl. § 854 I BGB), nicht aber der mittelbare (vgl. § 868 BGB) berechtigte Besitz als „sonstiges Recht" im Sinne von § 823 I BGB qualifiziert wird, vgl. hierzu nur *Förster*, in: Beck'scher Online-Kommentar zum BGB, Stand: 01. 11. 2020 (56. Aufl.), § 823 Rn. 156f. sowie bereits Fn 5.

Bejaht man – wie auch das LG Darmstadt bzw. OLG Frankfurt am Main – die internationale Zuständigkeit deutscher Gerichte sowie die Geltung deutschen Sachrechts für den Hauptanspruch (vgl. Art. 4 II Rom II-VO), stellt sich im Rahmen des Hauptanspruchs (hier: § 823 I BGB)[*13] die selbstständig kollisionsrechtlich anzuknüpfende *Vorfrage*,[*14] ob K – im Zeitpunkt der schädigenden Handlung (hier: fahrlässiger Verlust der Möbelstücke) – *Eigentümerin* der Möbelstücke war.

3. Das Sachenrechtsstatut (Art. 43 I, II EGBGB): *lex rei sitae*

Das deutsche Internationale Sachenrecht folgt der – nahezu weltweit anerkannten[*15] – Situs-Regel.[*16] Grundsätzlich – und vorbehaltlich der Sondernormen (vgl. Artt. 45, 46 EGBGB) – liefert die Rechtsordnung des Belegenheitsortes der Sache (sogenannte *lex rei sitae*) eine Antwort darauf, ob (dingliche) Rechte an einer Sache begründet wurden bzw. bestehen (vgl. Art. 43 I EGBGB). Gelangt die streitgegenständliche Sache – wie bei beweglichen Sachen nicht unüblich – in einen anderen Staat, kommt es zu einem *Statutenwechsel*.[*17] Für diese Fälle regelt Art. 43 II EGBGB, dass „im Ursprungsstaat entstandene Rechte an einer Sache nicht im Widerspruch zur neuen *lex rei sitae* ausgeübt werden können."[*18] Im Ergebnis läuft die Deutung von Art. 43 I, II EGBGB auf das Folgende hinaus: Es bedarf der Trennung von Rechtsbestands- und Rechtswirkungsstatut.[*19] Während über den Bestand einer bestimmten dinglichen Rechtslage, die noch im Ausgangsstaat begründet wurde, weiterhin allein die alte *lex rei sitae* entscheidet (Rechtsbestandsstatut), entscheidet die neue *lex rei sitae* über die Wirkung, die dieser dinglichen Rechtslage in der neuen rechtlichen Umwelt zukommt (Rechtswirkungsstatut).[*20]

Im zugrundeliegenden Fall haben A und B das Eigentum an den Möbelstücken nicht erlangt – und zwar weder in Deutschland noch im Ausland. Für einen Eigentumserwerb des A in Deutschland gem. den §§ 929 ff. BGB mangelte es bereits am Besitzerwerb,[*21] wohingegen B das Eigentum mangels dinglicher Einigung nicht erlangen konnte.[*22] Damit blieb K zunächst die Eigentümerin der Möbelstücke. Mit dem Transport der Möbelstücke in die USA (Memphis, Tennessee) kam es zu einem *Statutenwechsel*.[*23] Die Rechte an der Sache richten sich ab diesem Zeitpunkt nach der Rechtsordnung des Bundesstaats Tennessee (vgl. Art. 43 I EGBGB in Verbindung mit Art. 4 III 1 EGBGB), wobei gem. Art. 43 II EGBGB „wohlerworbene Rechte" – grundsätzlich – auch von der neuen Belegenheitsrechtsordnung anerkannt werden. Spätestens im Jahr 2013 waren die Möbelstücke nicht mehr auffindbar. Nach gerichtlicher Feststellung konnte die Handlung,

13 Vgl. *Wandt*, Gesetzliche Schuldverhältnisse, 10. Auflage, München 2020, § 16 Rn. 1ff. zu den Tatbestandsvoraussetzungen für einen Anspruch aus § 823 I BGB: (1) Rechtsgutverletzung, (2) Verletzungshandlung, (3) Haftungsbegründende Kausalität, (4) Rechtswidrigkeit, (5) Verschulden, (6) Schaden sowie (7) Haftungsausfüllende Kausalität.

14 Vgl. hierzu *Bernitt*, Die Anknüpfung von Vorfragen im europäischen Kollisionsrecht, 2010, Tübingen, S. 147ff., insbesondere S. 157: „Die einzig überzeugende Lösung für die Anknüpfung der Vorfrage nach dem Eigentum besteht somit in einer selbstständigen Anknüpfung nach dem Kollisionsrecht der lex fori." – DOI: https://doi.org/10.1628/978-3-16-151422-7.

15 Vgl. hierzu *Mansel*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, 2015, Berlin 2015, Art. 43-46 EGBGB (Internationales Sachenrecht), Art. 43 Rn. 90ff. (im Folgenden: *Mansel*, in: Staudinger Kommentar zum BGB).

16 Vgl. zu dieser statt vieler *Wendehorst*, in: Münchener Kommentar zum BGB, Art. 43 EGBGB Rn. 3f. mit zahlreichen Nachweisen.

17 Vgl. hierzu allgemein *Junker*, Internationales Privatrecht, 3. Auflage 2019, München 2019, § 17 Rn. 7 sowie 44ff. (im Folgenden: *Junker*, Internationales Privatrecht). – DOI: https://doi.org/10.17104/9783406730733; *Köhler*, Examinatorium Internationales Privatrecht, 2. Auflage 2020, Baden-Baden 2020, Rn. 341 (im Folgenden: *Köhler*, Examinatorium Internationales Privatrecht). – DOI: https://doi.org/10.5771/9783845296128.

18 *Wendehorst*, in: Münchener Kommentar zum BGB, Art. 43 EGBGB Rn. 5.

19 Vgl. *Wendehorst*, in: Münchener Kommentar zum BGB, Art. 43 EGBGB Rn. 6 mit weiteren Nachweisen; weitgehend zustimmend *Prütting*, in: beck-online (Grosskommentar, Hrsg. von Gsell/Krüger/Lorenz/Reymann), Stand: 01.02.2020, Art. 43 Rn. 120f.

20 Vgl. umfassend *Wendehorst*, in: Münchener Kommentar zum BGB, Art. 43 EGBGB Rn. 6 sowie Rn. 127ff., insbesondere Rn. 133ff.

21 Das LG Darmstadt (BeckRS 2016, 130834 Rn. 26) verneinte bereits eine dingliche Einigung.

22 Vgl. zur Notwendigkeit einer dinglichen Einigung sowie eines Besitzerwerbs für einen Eigentumserwerb gem. den §§ 929ff. BGB statt vieler *Wieling/Finkenauer*, Sachenrecht, 6. Auflage 2020, Berlin 2020. § 1 Rn. 19ff. und 23. – DOI: https://doi.org/10.1007/978-3-662-61798-4.

23 Vgl. hierzu allgemein *Junker*, Internationales Privatrecht, § 17 Rn. 7 sowie 44ff.; *Köhler*, Examinatorium Internationales Privatrecht, Rn. 341.

die zur Unauffindbarkeit der Möbelstücke führte, lediglich in den USA (Memphis, Tennessee) begangen worden sein. Das OLG Frankfurt am Main begründete die Eigentümerstellung der K sodann mit der Vorschrift des § 1006 II BGB, indem es ausführte:

> „Die [K] kann sich insofern auf § 1006 II BGB berufen, wonach zugunsten des früheren Besitzers einer beweglichen Sache vermutet wird, dass er während der Dauer seines Besitzes Eigentümer der Sache gewesen ist. Die Eigentumsvermutung zugunsten des früheren Besitzers wirkt dabei auch über die Beendigung des Besitzes hinaus so lange fort, bis sie widerlegt wird."[*24]

4. Die Bewertung der These des OLG Frankfurt am Main bei hypothetischem Inlandssachverhalt

Um die These des OLG Frankfurt am Main einer kritischen Überprüfung zu unterwerfen, empfiehlt es sich zunächst das Fallbeispiel zu einem *reinen Inlandssachverhalt* abzuändern:

> B wird von A beauftragt, die Möbelstücke im Inland (Deutschland) auszuliefern. Im Inland (Deutschland) verschwinden die Möbelstücke sodann im inländischen Lager der B.

Bei einem solchen, reinen Inlandssachverhalt stößt die These des OLG Frankfurt am Main auf keine Bedenken: Zunächst hatte K den Eigenbesitz (vgl. § 872 BGB) an den Möbelstücken. Gemäß § 1006 I 1 BGB wurde zu diesem Zeitpunkt zugunsten der K vermutet, sie habe mit dem Eigenbesitzerwerb zugleich das Eigentum erworben – deshalb firmiert die Vorschrift des § 1006 I 1 BGB auch verbreitet als Eigentums*erwerbs*vermutung.[*25] Indem K der B die Möbelstücke zum Zwecke des Transports übergab (und gerade nicht, um der B das Eigentum an den Möbelstücken zu übertragen), verlor sie ihren unmittelbaren Eigenbesitz. K blieb auch nicht mittelbare Besitzerin gemäß § 868 BGB, weil zwischen K und B kein Besitzmittlungsverhältnis bestand,[*26] so dass die Vermutung des § 1006 I 1 BGB auch nicht über die Vorschrift des § 1006 III BGB weiterhin für sie (K) stritt. Indes streitet die Eigentumserwerbsvermutung wegen der Vorschrift des § 1006 II BGB so lange für K, bis es nachweislich zu einem Eigentumsverlust gekommen ist.[*27] Oder anders gewendet: Solange kein anderer Akteur den Eigenbesitz an den Möbelstücken erlangt, wird weiterhin vermutet, K sei Eigentümerin der Möbelstücke – deshalb firmiert die Vorschrift des § 1006 II BGB auch verbreitet als *Rechtsfortdauervermutung*.[*28] Aus dem festgestellten Sachverhalt geht nicht hervor, dass B (oder eine dritte Person) den Eigenbesitz (vgl. § 872 BGB) an den Möbelstücken erlangt hat. Deshalb wird gemäß § 1006 II BGB zugunsten der K (weiterhin) vermutet, sie sei im Zeitpunkt der schädigenden Handlung (Verlust der Möbelstücke) Eigentümerin der Möbelstücke gewesen.

Widmet man sich nun wieder dem Ausgangsfall, der einen *grenzüberschreitenden Bezug* aufweist, stößt die Annahme, die deutsche Eigentumsvermutung – *scil.* § 1006 II BGB – streite zugunsten der K, doch auf einige Bedenken, denn:

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24 OLG Frankfurt am Main NJW-RR 2018, 803, 804 Rn. 26.

25 Vgl. statt vieler *Marco Brand*, Der Organbesitz, 2015, Tübingen, S. 200 mit zahlreichen Nachweisen in Fn 10.

26 Erforderlich hierfür wäre nämlich ein konkretes Besitzmittlungsverhältnis (vgl. hierzu allgemein *Vieweg/Werner*, Sachenrecht, 8. Auflage 2018, München 2018, § 2 Rn. 29 und 32) zwischen K und B, das deshalb nicht bestand, weil zwischen K und B kein schuldrechtlicher Vertrag zustande kam (vgl. hierzu LG Darmstadt BeckRS 2016, 130834 Rn. 21) sowie kein gesetzliches Besitzmittlungsverhältnis bestand.

27 Vgl. hierzu statt vieler *Thole*, in: Staudinger Kommentar zum BGB, 2019, Berlin 2019, § 1006 Rn. 53 mit zahlreichen Nachweisen (im Folgenden: *Thole*, in: Staudinger Kommentar zum BGB).

28 Siehe etwa *Fritzsche*, in: beck-online Kommentar, Stand: 01.11.2020 (56. Aufl.), § 1006 Rn. 9.

5. Zur Rechtsprechung des Bundesgerichtshofs (BGH) zum kollisionsrechtlichen Umgang mit der Eigentumsvermutung aus dem Besitz

5.1. Die Auffassung des VII. BGH-Zivilsenats

Schon in der frühen Nachkriegszeit äußerte sich der VII. BGH-*Zivilsenat* zum kollisionsrechtlichen Umgang mit der Eigentumsvermutung aus dem Besitz. Der VII. BGH-*Zivilsenat* postulierte, dass allgemeine Beweislastregeln, zu denen auch die Eigentumsvermutung zugunsten des Besitzers gehöre, *nicht* dem Prozessstatut (sog. *lex fori*), sondern dem Belegenheitsstatut (*lex rei sitae*) unterfallen.*[29] Deshalb, so der VII. BGH-*Zivilsenat*, richtet sich „die Frage, ob für den Besitzer einer beweglichen Sache eine Eigentumsvermutung besteht oder nicht, nach dem Recht des Ortes, an dem die Sache während der Besitzzeit desjenigen sich befand oder befindet, der das Eigentum an ihr in Anspruch nimmt und sich auf Grund seines früheren oder gegenwärtigen Besitzes auf die Eigentumsvermutung beruft.“*[30] Die Passage des BGH-Urteils erscheint bei erster Lektüre etwas kryptisch. Gleichwohl lässt sich ihre Kernaussage bei näherer Lektüre leicht entziffern: Beansprucht eine Person das Eigentum an einer Sache und ist sie ihr gegenwärtiger Besitzer, so streitet die Eigentumsvermutung des § 1006 BGB nur für sie, sofern sich die Sache im Inland (Deutschland) befindet (vgl. Art. 43 I EGBGB). Beansprucht eine Person das Eigentum an einer Sache und ist sie ihr früherer Besitzer, so streitet die Eigentumsvermutung des § 1006 BGB nur für sie, sofern sich die Sache während ihrer Besitzzeit im Inland (Deutschland) befunden hat (vgl. Art. 43 I EGBGB).

Der Leser mag nun aufhorchen. Im Fallbeispiel befand sich die Sache (die Möbelstücke) – im Zeitpunkt der schädigenden Handlung – gerade nicht (mehr) im Inland (Deutschland), sondern im Ausland (Tennessee, USA). Nach der Rechtsprechung des VII. BGH-*Zivilsenats* kann zugunsten der K gerade nicht die inländische Eigentumsvermutung (§ 1006 BGB), sondern allenfalls die *ausländische* Eigentumsvermutung, nämlich diejenige der Rechtsordnung des Bundesstaates Tennessee eingreifen. Das OLG Frankfurt am Main hat insofern entgegen der Rechtsprechung des VII. BGH-*Zivilsenats* entschieden.

5.2. Die Auffassung des IV. BGH-Zivilsenats

Indes hat eine Entscheidung des IV. BGH-*Zivilsenats* aus dem Jahre 1994 für Verwirrung rund um den (richtigen) kollisionsrechtlichen Umgang mit der Eigentumsvermutung aus dem Besitz gesorgt – und möglicherweise auch das Urteil des OLG Frankfurt am Main beeinflusst. Der IV. BGH-*Zivilsenat* äußerte seinerzeit zweierlei: Einerseits greife zugunsten des gegenwärtigen Besitzers einer – nunmehr im Inland belegenen – beweglichen Sache die Eigentumsvermutung des § 1006 I 1 BGB auch dann, wenn der Eigenbesitz an der Sache im Ausland begründet wurde.*[31] Andererseits wirke die Eigentumsvermutung aus § 1006 I 1 BGB fort, wenn die Sache ins Ausland verbracht wird.*[32] Gerade die letztere Aussage steht evident im Widerspruch zu der Auffassung des VII. BGH-*Zivilsenats*, der bei einem Statutenwechsel allenfalls die ausländische Eigentumsvermutung aus dem Besitz heranzieht. Indes darf die Aussage des IV. BGH-*Zivilsenats* nicht überschätzt, jedenfalls aber nicht kontextfrei betrachtet werden. Der IV-BGH-*Zivilsenat* formuliert nämlich weiter: „Deshalb kann hier [im zugrunde liegenden Fall] offen bleiben, ob die Eigentumsvermutung des Art. 930 ZGB […] ebensoweit [reicht] wie diejenige aus § 1006 BGB und ob sie, wenn deutsches Recht nicht eingriffe, auch ihrerseits die Bekl. von weiteren Beweisen freistellen würden.“*[33] Der IV. BGH-*Zivilsenat* hielt es lediglich für nicht entscheidungserheblich welche Eigentumsvermutung aus dem Besitz, sprich die deutsche oder die schweizerische, heranzuziehen ist. Er hat die Streitfrage, ob die deutsche Eigentumsvermutung bei einem Statutenwechsel fort gilt, schlicht offengelassen.*[34] Dieser Streitfrage gilt es daher auf den Grund zu gehen.

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29 Vgl. BGH NJW 1960, 774, 775.

30 BGH NJW 1960, 774, 775.

31 Vgl. BGH NJW 1994, 939, 940.

32 Vgl. BGH NJW 1994, 939, 940.

33 BGH NJW 1994, 939, 941.

34 So auch *Lorenz*, Zur Abgrenzung von Wertpapierrechtsstatut und Wertpapiersachstatut im internationalen Wertpapierrecht – Neue Juristische Wochenschrift (NJW) 1995, 176, 178 (im Folgenden: *Lorenz*, NJW 1995).

Dem Urteil des OLG Frankfurt am Main ist insofern nur zuzustimmen, wenn (1) die Eigentumsvermutung aus dem Besitz gemäß der *lex fori* kollisionsrechtlich anzuknüpfen, (2) die Eigentumsvermutung aus dem Besitz als wohlerworbenes Recht im Sinne von Art. 43 II EGBGB zu begreifen oder (3) eine wesentlich engere Verbindung gemäß Art. 46 EGBGB anzunehmen ist.

6. *Lex fori*-Anknüpfung der Eigentumsvermutung aus dem Besitz?

Der VII. BGH-*Zivilsenat* verneinte eine kollisionsrechtliche Anknüpfung der Eigentumsvermutung aus dem Besitz anhand der *lex fori*, weil allgemeine Beweislastregeln nicht so eng mit der besonderen Ausgestaltung des Prozessverfahrens in den einzelnen Ländern zusammenhängen.[*35] Die Auffassung des BGH entspricht dem heutigen europäischen Verständnis: Der Unionsgesetzgeber unterwirft Beweislastregelungen und gesetzliche Vermutungen sowohl für vertragliche als auch für außervertragliche Schuldverhältnisse der *lex causae* (vgl. Art. 18 Rom I-VO; Art. 22 Rom II-VO). Dieser Umstand dürfte als hinreichendes Indiz dafür gelten, dass Beweislastregelungen *rechtskreisübergreifend* materiell-rechtlich qualifiziert werden.[*36] Nach alledem scheidet eine Anknüpfung der Eigentumsvermutung aus dem Besitz anhand der *lex fori* aus.

7. Die Eigentumsvermutung aus dem Besitz als wohlerworbenes Recht im Sinne von Art. 43 II EGBGB?

Offen bleibt, ob die Eigentumsvermutung aus dem Besitz als ein „wohlerworbenes Recht" im Sinne von Art. 43 II EGBGB begriffen werden kann. Diese Frage wurde – soweit ersichtlich – noch nicht eingehend – *scil*. monographisch – diskutiert.[*37] Bislang äußerten sich *Armbrüster*[*38], *Behr*[*39], *Lorenz*[*40] und *Einsele*[*41] hierzu: Während *Lorenz* davon spricht, dass es sich bei der Eigentumsvermutung aus dem Besitz „nicht um einen abgeschlossenen Erwerbstatbestand, sondern um die inhaltliche Ausgestaltung eines Sachenrechts [handelt]"[*42], hält es *Einsele* für eine „doch wohl etwas merkwürdige Vorstellung"[*43] die Eigentumsvermutung aus dem Besitz als wohlerworbenes Recht im Sinne von Art. 43 II EGBGB zu bezeichnen. Auch *Behr* vertritt den Standpunkt, die Eigentumsvermutung aus dem Besitz könne kein wohlerworbenes Recht darstellen, weil Eigentumsvermutungen keinen „Einfluss auf die materielle Rechtslage [haben]."[*44] *Armbrüster* hingegen scheint einer Qualifikation als „wohlerworbenes Recht" nicht abgeneigt zu sein, indem er ausführt: „Die belgische Eigentumsvermutung könnte dann, verstanden als Bestandteil der sog. sachenrechtlichen Prägung der Gegenstände, nach deren Verbringung ins Bundesgebiet [Deutschland] hier fortbestehen."[*45]

35 Vgl. BGH NJW 1960, 774, 775.

36 Siehe dazu auch *Varga*, in: beck-online (Grosskommentar, Hrsg. von Gsell/Krüger/Lorenz/Reymann), Stand: 15.02.2016, Art. 22 Rom II-VO Rn. 3 mit weiteren Nachweisen in Fn 7.

37 Vgl. auch *Armbrüster*, Eigentumsvermutung nach § 1006 BGB und Statutenwechsel im internationalen Privatrecht – Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1990, 25 Fn 26 (im Folgenden: *Armbrüster*, IPRax 1990).

38 Vgl. *Armbrüster*, IPRax 1990, 25.

39 Vgl. *Behr*, Ausländische Inhaberaktien und § 1006 BGB: Ein Beitrag zum Anwendungsbereich gesetzlicher Eigentumsvermutungen, in: Festgabe für Otto Sandrock zum 65. Geburtstag, 1995, Frankfurt am Main, S. 159, 164ff. (im Folgenden: *Behr*, in: Festschrift für Otto Sandrock zum 65. Geburtstag).

40 Vgl. *Lorenz*, NJW 1995, 176, 177f.

41 Vgl. *Einsele*, Kollisionsrechtliche Behandlung von Wertpapieren und Reichweite der Eigentumsvermutung des § 1006 BGB – Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1995, 163, 164 (im Folgenden: *Einsele*, IPRax 1995).

42 *Lorenz*, NJW 1995, 176, 178.

43 *Einsele*, IPRax 1995, 163, 164.

44 *Behr*, in: Festschrift für Otto Sandrock zum 65. Geburtstag, S. 159, 165.

45 *Armbrüster*, IPRax 1990, 25.

7.1. Auslegung des Art. 43 II EGBGB und die Wurzeln der Eigentumsvermutung nach überwiegender Auffassung in Rechtsprechung und Lehre

Aufschluss darüber, welcher Auffassung der Vorzug gebührt, kann nur eine Auslegung des Art. 43 II EGBGB liefern. Mittlerweile, so das überwiegende Schrifttum[*46], dem sich nunmehr auch der BGH[*47] angeschlossen hat, bewirkt Art. 43 II EGBGB eine temporale Spaltung des Sachstatuts. Hierbei gilt es – wie bereits gezeigt wurde – zwischen Rechtsbestands- und Rechtswirkungsstatut zu unterscheiden. Legt man ein solches Verständnis Art. 43 II EGBGB zugrunde, bedeutet dies für die Eigentumsvermutung aus dem Besitz, dass sie – weil es sich bei ihr um eine „Wirkung eines dinglichen Rechts handelt“[*48] – dem Rechtswirkungsstatut unterfällt und damit *wandelbar* ist. Konkret: Es findet die Eigentumsvermutung aus dem Besitz der Belegenheitsrechtsordnung Anwendung[*49] – und das Urteil des OLG Frankfurt am Main hielte rechtlicher Nachprüfung nicht stand.

Wirft man einen näheren Blick auf das heutige Verständnis der Eigentumsvermutung aus dem Besitz (§ 1006 I 1 BGB), stößt die kollisionsrechtliche Beurteilung derselben anhand des Rechtswirkungsstatuts auf Bedenken. Wie bereits ausgeführt, vermutet § 1006 I 1 BGB, dass der Besitzer mit dem Erwerb seines Eigenbesitzes (vgl. § 872 BGB) auch das Eigentum erworben hat.[*50] Überwiegend wird vertreten, die Vorschrift des § 1006 BGB fuße auf dem Traditionsprinzip.[*51] Vor diesem Hintergrund vertritt ein Teil der Lehre die Auffassung, die deutsche Eigentumsvermutung finde in grenzüberschreitenden Bezügen immer und nur dann Anwendung, wenn der Besitzerwerb im Inland (Deutschland) stattgefunden hat.[*52] *Spohnheimer* formuliert hierzu: „Folgt nun ein Land, in dem der Besitzer den Besitz ergriffen hat, für die Übereignung dem Konsensualprinzip, so erscheint es fernliegend, ihn an der Eigentumsvermutung des § 1006 [BGB] partizipieren zu lassen.“[*53] Die Eigentumserwerbsvermutung gilt – dieser Auffassung zufolge – als ein wohlerworbenes Recht.[*54] Sie unterliegt mithin dem Rechtsbestandsstatut. Dies entspricht im Ergebnis der kontextgelösten Formulierung des IV. BGH-*Zivilsenats*. Für das hiesige Fallbeispiel würde dies bedeuten, dass für K, weil sie den Eigenbesitz an den Möbelstücken in Deutschland erlangt hat, weiterhin die deutsche Eigentumserwerbsvermutung aus § 1006 BGB streitet – und das Urteil des OLG Frankfurt am Main hielte rechtlicher Prüfung stand.

7.2. Qualifikation der Vorschrift des § 1006 BGB als Ausfluss des Traditionsprinzips?

Indes ist die Auffassung von Rechtsprechung und herrschender Lehre, die Vorschrift des § 1006 BGB sei Ausfluss des Traditionsprinzips, zweifelhaft. Die in der Literatur schon früh geäußerte Kritik zu dieser These, ist nahezu verstummt: Während *Rosenberg*[*55] die Eigentumsvermutung – getreu ihrem Wortlaut – schon immer als Rechtszustandsvermutung begriff, erhob *Armbrüster*[*56] den weitergehenden Einwand, auch Rechtsordnungen, die nicht dem Traditionsprinzip folgen, kennen ähnliche Eigentumsvermutungsregelungen aus dem Besitz; schon deshalb könne § 1006 BGB seine Wurzeln nicht im Traditionsprinzip

46 Siehe bereits Fn 19.

47 Vgl. BGH NJW-RR 2010, 983, 984.

48 So die Bezeichnung bei *Wendehorst*, in: Münchener Kommentar zum BGB, Art. 43 EGBGB Rn. 6 sowie Rn. 127ff., insbesondere Rn. 133ff.; so auch *Einsele*, IPRax 1995, 163, 164.

49 So ausdrücklich *Behr*, in: Festschrift für Otto Sandrock zum 65. Geburtstag, S. 159, 166.

50 Siehe dazu *Marco Brand*, Der Organbesitz, 2015, Tübingen, S. 200; *Berger*, in: Jauernig Kommentar zum BGB, 18. Auflage 2021, München 2021, § 1006 Rn. 1.

51 Vgl. *Spohnheimer*, in: beck-online (Großkommentar, Hrsg. von Gsell/Krüger/Lorenz/Reymann), Stand: 1.11.2020, § 1006 Rn. 6 mit weiteren Nachweisen.

52 Vgl. *Spohnheimer*, in: beck-online (Großkommentar, Hrsg. von Gsell/Krüger/Lorenz/Reymann), Stand: 1.11.2020, § 1006 Rn. 68f.; *Thole*, in: Staudinger Kommentar zum BGB, § 1006 Rn. 105.

53 *Spohnheimer*, in: beck-online (Großkommentar, Hrsg. von Gsell/Krüger/Lorenz/Reymann), Stand: 1.11.2020, § 1006 Rn. 68.

54 Auf diese Konsequenz hinweisend *Armbrüster*, IPRax 1990, 25.

55 Vgl. *Rosenberg*, Beweislast, 5. Auflage 1965, München, Berlin 1965, § 16 (S. 226ff.).

56 Vgl. *Armbrüster*, IPRax 1990, 25.

haben. Hierzu lässt sich folgendes ergänzen: Selbst Rechtsordnungen, die – wie die schweizerische Rechtsordnung – gleichermaßen das Traditionsprinzip zugrunde legen, verstehen die Eigentumsvermutung aus dem Besitz (vgl. Artt. 930, 931 ZGB) nicht als Ausfluss des Traditionsprinzips, sondern begreifen sie als bloße *Wahrscheinlichkeitsfolgerung*.[*57] Wirft man einen Blick in die BGB-Materialien, so findet ebendiese Folgerung – Eigentumsvermutung als bloße Wahrscheinlichkeitsfolgerung – eine gewichtige Stütze. Aus den BGB-Materialien geht nämlich nicht eindeutig hervor, dass es sich bei § 1006 BGB um eine Vorschrift handelt, die auf das Traditionsprinzip zurückzuführen ist. Der historische BGB-Gesetzgeber begründete die Aufnahme der Vorschrift nämlich unter anderem mit den Worten: „Diese Vermuthung entspreche […] der Anschauung des deutschen Rechtes [und] dem Code 2279 “[*58] Platziert man die subjektiv-historische Auslegungsmethode in einer Rangfolge der Auslegungsregeln zu Recht – für sie streitet sowohl die Gesetzesbindung gem. Art. 20 III, 97 I GG als auch das Gewaltenteilungs- und Demokratieprinzip[*59] – an die oberste Stelle, findet die Auffassung der Rechtsprechung und herrschenden Lehre methodisch keine Stütze, weil sich der historische BGB-Gesetzgeber an Art. 2279 Code Civil orientierte, dem französischen Zivilrecht das Traditionsprinzip aber fremd ist.

Für die kollisionsrechtliche Behandlung von Eigentumsvermutungen aus dem Besitz – *scil.* § 1006 BGB – bedeutet dies, dass solche dem Rechtswirkungsstatut unterfallen. Eigentumsvermutungen aus dem Besitz erweisen sich nicht als sachenrechtliche Prägung der Gegenstände. Vielmehr entscheidet die *aktuelle lex rei sitae* darüber, ob und inwiefern der Besitz an einer Sache eine Eigentumsvermutung zugunsten des Besitzers statuiert. Das OLG Frankfurt am Main hätte insofern, weil sich die Möbelstücke in Tennessee (USA) befanden, die ausländische Eigentumsvermutung aus dem Besitz – sofern die Rechtsordnung des Bundestaates Tennessee (USA) eine solche kennt – heranziehen müssen. Indes hätte eine solche K wohl kaum geholfen, ihre Eigentümerstellung zu beweisen, zumal sie zu diesem Zeitpunkt weder unmittelbare noch mittelbare Besitzerin der Möbelstücke war. K hatte, indem sie die Möbelstücke aus der Hand gab, „die Lebenserfahrung gegen sich und damit die Obliegenheit der Beweissicherung.“[*60] Die Heranziehung deutschen Rechts – hier: § 1006 II BGB – konnte nach alledem, insbesondere unter Zugrundelegung des Art. 43 I, II EGBGB, in jedem Fall nicht überzeugen.

8. Wesentlich engere Verbindung gemäß Art. 46 EGBGB?

Damit ist aber nicht, jedenfalls nicht abschließend festgestellt, dass die deutsche Eigentumsvermutung aus § 1006 II BGB nicht auf anderem Wege Eingang in das Verfahren hätte finden können. Auch das Internationale Sachenrecht strebt danach, das sachnächste Recht zu ermitteln.[*61] Dies belegt schon die Kodifizierung des Art. 46 EGBGB.[*62] Die Vorschrift des Art. 46 EGBGB statuiert, dass das Recht derjenigen Rechtsordnung anzuwenden ist, mit der eine wesentlich engere Verbindung besteht. An dieser Stelle besteht Einigkeit darüber, dass Art. 46 EGBGB eine restriktiv zu handhabende Ausnahmenorm darstellt.[*63] *Mansel*[*64] fordert für die Einschlägigkeit des Art. 46 EGBGB die Ermittlung aller Sachverhaltsumstände und der relevanten Interessen, wobei ebendiese Gesamtabwägung immer auf einen konkreten Anknüpfungsgegenstand

57 Vgl. *Winkler*, Die Rechtsvermutungen aus dem Besitz, 1969, Zürich, S. 24.

58 Vgl. Prot. S. 4052 (*Mugdan*, Materialien zum Bürgerlichen Gesetzbuch, Bd. III, S. 520; siehe aber auch *Armbrüster*, IPRax 1990, 25, 26 Fn 15 unter Verweis auf eine Mindermeinung in Prot. S. 3372 (*Mugdan*, Materialien zum Bürgerlichen Gesetzbuch, Bd. III, S. 519): „Immerhin habe die Vermuthung zu Gunsten des Eigenbesitzers eine gewisse statistische Wahrscheinlichkeit für sich, daß der Eigenbesitzer Eigenthümer sei.“

59 Vgl. hierzu kürzlich *Höpfner/Schneck*, Verfassungsrechtliche Vorgaben für die Wahl der Rechtsanwendungsmethode – AD Legendum 2020, 201, 202ff.; *Rüthers*, Die Entwicklung der juristischen Methodenlehre nach dem Zweiten Weltkrieg – Anmerkungen und Hypothesen – AD Legendum 2020, 217, 219f. jeweils mit weiteren Nachweisen.

60 *Armbrüster*, IPRax 1990, 25, 26.

61 Vgl. allgemein zu dieser Funktion des IPR („Prinzip der engsten Verbindung“) *Junker*, Internationales Privatrecht, § 5 Rn. 5ff.; speziell für das Internationale Sachenrecht *Mansel*, in: Staudinger Kommentar zum BGB, Art. 43 Rn. 16.

62 Es handelt sich bei der Vorschrift um eine sogenannte Ausweichklausel, vgl. *Mansel*, in: Staudinger Kommentar zum BGB, Art. 46 Rn. 5.

63 Vgl. statt vieler *Spickhoff*, in: beck-online Kommentar zum BGB, Stand: 01.11.2020 (56. Aufl.), Art. 46 Rn. 1: „Notbehelf“; deutlicher *Wendehorst*, in: Münchener Kommentar zum BGB, Art. 46 EGBGB Rn. 2: „extreme Ausnahmefälle“.

64 *Mansel*, in: Staudinger Kommentar zum BGB, Art. 46 Rn. 33f.

bezogen sein muss. Unter Anknüpfungsgegenstand ist dabei – so *Wendehorst*[*65] – die konkrete Rechtsfrage im Sinne des Begehrens des Anspruchstellers (hier: Schadensersatz aus Delikt, genauer: wegen Eigentumsverletzung) zu verstehen.

Legt man all dies dem Fallbeispiel zugrunde, kommt man zu dem Ergebnis, dass die deutsche Eigentumsvermutung aus § 1006 II BGB über Art. 46 EGBGB Anwendung findet: Hierfür sprechen schon die objektiven Umstände des konkreten Einzelfalls.[*66] Einerseits haben die Parteien (K und B) eine gemeinsame Niederlassung in Deutschland, andererseits fand auch die Übergabe der Möbelstücke in Deutschland statt.[*67] Hinzu kommt, dass auch der Hauptanspruch (hier: Schadensersatz aus Delikt) deutschem Sachrecht unterliegt – und zwar aus ähnlichen Erwägungen: Die Parteien haben im Inland (Deutschland) ihren gewöhnlichen Niederlassungsort (vgl. Art. 4 II Rom II-VO). Darüber hinaus spielte sich auch der sonstige Sachverhalt – etwa die Beauftragung der B durch A, der Vertragsschluss zwischen A und K – im Inland (Deutschland) ab. Abschließend gelangten die Möbelstücke – und insofern für A und K nicht ersichtlich – unter außergewöhnlichen Umständen in die USA (Tennessee). A hatte B nämlich lediglich damit beauftragt, die Möbel nach *England* zu transportieren. Nur aufgrund der Tatsache, dass das Kreditkartenunternehmen die Kreditkartenzahlung nicht akzeptierte, gelangten die Möbel in die USA. Nimmt man das Prinzip der Ermittlung des sachnächsten Rechts ernst, kann dem Statutenwechsel im konkreten Fall keine Bedeutung beigemessen werden. Damit bleibt es im Ergebnis bei der Feststellung des OLG Frankfurt am Main: Zugunsten der K streitet die deutsche Eigentumsvermutung aus § 1006 II BGB.

9. Fazit

Der kollisionsrechtliche Umgang mit der sachenrechtlichen Eigentumsvermutung aus dem Besitz erfolgt in Rechtsprechung und Lehre nicht immer einheitlich. Die Ursache ist freilich schnell ausgemacht: Während der VII. BGH-*Zivilsenat* die Eigentumsvermutung aus dem Besitz dem Rechtswirkungsstatut unterwarf, erlaubte ein Urteil des IV. BGH-*Zivilsenat* eine gegenteilige Interpretation dergestalt, dass es sich bei der Eigentumsvermutung aus dem Besitz um ein wohlerworbenes Recht im Sinne von § 43 II EGBGB handelt, sie mithin dem Rechtsbestandsstatut unterliegt. Hinzu kommt, dass das nationale Verständnis der Eigentumsvermutung aus dem Besitz (§ 1006 BGB) als Eigentums*erwerbs*vermutung, die ihren Ursprung *vermeintlich* im Traditionsprinzip habe, für Verwirrung im kollisionsrechtlichen Umgang mit derselben sorgt. Hier konnte sowohl methodisch als auch rechtsvergleichend gezeigt werden, dass die Eigentumsvermutung aus dem Besitz keinerlei Bezüge zum Traditionsprinzip aufweist. Vielmehr handelt es sich bei ihr um eine bloße *Wahrscheinlichkeitsregelung*. Damit steht fest: Grundsätzlich entscheidet die Belegenheitsrechtsordnung, ob der Besitz an einer Sache eine Eigentumsvermutung für den Besitzer bewirkt (Rechtswirkungsstatut). Getreu dem Motto „jede Regel hat eine Ausnahme" lässt sich über Art. 46 EGBGB ein gegenteiliges Ergebnis erzielen. So können die objektiven Umstände des Einzelfalls – trotz Statutenwechsels – für die Anwendung des Rechts des ehemaligen Belegenheitsstaates streiten. Besonderes Gewicht haben hierbei vor allem der gemeinsame gewöhnliche Aufenthalt der Parteien sowie der Ort der Sachübergabe.

65 *Wendehorst*, in: Münchener Kommentar zum BGB, Art. 46 EGBGB Rn. 24.

66 Siehe zu diesen allgemein *Mansel*, in: Staudinger Kommentar zum BGB, Art. 46 Rn. 35.

67 Vgl. *Mansel*, in: Staudinger Kommentar zum BGB, Art. 46 Rn. 35 unter Hinweis auf den gemeinsamen gewöhnlichen Aufenthalt sowie den Ort der Sachübergabe.

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Is European Data Protection Toxic for Innovative AI?

An Estonian Perspective[*1]

1. Introduction

Data constitute the lifeblood of Artificial Intelligence (AI).[*2] To fulfil their function, AI systems need data as a source for their learning. Big Data, which refers to the exponential growth in the volume of digital data, has been a key element in enabling the rapid development of successful AI applications. In turn, the development of AI systems based on machine learning[*3] fosters the creation of vast datasets. As machine learning sees more and more extensive deployment, it magnifies the ability to use personal information in ways that may impinge on the rights of the individual.[*4] For example, while an AI tool used by law-enforcement

1 This work has been supported by the research project 'Machine learning and AI powered public service delivery', RITA 1/02-96-04, funded by the Estonian government.

2 No legal definition of AI has yet been set forth in EU hard law. The Artificial Intelligence Act proposal of the European Commission published in April 2021 offers the following definition for AI: 'Software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with.' See Commission, 'Proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts' COM (2021) 206 final, art 3(1). For different definitions, cf Sofia Samoili and others, 'AI Watch: Defining Artificial Intelligence –. Towards an operational definition and taxonomy of artificial intelligence' (Publications Office of the European Union 2020) EUR 30117 EN <http://publications.jrc.ec.europa.eu/repository/bitstream/JRC118163/jrc118163_ai_watch._defining_artificial_intelligence_1.pdf> accessed 1 July 2021. According to the definition proposed by Estonia's AI Taskforce, AI 'includes systems that exhibit intelligent behaviour by analysing their environment and making decisions that are somewhat independent to meet certain objectives'. 'Report of Estonia's AI Taskforce' (May 2019) 7 <https://f98cc689-5814-47ec-86b3-db505a7c3978.filesusr.com/ugd/7df26f_486454c9f32340b28206e140350159cf.pdf> accessed 1 July 2021.

3 Machine learning (ML) consists of a set of mathematical techniques at the intersection of algorithmic, statistical learning and optimisation theory that are aimed at extracting information from a set of examples (images, sensor records, text, etc.) for purposes of solving a problem related to said data (classification, recognition, generation, etc.). High-Level Expert Group on Artificial Intelligence, 'A Definition of AI: Main Capabilities and Scientific Disciplines' (2019) 3 <https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=56341> accessed 1 July 2021; Ronan Hamon, Henrik Junklewitz, and Ignacio Sanchez, 'Robustness and Explainability of Artificial Intelligence – from Technical to Policy Solutions' (Publications Office of the European Union 2020) 10 <https://publications.jrc.ec.europa.eu/repository/bitstream/JRC119336/dpad_report.pdf> accessed 1 July 2021.

4 Martin Ebers, 'Regulating AI and Robotics: Ethical and Legal Challenges' in Martin Ebers and Susana Navas (eds), *Algorithms and Law* (CUP 2020) 63: '[P]ersonal data is increasingly both the source and the target of AI applications.' – DOI: https://doi.org/10.1017/9781108347846.003. See also European Parliamentary Research Service, 'The Impact of the

officers to analyse biometric data[*5] for facial recognition and emotion detection may serve as an efficient mechanism for identifying offenders, such use of AI may, at the same time, lead to discrimination and false accusations.

Unlike those for data protection, the international, national, and regional regulatory frameworks for AI are still at an early stage of development, and no consensus exists yet on how AI should be regulated. However, change is afoot: at EU level, the European Commission published the first-ever proposal for a legal framework on AI, the Artificial Intelligence Act, on 21 April 2021.[*6]

This paper examines, from the perspective of Estonia as an EU member state in the broader sense and from the Estonian national perspective in the narrower sense, the extent to which the application of AI systems is possible while respect is maintained for privacy and the personal-data protection rights[*7] guaranteed by EU and Estonian law.

2. Regulating personal data's protection in the EU: How much space for AI?

The rapid expansion of the Internet in the mid-1990s called for a legal response to regulate associated risks, particularly those to the right to privacy. In 1995, the EU adopted its first general data-protection act, the European Union Data Protection Directive, covering both private actors and the public sector.[*8] The EU data-protection reform of 2016 and the adoption of the General Data Protection Regulation (GDPR) involved more than a revision of the 1995 Data Protection Directive: the GDPR has been designed to keep up with technological and socioeconomic changes while guaranteeing fundamental rights and providing people with means to exercise control over their personal data.[*9]

2.1. The GDPR

As an EU regulation, the GDPR applies directly in all member states, as well as outside the EU to all companies that offer goods or services to customers or businesses in the EU.[*10] Public institutions too are subject to the rules of the GDPR, when processing personal data, except when said data are being processed for the purposes of prevention, investigation, or detection of criminal offences; prosecution for them; or the execution of criminal-law penalties, which falls within the scope of the Data Protection Law Enforcement Directive (or Law Enforcement Directive).[*11] Although the GDPR applies to all processors of personal data, public-sector entities may take advantage of many exceptions that are not available for activities in the private sector. Most notably, nearly half of the articles of the GDPR comprise so-called opening clauses that allow member states to substantiate, supplement, or modify the regulatory content of the respective

General Data Protection Regulation (GDPR) on Artificial Intelligence' (2020) 1 <www.europarl.europa.eu/RegData/etudes/STUD/2020/641530/EPRS_STU(2020)641530_EN.pdf> accessed 1 July 2021.

5 'Biometric data means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data' per Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR) [2016] OJ L119, art 4(14).

6 See n 2 and the paper's sub-s 2.2, on a proposal for the regulation of artificial intelligence.

7 Art 4(1) GDPR defines personal data as any information related to an identified or identifiable natural person, one who can be identified, directly or indirectly – in particular, by reference to an identifier.

8 Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 (Data Protection Directive).

9 Lilian Mitrou, 'Data Protection, Artificial Intelligence and Cognitive Services: Is the General Data Protection Regulation (GDPR) "Artificial Intelligence-Proof"?' (2019) 26. – DOI: https://doi.org/10.2139/ssrn.3386914.

10 Art 3 GDPR.

11 Art 2(d) GDPR; Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data (Data Protection Law Enforcement Directive) [2016] OJ L119.

provision.[*12] Some of the opening clauses extend across multiple articles or even allow the restriction of numerous principles for the sake of public interest, national security, *et cetera*.[*13] For this reason, the GDPR has been deemed an 'atypical hybrid of a regulation and a directive'.[*14]

2.1.1. Automated decision-making

The GDPR specifically addresses automated individual-specific decision-making – including decisions generated by means of AI – and articulates the right of the data subject not to be subject to decisions that are based solely on automated processing without human intervention.[*15] Appealing to the GDPR, people may object to automated decisions made about them.

However, the GDPR does specify as an exception that fully automated decision-making may, *inter alia*, be allowed by EU or member state's law on condition that the law lays down 'suitable measures to safeguard the data subject's rights and freedoms and legitimate interests'.[*16] An exception of this nature can be found in § 15[1] of the Estonian Social Welfare Act[*17], which allows automated processing of data of persons aged 16 to 26 for purposes of identifying young people who are not in an employment, education, or training relationship (the so-called NEET youth). According to the law's explanatory memorandum, the amendment permits the use of information-technology solutions (incl. algorithms) in aims of analysing young citizens' eligibility for social benefits and their possible need for help.[*18] The system foresees no specific measures to safeguard the data subject's rights. In the opinion of the legislator, the right of the data subject to object to further data-processing when contacted by the municipality provides sufficient protection.[*19] Still, under this law, the name and identity code of those young persons who decline further data-processing shall be recorded in the database until the relevant person's 27th birthday. The Estonian Data Protection Inspectorate's director general and also Estonia's Chancellor of Justice have criticised the amendment, stating that interference in the private life of a norm's addressees requires there to exist a concrete danger to a legally protected right.[*20] However, the legality of the law has not been contested in court.

2.1.2. General data-protection principles

The use of AI and Big Data systems pose unique challenges connected with the GDPR. Some scholars have stated that, while Big Data technologies are evolving and innovation is encouraged on global scale, the GDPR has created a legal framework within the EU that establishes unnecessary boundaries, ultimately inhibiting innovation.[*21]

The terms of the GDPR regarding data-processing are based on seven principles[*22], five of which are particularly relevant for discussion of AI systems.[*23] These are described below.

12 Jürgen Kühling and Mario Martini, 'Die Datenschutz-Grundverordnung – Revolution oder Evolution im Datenschutzrecht im europäischen und nationalen Datenschutzrecht?' (2016) EuZW 448, 450.

13 Ibid; see, for example, art 23 GDPR.

14 Kühling and Martini (n 12) 449.

15 Art 22 GDPR.

16 Art 22(2)(b) GDPR.

17 English translations of Estonian legal acts are available from the Estonian Ministry of Justice's official journal: 'Riigi Teataja' (2021) <www.riigiteataja.ee/en/> accessed 1 July 2021.

18 Ministry of Social Affairs, 'Seletuskiri sotsiaalhoolekande seaduse ja maksukorralduse seaduse muutmise seaduse eelnõu juurde' ['Explanatory Memorandum to the Draft Law Amending the Social Welfare Act and Taxation Act'] 17 <https://m.riigikogu.ee/download/dfe1c650-c7ac-4af8-a0c4-023a721c7945> accessed 1 July 2021.

19 Ibid.

20 Paloma Krõõt Tupay, 'Estonia, the Digital Nation – Reflections of a Digital Citizen's Rights in the European Union' (2020) VI European Data Protection Law Review 14. – DOI: https://doi.org/10.21552/edpl/2020/2/16.

21 Tal Z Zarsky, 'Incompatible: The GDPR in the Age of Big Data' (2017) 996. Abstract at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3022646> accessed 1 July 2021.

22 Art 5 GDPR.

23 Accuracy, storage limitations, confidentiality, and the accountability principle are not addressed in this article.

2.1.2.1. Limitation of purpose

The purpose-limitation principle requires data to be collected for specified, explicit, and legitimate purposes and not further processed in a manner that is incompatible with those purposes.[*24] The purpose must be stated at the time of the collection of data. Importantly, the principle of purpose limitation conflicts with the way Big Data material is collected and used, which is characterised by collecting vast quantities of data whilst the methods of analysis and the specific purpose of the data-handling are determined only during or after collection.[*25] Furthermore, the purpose-limitation principle requires the purpose to be indicated unambiguously. A purpose statement such as 'to improve the service' is not deemed specific enough.[*26] In practice, however, often neither the data controller nor the data subject knows at the time of data collection what exact purposes the processing might serve in future.

The GDPR establishes an exception to the purpose-limitation principle by allowing further processing for 'statistical purposes', an aim not considered incompatible with the initial purposes, whatever those may be.[*27] This offers some leeway for the use of Big Data and machine learning, as the latter is often statistical in nature and employed for statistical purposes with existing datasets (one example is the use of logistic regression for the classification of data). On the other hand, the GDPR states that results of data-processing performed for statistical purposes must not be 'used in support of measures or decisions regarding any particular natural person'.[*28] The specific safeguards applied to processing for statistical purposes are to be regulated by the EU's member states.[*29] According to the GDPR, pseudonymisation may ensure the protection of data subjects' rights and freedoms in this regard.[*30] Some argue that this inhibits the use of Big Data, in that pseudonymisation reduces the usefulness of the result of the data processing,[*31] while others see this approach as the legislators' way of enabling the use of Big Data analysis.[*32]

The most important exceptions to the purpose-limitation principle can be derived from Art. 6(2) and (3) GDPR, whereby member states are allowed to maintain or introduce specific provisions for application of the GDPR within the framework of public administration[*33], while derogation based on Art. 6(3) GDPR may be laid down also by EU law.

Implementation of the Estonian Once-Only Principle (OOP) constitutes one such derogation. According to this principle, which is laid down by law,[*34] the state should request any given piece of information from a private person only once. Information obtained from private parties must, therefore, be managed by the state in such a way that it can be accessed by other public agencies when needed. In essence, the principle represents the reusability of citizens' data in state databases. Following on from the success of the

24 Art 5(1)(b) GDPR.

25 Zarsky (n 21) 1006–1007.

26 Recital (39) GDPR; Michèle Finch and Asia Biega, 'Reviving Purpose Limitation and Data Minimisation in Personalisation, Profiling and Decision-Making Systems' (2021) Max Planck Institute for Innovation and Competition (research paper series) 1. – DOI: https://doi.org/10.2139/ssrn.3749078. See also Article 29 Data Protection Working Party (Art 29 WP), 'Opinion 03/2013 on Purpose Limitation (WP 203)' (2013) 00569/13/EN 16.

27 Art 5(1)(b) GDPR.

28 Recital (162) GDPR.

29 Recital (162) GDPR: 'Union or Member State law should [...] determine statistical content, control of access, specifications for the processing of personal data for statistical purposes and appropriate measures to safeguard the rights and freedoms of the data subject and for ensuring statistical confidentiality.'

30 Art 89(1) GDPR: 'Those measures may include pseudonymisation provided that those purposes can be fulfilled in that manner.' According to art 4(5) GDPR '[p]seudonymisation means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information'.

31 Zarsky (n 21) 1008. Identifiable data are data that can be attributed to an identified or identifiable natural person. When pseudonymisation is employed, personal data cease to be identifiable data without the use of additional information, provided that said additional information is maintained separately and is subject to appropriate technical and organisational measures. See art 4(5) GDPR.

32 Viktor Mayer-Schönberger and Yann Padova, 'Regime Change? Enabling Big Data through Europe's New Data Protection Regulation' (2016) XVII Columbia Science & Technology Law Review 329 <www.researchgate.net/publication/303665079_Regime_Change_Enabling_Big_Data_Through_Europe's_New_Data_Protection_Regulation> accessed 1 July 2021.

33 See Boris P Paal, Daniel A Pauly, and Eike Michael Frenzel's annotations to art 6 GDPR in *Beck'scher Online-Kommentar*, marginal notes 32–33, 42–44; Jürgen Kühling and Benedikt Buchner's annotations to art 6 GDPR in *Beck'scher Online-Kommentar*, marginal notes 194–98.

34 Public Information Act (Avaliku teabe seadus) RT I, 15.03.2019, para 43^1 s 3.

Once-Only Principle, the European Commission has devised a proposal to implement the OOP for public services by 2023.[*35]

It follows from the above that, on foundations of Art. 6(2)-(3) GDPR, an exemption for the application of AI systems based on the processing of personal data in public administration may be created by national or EU law.[*36] However, the regulation of derogations in light of the given opening clauses raises various legal questions that have not yet been answered. On the one hand, with regard to derogation by the member states, it is unclear whether each of the opening clauses, which are similar in their respective content, constitutes an independent legal basis or, rather, they must be applied cumulatively.[*37] On the other hand, the scope of possible exceptions based on Art. 6(2)-(3) GDPR[*38] is unclear.[*39] For example, is it possible to derogate freely from the data-processing principles regulated in Art. 5 GDPR such that these principles do not apply in the context of the public administration? Or must such exceptions remain faithful to the principles of the GDPR to a certain extent?[*40] There is still much need for discussion to answer these questions within the EU.[*41]

According to Art. 6(4) GDPR, processing for another purpose is lawful on the condition that the new purpose is compatible with the original one. The GDPR requires, alongside other evaluations, considering the reasonable expectations of the data subjects with regard to the usage of their data, as well as the consequences of the new processing, when one is assessing the compatibility of the previous and the latter purpose.[*42]

Finally, GDPR Art. 6(4) allows further processing of collected data if said processing is based on member state or EU law that represents 'a necessary and proportionate measure in a democratic society' to safeguard the important interests of the state as listed in Art. 23(1) GDPR.[*43] In this respect, the question of the relationship between Art. 6(4) and possible exceptions based on Art. 6(2) and (3) arises.

Furthermore, the European Data Protection Supervisor (EDPS) has noted that Art. 6(4) GDPR does not grant 'open-ended permission to enact any sweeping and generic legislative text to allow for unlimited reuse of personal data across government departments' and that the reuse of data under the OOP needs to be fully aligned with the principles of data protection.[*44] According to the EDPS, easing the administrative burden on individuals or organisations, increasing the efficiency of administrative procedures, and saving time and resources do not constitute separate grounds under Art. 23(1) GDPR for restricting the principle of purpose limitation.[*45]

As can be seen, there are several legal ways to enable the use of AI systems (especially in the public domain) by making use of an exemption from the purpose-limitation principle. However, the unclear wording of the exception clauses renders it difficult to assess the extent to which public administrations may rely on them when using AI systems.[*46]

35 Commission and Connecting Europe Facility Digital, 'Once-Only Principle (OOP)' <https://ec.europa.eu/cefdigital/wiki/display/CEFDIGITAL/Once+Only+Principle> accessed 1 July 2021. The once-only principle is designed to allow public administrations in Europe to reuse, or share, data and documents that people have already supplied, in a transparent and secure manner, by 2023. Some public administrations have already implemented this principle, among them Estonia's.

36 In essence, art 22(2)(b) GDPR also allows member-state law to circumvent the restriction on automated individual-specific decision-making. See section 2.1.1 of this paper, on automated decision-making.

37 Kühling and Büchner (n 33) marginal note 195ff; Marion Albers and Raoul-Darius Veit's annotations to art 6 GDPR in *Beck'scher Online-Kommentar,* Datenschutzrecht, marginal notes 59–62.

38 Art 6(4) GDPR.

39 Paal and others (n 33) marginal notes 32, 43.

40 See also Marion Albers and Raoul-Darius Veit's annotations to art 6 GDPR in *Beck'scher Online-Kommentar*, Datenschutzrecht, marginal note 56.

41 Mario Martini and Michael Wenzel, 'Once Only Versus Only Once: Das Prinzip einmaliger Erfassung zwischen Zweckbindungsgrundsatz und Bürgerfreundlichkeit' [2017] DVBI 2017, 749, 758. – DOI: https://doi.org/10.1515/dvbl-2017-1206.

42 Mitrou (n 9) 48; recital (50) GDPR.

43 Art 6(2) and (3) GDPR.

44 European Data Protection Supervisor, 'Opinion 8/2017: EDPS Opinion on the Proposal for a Regulation Establishing a Single Digital Gateway and the "Once-Only" Principle' (2017) 7, 10 <https://edps.europa.eu/sites/edp/files/publication/17-08-01_sdg_opinion_en_0.pdf> accessed 1 July 2021.

45 European Data Protection Supervisor, 'A Digital Europe Needs Data Protection' (2017) 6, 10 <https://edps.europa.eu/press-publications/press-news/press-releases/2017/digital-europe-needs-data-protection-0_en> accessed 1 July 2021.

46 Paal and others (n 33) marginal notes 32, 43; Martini and Wenzel (n 41).

2.1.2.2. Data minimisation

The principle of data minimisation requires the processing of personal data to be adequate, relevant, and limited to what is necessary in relation to the purposes for which they are processed.[*47] In contrast, companies active in the field of Big Data analytics often gather and store as many data as possible.[*48] Data minimisation obligates the developers of AI systems to know which pieces of information the system requires for achieving the system's purpose.[*49] Having this awareness prior to the system's use may prove difficult. This is especially true in the case of Big Data: the functioning of many AI systems is made possible purely by dint of the vast volumes of data gathered.[*50]

Additionally, just as with the principle of purpose limitation, exceptions may apply. Hence, as noted above, the use of Big Data analysis is expressly permissible when the data are processed for statistical purposes that do not involve decisions related to any particular natural person.[*51]

Moreover, the GDPR's principle of data protection, by design and by default, obligates the controller to implement appropriate technical and organisational measures to comply with the regulation's data-protection requirements.[*52] Many of these principles were considered in the course of developing digital contact-tracing apps to fight the spread of the COVID-19 pandemic in the summer of 2020. Whereas using location data to trace contacts would have allowed performing further data-processing and, thereby, learning more about the data subjects' movements, the designers of many apps, among them the Estonian app HOIA, opted for Bluetooth Low Energy signals. In essence, instead of storing the location data of each user, the app gathers only anonymous Bluetooth codes from nearby mobile phones, thus minimising data collection.[*53]

2.1.2.3. Lawfulness

Among the prerequisites specified by the GDPR is a requirement for every instance of personal-data processing to have a legal basis; data-processing shall not be performed if it lacks legitimate grounds. Art. 6 GDPR provides for six separate legal bases for processing of personal data – namely, consent, performance of a contract, legitimate interest, vital interest, a legal requirement, and public interest:[*54]

As mentioned above, the GDPR places great emphasis on how consent is obtained and for what it can be used.[*55] Most importantly, data subjects may withdraw their consent at any time.[*56] Where consent has been withdrawn, the processing already undertaken is still lawful but further processing must cease.[*57] Both the need for consent and the withdrawal right may pose an obstacle for AI systems. As many AI systems continuously learn from past data, it is difficult to stop the process of such learning. Therefore, the GDPR's consent provisions present a permanent liability risk with regard to AI systems that continuously learn from information whose subsequent processing would be unlawful.[*58]

The invocation of a legitimate interest as the legal basis for data-processing by the data controller requires careful assessment. A balancing test must be carried out to evaluate whether the data subject's

47 Art 5(1)(c) GDPR.

48 Zarsky (n 21) 1010–11.

49 Biega and Finck (n 26) 30–31.

50 Ibid 31–32.

51 See this paper's section 2.1.2.1, addressing purpose limitation.

52 See art 25 GDPR.

53 Dan Bogdanov and Triin Siil, 'Infotehnoloogilised võimalused põhiõiguste kaitsel' [2020] (6) Juridica 474, 478 accessible via <www.juridica.ee/article.php?uri=2020_6_infotehnoloogilised_v_imalused_p_hi_iguste_kaitsel> accessed 1 July 2021; see also European Parliament, 'National COVID-19 Contact Tracing Apps' (briefing, 2020) PE 652.711 <www.europarl.europa.eu/RegData/etudes/BRIE/2020/652711/IPOL_BRI(2020)652711_EN.pdf> accessed 1 July 2021.

54 Agencia Española de Protección de Datos, 'RGPD Compliance of Processings That Embed Artificial Intelligence: An Introduction' (2020) 19 <www.aepd.es/sites/default/files/2020-02/adecuacion-rgpd-ia-en_0.pdf> accessed 1 July 2021.

55 See section 2.1.2.1, above.

56 Art 7(3) GDPR.

57 Ibid.

58 Matthew Humerick, 'Taking AI Personally: How the EU Must Learn To Balance the Interests of Personal Data Privacy & Artificial Intelligence' (2018) 406–407 <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1633&context=chtlj> accessed 1 July 2021.

fundamental rights or freedoms override the legitimate interests of the data controller.[*59] An organisation's legitimate interest might include profiling customers for targeted marketing, preventing fraud, or pursuing physical and information security.[*60] Remarkably, legitimate interests may not be taken as a legal basis for data-processing by public authorities. Under Art. 6(1)(e) GDPR, public agencies may instead appeal to public interests as the basis for data-processing.

In one exception, the GDPR foresees that processing may be carried out without the consent of the data subject when this is for the performance of a task in the public interest or in the exercise of official authority vested in the controller.[*61] One can cite the above-mentioned regulation pertaining to NEET youth as an example in this regard.[*62]

2.1.2.4. Transparency

Data subjects can consent to data-processing and exercise their rights only if they understand what is being done with their data.[*63] Accordingly, the GDPR establishes that controllers are obliged to provide 'concise, transparent, intelligible and easily accessible' information to data subjects to ensure transparency of their data-processing operations.[*64] The Article 29 Working Party has noted that phrasings such as 'We may use your personal data to develop new services' and 'We may use your personal data for research purposes' do not convey the purpose of the data-processing in a clear enough manner.[*65]

As machine-learning systems are growing more sophisticated by the day, providing meaningful and at the same time easily understandable information about the logic involved can prove to be a difficult task. The deduction mechanisms and learning processes of machine-learning models are often hard to explain, especially since users usually have no prior knowledge of how automatic systems work. This may prove a particular challenge for organisations utilising unsupervised machine-learning models, whereby an AI system can evolve on its own.[*66]

2.1.2.5. Accuracy and integrity

Under the principle of accuracy, personal data must be processed accurately and, where necessary, kept up to date.[*67] According to the GDPR, every reasonable measure must be taken to ensure that a personal datum that is inaccurate, with respect to the purposes for which it is processed, is erased or rectified without delay.[*68] Personal data intended for processing and their sources must be validated, as data of unknown credibility can lead to a breach of data integrity.[*69] This issue is particularly important with regard to Big Data and AI systems, wherein poor-quality or biased/unrepresentative data in particular may lead to a discriminatory outcome. Therefore, controllers are obliged also to ensure the representativeness of the data[*70] in the future environment of the system.[*71]

59 Information Commissioner's Office, 'Big Data, Artificial Intelligence, Machine Learning and Data Protection' (2017) 34 <https://ico.org.uk/media/for-organisations/documents/2013559/big-data-ai-ml-and-data-protection.pdf> accessed 1 July 2021.

60 Ibid 33.

61 Art 1(e) GDPR.

62 See the discussion in section 2.1.1, above.

63 Mitrou (n 9) 55.

64 Art 12(1) GDPR.

65 Art 29 WP, 'Guidelines on Transparency under Regulation 2016/679' (2017) 9 <https://ec.europa.eu/newsroom/just/document.cfm?doc_id=48850> accessed 1 July 2021.

66 Humerick (n 58) 411–12. As to the question of whether the GDPR provides individuals with a right to explanation of AI models and decisions, cf Martin Ebers, 'Regulating Explainable AI in the European Union: An Overview of the Current Legal Framework(s)' in Liane Colonna and Stanley Greenstein (eds), *Nordic Yearbook of Legal Informatics 2020–2021* (forthcoming).

67 Art 5(1)(d) GDPR.

68 Ibid.

69 ENISA, 'Big Data Security: Good Practices and Recommendations on the Security of Big Data Services' (2015) 13–15 <www.enisa.europa.eu/publications/big-data-security/at_download/fullReport> accessed 6 July 2021.

70 Data representativeness is the concept of how well a dataset represents the entire population with regard to the characteristic under study. In essence, the dataset should project actual conditions as precisely as possible.

71 Mitrou (n 9) 51–52.

The GDPR confers on data subjects the right to demand rectification of inaccurate personal data without undue delay.[*72] If use of incorrect personal data has resulted in an incorrect outcome, one often can correct the mistake by simply running the process again but with the data rectified. Handling mistakes in data used as input to AI systems may, however, prove to be much more complex. For AI-based systems, the only solution is to re-teach the system, from rectified data, and doing so presents serious financial repercussions for the data controller. That said, the obligations specified apply only where the pattern learnt allows the identification of the data subject. In the context of AI systems, this is typically not the case.[*73]

2.2. The proposal for a regulation laying down harmonised rules on artificial intelligence

Unlike the realm of data protection, regulatory frameworks for that of AI are still in only their early stages.[*74] At EU level, the High-Level Expert Group on AI established by the European Commission has developed guidelines and other soft-law documents aimed at ensuring the ethical use of AI.[*75] In 2020, the European Commission published its White Paper on AI.[*76] The following consultations resulted in a proposal for a regulation laying down harmonised rules on artificial intelligence (the so-called Artificial Intelligence Act)[*77]. This proposal was released in 2021. The regulation would apply to both public and private actors, within and external to the EU, wherever an AI system is placed on the European Union market or its use affects people located in the EU.[*78] According to Art. 2(4) of the proposal, the regulation would not apply, however, to public authorities in a third country or to international organisations using AI systems in the framework of international agreements for law enforcement and judicial co-operation with the EU or with one or more member states.

In its draft, the European Commission proposes prohibiting the use of four kinds of AI system: firstly, 'AI systems that deploy subliminal techniques beyond a person's consciousness in order to materially distort a person's behaviour' in a manner that may cause physical or psychological harm; secondly, 'AI systems that exploit any of the vulnerabilities of a specific group of persons due to their age, physical or mental disability, in order to materially distort the behaviour of a person pertaining to that group' in a manner that may cause physical or psychological harm; thirdly, AI systems used by public authorities for the 'evaluation or classification of the trustworthiness of natural persons' on the basis of their social behaviour or personal/personality characteristics, where the 'social score' leads to unfavourable consequences disproportionate to the social behaviour; and, fourthly, with certain exceptions, 'real-time remote biometric identification systems in publicly accessible spaces for the purpose of law enforcement'.[*79]

Some types of AI system are deemed 'high-risk' for purposes of the proposal.[*80] Although the articulation of this concept is not clearly developed, the European Commission provides a list of areas wherein the use of an AI system is deemed high-risk.[*81] Per the proposal, high-risk AI systems shall be subject to increased regulation, laid out in the draft act's second chapter. Among other requirements, the providers of high-risk AI systems are subject to an obligation to establish risk-management systems, follow concrete

72 Art 16 GDPR.

73 Tina Krügel, '§ 11 Datenschutzrechtliche Herausforderungen künstlicher Intelligenz und Robotik' in Martin Ebers and others (eds), *Künstliche Intelligenz und Robotik* (2020) marginal note 34. – DOI: https://doi.org/10.17104/9783406769818.

74 Ebers (n 4) 83ff.

75 High-Level Expert Group on Artificial Intelligence, 'Ethics Guidelines for Trustworthy AI' (2019) <https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=60419> accessed 1 July 2021.

76 Commission, 'White Paper on Artificial Intelligence' COM(2020) 65 final 2, 16.

77 Commission, 'Proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts' COM(2021) 206 final.

78 Ibid art 2(1).

79 Ibid art 5. The European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS) concluded in their joint opinion that a stricter approach is necessary; EDPB–EDPS, 'Joint Opinion 5/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act)' (2021) 12, no 30 <https://edps.europa.eu/system/files/2021-06/2021-06-18-edpb-edps_joint_opinion_ai_regulation_en.pdf> accessed 1 July 2021.

80 Ibid art 6, annexes II and III.

81 Ibid annex III.

data-governance practices, compile technical documentation, retain system logs, ensure transparency for the users, and implement measures for human oversight while the system is in use.[*82]

Importantly, the proposed regulation's explanatory memorandum states that 'the proposal is without prejudice and complements the General Data Protection Regulation'.[*83] The proposed regulation, therefore, would not make substantial changes to the general applicability of the data-protection rules of the GDPR to AI systems. Only two exceptions are foreseen so far. The first of them, regulated in Art. 10(5) of the proposal, pertains to the processing of special categories of data by high-risk AI systems; this processing would be allowed only to the extent 'that is strictly necessary for the purposes of ensuring bias monitoring'. Hence, the proposed amendment specifies the regulatory content of Art. 9 GDPR, comprising the processing of special categories of personal data.[*84] With the second exception, the proposal provides a legal basis for the use of regulatory sandboxes for the development of AI in the public interest[*85], a matter not explicitly regulated in the GDPR. However, as the European Data Protection Board and the European Data Protection Supervisor stressed in their joint opinion on the European Commission's proposal, the GDPR already has a provision for further data-processing in the public interest, and the use of regulatory sandboxes would still have to comply with the requirements of the GDPR.[*86]

The proposal is still to be negotiated between the European Parliament and the Council, and it will be subject to changes accordingly. Only time will tell whether those lead toward more privacy-preserving AI rules or a more flexible approach.

3. Estonian law regarding AI and data protection

3.1. Data-protection regulation in Estonia

According to the Estonian Constitution, all persons are entitled to access information about them held by public authorities.[*87] Also enshrined in the Constitution is the right to privacy, which, according to the Estonian courts' practice, includes protection against the processing of their personal data.[*88] Furthermore, the Supreme Court of Estonia has acknowledged the right to informational self-determination,[*89] which can be defined as the right of a person to decide for him- or herself how much – if at all – his or her personal data are to be collected by the state.[*90]

In response to the EU's data-protection reform, Estonian law needed to be revised. To this end, Estonia adopted a new version of the Personal Data Protection Act and amended other laws so as to be consistent with EU law.[*91]

Estonian law presents some deviations from the GDPR. To ensure the exercise of state supervision, the Estonian Law Enforcement Act foresees derogation from certain rules of the GDPR for law-enforcement agencies.[*92] Most importantly, the law allows deviation from the rights of the data subject laid down in

82 Ibid art 9–15.

83 Ibid 4; cf Recital 41 of the proposal: 'The fact that an AI system is classified as high risk under this Regulation should not be interpreted as indicating that the use of the system is necessarily lawful under other acts of Union law or under national law compatible with Union law, such as on the protection of personal data.'

84 Critically, the EDPB–EDPS (n 79) 20ff, no 73: the proposal does not seem 'sufficiently clear to create a legal basis for the processing of special categories of data, and need[s] to be complemented with additional protective measures'.

85 Ibid art 53-54, recital (72); cf again EDPB–EDPS (n 79) 18ff.

86 EDPB–EDPS (n 79) 18ff.

87 Constitution of the Republic of Estonia para 44 (3), per the Riigi Teataja archive (n 17).

88 Art 26 of the Constitution of Estonia; see also Supreme Court of Estonia Administrative Law Chamber 23.10.2003, decision 3-3-1-57-03 <www.riigikohus.ee/et/lahendid/?asjaNr=3-3-1-57-03> accessed 1 July 2021.

89 Supreme Court of Estonia Constitutional Review Chamber 12.1.1994, decision III-4/A-1/94 <https://rikos.rik.ee/?asjaNr=III-4/1-1/94> accessed 1 July 2021.

90 Commentaries to the Estonian Constitution sub-s 26(24) <https://pohiseadus.ee/sisu/3497> accessed 1 July 2021; Supreme Court Administrative Law Chamber 12.7.2012, Judgment 3-3-1-3-12 19 <www.riigikohus.ee/et/lahendid?asjaNr=3-3-1-3-12> accessed 1 July 2021.

91 Law on the Implementation of the Personal Data Protection Act (Isikuandmete kaitse seaduse rakendamise seadus) RT I, 13.03.2019 2, per the Riigi Teataja archive (n 17).

92 Law Enforcement Act (Korrakaitseseadus) RT I, 03.03.2021 5, para 13, per the Riigi Teataja archive (n 17).

Chapter 3 of the GDPR.[*93] Yet Estonian law does not provide for any safeguards or restrictions in this regard, even though these are required by Art. 23(2) GDPR. Interestingly, when transposing the Law Enforcement Directive into national law, the Estonian legislator decided that the prevention of threats to public security would fall not under the directive but under the GDPR; thereby, stricter rules were applied to the maintenance of law and order than to offence-related proceedings. In Estonia, the scope of said directive is reduced to covering only the latter.[*94]

Further exceptions to the rights laid down in the GDPR apply when personal data are processed for scientific and historical research, as well as official statistics. In these instances, personal data may be processed in certain cases without the data subject's consent.[*95] Furthermore, in Estonia, information-society services may be provided directly to a child on the basis of his or her consent if the child is at least 13 years old.[*96]

The Personal Data Protection Act also covers some issues that are not regulated in the GDPR: matters such as the right to process personal data of deceased persons[*97], processing of data in connection with the violation of contractual obligations[*98], and data related to public places.[*99]

In addition to the Personal Data Protection Act, many other legal acts are relevant to processing personal data and using automated decision-making. These include, above all:

- the Public Information Act, which foresees that all non-restricted data contained in public databases shall be published online[*100];
- the Cybersecurity Act[*101], setting forth the requirements connected with the maintenance of fundamentally important networks and information systems (for example, the Estonian Electronic Health Record System)[*102];
- the Code of Civil Procedure,[*103] which provides that payment orders may be made in an automated manner by the court if the prerequisites specified for making the order (i.a., the sum must not be greater than the prescribed amount) are met[*104];
- the Law Enforcement Act, according to which the police may process personal data by using monitoring equipment and may obtain data from electronic-communications undertakings[*105];
- the State Liability Act, which provides for compensation for damages in the event that an administrative act extraordinarily restricts a person's fundamental rights.[*106]

93 Ibid.

94 The Personal Data Protection Act (Isikuandmete kaitse seadus), RT I, 04.01.2019 11, para 12 s 2 states that the chapter transposing the Law Enforcement Directive does not apply to processing of personal data in the exercise of activities of law-enforcement agencies with the aim of 'preventing a threat, ascertaining and countering a threat or eliminating a disturbance'. The explanatory memorandum to the Personal Data Protection Act (2018) 19 further clarifies that the above-mentioned chapter covers only offence-related proceedings. On the other hand, the Law Enforcement Directive is not limited to offence proceedings and applies also to the safeguarding against and the prevention of threats to public security. Recital 12 of that directive states, further, that the scope includes 'maintaining law and order as a task conferred on the police or other law-enforcement authorities where necessary to safeguard against and prevent threats to public security and to fundamental interests of the society protected by law which may lead to a criminal offence'. The Estonian restrictive approach to the scope of the Law Enforcement Directive was, *inter alia*, criticised by the director general of the Estonian Data Protection Authority. See Estonian Data Protection Authority, 'Andmekaitse Inspektsiooni peadirektori seisukohad uue andmekaitseõiguse kontseptsiooni asjus (koostatud Justiitsministeeriumis 27.04.2017)' (2017) 2 <www.aki.ee/sites/default/files/dokumendid/reform/jum_oigusraamistiku_kontseptsiooni_markused_27.04.2017.pdf> accessed 1 July 2021.

95 The right to derogate is set out in art 89 GDPR. See the Personal Data Protection Act (n 94) para 6.

96 Cf the Personal Data Protection Act (n 94) para 8(1); art 6(1)(a) GDPR.

97 Personal Data Protection Act (n 94) para 9.

98 Personal Data Protection Act (n 94) para 10.

99 Personal Data Protection Act (n 94) para 11.

100 Public Information Act (n 34) paras 28, 30, and 32.

101 Cybersecurity Act (Küberturvalisuse seadus) RT I, 22.05.2018 1 para 1 s 1, per the Riigi Teataja archive (n 17).

102 For further information, see 'Health Information System Statute'; Health and Welfare Information Systems Centre, 'Patient Portal' <www.digilugu.ee/login?locale=en> accessed 1 July 2021.

103 Code of Civil Procedure (Tsiviilkohtumenetluse seadustik) RT I, 09.04.2021 17 para 489^2, per the Riigi Teataja archive (n 17).

104 Addressed in detail by Piia Kalamees, 'Tarbija õiguste kaitse maksekäsu kiirmenetluses Euroopa Kohtu praktika valguses' [2019] (8) 613 <www.juridica.ee/article.php?uri=2019_8_tarbija_> accessed 1 July 2021.

105 Law Enforcement Act (n 92) paras 34 and 35.

106 State Liability Act (Riigivastutuse seadus) RT I, 17.12.2015 76 para 16, per the *Riigi Teataja* archive (n 17).

3.2. The regulation of AI systems in Estonia

In Estonia, there are (as yet) no laws dealing specifically with AI systems. Instead, general laws apply. The processing of personal data within the realm of AI systems – especially by means of profiling and automated decision-making – requires compliance with general regulations on the protection of equal treatment and non-discrimination, therefore. Among the relevant equal-treatment acts are the Equal Treatment Act[*107], the Gender Equality Act[*108], and the Employment Contracts Act (which obliges employers to protect their employees against discrimination, to follow the principle of equal treatment, and to promote equality[*109]). So far, there is also no Estonian case law regarding the use of AI or AI-based decision-making.

Yet a working group managed by the Ministry of Economic Affairs and Communications and the Government Office did publish a report on the possibilities for applying AI in Estonia on wider scale.[*110] The report, released in May 2019, presents the conclusion that neither significant changes to the legal system nor a separate 'AI law' is necessary for successfully regulating AI systems[*111] and that personal-data processing in the context of AI is sufficiently protected by the GDPR and the respective national law.[*112] However, the report explicitly excludes ethics issues from consideration, and the authors note that human interaction with AI may give rise to further questions related to fundamental rights, which the report does not address in detail.[*113]

Then, in 2020, the Estonian Ministry of Justice prepared a project for the legislative regulation of algorithmic systems.[*114] The project argument states that a separate legislative act must be enacted to regulate algorithmic systems, as current legislation does not provide for sufficient protection of fundamental rights in the use of AI.[*115] With regard to data protection, the expert opinion identified a particular danger to fundamental rights in the lack of human control and the opacity of algorithms.[*116] The Ministry of Economic Affairs and Communications, in response to the legislative intent, asked whether a separate AI law is needed at all. The ministry recommended instead amending multiple regulations that hinder the adoption of self-learning algorithmic systems. Regarding fundamental-rights protection, it proposed avoiding over-regulation and making the necessary individual amendments to the existing law instead of adopting a new, separate legal act.[*117] Most comments on the Ministry of Justice's project recommended co-ordinating Estonian legislation on AI with the (legislative) plans of the EU.[*118] In this spirit, the Ministry of Justice decided to put new legislation on hold[*119] until the European Commission could present its proposals on the regulation of AI in 2021.[*120]

107 Equal Treatment Act (Võrdse kohtlemise seadus) RT I, 26.04.2017 9, per the Riigi Teataja archive (n 17).

108 Gender Equality Act (Soolise võrdõiguslikkuse seadus) RT I, 10.01.2019 19, per the Riigi Teataja archive (n 17).

109 Employment Contracts Act (Töölepingu seadus) RT I, 28.05.2021 19 para 3, per the Riigi Teataja archive (n 17).

110 Report of Estonia's AI Taskforce (n 2).

111 Ibid 38.

112 Ibid 40.

113 Ibid 42.

114 Ministry of Justice, 'Algoritmiliste süsteemide mõjude reguleerimise väljatöötamise kavatsus ("krati VTK")' (2020) <https://adr.rik.ee/jm/fail/7458503/subfile/1> accessed 1 July 2021.

115 Ibid 30.

116 Ibid 11.

117 Ministry of Economic Affairs and Communications, 'Vastus Justiitsministeeriumi algoritmiliste süsteemide mõjude reguleerimise väljatöötamise kavatsusele ("krati VTK")' (2020) <https://eelnoud.valitsus.ee/main/mount/docList/93ebe63d-de8c-4662-9908-3232aa7f987c> accessed 1 July 2021.

118 See, for example, Ministry of Foreign Affairs, 'Algoritmiliste süsteemide mõjude reguleerimise väljatöötamise kavatsuse kooskõlastamine' (2020) 2 <https://eelnoud.valitsus.ee/main/mount/docList/93ebe63d-de8c-4662-9908-3232aa7f987c> accessed 1 July 2021.

119 Liisi Jürgen, Tea Kookmaa, and Tanel Kerikmäe, 'Jürgen, Kookmaa, Kerikmäe: kratiseadus pandi ootele' *ERR* (1 December 2020) <www.err.ee/1192069/jurgen-kookmaa-kerikmae-kratiseadus-pandi-ootele> accessed 1 July 2021.

120 Commission, 'Artificial Intelligence – Ethical and Legal Requirements' (initiative document) < https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12527-Artificial-intelligence-ethical-and-legal-requirements_en> accessed 1 July 2021.

4. Conclusion

The discussion above was aimed at examining, from an Estonian perspective, the extent to which it is possible to develop and employ AI while complying with the rules for data protection within the EU.

A closer look at the legal regulations shows that the development and application of AI systems within the EU is limited by numerous provisions of data-protection law. It remains clear that many of these requirements, among them that of following the principle of consent, are subject to exceptions – especially in the context of public law. There is clearly a need for debate pertaining to their content and scope of application. The use of AI by the private sector, to which the GDPR's opening clauses do not apply, likewise requires further evaluation. On account of their unclear wording, many of the legal exceptions raise several questions of their own, and their potential scope remains unclear. The complexity of the legal requirements, in combination with the risk of potential liability under data-protection law when one is using AI, poses a risk that the development and use of AI in Europe will not be able to proceed at an unbridled pace. It is important to remember that, in a global world, the race to develop AI best and the most rapidly is one with global scale. Countries in which compliance with democratic principles and the protection of fundamental rights does not pose meaningful restrictions for the simple reason that no such rights apply are certainly at a technical advantage. Therefore, democratic states must consider that lagging behind non-democratic states in the technological race could itself pose concrete threats to public safety and security.

However, it must also not be forgotten that the EU is a community of values. It is precisely these values that guarantee the quality of life and well-being of the people in the EU. As Art. 2 of the Treaty of the EU states, the Union is founded on the values of respect for human dignity and human rights, freedom, democracy, equality, and the rule of law. For this reason, data-protection law must not simply be abolished on the argument that it 'inhibits innovation'. On the contrary, EU data protection can light the way for others, as the example of the GDPR shows: it is one of the most successful legal acts of the EU, one that has influenced many non-European countries and served as a worldwide model – e.g. for Canada and the US state of California.[*121] As the political priorities under newly appointed European Commission President von der Leyen confirm, the EU is now also claiming a leading role in the field of AI.[*122]

As with data protection, the biggest challenge in regulating AI systems is finding the right balance between openness to innovation and protection of fundamental rights. The constant analysis of data-protection regulations and, where required, their legal amendment together form a necessary condition for maintaining this balance in an environment of constant technological development. Also, it is to be hoped that legal practice and scholarship, along with the European Data Protection Supervisor and/or the European Commission by means of guidelines on the interpretation of the GDPR in relation to AI, will, over time, fill in the gaps and clarify the uncertainties inherent to the GDPR's vague and sometimes unclear formulation. In this respect, the objective behind this paper has been to contribute to the necessary legal discussion by providing an overview of the most relevant data-protection rules connected with the application of AI systems in the EU.

[121] See also Martin Ebers and Marta Cantero Gamito, 'Algorithmic Governance and Governance of Algorithms: An Introduction' 1, 8ff in Ebers and Cantero (eds), *Algorithmic Governance and Governance of Algorithms: Legal and Ethical Challenges* (Springer 2020). – DOI: https://doi.org/10.1007/978-3-030-50559-2.

[122] Ibid.

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Zugang zum Recht – Beobachtungen zur Kostendimension

1. Einführung

Der Leiter des mehrjährigen Forschungsprojekts *„Florence Access-to-Justice Project“*[*2] *Mauro Cappelletti* formulierte 1978, dass man sich in einem langen historischen Kampf um den *Zugang zum Recht* befinde.[*3] Pathetisch klingt es weiter, wenn er erklärt, was damit gemeint ist. So stellt es einen Grundpfeiler eines Rechtssystems dar, dass dieses „*equally accessible to all*“ ist. Ein System also, das es dem einzelnen Bürger erlaubt und ermöglicht, seine Rechte zu verteidigen und seine (Rechts-) Streitigkeiten beizulegen, muss für jedermann gleichermaßen zugänglich sein.[*4] Auch nach dieser Umschreibung bleibt ein soziologischer[*5] Laie zunächst etwas ratlos zurück, was sich im Einzelnen hinter dieser international geführten Debatte verbergen soll.[*6] Erst durch die Aufzählung der Barrieren, die einem effektiven Zugang zum Recht entgegenstehen, klärt sich dies auf.[*7] So kann jemand sein Recht oftmals wegen der damit verbundenen Kosten nicht erreichen.[*8] Daneben verhindern auch andere Faktoren, dass der Einzelne sein Recht erhält; so z.B. *Party Capability*[*9] *und Diffuse Interests*[*10]*, bekannte Begriffe der internationalen Access to Justice*-Debatte. Mit dem Wissen um diese Barrieren benutzt *Cappelletti* sodann die Wellen-Metapher, um die verschiedenen

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2 Aus dem vierjährigen rechtsvergleichenden und interdisziplinären Forschungsprojekt, das im Herbst 1973 begann und im Jahr 1979 abgeschlossen wurde, resultierte, neben anderen Büchern und Aufsätzen, das 4 Bände umfassende Standardwerk mit dem Namen „*Access to Justice*“.

3 Mauro Cappelletti, Bryant Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective” (1978) 27 Buff. L. Rev. 181 [182]: „long historical struggle for “access to justice””,

4 Ibid.

5 Genauer ein anthropologischer, ökonomischer, politikwissenschaftlicher und psychologischer Laie, vgl. ibid 181.

6 So auch Matthias Kilian, ‘Zugang zum Recht: Beobachtungen in Zeiten von Gesetzen zur Kosteneinsparung bei der Prozesskosten- und Beratungshilfe’ [2008] AnwBl 236 [236].

7 Vgl. Mauro Cappelletti, ‘Access to Justice: Comparative General Report’ (1975) 40 RabelsZ 669 [673ff.]; Mauro Cappelletti, Bryant Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective” (1978) 27 Buff. L. Rev. 181 [186ff.].

8 Mauro Cappelletti, ‘Access to Justice: Comparative General Report’ (1975) 40 RabelsZ 669 [674f.].

9 Ibid 677.

10 Hierzu ibid 680.

Phasen des „Kampfes“ um einen verbesserten Zugang zum Recht aufzuzeigen und zu identifizieren.[*11] So konzentrierte sich dieser Kampf in einem ersten – im internationalen Vergleich teils unterschiedlich ausgestalteten[*12] – Ansatz auf die Etablierung oder den Ausbau der staatlichen Kostenhilfe. Sodann wurde in einer zweiten Welle nach Wegen gesucht, wie dem Problem der *Diffuse Interests* adäquat begegnet werden kann.[*13] Im universalen *„Acces-to-Juctice Approach“* schließlich erfolgte die Suche nach Alternativen zur Beilegung von (Rechts-)Streitigkeiten.[*14]

Im Rahmen dieses Beitrags wird vor dem Hintergrund der ersten Welle die These formuliert, dass sich der deutsche Ansatz zur Verbesserung des Zugangs zum Recht von der staatlichen Finanzierungsintervention in der Form der staatlichen Kostenhilfe zu distanzieren begonnen hat und stattdessen eine vermehrte Hinwendung zur marktbasierten Finanzierungsintervention stattfindet. Um diese These zu überprüfen, soll zunächst die sich in Deutschland sowie Großbritannien vollzogene Entwicklung der staatlichen Kostenhilfe überblicksartig dargestellt werden (dazu 1.). Anschließend sollen Beobachtungen zu den neusten Entwicklungen am deutschen Rechtsdienstleistungsmarkt angestellt werden (dazu 2.). In einem Sonderkapitel gilt es, die dem deutschen Rechtsdienstleistungsmarkt immanenten Regulierungen – mit Blick auf die Ausgestaltung in anderen Mitgliedstaaten der Europäischen Union – näher zu beleuchten, da diese grundsätzlich ein der Kernthese entgegenstehendes Hindernis darstellen (dazu 3.). Zum Schluss soll ein vorsichtiges Resümee hinsichtlich der angestellten Beobachtungen und der sich daraus ergebenden Anforderungen an die Verbesserung des Zugangs zum Recht gewagt werden (dazu 4.).

2. Entwicklungslinien der staatlichen Kostenhilfe

2.1. Aufbau und Abbau der staatlichen Kostenhilfe

Nach dem Zweiten Weltkrieg ging es auf dem Weg zum deutschen Rechtsstaat zunächst um die Etablierung eines einheitlichen und umfassenden Rechtsschutzsystems über die ordentliche Gerichtsbarkeit hinaus. Erst in den 1970er Jahren richteten sich die deutsche rechtspolitische Debatte und diesbezügliche Reformbestrebungen verstärkt darauf, das vorhandene Rechtsschutzsystem auch denjenigen zugänglich zu machen, die bis dahin nur unzureichend ihre Rechte durchsetzen konnten.[*15] Während der in der internationalen rechtsvergleichenden und interdisziplinären Auseinandersetzung so bezeichneten *First Wave* wurde die Debatte um den Zugang zum Recht anfangs überwiegend auf der Kostenebene geführt.[*16] Demnach wurde in Deutschland Ende der 1970er Jahre das Armenrecht zugunsten der Prozesskostenhilfe[*17] abgeschafft und die Beratungshilfe[*18] eingeführt.[*19] Durch eine ungezielte finanzielle Förderung mittels staatlicher Steuergelder sollte das System, welches es den Bürgern ermöglicht, ihre Rechte zu verteidigen und (Rechts-) Streitigkeiten beizulegen, *equal accessible to all* gemacht werden.[*20] Außerdem sollte dieses System so vermehrt Ergebnisse hervorbringen, die individuell und sozial gerecht sind.[*21] Dass diese Bestrebungen einen

11 Ibid 681f; Mauro Cappelletti, Bryant Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective” (1978) 27 Buff. L. Rev. 181 [196ff].

12 Vgl. Mauro Cappelletti, ‘Access to Justice: Comparative General Report’ (1975) 40 RabelsZ 669 [682ff].

13 Ibid 693ff.; vgl. hierzu Astrid Stadler und Hans-W. Micklitz, ‘Notwendigkeit eines Verbandsklagegesetzes’ in dies. (Hrsg.), *Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft* (Landwirtschaftsverlag 2005) 1 [1ff].

14 Mauro Cappelletti, ‘Access to Justice: Comparative General Report’ (1975) 40 RabelsZ 669 [704ff]; Astrid Stadler und Hans-W. Micklitz, ‘Notwendigkeit eines Verbandsklagegesetzes’ in dies. (Hrsg.), *Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft* (Landwirtschaftsverlag 2005) 1 [17].

15 Peter Derleder, ‘Gleicher Zugang zum Recht für alle’ [2009] VuR 163 [163].

16 Mauro Cappelletti, ‘Access to Justice: Comparative General Report’ (1975) 40 RabelsZ 669 [682].

17 Gesetz über die Prozesskostenhilfe vom 13.06.1980 (BGBl I, S. 677), in Kraft am 01.01.1981.

18 Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz) vom 18.06.1980 (BGBl. I, S. 689), in Kraft am 01.01.1981.

19 Peter Derleder, ‘Gleicher Zugang zum Recht für alle’ [2009] VuR 163.

20 Vgl. Matthias Kilian, ‘Zugang zum Recht: Beobachtungen in Zeiten von Gesetzen zur Kosteneinsparung bei der Prozesskosten- und Beratungshilfe’ [2008] AnwBl 236 [236 mwN].

21 Auf diesen zwei Zwecken liegt der Fokus des „*access to justice*“, vgl. Mauro Cappelletti, Bryant Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective” (1978) 27 Buff. L. Rev. 181 [182].

Grundpfeiler eines Rechts- und Sozialstaates darstellen[*22], wurde später vom BVerfG[*23] unter Berufung auf den Rechtsschutzgedanken des Art. 20 III GG ausdrücklich determiniert.[*24] Auf europäischer Ebene ist dieser Grundsatz in Art. 6 EMRK[*25] und Art. 47 GRCh[*26] abgesichert. Denn wenn das Gewaltmonopol einzig beim Staat liegt und der Einzelne damit zur Durchsetzung seiner Rechte an die Gerichte verwiesen wird, leitet sich daraus die Aufgabe des Staates ab, Gerichte einzurichten und den Zugang zu ihnen jedermann in grundsätzlich gleicher Weise zu eröffnen.[*27] Daraus resultiert aber auch, so das BVerfG 1983[*28], dass ein Bemittelter ebenso wie ein Unbemittelter wirksamen Rechtsschutz in Anspruch nehmen können muss.[*29]

In der internationalen, aber insbesondere in der britischen Debatte zeichnete sich jedoch bereits Mitte der 1990er Jahre immer mehr ab, dass der staatliche Haushalt notorisch schlecht gefüllt ist und die ungezielte finanzielle Förderung staatlicher Kostenhilfe zu derart bescheidenen Ergebnissen bei der Verbesserung des Zugangs zum Recht führte[*30], dass die britische Regierung sich 1998 gezwungen sah, den *Access to Justice Act*[*31] zu erlassen, um künftig bei der staatlichen Kostenhilfe Einsparungen vornehmen zu können.[*32] Etwas später, im Jahr 2006, gelangte der rechtspolitische Diskurs sodann auch in Deutschland, zu der Auffassung, dass die Aufwendungen für die staatliche Kostenhilfe in der Form der Prozesskosten-, Verfahrenskosten- und Beratungshilfe dringend begrenzt werden müsse.[*33] Diesbezügliche im Jahr 2006 beginnende Reformbestrebungen fußten auf dem Verdikt, dass Deutschland allein in diesem Jahr für die Prozesskostenhilfe in Zivilsachen 490 Mio. Euro aufgewandt hatte und diese Tendenz steigend war. Dies entsprach 5,95 Euro für die Prozesskostenhilfe pro Bürger.[*34] Beim Allzeithoch im Jahr 2008 betrugen die Aufwendungen für die Prozesskostenhilfe in der ordentlichen Gerichtsbarkeit sowie für die Beratungshilfe in der Summe sogar 589 Mio. Euro.[*35] Dass Deutschland im internationalen Vergleich seit jeher vergleichsweise wenig für die staatliche Kostenhilfe ausgibt, blieb damals in der rechtspolitischen Debatte oftmals außen vor. So sind die Pro-Kopf-Ausgaben für staatliche Kostenhilfe in den Niederlanden, Schweden und Norwegen fünfmal, in Großbritannien sogar zehnmal so hoch.[*36] Den Anstoß zur Reform lieferten damals

22 Peter Derleder, 'Gleicher Zugang zum Recht für alle' [2009] VuR 163 [164]; Matthias Kilian, 'Gedanken zur Kostenrechtsmodernisierung II: Prozesskosten und Beratungshilfe – Den Zugang zum Recht sichern: Tatsachen, Anforderungen, Probleme und Lösungsideen' [2014] AnwBl 46 [46].

23 BVerfGE 81, 347 [356]; NJW 1991, 413 [414].

24 Schon viel früher wurde aus dem Sozialstaatsprinzip und dem allgemeinen Gleichheitssatz die Forderung nach einer „weitgehenden Angleichung der Situation von Bemittelten und Unbemittelten im Bereich des Rechtsschutzes" abgeleitet. Vgl. Peter Derleder, 'Gleicher Zugang zum Recht für alle' [2009] VuR 163 [164]; BVerfGE 9, 124 [130f]; NJW 1959, 715 [716].

25 EGMR, Urteil vom 15.02.2005 – 68416/01, Steel und Morris/Vereinigtes Königreich; EGMR (V. Sektion), Entscheidung vom 08.12.2009 – 54193/07 Herma/Deutschland.

26 EuGH, Urteil vom 22.12.2010 – C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH/Deutschland.

27 BVerfGE 81, 347 [356]; NJW 1991, 413 [414]; vgl. hierzu auch, Entwurf eines Gesetzes zur Begrenzung der Aufwendungen für die Prozesskostenhilfe (Prozesskostenhilfebegrenzungsgesetz – PKHBegrenzG), BT-Drucks. 16/1994 S. 1 und 12: https://www.neuerichter.de/fileadmin/user_upload/lv_berlin_brandenburg/BT-Drs_16_1994.pdf; zuletzt abgerufen am 14.01.2021.

28 BVerfGE 63, 380 [395]; NJW 1983, 1599 [1600].

29 Vgl. Peter Derleder, 'Gleicher Zugang zum Recht für alle' [2009] VuR 163 [164].

30 Matthias Kilian, 'Zugang zum Recht: Beobachtungen in Zeiten von Gesetzen zur Kosteneinsparung bei der Prozesskosten- und Beratungshilfe' [2008] AnwBl 236 [236].

31 https://www.legislation.gov.uk/ukpga/1999/22/contents; zuletzt abgerufen am 14.01.2021.

32 Matthias Kilian, 'Zugang zum Recht: Beobachtungen in Zeiten von Gesetzen zur Kosteneinsparung bei der Prozesskosten- und Beratungshilfe' [2008] AnwBl 236 [239].

33 Vgl. Entwurf eines Gesetzes zur Begrenzung der Aufwendungen für die Prozesskostenhilfe (Prozesskostenhilfebegrenzungsgesetz – PKHBegrenzG), BT-Drucks. 16/1994 – http://dip21.bundestag.de/dip21/btd/16/019/1601994.pdf; zuletzt abgerufen am 14.01.2021; Entwurf eines Gesetzes zur Änderung des Beratungshilferechts, BR-Drucks. 648/08 –http://dipbt.bundestag.de/dip21/brd/2008/0648-08.pdf; zuletzt abgerufen am 14.01.2021; zudem sollten bereits mit einem Gesetzentwurf von 2004 Gerichtsgebühren für das Sozialgerichtsverfahren eingeführt werden, Entwurf eines Gesetzes zur Änderung des Sozialgerichtsgesetzes, BR-Drucks. 663/03 – http://dipbt.bundestag.de/dip21/brd/2003/0663-03.pdf; zuletzt abgerufen am 14.01.2021; Peter Derleder, 'Gleicher Zugang zum Recht für alle' [2009] VuR 163 [164ff].

34 Matthias Kilian, 'Zugang zum Recht: Beobachtungen in Zeiten von Gesetzen zur Kosteneinsparung bei der Prozesskosten- und Beratungshilfe' [2008] AnwBl 236 [240].

35 Matthias Kilian, 'Gedanken zur Kostenrechtsmodernisierung II: Prozesskosten und Beratungshilfe – Den Zugang zum Recht sichern: Tatsachen, Anforderungen, Probleme und Lösungsideen' [2014] AnwBl 46 [46].

36 Matthias Kilian, 'Zugang zum Recht: Beobachtungen in Zeiten von Gesetzen zur Kosteneinsparung bei der Prozesskosten- und Beratungshilfe' [2008] AnwBl 236 [240]; Matthias Kilian, 'Gedanken zur Kostenrechtsmodernisierung II: Prozesskosten und Beratungshilfe – Den Zugang zum Recht sichern: Tatsachen, Anforderungen, Probleme und Lösungsideen' [2014] AnwBl 46 [47].

die Länder Baden-Württemberg und Niedersachsen. Als schlagendes Argument wurde dabei das bundesweite Einsparungspotenzial von ca. 100 Mio. Euro genannt.[*37] Angesichts der weltweiten Finanzkrise im Jahr 2008/2009, in der Konjunkturprogramme in enormen Summen nötig und von staatlicher Seite bewilligt wurden, schien eine Kürzung der überschaubaren Aufwendungen für die Gewährung gleichen Zugangs zum Recht am Ende politisch nicht tragbar.[*38] Die Reformbestrebungen scheiterten schlussendlich im Februar 2009 am Veto der SPD-Fraktion im Deutschen Bundestag.[*39] Schon damals war aber absehbar, dass von politischer Seite eine Einsparung bei der Beratungs-, Verfahrenskosten- und Prozesskostenhilfe auch weiterhin als erforderlich angesehen würde.[*40] So reichten dann auch die Länder die bereits in der 16. Legislaturperiode eingebrachten Reformgesetzentwürfe[*41] erneut 2012 – mit teilweise veraltetem Zahlenmaterial in der Gesetzesbegründung – in der 17. Legislaturperiode ein.[*42] Dass zu diesem Zeitpunkt die Aufwendungen für die Kostenhilfe bereits wieder rückläufig waren, konnte somit nicht mehr in Ansatz gebracht werden.[*43] Ebenso wenig konnten die aus Rückflüssen resultierenden Einnahmen – zumindest noch im Gesetzentwurf des Bundesrates – beziffert werden. Ausgaben für die staatliche Kostenhilfe wurden dort schlicht mit deren Kosten gleichgesetzt.[*44] Zwar gab es auch Reformziele, die durchaus sinnvoll waren, so insbesondere die Bekämpfung des Missbrauchs der Prozesskostenhilfe durch mutwillige Rechtsverfolgung.[*45] Mit dem am 01. Januar 2014 in Kraft getretenen Gesetz zur Änderung des Prozesskostenhilfe- und Beratungshilferechts[*46] distanzierte man sich jedoch vom Ansatz der staatlichen Finanzierungsintervention zur Verbesserung des Zugangs zum Recht.

2.2. Ergründung neuer Wege bei der Verbesserung des Zugangs zum Recht durch eingehende Bedürfnisidentifizierung

2.2.1. Überblick über den angelsächsischen Ansatz der Bedürfnisidentifizierung

Dass diese Abkehr nicht zwangsläufig als politische Herabstufung der Bedeutung des Prinzips der Gleichheit vor dem Recht aufgefasst werden muss[*47], zeigt die Mitte der 1990er Jahre voranschreitende „*Re-Engineering*“[*48]-Entwicklung in England. Dort wurde nach dem gescheiterten Ansatz der staatlichen Finanzierungsintervention intensiv nach neuen Ansätzen zur Verbesserung des Zugangs zum Recht gesucht. Dabei lag der Fokus zunächst auf der Bedürfnisidentifizierung der rechtssuchenden Bevölkerung.[*49]

37 Peter Derleder, ‘Gleicher Zugang zum Recht für alle’ [2009] VuR 163 [164].

38 Peter Derleder, ‘Gleicher Zugang zum Recht für alle’ [2009] VuR 163 [165].

39 Vgl. Peter Derleder, ‘Gleicher Zugang zum Recht für alle’ [2009] VuR 163 [164].

40 So schon Peter Derleder, ‘Gleicher Zugang zum Recht für alle’ [2009] VuR 163 [168].

41 Prozesskostenhilfe: BT-Drucks. 16/1994 – http://dip21.bundestag.de/dip21/btd/16/019/1601994.pdf; zuletzt abgerufen am 14.01.2021; 17/1216 – https://dip21.bundestag.de/dip21/btd/17/012/1701216.pdf; zuletzt abgerufen am 14.01.2021; Beratungshilfe: BT-Drucks. 17/2164 – https://dip21.bundestag.de/dip21/btd/17/021/1702164.pdf; zuletzt abgerufen am 14.01.2021.

42 Entwurf eines Gesetzes zur Änderung des Prozesskostenhilfe- und Beratungshilferechts, BR-Drucks. 516/12 – https://www.bundesrat.de/SharedDocs/drucksachen/2012/0501-0600/516-12.pdf?__blob=publicationFile&v=3; zuletzt abgerufen am 14.01.2021.

43 Vgl. Matthias Kilian, ‘Gedanken zur Kostenrechtsmodernisierung II: Prozesskosten und Beratungshilfe – Den Zugang zum Recht sichern: Tatsachen, Anforderungen, Probleme und Lösungsideen’ [2014] AnwBl 46 [46, 48].

44 Erst im Gesetzentwurf der Bundesregierung BT-Drucks. 17/11472 ist dieses Problem erkannt und teilweise behoben worden, vgl. Matthias Kilian, ‘Gedanken zur Kostenrechtsmodernisierung II: Prozesskosten und Beratungshilfe – Den Zugang zum Recht sichern: Tatsachen, Anforderungen, Probleme und Lösungsideen’ [2014] AnwBl 46 [48]; Matthias Kilian, ‘Zugang zum Recht: Beobachtungen in Zeiten von Gesetzen zur Kosteneinsparung bei der Prozesskosten- und Beratungshilfe’ [2008] AnwBl 236 [240].

45 Vgl. hierzu bereits Peter Derleder, ‘Gleicher Zugang zum Recht für alle’ [2009] VuR 163 [164f]; Matthias Kilian, ‘Gedanken zur Kostenrechtsmodernisierung II: Prozesskosten und Beratungshilfe – Den Zugang zum Recht sichern: Tatsachen, Anforderungen, Probleme und Lösungsideen’ [2014] AnwBl 46 [48].

46 Vom 31.08.2013 (BGBl I, S. 3533).

47 So auch Matthias Kilian, ‘Zugang zum Recht: Beobachtungen in Zeiten von Gesetzen zur Kosteneinsparung bei der Prozesskosten- und Beratungshilfe’ [2008] AnwBl 236 [239].

48 Vgl. Richard Moorhead and Pascoe Pleasence, *After Universalism: Re-engineering Access to Justice* (Wiley-Blackwell 2003).

49 Matthias Kilian, ‘Zugang zum Recht: Beobachtungen in Zeiten von Gesetzen zur Kosteneinsparung bei der Prozesskosten- und Beratungshilfe’ [2008] AnwBl 236 [236f mwN].

Entsprechende empirische Erkenntnisse, die überhaupt erst viele neue Lösungsansätze ermöglichten[*50], verdeutlichten, dass es neben der Kostendimension oftmals an dem Wissen der rechtssuchenden Bevölkerung fehlt, an wen sie sich wenden sollen und wie ein Problemlösungsprozess initiiert werden kann. Besonders häufig verfielen dabei Personen mit niedrigem Einkommen und Bildungsmilieu und damit aufgrund dieser besonderen Verletzlichkeit benachteiligte Bevölkerungsgruppen in eine Lethargie, ihre Rechtsprobleme dem Zugang zum Recht zuzuführen.[*51] Zudem kristallisierte sich in der internationalen *Access to Justice*-Debatte immer mehr heraus, dass sich rechtssuchende Bürger oftmals einem Lebensproblem ausgesetzt sehen, das nur bedingt einen juristischen Kern hat. Eine frühzeitige Eliminierung dieser sog. *trigger problems* kann dazu führen, dass sich die rechtlichen Bedürfnisse der Bevölkerung reduzieren, da es nicht zu weitreichenden, auch die Kostenhilfe beanspruchenden Folgeproblemen kommen kann. Damit verringern sich nicht nur die Kosten für die Volkswirtschaft und den Sozialstaat, sondern es verbessert sich auch die Lebensqualität der Bürger.[*52] Dass insbesondere sog. *additive Effekte* eines nicht gelösten Rechtsproblems erhebliche mittelbare wie unmittelbare negative volkswirtschaftliche und damit ökonomische Nebeneffekte hervorrufen können, wurde im Zuge von breit angelegten Bevölkerungsumfragen ebenfalls erforscht und empirisch belegt. So gaben viele Befragte an, dass sie aufgrund eines Rechtsproblems Schwierigkeiten hatten, ihr Leben normal zu führen, was in Problemen bei der Erwerbstätigkeit sowie beim Einkommen resultierte.[*53]

2.2.2. Erforschung der rechtlichen Bedürfnisse der Bevölkerung in Deutschland

Fraglich ist, ob eine ähnlich intensive Bedürfnisidentifizierung auch in Deutschland vor oder nach der Änderung des Prozesskostenhilfe- und Beratungshilferechts stattgefunden hat bzw. stattfindet. Auch auf dem Weg zu einer kostengünstigeren Verbesserung beim deutschen Zugang zum Recht wäre eine – über die Kostendimension hinausgehende – empirische Ermittlung der Bedürfnisse der Bevölkerung unerlässlich. Anders als im internationalen, insbesondere im angelsächsischen Bereich lässt sich jedoch in Deutschland–– soweit ersichtlich – nur vereinzelt systematische empirische Forschung, die sich mit den *unmet legal needs*[*54] der Bürger befasst, erkennen.[*55] So ergab z.B. eine umfassende Bevölkerungsumfrage, „Mandanten und ihre Anwälte", des Soldan Instituts im Zeitraum von 2006 bis 2007[*56], dass insbesondere die Möglichkeit zu einem sofortigen Gespräch mit einem Rechtsanwalt wie auch die Möglichkeit, in nächster Zeit einen Termin zu erhalten, für über 83 % der Befragten wichtig bis sehr wichtig ist.[*57] Auch wenn es sich hierbei nur um vereinzelte und keine unabhängigen, flächendeckenden sowie vom Staat initiierten empi-

50 So wurde z.B. eine Art Empfehlungsnetzwerk, als „*first point of call*", in der Form von staatlichen Beratungseinrichtungen, im Zuge der „*Re-Enginiering*"-Entwicklung, durch den *Community Legal Service* eingerichtet, die die bestehenden Angebote besser miteinander vernetzt und dadurch zugänglich macht. Matthias Kilian, 'Zugang zum Recht: Beobachtungen in Zeiten von Gesetzen zur Kosteneinsparung bei der Prozesskosten- und Beratungshilfe' [2008] AnwBl 236 [238f mwN].

51 Ibid 237ff; Matthias Kilian, 'Gedanken zur Kostenrechtsmodernisierung II: Prozesskosten und Beratungshilfe – Den Zugang zum Recht sichern: Tatsachen, Anforderungen, Probleme und Lösungsideen' [2014] AnwBl 46 [48].

52 Matthias Kilian, 'Zugang zum Recht: Beobachtungen in Zeiten von Gesetzen zur Kosteneinsparung bei der Prozesskosten- und Beratungshilfe' [2008] AnwBl 236 [238]; Matthias Kilian, 'Gedanken zur Kostenrechtsmodernisierung II: Prozesskosten und Beratungshilfe – Den Zugang zum Recht sichern: Tatsachen, Anforderungen, Probleme und Lösungsideen' [2014] AnwBl 46 [48f].

53 Matthias Kilian, 'Zugang zum Recht: Beobachtungen in Zeiten von Gesetzen zur Kosteneinsparung bei der Prozesskosten- und Beratungshilfe' [2008] AnwBl 236 [238 mwN]; Matthias Kilian, 'Gedanken zur Kostenrechtsmodernisierung II: Prozesskosten und Beratungshilfe – Den Zugang zum Recht sichern: Tatsachen, Anforderungen, Probleme und Lösungsideen' [2014] AnwBl 46 [49 mwN].

54 Zum Begriff Mauro Cappelletti, 'Access to Justice: Comparative General Report' (1975) 40 RabelsZ 669 [678].

55 Matthias Kilian, 'Zugang zum Recht: Beobachtungen in Zeiten von Gesetzen zur Kosteneinsparung bei der Prozesskosten- und Beratungshilfe' [2008] AnwBl 236 [237].

56 Vgl. Christoph Hommerich, Matthias Kilian, *Mandanten und ihre Anwälte: Ergebnisse einer Bevölkerungsumfrage zur Inanspruchnahme und Bewertung von Rechtsdienstleistungen, (DeutscherAnwaltVerlag 2007);* Christoph Hommerich, Matthias Kilian, 'Warum Bürger keinen Anwalt beauftragen – Wie Rechtsprobleme ohne Anwalt gelöst werden' [2007] AnwBl 783.

57 Vgl. Christoph Hommerich, Matthias Kilian,'Die Auswahl von Experten durch Laien – Worauf Bürger achten, wenn sie einen Rechtsanwalt suchen' [2007] AnwBl 858; Matthias Kilian, 'Gedanken zur Kostenrechtsmodernisierung II: Prozesskosten und Beratungshilfe – Den Zugang zum Recht sichern: Tatsachen, Anforderungen, Probleme und Lösungsideen' [2014] AnwBl 46 [50]; Christoph Hommerich, Matthias Kilian, 'Warum Bürger keinen Anwalt beauftragen – Wie Rechtsprobleme ohne Anwalt gelöst werden' [2007] AnwBl 783 [784].

rischen Forschungen handelt, zeichnet sich die Tendenz ab, dass es durch den Verrechtlichungsprozess der letzten Jahrzehnte[*58] für die rechtssuchende Bevölkerung – insbesondere für Angehörige niedriger Bildungsmilieus[*59] – ein Bedürfnis von überragender Wichtigkeit darstellt, beim Auftreten eines Rechtsproblems schnell und unkompliziert Zugang zu einem fachkundigen Dritten zu erhalten. Dabei ist es für den Rechtssuchenden oftmals von größerer Wichtigkeit, schnell eine Auskunft zu erhalten, als etwa die Fachkompetenz oder die örtliche Nähe des Ratgebers.[*60]

Auch im Hinblick auf die Kostendimension lassen sich nur vereinzelt – überwiegend für die Versicherungsbranche – erhobene empirische Studien anführen.[*61] Der ROLAND Rechtsreport von 2020 ermittelte die öffentliche Meinung zum deutschen Rechtssystem und anderen ausgewählten rechtspolitischen Schwerpunktthemen für die ROLAND Rechtsschutz-Versicherungs-AG. Durchgeführt wurde die statistische Erhebung vom Institut für Demoskopie Allensbach (IfD), das für 2020 1.228 Personen befragte.[*62] Es zeigte sich, dass Bürger im Durchschnitt erst bei einem Streitwert von 1.840 Euro gerichtlichen Rechtsschutz suchen.[*63] Daneben gaben etwa 25% der Befragten an, in den vergangenen fünf Jahren zwar einen Bedarf nach rechtlichem Beistand gehabt, diesen jedoch bewusst nicht ergriffen zu haben.[*64] Laut einer repräsentativen forsa-Studie aus dem Jahr 2013, die im Auftrag des Gesamtverbandes der Deutschen Versicherungswirtschaft (GDV) durchgeführt wurde, scheuten 71% der Befragten vor der Beauftragung eines Rechtsanwalts aufgrund der Kosten zurück.[*65] Neben dem verfassungsrechtlich abgesicherten oben genannten Prinzip, dass der Zugang zum Recht nicht aufgrund wirtschaftlicher Leistungsfähigkeit versperrt sein darf[*66], ergibt sich dabei aus dem Justizgewährungsanspruch, der aus dem Rechtsstaatsprinzip Art. 20 III des Grundgesetz folgt, dass das Kostenrisiko nicht zu dem mit dem Verfahren angestrebten wirtschaftlichen Erfolg außer Verhältnis stehen darf, sodass die Anrufung der Gerichte nichtmehr sinnvoll erscheint.[*67] Ebenso ist dieses Prinzip in Art. 6 EMRK und Protokoll Nr. 1 Art. 1 der EMRK verbürgt.[*68] Unter Berücksichtigung dieser Bedürfnisse der rechtssuchenden Bevölkerung lassen sich Beobachtungen der neusten Entwicklungen auf dem Rechtsdienstleistungsmarkt leichter darstellen.

58 Peter Derleder, 'Gleicher Zugang zum Recht für alle' [2009] VuR 163 [163 mwN].

59 Christoph Hommerich, Matthias Kilian, 'Warum Bürger keinen Anwalt beauftragen – Wie Rechtsprobleme ohne Anwalt gelöst werden' [2007] AnwBl 783 [784].

60 Christoph Hommerich, Matthias Kilian, *Mandanten und ihre Anwälte: Ergebnisse einer Bevölkerungsumfrage zur Inanspruchnahme und Bewertung von Rechtsdienstleistungen, (DeutscherAnwaltVerlag 2007) 110;* Matthias Kilian, 'Gedanken zur Kostenrechtsmodernisierung II: Prozesskosten und Beratungshilfe – Den Zugang zum Recht sichern: Tatsachen, Anforderungen, Probleme und Lösungsideen' [2014] AnwBl 46 [50].

61 So insb. die seit 10 Jahren jährlich von dem Institut für Demoskopie Allensbach für die ROLAND Rechtsschutz-Versicherungs-AG durchgeführten Rechtsreporte. Rechtsreport von 2020 – https://www.ifd-allensbach.de/fileadmin/IfD/sonstige_pdfs/ROLAND_Rechtsreport_2020.pdf; zuletzt abgerufen am 14.01.2021.

62 Dass sich Gesetzesentwurfsbegründungen trotz dieser marginalen Anzahl an Befragten, diesen Umfragen zur Darstellung bedienen, könnte als Indiz dafür gewertet werden, dass es an umfassenderem statistischen Datenmaterial fehlt, vgl. Entwurf eines Gesetzes zur Förderung verbrauchergerechter Angebote im Rechtsdienstleistungsmarkt vom 12.11.2020 – https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Rechtsdienstleister.pdf?__blob=publicationFile&v=1, S. 10; zuletzt abgerufen am 14.01.2021.

63 Vgl. ROLAND Rechtsreport 2020 – Einstellung der Bevölkerung zum deutschen Justizsystem und zur außergerichtlichen Konfliktlösung, S. 24, Schaubild 15; – https://www.ifd-allensbach.de/fileadmin/IfD/sonstige_pdfs/ROLAND_Rechtsreport_2020.pdf; zuletzt abgerufen am 14.01.2021.

64 Vgl. ROLAND Rechtsreport 2020 – Einstellung der Bevölkerung zum deutschen Justizsystem und zur außergerichtlichen Konfliktlösung, S. 23, Schaubild 14; – https://www.ifd-allensbach.de/fileadmin/IfD/sonstige_pdfs/ROLAND_Rechtsreport_2020.pdf; zuletzt abgerufen am 14.01.2021; Eine aus dem Jahr 2010 durchgeführte Consumer Empowerment Survey kam für europäische Verbraucher dabei zu ähnlichen Ergebnissen auf europäischer Ebene. So würde jeder zweite Verbraucher, bei einem Streitwert bis zu 500 Euro keine gerichtliche Klage erheben, wo hingegeben 20% davon ausgingen, dass ein Anlass zur Beschwerde bezüglich einer Verbraucherkauftransaktion bestand, vgl. Consumer Empowerment Survey, Eurobarometer Nr. 342, 2010, S. 217 und S. 169 – https://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_342_en.pdf; zuletzt abgerufen am 14.01.2021.

65 Vgl. Ängste und Erwartungen von Verbrauchern bei rechtlichen Auseinandersetzungen, S. 10 – https://www.gdv.de/resource/blob/30990/916cec00467920d4121f3f234e109ba5/studie-forsa-studie-kosten-eines-rechtsstreits-data.pdf; zuletzt abgerufen am 14.01.2021.

66 Vgl. oben Fn 23.

67 BVerfGE 85, 337; NJW 1992, 344.

68 BVerfGE 107, 395 [406f], NJW 2003, 1102; Max Vollkommer in Richard Zöller (Hrsg.), *ZPO* (33. Auflage Otto Schmidt) Einleitung Rn. 48 mwN.

3. Beobachtungen der neusten Entwicklungen am deutschen Rechtsdienstleistungsmarkt

Wie bereits angesprochen kam schon 2013 eine forsa-Studie im Auftrag des GDV zu dem Schluss, dass nach wie vor ca. 70% der Bevölkerung durch die Kosten, die eine anwaltliche Rechtsauskunft und -beratung verursacht, davon abgeschreckt werden, sich rechtlichen Rat einzuholen.[*69] Dieser Befund sowie die anderen oben genannten empirischen Erforschungen suggerieren, dass ein Bedürfnis nach schneller, effektiver und kostengünstiger Rechtsdienstleistung im Sinne der Rechtsauskunft und -beratung bei der Bevölkerung und insbesondere bei Verbrauchern besteht, der Anwalt aber nicht die präferierte Anlaufstelle darstellt.[*70] Die Befriedigung des Bedürfnisses nach Rechtsdienstleistungen im Sinne einer Rechtsauskunft und -beratung, ob eventuelle Ansprüche dem Grunde nach tatsächlich bestehen, generiert sodann bei der Bejahung dieser Frage folgelogisch ein neues Bedürfnis, nämlich das nach schneller, effektiver und kostengünstiger Rechtsdurchsetzung. Denn oftmals hindert ein rationales Desinteresse die eigenverantwortliche und individuelle Rechtsdurchsetzung der Ansprüche, da aus der Sicht des Anspruchsberechtigten und potenziellen Klägers die Kosten der Rechtsverfolgung und das oftmals anschließende Risiko des Prozessverlusts die Wahrscheinlichkeit der erfolgreichen Rechtsdurchsetzung sowie des Prozessgewinns überwiegen, und es wird sowohl von der Rechtsverfolgung als auch von einer Klageerhebung Abstand genommen.[*71] Dieses rationale Desinteresse wirkt sich dahingehend negativ aus, dass das Schadensrecht seine verhaltenssteuernde Funktion für die Zukunft verliert.[*72] Dem ökonomischen Geist entsprechend wird zudem am Markt immer dort, wo Bedürfnisse bestehen und somit ein Mangel vorliegt, zur Befriedigung dieser Bedürfnisse gewirtschaftet und es werden auf ökonomische Weise Güter und Dienstleistungen bereitgestellt.[*73]

So ist es dann auch wenig verwunderlich, dass sich in den letzten vier bis fünf Jahren auf dem deutschen Rechtsdienstleistungsmarkt verstärkt Geschäftsmodelle etabliert haben, die Dienstleistungen zur Befriedigung nicht nur eines der zuvor genannten Bedürfnisse, sondern zur Befriedigung beider Bedürfnisse anbieten.[*74] Im Grunde handelt es sich bei den verschiedensten am Markt auftretenden Anbietern, z.B. „flightright“[*75] und „wenigermiete.de“[*76], um im Kern ähnliche Geschäftsmodelle. Überwiegend werden dabei unter Zuhilfenahme softwarebasierter Möglichkeiten und damit weitestgehend automatisierter

69 Vgl. Ängste und Erwartungen von Verbrauchern bei rechtlichen Auseinandersetzungen, S. 10 – https://www.gdv.de/resource/blob/30990/916cec00467920d4121f3f234e109ba5/studie-forsa-studie-kosten-eines-rechtsstreits-data.pdf; zuletzt abgerufen am 14.01.2021.

70 So auch, Markus, Hartung, ‘Inkasso, Prozessfinanzierung und das RDG – Was darf ein Legal-Tech-Unternehmen als Inkassodienstleister?” [2019] AnwBl 353 [354]; vgl. ferner Volker Römermann, ‘Tore auf für Legal Tech’ (LTO, 12.12.2019) – https://www.lto.de/recht/juristen/b/legal-tech-bgh-lexfox-wenigermiete-berufsrecht-rdg-anwaelte-erfolgshonorar/; zuletzt abgerufen am 14.01.2021.

71 Zum rationalen Desinteresse in Bezug auf den kollektiven Rechtsschutz vgl. Hans-Bernd Schäfer, ‘Anreizwirkungen bei der Class Action und der Verbandsklage’ in Jürgen Basedow, Klaus J Hopt, Hein Kötz und Dietmar Baetge (Hrsg.), *Bündelung gleichgerichteter Interessen im Prozess* (Mohr Siebeck 1999) 67ff; Markus Hartung, ‘Legal Tech und das RDG – Raus aus der Beziehungskrise! – Warum es bei der Legal Tech-Diskussion nicht um Tech, sondern um den Zugang zum Recht geht’ [2020] AnwBl 8.

72 Darauf kann an dieser Stelle nicht näher eingegangen werden vgl. aber eingehend dazu, Hans-Bernd Schäfer, ‘Anreizwirkungen bei der Class Action und der Verbandsklage’ in Jürgen Basedow, Klaus J Hopt, Hein Kötz und Dietmar Baetge (Hrsg.), *Bündelung gleichgerichteter Interessen im Prozess* (Mohr Siebeck 1999) 67 [68f].

73 Vgl. Hans-Bernd Schäfer, Claus Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (5. Auflage, Springer 2012) XXXIII. – DOI: https://doi.org/10.1007/978-3-642-29122-7.

74 Vorreiter war hier Flightright – https://www.flightright.de/, die die pauschalisierten Schadensersatzansprüche die den Fluggästen gem. FluggastrechteVO (EG) Nr. 261/2004 des europäischen Parlaments und des Rates vom 11.02.2004 zustehen, schnell und kostengünstig realisieren; vgl. Markus Hartung, ‘Legal Tech und das RDG – Raus aus der Beziehungskrise! – Warum es bei der Legal Tech-Diskussion nicht um Tech, sondern um den Zugang zum Recht geht’ [2020] AnwBl 8 [8f]; vgl. zu dem Geschäftsmodell von myRight, Alexander Morell, ‘Keine Kooperation ohne Konflikt’ [2019] JZ 809. – DOI: https://doi.org/10.1628/jz-2019-0299.

75 https://www.flightright.de/.

76 https://www.wenigermiete.de/, bietet auf ihrer Plattform z.B. eine Funktion an, mittels derer sich nach Eingabe gewisser Rahmendaten bezüglich des Mietobjekts, eine erste Einschätzung zum Sparpotenzial bezüglich des Mietzinses darstellen lassen soll. Grundsätzlich erwartet den Rechtssuchenden jedoch zunächst lediglich die Auskunft, dass sich der Fall zur Rechtsdurchsetzung anbietet oder nicht anbietet sowie im ersten Fall, die damit verbundene Möglichkeit einen Auftrag zu erteilen, dass der Einzelfall durch einen Experten geprüft werden soll, vgl. Schriftliche Stellungnahme von Prof. Dr. Christian Wolf zu dem Gesetzentwurf – https://brak.de/w/files/04_fuer_journalisten/presseerklaerungen/2020_03_10_ipa-stn.-zu-gesetz-ee_rdg-modernsg_bt-drs.19_9527u.19_16884.pdf S. 7f; zuletzt abgerufen am 14.01.2021.

Vorgänge (Legal-Tech-Anwendungen)[*77] auf den Plattformen der Anbieter zunächst Tools und Eingabemasken[*78] zur Einschätzung angeboten, ob ein vermeintlicher Anspruch zur außergerichtlichen oder gerichtlichen Anspruchsdurchsetzung dem Grunde nach besteht.[*79] Ist dies zu bejahen, obliegt es dem Gläubiger dieser Ansprüche, den Dienstleister mit der Anspruchsdurchsetzung zu beauftragen.[*80] Dies geschieht überwiegend, indem die Ansprüche an den Dienstleister zur treuhänderischen Einziehung abgetreten werden (sog. Inkassozession).[*81] Sodann erfolgt eine zunächst außergerichtliche und im Falle der Erfolglosigkeit der außergerichtlichen Bemühungen eine gerichtliche Anspruchsdurchsetzung für den Kunden. Das Besondere an derartigen Geschäftsmodellen und der Grund, weswegen sich die Rechtssuchenden zur Bedürfnisbefriedigung im großen Stil dieser Unternehmen bedienen[*82], ist, dass sie zusätzlich zur schnellen und unkomplizierten (Erst-)Einschätzung das rationale Desinteresse an einer Anspruchsdurchsetzung dahingehend fast vollständig eliminieren, dass diese Unternehmen neben der völligen Konfliktdelegation – der Kunde wird durch die Abtretung seiner Ansprüche komplett aus der Eigenverantwortung entlassen[*83] – auch die Kosten von der außergerichtlichen bis hin zur gerichtlichen Geltendmachung bei erfolgloser Rechtsdurchsetzung übernehmen.[*84] Man kann diesen Geschäftsmodellen, die diese Unternehmen anbieten, im Einzelnen kritisch gegenüberstehen.[*85] Zugutezuhalten ist ihnen jedoch, dass diese Dienstleistung eine große Anreizwirkung auf die traditionell apathischen und eigenverantwortungsscheuenden Rechtssuchenden auch oberhalb der Berechtigung zur staatlichen Kostenhilfe ausübt. Dieser Anreiz wird auch nicht dahingehend geschmälert, dass als einziger (offensichtlicher)[*86] Haken an der Sache, der Unternehmer im Fall der erfolgreichen Geltendmachung der Ansprüche einen Teil der ausgekehrten Schadens- bzw. Erlössumme einbehält.[*87] Das „Rundumsorglospaket“[*88] hat einen stattlichen Preis, den der Adressatenkreis zur Bedürfnisbefriedigung jedoch zu zahlen bereit ist.

Im Allgemeinen kann festgehalten werden, dass jedes zusätzliche Hilfsangebot respektive (Geschäfts-) Modell, sei es nun staatlicher oder marktbasierter Natur, das den Zugang zum Recht verbessert, einen Gewinn für den Rechtssuchenden und damit für den Rechtsstaat darstellt. Denn wenn eine der Barrieren,

77 Vgl. zur Begriffsdefinition, Christina-Maria Leeb, *Digitalisierung, Legal Technology und Innovation* (Duncker&Humblot 2019) 49ff. – DOI: https://doi.org/10.3790/978-3-428-55784-4; Michael Grupp, ‘Legal Tech – Impulse für Streitbeilegung und Rechtsdienstleistung – Informationstechnologische Entwicklung an der Schnittstelle von Recht und IT’ [2014] AnwBl 660; Martin Fries, ‘Staatsexamen für Roboteranwälte? – Optionen für die Regulierung von Legal-Tech-Dienstleister’ [2018] ZRP 161.

78 Fabian Widder, ‘Verbraucherschutz und RDG – wo bleibt die Anwaltschaft? – Legal Tech – Notwendigkeit einer gesetzlichen Regelung nach dem BGH-Urteil Lexfox’ [2020] AnwBl 269.

79 Markus Hartung, ‘Legal Tech und das RDG – Raus aus der Beziehungskrise! – Warum es bei der Legal Tech-Diskussion nicht um Tech, sondern um den Zugang zum Recht geht’ [2020] AnwBl 8, ein Befürworter dieser Geschäftsmodelle, kommt dennoch zu der Ansicht, dass es sich bei dieser Art der Rechtsdienstleistung in der Form der Rechtsberatung, um „Konfektionsaware von der Stange“ und „kein maßgeschneidertes Produkt“ handelt.

80 Vgl. https://myflyright.com/de/agb/.

81 Vgl. Fabian Widder, ‘Verbraucherschutz und RDG – wo bleibt die Anwaltschaft? – Legal Tech – Notwendigkeit einer gesetzlichen Regelung nach dem BGH-Urteil Lexfox’ [2020] AnwBl 269.

82 So berichtet Flightright davon schon 300.000.000 Euro durchgesetzt zu haben, vgl. Homepage – https://www.flightright.de/.

83 Vgl. Reinhard Greger, ‘Streiten – oder streiten lassen? Erfolg des „Rundum-sorglos-Modells – Innovative Formen und rechtliche Grenzen der Konfliktdelegation’ [2017] MDR 932; Markus Hartung, ‘Legal Tech und das RDG – Raus aus der Beziehungskrise! – Warum es bei der Legal Tech-Diskussion nicht um Tech, sondern um den Zugang zum Recht geht’ [2020] AnwBl 8 [9].

84 Martin Henssler, ‘Prozessfinanzierende Inkassodienstleister – Befreit von den Schranken des anwaltlichen Berufsrechts?’ [2019] NJW 545. Es wird primär eine Prozessfinanzierung gegen Erfolgsbeteiligung angeboten.

85 Gegen dieses Geschäftsmodell statt vieler, vgl. Martin Henssler, ‘Prozessfinanzierende Inkassodienstleister – Befreit von den Schranken des anwaltlichen Berufsrechts?’ [2019] NJW 545ff.

86 Siehe dazu, dass lediglich Konfektionsware angeboten werden kann, Markus Hartung, ‘Legal Tech und das RDG – Raus aus der Beziehungskrise! – Warum es bei der Legal Tech-Diskussion nicht um Tech, sondern um den Zugang zum Recht geht’ [2020] AnwBl 8 [8]; Wozu algorithmisierte Rechtsfindung bereits im Stande ist vgl., Martin Engel, ‘Algorithmisierte Rechtsfindung als juristische Arbeitshilfe’[2014] JZ 1096. – DOI: https://doi.org/10.1628/002268814x14128399965895; Markus Hartung, Micha-Manuel Bues, Gernot Halbleib, *Legal Tech – Die Digitalisierung des Rechtsmarkts* (C.H. Beck 2017) 259ff.

87 In der Regel 30-35%; Reinhard Greger, ‘Streiten – oder streiten lassen? Erfolg des „Rundum-sorglos-Modells – Innovative Formen und rechtliche Grenzen der Konfliktdelegation’ [2017] MDR 932; Martin Henssler, ‘Prozessfinanzierende Inkassodienstleister – Befreit von den Schranken des anwaltlichen Berufsrechts?’ [2019] NJW 545.

88 Vgl. Begriffsbestimmung Reinhard Greger, ‘Streiten – oder streiten lassen? Erfolg des „Rundum-sorglos-Modells – Innovative Formen und rechtliche Grenzen der Konfliktdelegation’ [2017] MDR 932 [933]; ders., ‘Rundum-sorglos-Modell“: Innovative Rechtsdienstleistung oder Ausverkauf des Rechts?’ [2018] MDR 897.

die verhindern, dass der Einzelne Zugang zu seinen Rechten erhält, die Kostendimension ist, kann es vom Ergebnis herkommend keinen Unterschied machen, wenn marktbasierte oder staatliche Finanzierungsmechanismen diesen Zugang zum Recht gewährleisten. Begünstigt wird dieser Wandlungsprozess hin zu stärker marktbasierten Finanzierungsmechanismen auch dadurch, dass das System der Finanzierung der Kosten einer Rechtsverfolgung in sich flexibel ist.[*89] Exemplarisch sei hier der schwedische Ansatz genannt, der die Verantwortung für die Finanzierung des Zugangs zum Recht der Versicherungswirtschaft überantwortet hat. Die staatliche Kostenhilfe konnte drastisch reduziert werden, indem die Bevölkerung auf die Möglichkeit zur Inanspruchnahme ihrer Rechtsschutzversicherung verwiesen wird. Eine solche ist in die Hausratsversicherung, über die so gut wie alle Schweden verfügen, integriert.[*90] Wie bereits angesprochen, muss die Reduzierung staatlich organisierter Finanzierungsmodelle nicht als politisch motivierte Zurücksetzung der Bedeutung der Gewährleistung des Zugangs zum Recht verstanden werden. An die Stelle des Staates tritt vielmehr als Finanzierer der Rechtsverfolgung die freie Marktwirtschaft und es findet sozusagen die Privatisierung einer Aufgabe statt, die traditionell als staatlich verstanden wird.[*91] Problematisch ist eine solche Aufgabenüberantwortung dann, wenn dadurch verfassungsrechtlich verbürgte Gemeinschaftsgüter gefährdet werden, die dem Schutz eines modernen Sozial- und Rechtsstaates unterstehen.[*92]

4. Nationale und internationale marktimmanente Barrieren, die der Hinwendung zu marktbasierten Finanzierungsmechanismen entgegenstehen

Der Rechtsdienstleistungsmarkt in Estland ist vollends dereguliert. Bis auf die Prozessvertretung vor dem Obersten Gerichtshof sowie bei der Übernahme eines Mandats, die mit staatlichen Mitteln finanziert werden, stehen estnische Rechtsanwälte im freien Wettbewerb mit nichtanwaltlichen Rechtsdienstleistern.[*93] Demgegenüber ist der deutsche Rechtsdienstleistungsmarkt seit dem 13. Dezember 1935[*94] durch das damals verkündete Rechtsberatungsmissbrauchsgesetz (RBerMißG) protektioniert.[*95] Nachdem das RBerMißG unter der Überschrift Rechtsberatungsgesetz (RBerG) in die amtliche Sammlung des Bundesrechts inhaltlich weitgehend[*96] unverändert aufgenommen wurde[*97], finden sich heute Befugnisse für die Teilnahme am deutschen Rechtsdienstleistungsmarkt im nach der Reform des RBerG am 01. Juli 2008[*98] in Kraft getretenen Rechtsdienstleistungsgesetz (RDG). Nach wie vor steht somit eine unter dem RBerG genannte Rechtsbesorgung, heute Rechtsdienstleistung, unter einem präventiven Verbot mit Erlaubnisvorbehalt, dass § 3 in Verbindung mit § 2 Abs. 1 und 2 RDG statuiert; nur derjenige, der über eine Erlaubnis verfügt oder von der Erlaubnispflicht frei ist, darf damit Tätigkeiten im Sinne von außergerichtlichen (Rechts-) Dienstleistungen erbringen und am Rechtsdienstleistungsmarkt anbieten.[*99] Auch wenn dies

89 Matthias Kilian, 'Zugang zum Recht: Beobachtungen in Zeiten von Gesetzen zur Kosteneinsparung bei der Prozesskosten- und Beratungshilfe' [2008] AnwBl 236 [239].

90 Ibid 239f.

91 Ähnlich, jedoch in Bezug auf ein anwaltliches Erfolgshonorar, Matthias Kilian, 'Zugang zum Recht: Beobachtungen in Zeiten von Gesetzen zur Kosteneinsparung bei der Prozesskosten- und Beratungshilfe' [2008] AnwBl 236 [239].

92 Insbesondere wenn der Verbraucherschutz dadurch leidet, vgl. dazu Schriftliche Stellungnahme zum Entwurf eines Gesetzes zur Förderung verbrauchergerechter Angebote im Rechtsdienstleistungsmarkt Prof. Dr. Christian Wolf, Ass. Iur. Nadja Flegler – https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Stellungnahmen/2020/Downloads/122120_Stellungnahme_IPA_RefE_Rechtsdienstleistungsmarkt.pdf;jsessionid=97FD7B32FEB5155A0AD2FB9F6301D287.1_cid324?__blob=publicationFile&v=2, S. 11f; zuletzt abgerufen am 14.01.2021.

93 Vgl. Deutscher Bundestag Drucks. 16/3655, S. 30 – http://dip21.bundestag.de/dip21/btd/16/036/1603655.pdf; zuletzt abgerufen am 14.01.2021.

94 RGBl. I S. 1478 – https://upload.wikimedia.org/wikipedia/commons/1/18/Deutsches_Reichsgesetzblatt_35T1_140_1478.jpg; zuletzt abgerufen am 14.01.2021.

95 Zuvor, unterlag die gewerbsmäßige Besorgung fremder Rechtsangelegenheiten den Bestimmungen der GewO, vgl. Günter Rennen, Gabriele Caliebe in dies. (Hrsg.), Rechtsberatungsgesetz (C.H. Beck 1986) Art. 1 § 1 Rn. 1.

96 Eine Änderung vor der Namensänderung erfuhr, das ursprüngliche Rechtsberatungsmissbrauchsgesetz v. 13.12.1935 (RGBl. I S. 1478) durch das Außenwirtschaftsgesetz v. 28.04.1961 (BGBl. I S. 481 (493)).

97 BGBl. III 303-12.

98 Vgl. Art. 20 Gesetz zur Neuregelung des Rechtsberatungsrechts v. 12.12.2007 BGBl. I S. 2860.

99 Vgl. Frank Remmertz in Michael Krenzler (Hrsg.), *Rechtsdienstleistungsgesetz* (2. Auflage, Nomos 2017) § 1 Rn. 6.

immer wieder behauptet wird[*100], stellt dieser rechtserhebliche Eingriff in die durch Art. 12 Abs. 1 des Grundgesetz geschützte Ebene der objektiven Berufswahlfreiheit[*101] oder zumindest der Berufsausübungsfreiheit[*102] keine Ausnahme im europäischen Vergleich, dar.[*103] Außer in Estland und Schweden[*104] finden sich in jedem anderen Mitgliedstaat der EU mal mehr[*105], mal weniger vergleichbare Ausformungen eines Rechtsdienstleistungsmonopols.[*106] In diesem Kontext ist auch die Entwicklung in Frankreich hervorzuheben, wo durch Art. 54 neue Fassung Rechtsanwaltsgesetz (RAG) zum 01.01.1992 erstmals ein Rechtsberatungsmonopol eingeführt wurde.[*107] Als überragend wichtige Gemeinschaftsgüter, die einen Eingriff in die Berufswahlfreiheit rechtfertigen, sind heute noch[*108] die in § 1 Abs. 1 RDG explizit aufgeführten Ziele, die Rechtssuchenden, den Rechtsverkehr und damit die Rechtsordnung vor unqualifizierten Rechtsdienstleistungen zu schützen, anzusehen. Mag das Rechtsdienstleistungsgesetz damit zwar in seiner Funktion und Zielsetzung ehrbaren Zwecken dienen, wird seit nunmehr fast vierzig Jahren[*109] in der deutschen Literatur vehement über dessen Daseinsberechtigung und seine Reichweite gestritten.[*110] Seit zwanzig Jahren spielt dabei auch die dem RDG immanente Behinderung des Zugangs zum Recht[*111] eine immer größer werdende Rolle. Denn wenn sich bei der Verbesserung des Zugangs zum Recht vermehrt den marktbasierten Finanzierungsmechanismen zugewandt werden soll, stellen derartige Beschränkungen eine zusätzliche Barriere auf dem Weg dorthin dar. Auch dieser Aspekt muss bei der Frage berücksichtigt werden, ob das Gesetz noch als „erforderlich" angesehen werden kann, um die verfassungsrechtlich als gemeinwohlrelevant qualifizierten Ziele des Rechtsdienstleistungsgesetzes in der Form des Schutzes des Rechtssuchenden und der ordnungsgemäßen Rechtspflege nachhaltig schützen zu können.[*112]

Da unabhängig davon, ob die Dienstleistungen der oben beschriebenen Geschäftsmodelle unter die Legaldefinition des Rechtsdienstleistungsbegriffs des § 2 Abs. 1 RDG fallen, der bestimmt, dass eine Rechtsdienstleistung „jede Tätigkeit in konkreten fremden Angelegenheiten ist, sobald sie eine rechtliche Prüfung des Einzelfalls erfordert", unterfallen Inkassodienstleistungen im Sinne des § 2 Abs. 2 RDG, also die Einziehung fremder oder zum Zweck der Einziehung auf fremde Rechnung abgetretene Forderungen, dem präventiven Verbot mit Erlaubnisvorbehalt des § 3 in Verbindung mit § 2 Abs. 2 RDG.[*113] Für diese Art der Rechtsdienstleistung ist damit der materielle Anwendungsbereich des RDG eröffnet und es ist in einem nächsten Schritt zu ermitteln, ob derjenige, der eine derartige außergerichtliche (Rechts-)Dienstleistung erbringt und am Rechtsdienstleistungsmarkt anbieten möchte, über eine Erlaubnis verfügt oder von der Erlaubnispflicht frei ist. Gemäß § 3 Bundesrechtsanwaltsordnung (BRAO) sind die Anwälte, als berufene

100 Michael Kleine-Cosack, 'Vom Rechtsberatungsmonopol zum freien Wettbewerb – Erosion des Rechtsberatungsgesetzes' [2000] NJW 1593 [1594, 1597].

101 Ein derartiger Eingriff kann nur durch die Abwehr nachweisbarer oder höchstwahrscheinlich schwererer Gefahren für ein überragend wichtiges Gemeinschaftsgut gerechtfertigt werden, vgl. BVerfGE 97,12; NJW 1998, 3481 [3481].

102 Ein Eingriff in die Berufsausübungsfreiheit, kann hingegen schon aufgrund eines Interesses des Gemeinwohls gerechtfertigt sein.

103 Vgl. Überblick bei Bernhard Dombek, '"Rechtsberatungsmonopol" der Anwaltschaft – Berechtigung und Grenzen' [2001] BRAK-Mitt. 98 [100].

104 Deutscher Bundestag Drucks. 16/3655, S. 28.

105 Vgl. für Österreich, das damit die gleichen Regeln wie Deutschland hat, Bernhard Dombek, '"Rechtsberatungsmonopol" der Anwaltschaft – Berechtigung und Grenzen' [2001] BRAK-Mitt. 98 [101].

106 Michael Kleine-Cosack in ders. (Hrsg.), *Rechtsdienstleistungsgesetz* (C.F. Müller 2014), Allg. Teil Rn. 19.

107 Vgl. Bernhard Dombek, '"Rechtsberatungsmonopol" der Anwaltschaft – Berechtigung und Grenzen' [2001] BRAK-Mitt. 98 [101].

108 Bis zum Masterpatent-Beschluss des BVerfG NJW 1998, 3481 (3483) war originäres 3 Ziel des RBerG, der Anwaltschaft ein ausreichendes Arbeitsfeld zu sichern als Gegenleistung für Ausbildung und berufsständische Bindungen, vgl. Begründung zum Rechtsberatungsgesetz abgedruckt in, Rudolf Altenhoff, Hans Busch, Kurt Kampmann in dies. (Hrsg.), *Rechtsberatungsgesetz* (Aschendorff, Münster Westfalen 1973) Anhang B S. 238ff.

109 Insbesondere nach dem die unter der alten Rechtslage bestehende Möglichkeit, eine unbeschränkte Vollerlaubnis als Rechtsbeistand zu beantragen, durch das 5. BRAGebÄndG vom 18.08.1980 aufgehoben wurde – was zu einer Verschärfung der Monopolstellung führte – da seitdem nur noch eine Teilerlaubnis in abschließend aufgezählten Rechtsgebieten erteilt werden konnte, vgl. Günter Rennen, Gabriele Caliebe in dies. (Hrsg.), *Rechtsberatungsgesetz* (C.H. Beck 1986) Art. 1 § 1 Rn. 3.

110 Vgl. statt vieler, Volker Römermann, 'RDG – zwei Schritte vor, einen zurück' [2008] NJW 1249; a.A. Kleine-Cosack, 'Öffnung des Rechtsberatungsmarkts – Rechtsdienstleistungsgesetz verabschiedet' [2007] BB 2637.

111 Martin Henssler, 'Die Zukunft des Rechtsberatungsgesetzes' [2001] AnwBl. 525 [526].

112 Vgl. hierzu noch zum alten RBerG Michael Kleine-Cosack, 'Vom Rechtsberatungsmonopol zum freien Wettbewerb – Erosion des Rechtsberatungsgesetzes' [2000] NJW 1593 [1596].

113 BVerfG NJW 2020, 208 [213] Rn. 40ff.

Berater und Vertreter in allen Rechtsangelegenheiten, folgelogisch von der Erlaubnis- d.h. Registrierungspflicht des RDG befreit.[*114] Für nicht-anwaltliche Anbieter von Inkassodienstleistungen besteht daneben im Rahmen des RDG die Möglichkeit, eine Erlaubnis, in der Form der Registrierung bei der zuständigen Behörde gemäß § 10 Abs. 1 Nr. 1 RDG, als Inkassodienstleister zu erhalten.[*115] Hierfür müssen neben anderen Voraussetzungen, die unter anderem die Verordnung zum Rechtsdienstleistungsgesetz (RDV) statuiert, insbesondere ein Sachkundenachweis gem. § 12 RDG in Verbindung mit § 4 RDV erbracht werden[*116] sowie die Eintragung in das Rechtsdienstleistungsregister gemäß § 16 RDG erfolgen.

Da die Geschäftsmodelle unstreitig auch eine Inkassodienstleistung erbringen, der sonstige Dienstleistungsumfang der Unternehmen sich jedoch vom klassischen Inkassobild – massenhafte Geltendmachung von grundsätzlich unstreitigen Forderungen durch Unternehmen gegen säumige Verbraucher[*117] – deutlich unterscheidet, wurde und wird in der Folge verstärkter Verbreitung derartiger Unternehmen in der deutschen Literatur und Rechtsprechung[*118] heftig über deren Zulässigkeit diskutiert.[*119] Neben anderen[*120] insbesondere unter dem Gesichtspunkt, ob das gesamte Geschäftsmodell der Unternehmen in diesem Umfang von der grundsätzlich erteilten Erlaubnis gemäß § 10 Abs. 1 Nr. 1 RDG (noch) umfasst sein kann.[*121] Angeheizt wurde diese Debatte vor allem durch die, nach herrschender Literaturansicht[*122], allein den Inkassodienstleitern zustehende Möglichkeit, eine erfolgsabhängige Vergütung für die Rechtssuchenden anbieten zu können.[*123] Gemäß § 49 b Abs. II S. 1 BRAO in Verbindung mit § 4 a RVG ist dies den Rechtsanwälten grundsätzlich verwehrt.[*124]

Auf die Einzelheiten dieser umfassenden Debatte kann im Rahmen dieses Beitrages nicht näher eingegangen werden.[*125] Festgehalten werden sollte aber, dass der Bundesgerichtshof (BGH) in einer Leitentscheidung zur Vereinbarkeit des Dienstleistungsumfangs, der Plattform von „wenigermiete.de“ der *Conny*- vormals *LexFox*-GmbH, mit dem RDG im Jahr 2019 zu der Ansicht gelangte, dass das explizite Geschäftsmodell der *Conny*-GmbH, zwar dem Erlaubnisvorbehalt des Rechtsdienstleistungsgesetzes unterfällt, jedoch im Rahmen der Registrierung als Inkassodienstleister gemäß § 10 I 1 Nr. 1 RDG sich (noch) als erlaubnisfähiger Teilnehmer am Rechtsdienstleistungsmarkt erweise und damit beteiligen dürfe.[*126] Zwar wurde damit keine allgemeingültige Aussage über die Zulässigkeit anderer Geschäftsmodelle getroffen.[*127] Dennoch verwies der Bundesgerichtshof in seinem Urteil mit Nachdruck darauf, dass der RBerG-Reformgesetzgeber von 2008 erhebliche Deregulierungs- und Liberalisierungsbestrebungen[*128] des

114 Frank Remmertz in Michael Krenzler (Hrsg.), *Rechtsdienstleistungsgesetz* (2. Auflage, Nomos 2017) § 1 Rn. 7.

115 Vgl. Daniela Schmidt in Michael Krenzler (Hrsg.), *Rechtsdienstleistungsgesetz* (2. Auflage, Nomos 2017) § 10 Rn. 6.

116 Hierfür ist gemäß § 4 Abs. 1 RDV ein Lehrgang von 120 Zeitstunden sowie nach § 4 Abs. 3 RDV der Nachweis mindestens einer bestandenen fünfstündigen Klausur notwendig.

117 Markus Hartung, ‘Legal Tech und das RDG – Raus aus der Beziehungskrise! – Warum es bei der Legal Tech-Diskussion nicht um Tech, sondern um den Zugang zum Recht geht’ [2020] AnwBl 8 [9].

118 Zur Unzulässigkeit des Modells, Landgericht (LG) Berlin BeckRS 2018, 19885; LG München AnwBl 2020, 238 [239]; LG Hannover, NZKart, 2020, 398, 400; zur Zulässigkeit, LG Berlin NJW 2018, 2898; LG Berlin BeckRS 2018, 18018.

119 Befürworter statt vieler, Markus, Hartung, ‘Inkasso, Prozessfinanzierung und das RDG – Was darf ein Legal-Tech-Unternehmen als Inkassodienstleister?” [2019] AnwBl 353; Gegner statt vieler, Reinhard Greger, ‘Rundum-sorglos-Modell“: Innovative Rechtsdienstleistung oder Ausverkauf des Rechts?’ [2018] MDR 897.

120 Zu “MyRight” und der Problematik des Interessenskonflikt gemäß § 4 RDG vgl., Martin Henssler, ‘Prozessfinanzierende Inkassodienstleister – Befreit von den Schranken des anwaltlichen Berufsrechts?’ [2019] NJW 545; andere Ansicht Alexander Morell, ‘Keine Kooperation ohne Konflikt’ [2019] JZ 809 [814]. – DOI: https://doi.org/10.1628/jz-2019-0299.

121 Instruktiv Fabian Widder, ‘Verbraucherschutz und RDG – wo bleibt die Anwaltschaft? – Legal Tech – Notwendigkeit einer gesetzlichen Regelung nach dem BGH-Urteil Lexfox’ [2020] 269.

122 Günther Bandisch in Walter Seitz (Hrsg.), *Inkasso-Handbuch* (4. Auflage, C.H. Beck 2015) Kapitel 31 Rn. 111; Dirk Seichter in Christian Deckenbrock und Martin Henssler (Hrsg.), *RDG (*4. Auflage, C.H. Beck 2015) § 4 RDGEG Rn. 4.

123 A.A. Martin Henssler, ‘Prozessfinanzierende Inkassodienstleister – Befreit von den Schranken des anwaltlichen Berufsrechts?’ [2019] NJW 545 [548]; Klaus Winkler in Michael Krenzler (Hrsg.), *Rechtsdienstleistungsgesetz* (2. Auflage, Nomos 2017) § 4 RDGEG Rn. 11.

124 Matthias Kilian in Martin Henssler und Hanns Prütting (Hrsg.), *BRAO* (5. Auflage, C.H. Beck 2019) § 49b BRAO Rn. 72ff, 101ff.

125 Überblick, wer Gutachtertätigkeiten für die entgegengesetzten Lager übernommen hat, Alexander Morell, ‘Keine Kooperation ohne Konflikt’ [2019] JZ 809 [809 Fn 4].

126 BGH NJW 2020, 208 (213) Rn. 38.

127 So betont der BGH NJW 2020, 208 [221] Rn. 110, dass es stets einer Würdigung der Umstände des Einzelfalls bedürfe; ebenso Robert Freitag, David Lang, ‘Offene Fragen von Legal und Illegal Tech nach der wenigermiete.de-Entscheidung“ des BGH’ [2020] ZIP 1201 [1210].

128 Kritisch dazu Volker Römermann, ‘RDG – zwei Schritte vor, einen zurück’ [2008] NJW 1249.

Rechtsdienstleistungsmarktes im Blick hatte, die die Entwicklung neuer Berufsbilder erlauben und denen es Rechnung zu tragen gilt.*[129] Es bleibt abzuwarten, ob der deutsche Gesetzgeber diese Rechtsprechung in neuen Reformbestrebungen bestätigen und weiter ausbauen und damit den Rechtsdienstleistungsmarkt für weitere Finanzierungsmechanismen öffnen wird.*[130]

Der aktuelle deutsche rechtspolitische Diskurs geht derweil noch einen Schritt weiter. So wird diskutiert*[131], ob der Anwaltschaft im größeren Umfang als bisher die Vereinbarung von Erfolgshonoraren ermöglicht werden sollen. Zwar sind in den letzten 20 Jahren in vielen europäischen Rechtsordnungen Erfolgshonorare legalisiert worden und unstreitig ließe sich damit die staatliche Kostenhilfe noch einmal deutlich reduzieren.*[132] Als unabhängiges Organ der Rechtspflege begegnet dieser Ansatz aber erheblichen Bedenken in der Literatur und daneben auch aus den Reihen der Anwaltschaft selbst.

5. Resümee

Die von Mauro *Cappelletti* formulierte Permisse von 1978, dass man sich im langen historischen Kampf um den Zugang zum Recht befinde, hat an ihrer Aktualität nicht eingebüßt. Vielmehr scheint es, dass sich der Kampf, um den – finanzierbaren – Zugang zum Recht gegenwärtig noch verstärkt hat. Nach der Abkehr vom Ausbau staatlich organisierten Finanzierungsmodellen etablieren sich vermehrt marktbasierte Finanzierungsmechanismen außerhalb der Anwaltschaft, deren Mitglieder traditionell als berufene Berater und Vertreter in allen Rechtsangelegenheiten angesehen wurden. Durch genaue Bedürfnisanalysen der rechtssuchenden Bevölkerung verstehen es die neuen Rechtsdienstleister gut, sich weiteres Marktpotenzial zu erschließen. Dies gelingt ihnen auch dadurch besser, da sie sich, sobald sie als Inkassodienstleister gemäß § 10 Nr. 1 RDG registriert sind, zur Bedürfnisbefriedigung Mitteln bedienen dürfen, die der Anwaltschaft bis dato – vielleicht auch berechtigter Weise*[133] – verwehrt bleiben. Es bleibt abzuwarten, ob die Rechtsprechung und der Gesetzgeber diesen Deregulierungs- und Liberalisierungsansätzen – weiter – folgen werden. Oder aber, ob in Zukunft, der bestehende Wettbewerbsvorteil ausgleichen wird und als Finanzierer der Rechtsberatung und der Rechtsdurchsetzung vermehrt auch den Rechtsanwalt treten darf.*[134] Bei der Delegation einer derartigen verfassungsrechtlich verbürgten staatlichen Aufgabe*[135] sollte in einem Sozialstaat aber immer auch ein besonderes Augenmerk auf den Umstand gelegt werden, dass tatsächlich alle Rechtssuchenden den – marktbasierten – Zugang zum Recht erhalten. Denn dieser folgt anderen, nach Eigenkapital kalkulierten Grundsätzen*[136] und nimmt im Zweifel auf atypische Sachverhalte sowie bildungsschwächere Bevölkerungsgruppen, die einer besonderen Hilfestellung beim Auffinden und Erkennen eines rechtlichen Konflikts bedürfen, keine Rücksicht. Auch in den nächsten vierzig Jahren werden noch einige Kämpfe geführt werden müssen auf dem Weg hin zu einem Rechtssystem, das für jedermann gleichermaßen zugänglich ist.

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129 BGH NJW 2020, 208 (223) Rn. 133.

130 Appell, dass der Gesetzgeber tätig werden, muss auch von Robert Freitag, David Lang, 'Offene Fragen von Legal und Illegal Tech nach der wenigermiete.de-Entscheidung" des BGH' [2020] ZIP 1201 [1210].

131 Vgl. Referentenentwurf des Bundesministerium der Justiz und für Verbraucherschutz Entwurf eines Gesetz zur Förderung verbrauchergerechter Angebote im Rechtsdienstleistungsmarkt vom 12.11.2020 – https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Rechtsdienstleister.pdf?__blob=publicationFile&v=1; zuletzt abgerufen am 14.01.2021.

132 Vgl. Matthias Kilian, 'Zugang zum Recht: Beobachtungen in Zeiten von Gesetzen zur Kosteneinsparung bei der Prozesskosten- und Beratungshilfe' [2008] AnwBl 236 [239 mwN].

133 Gem. § 1 BRAO ist der Rechtsanwalt ein unabhängiges Organ der Rechtspflege.

134 Siehe dazu Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz Entwurf eines Gesetzes zur Förderung verbrauchergerechter Angebote – https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Rechtsdienstleister.pdf?__blob=publicationFile&v=1; zuletzt abgerufen am 14.01.2021.

135 Der Justizgewährungsanspruch folgt aus dem Rechtsstaatsprinzip Art. 20 III GG und wird ebenso aus dem Fair-trail-Grundsatz abgeleitet Art. 6 I EMRK; dazu BVerfGE 107, 395, vgl. oben Fn 67, 68 und 23, 24.

136 Schriftliche Stellungnahme zum Entwurf eines Gesetzes zur Förderung verbrauchergerechter Angebote im Rechtsdienstleistungsmarkt Prof. Dr. Christian Wolf, Ass. Iur. Nadja Flegler – https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Stellungnahmen/2020/Downloads/122120_Stellungnahme_IPA_RefE_Rechtsdienstleistungsmarkt.pdf;jsessionid=97FD7B32FEB5155A0AD2FB9F6301D287.1_cid324?__blob=publicationFile&v=2 S. 5, 11ff; zuletzt abgerufen am 14.01.2021.

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Die Transplantate vom deutschen Recht für die Reform des Privatrechts in Estland

Am Beispiel des Abstraktionsprinzips[*1]

1. Die Einführung

Estland gehört zusammen mit Deutschland zu den wenigen Ländern, in denen das Abstraktionsprinzip für die Rechtsgeschäfte sowohl in der Rechtstheorie als auch in der Rechtsprechung eindeutig anerkannt wird. Anders als in Deutschland ist das Abstraktionsprinzip (zusammen mit dem Trennungsprinzip) in Estland ausdrücklich im Gesetz fixiert worden. Hier werden der Übernahmeprozess sowie die Auswirkungen des Abstraktionsprinzips analysiert. Auf Beispiel des Abstraktionsprinzips kann man sehen, wie man einen Rechtsbegriff von einem anderen Recht übernehmen kann und wie die Transplantation funktionieren kann.

2. Die Wurzeln des Abstraktionsprinzips im deutschen Recht

Als Vater des Abstraktionsprinzips gilt Friedrich Carl von Savigny, der die Lehre über einen selbständigen dinglichen Vertrag begründete, verbunden mit einer Regelung der Anfechtung eines fehlerhaften Geschäftes wegen Irrtums[*2]. Zweite Urquelle des Abstraktionsprinzips im deutschen Recht war die Rechtspraxis, die sich in Immobiliengeschäften herausbildete, sowie das „starke“ Grundbuch[*3]. Das Abstraktionsprinzip wurde aber auch bei Abtretung der Forderungen angewandt. Im deutschen Bürgerlichen Gesetzbuch (BGB)[*4] ist das Abstraktionsprinzip nicht ausdrücklich enthalten. Es wird jedoch unbestritten angenommen, dass das System der Schuldverhältnisse im BGB auf dem Trennungs- und Abstraktionsprinzip basiert. In der Rechtssprechung ist die Geltung des Abstraktionsprinzips ebenso nicht widerlegt

1 „Transplants from German Law for the Reform of Private Law in Estonia. On the example of the principle of abstraction“ (Dieser Artkel basiert teilweise auf der Dissertation des Autors „System der Vermögensgeschäfte in Estland“ [„Varaliste tehingute süsteem Eestis“]) (2009).

2 Vor allem sind wichtig Seine Bücher, „System des heutigen Römisches Rechts“ (1840) und “Obligationenrecht, Bd. II” (1853).

3 Die Übersicht Villu Kõve, „Varaliste tehingute süsteem Eestis“ [„Das System der Vermögensgeschäfte im Estland“] (Tartu Ülikooli Kirjastus 2009) 33–43.

4 „Bürgerliches Gesetzbuch“ (BGB), vom 18.08.1896, in der Fassung vom 2.01.2002 (BGBl. I S 42, 2909), zuletzt geändert 21.12.2020 (BGBl I S 3229).

worden. Gleichwohl hat die Rechtsprechung das Abstraktionsprinzip durch Fehleridentität, Bedingungszusammenhang und Geschäftseinheit eingeengt. Obwohl das Abstraktionsprinzip in der Rechtswissenschaft von Anfang an immer wieder kritisiert wurde, wurde es im Deutschland nie richtig angefochten.[*5]

3. Das System der Vermögensgeschäfte im deutschen Recht und in anderen Ländern

Im System der Vermögensgeschäfte gibt es in verschidenen Ländern nach wie vor gravierende Unterschiede. Unter anderem ist das Sachenrecht, anders als viele andere Bereiche des Privatrechts, zum grossen Teil nicht durch die Regelungen der EU angeglichen worden.

Im Allgemeinen kann es aufgrund der *causa*-Bedeutung in der Geschäftslehre zwischen Länderngruppen unterschieden werden. Einerseits gibt es Länder, in denen *causa* schon gemäß dem Recht die Grundlage der Geschäftslehre bildet (wie in Frankreich, Italien und Spanien). Andererseits verursacht die Anerkennung abstrakter Geschäfte in einigen Ländern weder in der Gesetzgebung noch in der Theorie oder in der Rechtssprechung keine wesentlichen Probleme. Zu diesen Ländern gehört vor allem Deutschland.[*6]

Bei der Übertragung von Eigentum an beweglichen Sachen ist eine traditionelle Einteilung die Trennung zwischen Rechtsordnungen, in denen für eine Übertragung von Eigentum an beweglichen Sachen nur eine Vereinbarung genügend ist (Konsensualprinzip), und Rechtsordnungen, in denen neben einer Vereinbarung noch eine Publizitätshandlung notwendig ist (Traditionsprinzip). Dem auf dem deutschen Abstraktionsprinzip beruhenden System (neben Deutschland fast nur im Griechenland anerkkannt) der Übertragung von Eigentum an beweglichen Sachen liegt einerseits das Traditionsprinzip zugrunde, d.h. für eine Eigentumsübertragung ist in der Regel eine Publizitätshandlung, meist eine Besitzübergabe, erforderlich. Andererseits ist die Voraussetzung für eine Eigentumsübertragung nicht eine geltende Kausalhandlung, sondern ein geltendes Verfügungsgeschäft. Damit hat das deutsche System, das vom Abstraktionsprinzip ausgeht, deutliche Unterschiede im Vergleich zu anderen Systemen.[*7]

Die Grundsätze der Übertragung von Eigentum an Grundstücken weisen zum Teil prinzipielle Unterschiede auf (z.B. in Griechenland). Die Tendenz zur wachsenden Bedeutung des Registers ist auch in diesen Ländern, in denen früher den Registereintragungen keine Aufmerksamkeit geschenkt wurde, eindeutig erkennbar. Außerdem ist die Übertragung des Eigentums an Grundstücken in meisten Ländern formell, d.h. in der Regel ist dafür eine notarielle Beurkundung bzw. auf eine andere Weise bestätigte Urkunde erforderlich. Zumeist wird als Voraussetzung für eine Übertragung von Eigentum an Grundstücken nicht die Besitzübergabe, d.h. *traditio* im engeren Sinn, gefordert. Vergleicht man die Lage in verschiedenen Ländern, ergeben sich als Unterscheidungskriterien die Fragen, (1) ob für die Übergabe des Eigentums an einer unbeweglichen Sache ein Verfügungsgeschäft notwendig ist und (2) ob seine Gültigkeit vom Kausalgeschäft abhängig ist. Folglich kann man zwischen Systemen, die auf dem Konsensualprinzip, auf dem Abstraktionsprinzip oder auch der *titulus-modus*-Lehre basieren, unterscheiden. Der entscheidende praktische Unterschied besteht jedoch darin, ob die Eintragung im Grundbuch konstitutiv (d.h. als Voraussetzung für die Eigentumsübertragung gilt) oder deklarativ ist (d.h. eine Schutzmaßnahme gegenüber den Dritten darstellt).[*8] In dem ersten Fall kann man von „Staaten eines starken Grundbuches“ sprechen.

Für eine Forderungsabtretung ist in der Regel nur eine (meistens formfreie) Vereinbarung notwendig. In einigen Ländern bedarf es wohl der gleichen Form wie das Geschäft, aus dem die Forderungsabtretung hervorgeht. Die Gesetze verschiedener Länder sind in Bezug auf die Forderungsabtretung (wenigstens dem Wortlaut nach) ziemlich ähnlich. Die einzige Vorschrift, die das Abstraktionsprinzip von außen beeinträchtigt, sieht im allgemeinen Fall die Haftung des Abtreters für die Gültigkeit der Forderung vor. Das Abstraktionsprinzip wird im Fall der Fordertungsabtretung neben Deutschland auch z.B. in Griechenland und in der Schweiz anerkannt.[*9]

5 Kõve (Fn 3) 33–43.

6 Ibid 90.

7 Ibid 85, 86.

8 Ibid 87.

9 Ibid 87, 88.

Verallgemeinert kann man sagen, dass das deutsche Abstraktionsprinzip neben Estland teilweise nur in Griechenland übernommen worden ist (wenigstens im Bereich der Übereignung von Sachen). Bemerkenswert ist, dass das Abstraktionsprinzip in keinem der Nachbarländer von Estland (Finnland, Lettland, Litauen, Russland) anerkannt wird. Darüber hinaus ist das Prinzip in weiteren Ländern, dessen starkes Grundbuch für Estland als Vorbild bei der Einrichtung des Grundbuchs galt (vor allem Österreich und die Schweiz), nicht anerkannt.

4. Historische Überblick des Rechts über die Vermögensgeschäfte in Estland

4.1. Die Entwicklungen vor dem Jahr 1918

Das estnische Recht ist aus historischen Gründen insbesondere vom deutschen Recht stark beeinflusst worden. Faktisch galt in Estland vor dem Jahr 1918 eine gewisse Mischung vom deutschen, römischen und lokalen Recht. Die Städte wie Estlands Hauptstadt Tallinn (Reval) waren rechtlich selbständig. Reval war das Stadtrecht von Lübeck verliehen worden und von Reval aus bekamen auch übrige Nordestnische Städte das lübische Recht. Die südestnischen Städte dagegen bekamen über Lettlands Hauptstadt Riga das hamburgische Recht. Auch nach der Inkorporierung der baltischen Länder oder Provinzen in das Russische Reich behielten diese Territorien die eigenen autonomen Rechtsordnungen. Dies betrifft besonders den Bereich des Privatrechts, in dem das frühere Recht über die Jahrhunderte beibehalten wurde (die sog. *baltische Sonderordnung*). [*10]

Die Einführung des Grundbuchs im 18. Jahrhundert spielte bei den späteren Entwicklungen im Bereich des Privatrechts eine bedeutsame Rolle. Einen noch größeren Einfluss übten die Ausarbeitung und das Inkrafttreten des eigenen Zivilgesetzbuches aus. Das Gesetzbuch wurde als III. Band *des Provincialrechts der Ostsee-Gouvernements* (besser bekannt unter dem Namen *Privatrecht der Ostseeprovinzen Liv-, Est- und Curland* oder *Baltisches Privatrecht*, *BPR*) am 1. Juli 1865 in Kraft gesetzt. Als Quellen für das BPR galten in der ersten Linie die lokalen nichtkodifizierten Regeln, aber im großen Teil auch verschiedene Lehrbücher über das römische Recht. Weitere Vorbilder waren das *Allgemeine Landrecht für die Preußischen Staaten*, österreichisches *Allgemeines Bürgerliches Gesetzbuch* und vermeintlich auch der Entwurf des sächsischen Zivilgesetzes von 1860. [*11] Große Auswirkungen auf das Sachenrecht hatten außerdem die Veränderungen des BPR vom 9. Juli 1889.

Die Grundprinzipien des BPR sind nicht einfach zu verstehen [*12]. Wahrscheinlich wurde das Trennungsprinzip schon damals anerkannt. Vor allem Artikel 3105 BPR, der zwischen dem Vertrag im weiteren Sinne und dem Schuldvertrag unterscheidet, deutete darauf hin. Außerdem hatte der Kaufvertrag selbst nach BPR Artikel 3831 keine verfügende Wirkung. [*13] Das Abstraktionsprinzip wurde im BPR aber sicher nicht anerkannt.

4.2. Die Entwicklungen in den Jahren 1918–1940

In der ersten Selbständigkeitsperiode der Republik Estland (1918–1940) wurde das Privatrechtssystem grundsätzlich nicht geändert. [*14] So galt BPR ohne größere Veränderungen bis 1940 und wurde auch in der Praxis angewandt.

10 Ibid 112, 113.

11 Zu der Gesetzbegungsideologie von BPR Marja Luts, „Private Law of the Baltic Provinces As a Patriotic Act" (2000) V Juridica International 157.

12 Dazu Carl Erdmann, „System des Privatrechts der Ostseeprovinzen Liv-, Est- und Kurland. Bd. 2" (Sachenrecht 1891) 110.

13 Auch Rammul – Ilus, 285.

14 Marju Luts-Sootak, Hesi Siimets-Gross, und Katrin Kiirend-Pruuli, „Estlands Zivilrechtskodifikation – ein fast geborenes Kind des Konservatismus – »Nichtgeborene Kinder der Liberalismus«?" im Martin Löhnig und Stephan Wagner (hg), „Zivilgesetzgebung im Mitteleuropa der Zwischenkriegszeit" (Mohr Siebeck 2018) 273. – DOI: https://doi.org/10.1628/978-3-16-156292-1.

Trotz der Bemühungen wurde das eigene estnische Zivilgesetzbuch damals nicht verabschiedet. Im Gegensatz dazu wurde in Lettland das neue Zivilgesetzbuch (das dem BPR allerdings sehr ähnlich war) im Jahr 1937 eingeführt.[*15] Der Entwurf des estnischen Zivilgesetzbuches (EZGB) wurde im Jahr 1940 dem estnischen Parlament[*16] vorgelegt, es wurde aber nie verabschiedet. Als Vorbild für den Entwurf galten vor allem das BPR, aber auch deutsches BGB, schweizerische und französische Zivilgesetzbücher, die Entwürfe der Zivilgesetzbücher von Russland und Ungarn sowie der Entwurf des einheitlichen Obligationenrechts für Frankreich und Italien.[*17] Das Sachenrecht wurde zumeist nach dem schweizerischen ZGB konzipiert (kombiniert mit Regeln des BGB).

Auch das EZGB folgte dem Trennungsprinzip. Der Kaufvertrag wurde nach § 1659 EZGB als rein schuldrechtlicher Vertrag definiert, der zusammen mit § 1332 nur eine Grundlage für die Eigentumsübergabe schafft. Im Bezug auf das Abstraktionsprinzip ist jedoch anzunehmen, dass dies im EZGB eher nicht anerkannt wurde. Für die Übereignung beweglicher Sachen sah § 966 Abs. 2 vor, dass für die Absprache über eine Übertragung des Eigentums ein rechtlicher Grund vorhanden sein musste. Bei den Grundstücken war die Regelung aber nicht so eindeutig. Nach § 924 EZGB konnte eine Eintragung ins Grundbuch nur dann erfolgen, wenn die Verfügungsmacht des Verfügenden und die rechtliche Grundlage für die Verfügung bewiesen wurden. In der Erläuterung zum EZGB wurde diese Norm so interpretiert, dass für den Erwerb des Grundeigentums eine gütlige schuldrechtliche Grundlage vorhanden sein musste.[*18] Folglich wurde das Abstraktionsprinzip nicht anerkannt.

4.3. Die Rechtslage in der Sowjetzeit (1940–1991)

Nach der sowjetischen Okkupation im 1940 wurden die alten Gesetze außer Kraft gesetzt. Am 1. Januar 1941 wurde das Zivilgesetzbuch von Sowjetrussland von 1922 (RZGB)[*19] eingeführt. Vom 5. Dezember 1941 bis 1944 (in der Zeit der deutschen Besatzung) galt wieder das BPR, danach wurde erneut das RZGB eingeführt.[*20]

Das RZGB war gesetzestechnisch gesehen ganz modern.[*21] Im Bereich der Grundprinzipien gab es aber eine gewisse Verwirrung im Gesetz. *Causa* war keine notwendige Voraussetzung eines Rechtsgeschäfts (siehe § 26 RZGB)[*22] und es gab keine besonderen Vorschriften über abstrakte oder kausale Rechtsgeschäfte. Darüber hinaus fehlte eine klare Stellungnahme über die Anerkennung des Trennungsprinzips. Nach § 180 RZGB wurde der Kaufvertrag als Schuldvertrag ohne eine verfügungsrechtliche Wirkung behandelt.[*23] Der wichtigste Unterschied lag aber im § 66 RZGB. Diese Norm schrieb vor, dass die Eigentumsübertagung im Fall der bestimmten Sachen schon mit Abschluss des Vertrages und im Fall der Gattungssachen mit Übergabe stattfindet.[*24] Damit folgte das RZGB bei den Gattungssachen dem Traditionsprinzip und bei individuellen Sachen dem Konsensualprinzip.[*25] Der Grund und Boden waren in der sowjetischen Zeit nicht im Zivilverkehr. Die Gebäude wurden im Prinzip nach Grundlagen der Übereignung beweglicher Sachen

15 Helmut Coing (hg). „Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte. Dritter Band. Zweiter Teilband. Gesetzgebung zum allgemeinen Privatrecht und zum Verfahrensrecht“ (Allgemeine Privatrecht: Mitteleuropa) Abschnitte 8 bis 14, 2086.

16 „Eesti Vabariigi Tsiviilseadustik (eelnõu EV Riigivolikogu erikomisjoni 12. III 1940. a redaktsioonis)“ (Tartu Ülikool, Eesti Akadeemiline Õigusteaduse Selts 1992/1940).

17 „Seletuskiri Tsiviilseadustiku 1935. a eelnõu nelja esimese raamatu juurde. Koostanud prof. J. Uluots“ (Amtliche Erläurterung zum EZGB) (1935) 4.

18 Ibid 84.

19 „VNFSV tsiviilkoodeks. Ametlik tõlge. Muudatustega kuni 15. novembrini 1940. Ametlik tekst ühes paragrahvide järgi süstematiseeritud materjale sisaldava lisaga“ (ENSV Kohtu Rahvakomissariaat 1940).

20 Toomas Anepaio, „Hobusemüügist omandireformini“ [„Von Pferdekauf bis zum Eigentumsreform“] [1997] (6) Juridica 288, 289–290.

21 Hans Schlosser, „Grundzüge der neueren Privatrechtsgeschichte: ein Studienbuch“ (6., völlig neubearb. u. erw. Aufl., C.F. Müller 1988) 191; Oleg Sadikov, „Das neue Zivilgesetzbuch Russlands“ [1996] (2) ZEuP 259.

22 Konstantin Grave, Aleksandra Pergament, und Tatjana Maltsman, „Tsiviilõigus“ [„Zivilrecht“] (Eesti Riiklik Kirjastus 1951) 15.

23 Ibid 66.

24 Ibid 38, 39.

25 Jenny Ananjeva u.a., „Nõukogude tsiviilõigus. Üldosa“ [„Das sowjetisches Zivilrecht. Allgemeiner Teil“] (Valgus 1971) 219, 220.

übereignet. Dabei musste der Kaufvertrag jedoch notariell beurkundet und in der Kommunalverwaltung registriert sein.[*26]

Am 1. Januar 1965 wurde das ZGB der Estnischen Sozialistischen Sowjetrepublik (ESZGB) in Kraft gesetzt. Dieses Gesetzbuch galt im großen Teil bis 2002. Das ESZGB unterschied sich im Allgemeinen nicht viel vom RZGB.[*27] Doch wurde das Sachenrecht als ein selbständiger Rechtsbereich beseitigt und durch das sog. Eigentumsrecht erstezt. Das Pfandrecht wurde ein Teil des Schuldrechtes. Im Gegensatz zum RZGB wurde im ESZGB das Trennungsprinzip wieder allgemein anerkannt. Der Kaufvertrag wurde im ESZGB § 242 Abs. 1 als ein rein schuldrechtliches Geschäft definiert.[*28] Nach § 138 ESZGB entstand das Eigentum an einer Sache mit der Übergabe der Sache, wenn es nicht anders vereinbart wurde. Zum Beispiel konnte der Eigentumsübergang alternativ mit Abschluss des Vertrages vollzogen werden. Das deutet im Prinzip auf die Einhaltung des Traditionssystems (nicht des Konsensualsystems) hin.[*29] Das Land war wie früher nicht im Verkehr, die Gebäude wurden nach den Regeln der Eigentumsübergabe von beweglichen Sachen übereignet. Der Kaufvertrag eines Wohngebäudes musste nach § 244 ESZGB notariell beurkundet und auch in der Kommunalbehörde registriert sein. Diese Registrierung hatte aber keine rechtlichen Wirkungen auf das Geschäft.[*30] Es gab ein kausales Übereignungssystem und das Abstraktionsprinzip wurde nicht anerkannt.[*31]

4.4. Die Übergangszeit im Privatrecht (1991–1993)

Nach Wiedererlangung der Selbständigkeit und nach Einführung des Grundgesetzes[*32] am 3. Juli 1992 blieben die alten Gesetzte vorerst in Kraft. Das heißt, dass auch das ESZGB weitergalt. Durch die ersten Reformgesetzen (z.B. das am 1. Juli 1990 in Kraft getretene Eigentumsgesetz[*33]) wurden die vermögensrechtlichen Verhältnisse nicht grundlegend geändert. Bezüglich des Vermögensrechtes gab es in der Praxis und auch in den Gesetzen damals aber doch eine große Verwirrung. Die ersten Fassungen des am 29. Mai 1993 in Kraft getretenen Gesetzes über die Privatisierung der Wohnräume[*34] und des am 24. Juli 1993 in Kraft getretenen Privatisierungsgesetzes[*35] (das hat die Privatisierung der Unternehmen betroffen) sind sogar davon ausgegangen, dass im Vermögensrecht das Konsensualprinzip galt.[*36]

Große Bedutung für die Zukunft des estnischen Privatrechts hatten das am 20. Juni 1991 in Kraft getretene Gesetz über die Grundlagen der Eigentumsreform[*37] und das am 1. November 1991 in Kraft getretene Gesetz über die Bodenreform[*38]. Beide Gesetze sahen die Restituierung der Eigentumsverhältnisse in den Zustand, in dem sie bis 1940 gewesen waren, vor, d.h. die Zurückübertragung des Landes und der Gebäude sowie eine breite Privatisierung des übrigen Landes. Da die vor 1940 stattgefundene Eintragungen im Grundbuch die Grundlage für die Restituierung bilden sollten, benötigte man in Estland ein neues Grundbuch für den Zivilverkehr des Landes. Gerade in den Jahren 1992–1993 wurden die Entscheidungen getroffen, die später auch zur Verwirklichung des Abstraktionsprinzips beigetragen haben. Es gab damals mehrere Entwürfe, wie man das Grundeigentum regeln sollte.[*39] Unter anderem gab es die Idee (die entsprechend in Lettland verwirklicht wurde), den alten Entwurf des ESZGB von 1940 in Kraft zu setzen. Diese Idee selbst wurde zwar nicht verwirklicht, obwohl der Entwurf dem Parlament vorgelegt worden

26 Grave u.a. (Fn 22) 35.

27 Ananjeva u.a. (Fn 25) 26–30, 37–39.

28 Jenny Ananjeva, Peeter Kask, und Endel Laasik (hg), „Eesti NSV tsiviilkoodeks. Kommenteeritud väljaanne“ [„ESZGB. Die kommentietrte Ausgabe“] (Eesti Raamat 1969) (TsK Komm) 262; Endel Laasik, „Nõukogude tsiviilõigus. Eriosa“ [„Das sowjetisches Zivilrecht. Besondere Teil“] (Valgus 1975) 11–12.

29 Ananjeva u.a. (Fn 25) 219–220.

30 TsK Komm (Fn 28) 160, 266; Laasik (Fn 28) 25.

31 Ananjeva u.a. (Fn 25) 159.

32 Eesti Vabariigi põhiseadus (RT I, 15.05.2015, 2).

33 Eesti Vabariigi omandiseadus (ÜVT 1990, 20, 299; RT I 1993, 72/73, 1021); gilt nicht ab 1. Dezember 1993.

34 Eluruumide erastamise seadus (RT I, 12.12.2018, 10).

35 Erastamisseadus (RT I, 04.07.2017, 59).

36 Kõve (Fn 3) 142, 143.

37 Eesti Vabariigi omandireformi aluste seadus (RT I, 12.12.2018, 9).

38 Maareformi seadus (RT I, 19.05.2020, 9).

39 Sieh darüber Kõve (Fn 3) 143, 144.

war, hatte aber wenigstens eine wichtige Konsequenz für die allgemeine Rechtslage in Estland. Nämlich traf das estnische Parlament (Riigikogu) am 1. Dezember 1992 eine grundlegende Entscheidung über die „Kontinuität der Gesetzgebung“[*40], wonach bei der Ausarbeitung der Gesetzentwürfe die Gesetze, die vor 1940 gegolten hatten, zugrunde liegen sollten. Diese Entscheidung hatte einen großen Einfluss auf spätere Entwicklungen. Gerade damals wurde außerdem entschieden, dass das neue estnische Zivilgesetzbuch enststehen soll, aber nicht als ein einheitliches Gesetz, sondern (wenigstens vorerst) geteilt in verschiedene selbständige Gesetze.

Für die Einführung des Grundbuchssystems bedarf als erster Schritt einem Gesetz über das Sachenrecht. Dementsprechend wurde von einer kleinen Arbeitsgruppe unter der Leitung des damaligen Jurastudenten Anre Zeno der Entwurf des Sachenrechtsgesetzes vorbereitet.[*41] Vorerst war der Absicht, nur den Verkehr der Grundstücke zu regeln, danach aber wurden auch die Regeln über bewegliche Sachen hinzugenommen. Die Grundlagen für das neue Gesetz wurden aus den sachenrechtlichen Regelungen des ESZGB übernommen. Diese Grundlagen wurden jedoch teilweise aufgrund des deutschen BGB und des schweizerischen ZGB geändert. Eine große Hilfe leisteten dabei *die Deutsche Stiftung für internationale rechtliche Zusammenarbeit e.V. (IRZ)* und *Friedrich Ebert Stiftung*. Durch die IRZ gab Dr. Oliver Vossius das erste Gutachten über den estnischen Entwurf ab. Am 9. Juni 1993 wurde das Sachenrechtsgesetz (SRG)[*42] verabschiedet und am 1. Dezember 1993 zusammen mit dem Grundbuchgesetz[*43] und das Einführungsgesetz zum SRG[*44] in Kraft gesetzt. Dabei wurden u.a. die Regeln des ESZGB über das Eigentumsrecht und Pfandrecht aufgehoben. Dagegen wurden die Vorschriften des Allgemeinen Teils und des Schuldrechts zunächst noch überwiegend beibehalten.

Die Frage nach den Grundprinzipien tauchte in den Diskussionen über den Entwurf des SRG nie wirklich auf.[*45] Das trug leider dazu bei, dass der Entwurf in wichtigen Aspekten unklar und sogar widersprüchlich war. So sah der erste Entwurf zum Beispiel vor, dass die Übereignung einer beweglichen Sache mit *traditio* ein gültiges Grundgeschäft voraussetzt.[*46] Für die Grundeigentumsübereignung sah der Entwurf gemäß dem Kausalprinzip vor, dass die Urkunde über den Erwerb des dinglichen Rechts für die Eintragung ins Grundbuch dem Grundbuchführer vorgelegt werden muss. Das bedeutete die Vorlage des schuldrechtlichen Kausalvertrags.[*47] Damit ging der erste Entwurf vom Trennungsprinzip, aber bestimmt nicht vom Abstraktionsprinzip aus. Der zweite Entwurf beinhaltete dagegen mehr „den deutschen Einfluss“. Dem hat das durch die *IRZ* erteilte zweite Gutachten viel beigetragen. Dieses Gutachten wurde von Prof. Dr. Günter Brambring und Dr. Sigrun Erber-Faller gefasst. Nach deutschem Vorschlag wurde im Entwurf zu den Regeln des Grundbuches der Begriff des dinglichen Vertrages hinzugenommen. Zudem wurden die Regelungen über die Übereignung beweglicher Sachen grundsätzlich nach Regelungen des BGB überarbeitet. Allerdings blieben einige kontroverse Regeln über das Kausalprinzip bestehen. Alles in allem kann man sagen, dass es noch keine grundsätzliche Entscheidung für das Abstraktionsprinzip getroffen wurde.[*48]

5. Die „Erfindung“ des Abstraktionsprinzips in den Jahren 1993–2003

Nach dem Inkrafttreten des SRG benötigte es noch 10 Jahren, bis das ganze System bereinigt und komplex ausgearbeitet werden konnte. Diese Zeit war für die Theorie und Rechtssprechung nötig, um zu erkennen, welche Regelungen und wie sie funktionieren sollen. Das Hauptproblem lag wahrscheinlich in der fehlenden Korrelation einerseits zwischen den Regelungen, die auf dem deutschen BGB basierten, und andererseits den Regelungen, die auf dem schweizerischen ZGB basierten. Zudem waren sowohl die estnische

40 Seadusloome järjepidevus (RT 1992, 52, 651).

41 Darüber Kõve (Fn 3) 144–147.

42 Asjaõigusseadus (RT I, 22.02.2019, 11).

43 Kinnistusraamatuseadus (RT I, 22.12.2020, 40).

44 Asjaõigusseaduse rakendamise seadus (RT I, 29.06.2018, 9).

45 „Asjaõiguse seaduse eelnõu seletuskiri 1993“ [„Begründung zum Entwurf des Sachenrechtsgesetzes 1993“].

46 Ibid 20.

47 Ibid 14.

48 Die Übersicht Kõve (Fn 3) 144–147.

eigene Rechtstheorie als auch die frühe Rechtssprechung zunächst unzulänglich. So wurde in der Rechtstheorie schon früher über das Abstraktionsprinzip geschrieben, doch wurde das Prinzip häufig mit dem Trennungsprinzip verwechselt.[*49] Für die „Erfindung" des Abstraktionsprinzips waren deutsche Lehrbücher und Gesetzeskommenatere sowie die Schulungen von deutschen Juristen und natürlich die Praxis der Notare und der Rechtspfleger sehr förderlich.

Die erste Regelung des SRG über die Übereignung beweglicher Sachen war allgemein den deutschen Regelungen des BGB sehr ähnlich. Daneben gab es aber ursprünglich auch § 92 Abs. 3 SRG, nach dem für das Übergehen des Eigentums ein rechtlicher Grund nötig war. Beim Grundstücksrecht war die Situation am Anfang noch unklarer und es gab mehrere problematische Regelungen. In der Praxis war für den Grundstücksverkehr von Anfang an die Geltung des Trennungsprinzips klar. Dazu trugen insbesondere die von Notaren verwendeten Vertragsmuster bei. Im Laufe der Zeit wurde das Abstraktionsprinzip als Grundlage auch im § 120 SRG (in der Regelung über den dinglichen Vertrag) in Bezug auf dingliche Verträge festgelegt. Der Text des § 120 SRG war am Anfang jedoch mehrdeutig und verwies neben dem dinglichen Vertrag auch auf den schuldrechtlichen Vertrag als dessen Grundlage.[*50] Daneben sah § 35 Abs. 1 Nr. 1 des Grundbuchgesetzes vorerst vor, dass dem Grundbuchantrag die den Erwerb des dinglichen Rechts berechtigende Urkunde beigefügt werden muss. Zudem konnte nach § 64 Abs. 2 SRG die Eintragung ins Grundbuch nur dann erfolgen, wenn zusammen mit dem dinglichen Vertrag auch die Urkunde, die eine Grundlage für die Eintragung eines dinglichen Rechts bildet, vorgelegt wird. Aufgrund dieser Vorschriften verlangten die Grundbuchämter in der Praxis die Vorlegung der schuldrechtlichen Verträge und diese wurden auch (einigermaßen) geprüft.[*51] Zudem sah § 121 Abs. 1 SRG vor, dass das schuldrechtliche Erwerbsgeschäft dem Eigentümer das Klagerecht für die Eintragung ins Grundbuch sowie für die Vindikation gibt. In dieser Weise wurde die Rechtslage eigentlich auch in der Rechtsprechung verstanden (noch unklarer war es bei der Übereignung beweglicher Sachen).[*52] Keine Klarheit im Bereich der Grundprinzipen des Vermögensrechts schaffte das am 1. September 1994 in Kraft getretene Gesetz über den Allgemeinen Teil des Zivilgesetzbuches,[*53] das u.a. die Regeln des ESZGB über nichtige Rechtsgeschäfte ersetzte.Wichtige Änderungen erfolgten nach dem 1. April 1999, als das SRG (zusammen mit anderen Gesetzen) wesentlich geändert wurde.[*54] Wahrscheinlich kann von dieser Zeit an auch vom Abstraktionsprinzip als von einem geltenden Rechtsgrundsatz gesprochen werden. Nämlich dann wurde § 92 Abs. 3 SRG aufgehoben und damit die einzige wichtige Regelung, die die Anerkennung des Abstraktionsprinzips bei Übereignung der beweglichen Sachen verhinderte, beseitigt. Im Grundbuchrecht wurde aber aus § 120 Abs. 1 SRG der Hinweis auf das Grundgeschäft herausgenommen und § 64 Abs. 2 aufgehoben. Damit wurden auch die wichtigsten Hindernisse für die Anerkenneung des Abstraktionsprinzips im Grundbuchrecht beseitigt.

Am 1. Juli 2002 traten ein neues Gesetz über den Allgemeinen Teil des Zivilgesetzbuches (ATZGB)[*55] und das Schuldrechtsgesetz[*56] in Kraft. Damit wurde das ESZGB fast vollständig aufgehoben. Als Ergebnis einer wichtigen Entscheidung sah § 6 Abs. 3 ATZGB eindeutig vor, dass die Rechte und Pflichten durch das Verfügungsgeschäft übertragen werden können (das Trennungsprinzip). Weiterhin legte § 6 Abs. 4 ausdrücklich fest, dass die Gültigkeit des Verfügungsgeschäftes nicht von der Gültigkeit des Verpflichtungsgeschäftes abhängt (das Abstraktionsprinzip). Seitdem gelten diese Prinzipien grundsätzlich für alle Verfügungsgeschäfte, d.h. für die Übereignungen der Grundstücke und beweglicher Sachen, sowie für die Übertragungen der Rechte (darunter für die Abtretung der Forderungen). Damit wurde in Estland, möglicherweise als im einzigen Land in der ganzen Welt das Abstraktionsprinzip direkt in das Gesetz hineingeschrieben. Dabei ist merkwürdig, dass in der amtlichen Erläuterung zum Gesetzesentwurf darüber fast kein

49 Priidu Pärna und Villu Kõve, „Asjaõigusseadus. Kommenteeritud väljaanne" [„Sachenrechtsgesetz. Kommentierte Ausgabe"] (Juura 1996) 18, 19.

50 Ibid 110.

51 Ibid 113, 114.

52 Ibid 218, 219.

53 Tsiviilseadustiku üldosa seadus (RT I 1994, 53, 889; 2002, 53, 336). nicht gültig ab 1. Juli 2002.

54 Asjaõigusseaduse, asjaõigusseaduse rakendamise seaduse, kinnistusraamatuseaduse ja täitemenetluse seadustiku, planeerimis- ja ehitusseaduse, riigilõivuseaduse, notari tasu seaduse ja Eesti Vabariigi pankrotiseaduse muutmise seaduse muutmise seadus (RT I 1999, 27, 380).

55 Tsiviilseadustiku üldosa seadus (RT I, 23.05.2020, 4).

56 Võlaõigusseadus (RT I, 08.01.2020, 10).

Wort geschrieben wurde. Auch andere Regelungen trugen zu dem ganzen System bei. So gibt es seitdem im Schuldrechtsgesetz entsprechende Regelungen des Bereichrungsrecht.

Am 1. Juli 2003 wurde § 121 Abs. 1 SRG aufgehoben und § 35 Abs. 1 Nr. 1 des Grundbuchgesetzes abgeändert.*[57] Damit wurden die letzten systemfremden Regelungen beseitigt. Der letzte „Baustein in der Mauer" war das am 27. Dezember 2003 in Kraft gesetzte Gesetz, das unter anderem viele wichtige Veränderungen des SRG vorsah.*[58] Die wichtigste Änderung war die Einführung des § 68 Abs. 5 ATZGB, nach dem die Willenserkärungen sich durch eine gerichtliche Entscheidung ersetzen lassen. Damit können die Erfüllung der Verträge und die Zurückübereignungen systematisch gefasst werden.

Insgesamt kann im estnischen Recht vom Abstraktsionsprinzip frühestens vom 1. April 1999 an, mit der Sicherheit aber vom 1. Juli 2002 an die Rede sein. Das ganze System wurde erst am 27. Dezember 2003 fertiggestellt. Merkwürdigerweise war die Anerkennung des Trennungsprinzips in der Rechtssprechung des Staatsgerichtshofes schon spätestens ab Ende der 1990-er klar zu sehen.*[59] Doch können die Spuren der Anwendung des Abstraktionsprinzips (wenigstens bei beweglichen Sachen) frühestes ab Anfang der 2000-er aufgefunden werden.*[60] Am markantesten war das Urteil des Staatsgerichtshofes vom 1. September 2004 über das Grundeigentum. In diesem Urteil behauptete der Staatsgerichtshof, dass das Abstraktionsprinzip im estnischen Recht schon ab 1. Dezember 1993 vorhanden gewesen war.*[61] In einem Urteil vom 4. April 2006 hat der Staatsgerichtshof das Abstraktionsprinzip sogar bei der Schenkung des Rücknahmerechts des Anteils an einen Wohngenossenschaft anerkannt.*[62]

6. Der heutige Stand: Abstraktionsprinzip als Wirklichkeit

Nach verschiedenen Gesetzesänderungen wird das Abstraktionsprinzip heute neben dem Gesetzestext eindeutig in der Theorie und Rechtssprechung anerkannt. An den Universitäten wird das System der Vermögensgeschäfte beruhend auf dem Trennungs- und Abstraktionsprinzip gelehrt. In 25 Jahren hat der Staatsgerichtshof etwa 20 Fälle, deren Lösung vom Abstraktionsprinzip abhängig war, behandelt. Einige von diesen Fällen sind Basis für die Entwicklung wichtiger Grundsätze.*[63] In den meisten Fällen hat der Staatsgerichtshof sachgerechte und vernünftige Lösungen gefunden, ohne die Geltung des Abstraktionsprinzips in die Frage gestellt zu haben oder irgendwie "korrigieren" zu müssen. Die Mehrheit der Fälle, die das Abstraktsionsprinzip betreffen, bleiben in die Jahren 2002–2010. Inhaltlich betrafen diese Fälle hauptsächlich die Fragen der Grundstückenübereingung und des gutgläubigen Erwerbs sowie des Bereicherungsrechts. Später sind nur sehr spezielle Probleme vor den Staatsgerichthof gebracht worden. Wenigstens einmal hat das Abstraktionsprinzip auch die Lösung eines strafrechtlichen Falles beeinflusst.*[64]
Insgesamt funktioniert das System ohne größere Schwierigkeiten. Die notarielle Praxis und die Praxis der Grundbuchführer haben viel dazu beigetragen. In der rechtswissenschaftlichen Literatur wird die Geltung des Abstraktionsprinzips überwiegend unumstritten anerkannt. Außerdem sind die Urteile des Staatsgerichtshofes betreffend das Abstraktionsprinzip nie seriös angegriffen worden und es hat kaum seriöse Vorschläge gegeben, das System grundsätzlich zu ändern. Bis jetzt besteht folglich kein großer Zweifel daran, dass Estland in Bezug auf das System der Vermögensgeschäfte den richtigen Weg gefunden hat.

57 Asjaõigusseaduse, kinnistusraamatuseaduse ja nendega seonduvate seaduste muutmise seadus (RT I 2003, 13, 64).

58 Võlaõigusseaduse ja sellega seonduvate seaduste muutmise seadus (RT I 2003, 78, 523).

59 Z.B., Urteil von 2.12.1998 in der Sache 3-2-1-121-98.

60 Z.B., Urteile von 21.06.2000 in der Sache 3-2-1-84-00; 19.06.2001 in der Sache 3-2-1-90-01; 04.05.2005 in der Sache 3-2-3-6-05.

61 Urteil von 01.09.2004 in der Sache 3-2-1-90-04.

62 Urteil von 4.04.2006 in der Sache 3-2-1-18-06.

63 Z.B., Urteile von 23.09.2005 in der Sache 3-2-1-80-05; 13.02.2008 in der Sache 3-2-1-140-07.

64 Urteil von 14.04.2010 in der Sache 3-1-1-3-10.

7. Schlussfolgerungen: Die Übernahme des Abstraktionsprinzips als Erfolgsgeschichte oder Fehler?

Es ist ganz klar, dass die Auswahl der Basisgrundsätze für das Recht der Vermögensgeschäfte auf das ganze Rechtssystem erheblich einwirkt. So beeinflusst die Auswahl der Grundprinzipien die Übertragung und Belastung des Eigentums an beweglichen Sachen und Grundstücken (u.a. die Anerkennung beschränkt dinglicher Rechte), die Übertragung der Rechte (u.a. Ansprüche, Wertpapiere und Beteiligungen), das Ausmaß und das System der Vertragsnichtigkeit und -auflösung sowie Rückabwicklung „gescheiterter" Verträge, das System der dinglichen Sicherheiten (in erster Linie die Behandlung des Pfandrechts), sowie das Gesellschaftsrecht, das Familien- und Erbrecht, das Vollstreckungs- und besonders Insolvenzrecht, aber gewissermasse auch öffentliches Recht, unter anderem Strafrecht und Verwaltungsrecht.

Die allgemeine Regelung des estnischen Zivilrechts und der Vermögensgeschäfte ist nach Meinung des Autors vernünftig sowie zeitgemäß und es fehlt das Bedürfnis, die Regelung grundsätzlich zu reformieren. Die verfassungsrechtliche Werte der Eigentumssicherheit und Verfügungsfreiheit, das allgemeine Gleichberechtigungsgrundrecht sowie das freie Selbstverwirklichungsrecht sind hinreichend gewährleistet. Die Rechtsprechung ist dafür der beste Beweis. Es wäre schwer zu behaupten, dass irgendein anderes System die genannten Grundrechte besser gewährleisten würde.

Die Anerkennung abstrakter schuldrechtlichen Geschäfte als eine allgemeine Möglichkeit neben kausalen Geschäften ist vernünftig, denn dieser Ansatz ermöglicht eine Weiterentwicklung des Rechtes und gestattet außerdem eine rechtlich adäquate Behandlung verschiedener außerordentlichen Schuldverhältnisse, z.B. verwickelter Verhältnisse der Unbarbezahlungen, Zivilverkehr der Wertpapiere und finanzieller Ansprüche.

Die Anwendung des Abstraktionsprinzips ist nicht unvermeidlich, trägt aber zum einheitlichen Funktionieren der Vermögensgeschäfte bei. Hauptsächliche Vorteile des Abstraktionsprinzips sind eine höhere Verkehrssicherheit sowie Flexibilität bei Gestaltung der Rechtsverhältnisse. Dazu kommen die Transparenz und innere Logik des Prinzips. Den Nachteil bildet vor allem eine gewisse „Lebensfremdheit" des Systems. Allerdings hat jedes System eigene Nachteile. Obwohl es an sich nicht behauptet werden kann, dass ein System der Vermögensgeschäfte besser als andere ist, kann man feststellen, dass das auf Trennungs- und Abstraktionsprinzip beruhende System in keiner Weise schlechter als andere Systeme ist.

Insgesamt kann man sagen, dass die Übernahme des deutschen Sachenrechts und Grundbuchssystems gelungen ist und sich in der Praxis bewährt hat. Zu versuchen, selbst ein Fahrrad im Bereich der Vermögensgeschäfte zu erfinden, wäre äusserst riskant gewesen. Dank des deutschen Vorbildes und der Unterstützung aus Deutschland hatte Estland die Möglichkeit, die neuen Regulationen in den Reformzeiten schnell vorzubereiten und in Kraft zu setzen. Wir machten und machen immer noch Gebrauch von deutscher Rechtsdogmatik, Literatur und Rechtssprechung, um unser eigenes System weiterzubilden und mögliche Lücken zu füllen. Das alles hat dazu beigetragen, den estnischen Rechtsverkehr und auch die Wirtschaft stärker, schneller und präziser zu machen. Der große Vorteil des deutschen Rechtsdenkens ist die Systematik, Logik und Klarheit. Das fehlt in solchen Maßen in vielen anderen Rechtsordnungen, darunter in unseren Nachbarländern. Eine Transplantation wie die Übernahme des Trennungs- und Abstraktionsprinzips gelingt nicht einfach. Neben dem reinen Gesetzestext bedarf es des einheitlichen Rechtssystems, das die Transplantation unterstützt, der Schulung, der Dogmatik und der kompetenten Rechtssprechung. Zusammenfassend kann man im Fall von Estland die Übernahme des Abstraktionsprinzips als Erfolgsstory beschreiben.

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German Transplants in Estonian Tort Law: General Duties to Maintain Safety

1. Introduction

The Law of Obligations Act[*1] (LOA) was passed in 2001 and entered force in Estonia on 1 July 2002. The authors of the commentary on the LOA have noted that the tort law provisions contained in the LOA are based on the tort law provisions of, above all, the German Civil Code, or *Bürgerliches Gesetzbuch* (BGB)[*2]. However, instead of the provisions of the BGB, the tort law provisions of the LOA were inspired in actuality by the relevant German case law, legal theory, and proposals for reforming the tort law provisions of the BGB.[*3]

Indeed, even at first glance, the tort law provisions of the LOA and BGB look quite different. In some places, the differences are obvious. Just a few examples are that, unlike in German law, the tortfeasor has to prove the absence of fault under the LOA's Subsection 1050(1); the fault is substantiated subjectively under its Subsection 1050(2); the strict liability provisions are set out in special laws in Germany, but in Estonia this is done in the LOA; and, unlike the LOA's Section 1056[*4], German law does not set out general strict liability. The list of significant differences is considerably longer.

However, one could give just as many (if not more) examples of how the science and case law of German tort law or, broadly speaking, legal thinking has found its way into Estonian case law on torts and into Estonian legal scholarly texts. One example that stands out in particular involves the issue of the division of liability in a situation wherein mutual damage has been caused by two motor vehicles: regardless of the difference between their relevant provisions, the German and Estonian case law have come to be nearly identical in this field.[*5]

This article is not intended to map or list all of the transplants from German tort law that have reached Estonian law or practice. Rather, it focuses on a transplant whose importance cannot be overestimated. This transplant is the concept of tort liability based on breach of the general duty to maintain safety. It is an issue whose importance is broader than that of individual questions: the recognition of general duties to

1 RT I, 8.1.2020, 10 <www.riigiteataja.ee/akt/108012020010> accessed on 26 May 2021.

2 Bürgerliches Gesetzbuch <www.gesetze-im-internet.de/bgb/> accessed on 26 May 2021.

3 P Varul and others, *Võlaõigusseadus III. Kommenteeritud väljaanne* (Juura 2009) 625.

4 The first sentence of the LOA's sub-s states that 'where damage is caused as a result of a danger characteristic of an especially dangerous thing or activity, the person who controls the source of danger is liable for causing the damage regardless of the person's fault'.

5 J Lahe and I Kull, 'Motor Vehicle Operational Risk and Awarding Damages in the Event of a Traffic Accident' (2014) 5 Journal of European Tort Law 105. – DOI: https://doi.org/10.1515/jetl-2014-0005.

maintain safety affects our understanding of the structure of tort law, the structure of the general composition of tort, and connections between the individual prerequisites for tort liability, while on a broader scale also affecting our thought in the field of tort law and our approach to cases emerging in legal practice.

I wrote of liability following from breach of the general duty to maintain safety for the first time in an article published in 2004.[*6] Three to four years later, Estonian courts started to implement a tort liability concept based on breach of the general duty to maintain safety. At the beginning of the 2000s, the respective concept of liability was still unfamiliar to many Estonian lawyers because not much time had passed since the entry into force of the LOA and the rules of the Civil Code of the Estonian SSR did not call for knowledge of the concept of liability proceeding from breach of the general duty to maintain safety.[*7] With the entry into force of the LOA, the approach to unlawfulness changed completely, and this, in turn, made it necessary to embrace the concept of the general duty to maintain safety, which has its origins in German law.

This article examines whether and to what extent the concept of liability based on the general duty to maintain safety has been recognised in Estonian legal practice. The relevant case law to date is assessed as well, for establishment of whether the adoption of the respective concept of liability has been successful and what problems still need to be resolved.

2. Unlawfulness in general

Under Estonian as well as German law, general tortious liability comprises three stages. As a general rule, the objective elements (*Objektiver Tatbestand*) – the act of the person who causes damage, damaging of the legal rights of the victim, and the causal link between the two – are verified at the first stage; unlawfulness (*Rechtswidrigkeit*) is verified at the second; and the tortfeasor's fault (*Verschulden*) is verified in the third. Verification of the prerequisites for liability usually takes place in the order presented above; principally, if it becomes evident that the causing of damage was not unlawful, there is no need to assess the tortfeasor's fault.[*8]

Unlawfulness is an important precondition for tortious liability both in German and in Estonian tort law. Under BGB Section 823 paragraph 1, the protected legal interests are the life, body, health, freedom, property and other rights (especially personal rights). Similar legal interests are protected also under clauses 1–5 of the LOA's Subsection 1045(1). It has been argued that the concept of unlawfulness establishes the scope of protection of tort law: the protected legal interests and, via them, the circle of persons who are able to distinguish between the claims for damages.[*9]

Under the BGB (Section 823, paragraph 2), the unlawfulness may arise also from violation of a statute. The same is provided for in clause 7 of the LOA's Subsection 1045(1). Under Section 826 of the BGB, a person who in a manner contrary to the public order intentionally inflicts damage on another person is liable toward the other person for making the damage good. This provision is very similar to that articulated in clause 8 of the above-mentioned subsection of the LOA.

In establishing unlawfulness, both German and Estonian tort law rely on two theories: the theory of the unfairness of the consequences (*Erfolgsunrecht*) and the theory of the unfairness of the act (*Handlungsunrecht*). In a situation wherein harm has been done to an absolutely protected legal interest of the injured person as a result of the direct active conduct of the tortfeasor, unlawfulness can be derived solely from the harmful consequence. Accordingly, it is not important whether the tortfeasor has, among other things, breached a duty. However, if the injured person's legal interest has been harmed by omission on the part

6 See 'The Concept of General Duties of Care in the Law of Delict' (2004) 9 Juridica International 108. In Estonia, the most extensive research into tort liability connected with a breach of the duty to maintain safety has been carried out by Iko Nõmm. See I Nõmm, 'Käibekohustuse rikkumisel põhinev deliktiõiguslik vastutus' (doctoral dissertation. University of Tartu 2013).

7 Civil Code of the Estonian SSR, passed on 12 June 1964 – ÜNT 1964, 25, 115; RT I 1997, 48, 775.

8 See FJ Säcker, R Rixecker, and H Oetker, *Münchener Kommentar zum BGB* (8th edn 2020). In the book's Section 823, Gerhard Wagner comments (in the first marginal note) that in the case of so-called negligence torts the objective composition of the act comprises the following three elements: the harming of a legally protected interest, anti-duty conduct, and liability-triggering causality between the anti-duty conduct and the harming of the legally protected interest. For confirmation of liability (addressed in marginal note 26), the following criteria must be met in addition: the absence of unlawfulness-precluding circumstances, fault capacity, damage, and liability-fulfilling causality.

9 Säcker, Rixecker, and Oetker (n 8) s 823, marginal 3.

of the tortfeasor or the harming of the injured person's legal interest is a more remote or indirect outcome of the tortfeasor's conduct, a duty that the tortfeasor has breached must be established if one is to hold the tortfeasor liable.[*10] In these situations, unlawfulness cannot be established solely on the basis of the harmful consequence. We can speak of omission of legal consequence only where the person had a duty to act.

That duty may be a statutory one (per clause 7 of Subsection 1045(1) of the LOA); cf BGB Subsection 823(2)) or a general duty to maintain safety (*generale Verkehrspflicht*). The Estonian Supreme Court has held that the general duty to maintain safety and a breach thereof need to be established in order for the tortfeasor to be held liable on the basis of the general composition of tort in situations wherein the cause of the damage is omission or insufficient action.[*11]

Tambet Tampuu has argued that the institute of the duty to maintain safety helps to sieve out persons subject to a duty to act with care toward the victim from among all those who have caused damage by their failure to act. If the person did not have such a duty, his or her liability is out of the question.[*12] Thus, the concept of the duties to maintain safety is, on one hand, necessary for holding liable those persons who have caused damage through omission or indirectly; on the other hand, it is also a filter that allows for determining (narrowing down) the circle of tortiously liable persons. For example, if A sells B a knife that the latter then uses to kill C, A's conduct is, as such, one the of the reasons for C's death. However, holding A liable in such a situation does not seem logical or fair. The denial of A's liability is supported by the concept of duties to maintain safety: if A did not breach a duty to maintain safety by selling the knife, A cannot be held liable for causing C's death.

In the structure of the general composition of tort, breach of the duty to maintain safety must be assessed already at the level of the objective elements of the act, not at that of unlawfulness. Therefore, the only thing left to do at the level of unlawfulness is to assess unlawfulness-precluding circumstances (LOA, Subsection 1045(2)). The establishment of a breach of the duty to maintain safety also entails assessing the tortfeasor as having been externally (objectively) negligent. Nevertheless, in Estonian tort law it is possible to distinguish easily between fault and cases of duties to maintain safety because, even though breach of a duty to maintain safety can be equated with failure to exercise the required level of care under the LOA's Subsection 104(3) (addressing failure to exercise external care), under Subsection 1050(2) of the LOA negligence must be assessed subjectively also. Per that subsection, in assessing a person's fault, account is taken of that person's situation, age, education, knowledge, abilities, and other personal attributes. Thus, at the last level in the three-level tort structure, the level of fault, one must assess, with regard to liability based on breach of the duty to maintain safety, whether the person was negligent, in light of his or her personal characteristics (i.e. assess failure to exercise internal care). Even though there is no provision analogous to the LOA's Subsection 1050(2) in German law and negligence is an objective concept, German legal doctrine makes an attempt to distinguish between unlawfulness and fault also in the event of liability based on a breach of a duty to maintain safety.[*13] Therefore, for example, the person's tortious capacity must still be established at the level of fault.

3. The meaning of the duty to maintain safety

In German tort law, according to legal writings, liability in the case of so-called negligence torts is based on the tortfeasor's failure to exercise the required level of care. Duties that give rise to liability are called duties to maintain safety. In the decision of the German Supreme Court that laid the foundations for the concept of the duties to maintain safety in 1902, it was held that the duty to maintain safety meant taking other persons' rights fairly into account.[*14]

In German tort law, the substance of the duty to maintain safety is understood as follows: anyone who gives rise to a hazardous situation (either via a dangerous thing controlled by him or her or via his or her

10 Säcker, Rixecker, and Oetker (n 8) s 823, marginal 7.

11 'Korteriühistu kohustused kahju hüvitamisel' [2012] Supreme Court Civil Chamber Judgment 3-2-1-161-12 (17 December 2012) para 10.

12 T Tampuu, *Lepinguvälised võlasuhted* (Juura 2017) 233.

13 Säcker, Rixecker, and Oetker (n 8) s 823, marginals 445–46.

14 Säcker, Rixecker, and Oetker (n 8) s 823, marginal 433.

dangerous behaviour) is required to take any and all necessary and reasonable precautionary measures to prevent harming others.[*15]

The duty to maintain safety should be understood analogously in Estonian law. The Estonian Supreme Court has held that the general duty to maintain safety consists of the duty to make every reasonable effort to ensure that other persons are not harmed in consequence of one's actions.[*16] In other words, the duty to maintain safety is the duty to act, in the exercise of one's rights, in a manner that does not harm other persons. The general duty to maintain safety can be derived from Subsection 2 of Section 138 of the General Part of the Civil Code Act, which states that a right shall not be exercised in an unlawful manner or in such a way that the purpose of exercising the right is the causing of damage to another person.[*17] Furthermore, it has been held in case law that, in the most general sense, the duty to maintain safety means a duty of care on the part of a person who has given rise to or controls a dangerous situation – i.e. the duty to take any and all reasonably necessary and suitable measures to protect other persons and legally safeguarded interests against the manifestation of the threat.[*18]

The person who creates a dangerous situation has a duty to maintain safety. The emergence of the duty to maintain safety is usually related to control over a situation of danger. In turn, it can be but need not be related to property as much as to simply dangerous behaviour. For instance, if a groundskeeper, in breach of contract, does not come to work and, in consequence, the pavement is not cleared of ice and snow, the groundskeeper cannot be criticised for a breach of the duty to maintain safety if a third party slips on the pavement and suffers bodily injury. However, once he engages in maintaining the pavement, he must take into account other people's rights – e.g. not leaving a snow shovel on the pavement, because others could stumble on it (this approach has received support from the judgement of the Civil Chamber of the Supreme Court in Civil Case 3-2-1-161-12, paragraph 12). It has been held in case law that the existence of the tortfeasor's duty to maintain safety may be indicated by, among other things, the manifested threat being in that person's sphere of influence, that person's actions creating trust on the part of the other person and giving the injured person an impression that the action was safe or that the tortfeasor fully controlled the threat, and the tortfeasor seeking economic gain from the dangerous activity.[*19]

The duty to maintain safety cannot demand the application of impossible but reasonable precautionary measures by the person. Likewise, the general duty to maintain safety cannot demand the incurring of unreasonable costs.[*20] Accordingly, Helmut Koziol has noted that liability proceeding from a violation of a protective rule and also that following from a breach of the general duty to maintain safety involve a stricter standard of fault-based liability because in these situations the fault does not need to be related to provision for a specific legal interest; mere abstract endangering is sufficient.[*21] It has been held in case law that the more serious the threat of damage, the higher the likelihood of damage, and the lower the cost and the smaller the effort to prevent the damage, the greater the likelihood that there is a duty to take measures to prevent or eliminate the damage.[*22]

Neither the BGB nor the LOA contains a direct reference to liability based on breach of the duty to maintain safety. The peculiarity of the duties to maintain safety lies in the fact that these are not set forth in legal rules and that the court must in each individual case decide on the existence of a duty to maintain safety and a breach thereof.[*23] Thus, duties to maintain safety are 'designed' in case law. This may be considered

15 W Hau and R Poseck (eds), *Beck `scher Online-Kommentar zum BGB* (56th edn: 1.11.2020) s 823, C Förster's marginal 102.

16 'Mittevaralise kahju rahalise hüvitamine nõuded' [2013] Supreme Court Civil Chamber Judgment 3-2-1-73-13 (20 June 2013) para 10.

17 'Korteriühistu kohustused kahju hüvitamisel' (n 11) para 10.

18 'Lepinguline kaitsekohustus. Käibekohustus' [2015] Supreme Court Civil Chamber Judgment 3-2-1-48-15 (10 June 2015) para 24.

19 'Lepinguline kaitsekohustus. Käibekohustus' (n 18) para 24.

20 See also 'Mittevaralise kahju rahalise hüvitamine nõuded' (n 16) para 11. On the required standard of conduct in various European countries, see B Winiger, E Karner, and K Oliphant, 'Essential Cases on Misconduct' [2018] Digest of European Tort Law 203. – DOI: https://doi.org/10.1515/9783110535679.

21 H Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (Jan Sramek 2012) 250.

22 In the 'Mittevaralise kahju rahalise hüvitamine nõuded' judgement (n 16) para 11 and the judgement of 10 June 2015 in Civil Case 3-2-1-48-15, 'Lepinguline kaitsekohustus. Käibekohustus' (n 18) para 24, Thomas Raab has explained the emergence of the duty to maintain safety in a very similar way. See T Raab, 'Bedeutung der Verkehrspflichten und ihre systematische Stellung im Deliktsrecht. Juristische Schulung' (2002) 42(11) Zeitschrift für Studium und praktische Ausbildung 1044.

23 'Lepinguline kaitsekohustus. Käibekohustus' (n 18) para 24.

problematic because subjects of law may find it difficult to anticipate what kind of level of care they should exercise in any particular situation in the opinion of the court. The answers eventually become clear on the basis of a final court decision. On the other hand, the same question could be asked in the framework of the meaning of negligence: under the LOA, Subsection 104(3), negligence means failure to exercise the required level of care, and, in principle, a person's negligence or exercise of the required level of care becomes clear in court. Nevertheless, the more extensive our case law on liability stemming from breach of the duty to maintain safety, the more predictable the standard of behaviour expected of the person by the court becomes.

The existence of a protective provision (declaring a statutory duty for the purposes of clause 7 of the LOA's Subsection 1045(1)) does not preclude liability stemming from a breach of the duty to maintain safety. In principle, the duty to maintain safety may demand that a person exercise a higher standard of care than the one established by a protective rule.*[24] The connection between protective rules and duties to maintain safety is expressed also in the fact that, theoretically, it is possible to transform all of the duties to maintain safety into protective rules. However, this is not reasonable in practice, and perhaps it is even impossible to achieve.

Duties to maintain safety as extracontractual duties are actually quite similar to contractual protective duties. The latter emerge solely for the parties of a contract with respect to one another or, for the purposes of the LOA's Section 80 or Section 81, with respect to third parties. If the victim suffers damage due to a breach of a contractual protective obligation, the victim usually must file a claim for damages under contract law (LOA, Subsection 1044(2)). Only in the event of the victim's death or bodily injury / damage to health, the victim always has a choice of the legal basis for the claim (LOA, Subsection 1044(3)).

Duties to maintain safety protect, above all, the absolutely safeguarded legal interests, but even their scope of protection may not be limited to those absolutely safeguarded interests.*[25]

4. Development of Estonian case law pertaining to liability based on a breach of the duty to maintain safety

It is somewhat surprising to note that it was Tallinn Court of Appeal (not, as one might expect, the Supreme Court) that led the way in applying a concept of tortious liability based on breach of the duty to maintain safety and in developing respective case law. Tallinn Court of Appeal already referred to the existence of the duty to maintain safety and the meaning thereof four years before the Supreme Court rendered its first respective judgement. More specifically, in its decision dated 16 December 2008, Tallinn Court of Appeal held in connection with the duties and liability of the keeper of an online commenting environment that it followed from the general definition of the duty to maintain safety that anyone who creates a source of danger in the private sector that may in a recognisable way pose a threat of harming the rights of third parties is required to take reasonable measures to prevent the harming of the rights.*[26]

A couple of years later, Tallinn Court of Appeal clearly applied liability based on a breach of the duty to maintain safety. At question was a case wherein the victim was a motorcyclist who had ridden into fallen telecommunications lines and had a road accident as a result thereof. The court of appeal noted that the owner of the telecommunications infrastructure (one of the defendants) did not make an effort to ensure the safety of the telecommunications line running across the road to the users of the carriageway. The fact that the owner of these lines had concluded a contract for work to maintain the telecommunications lines does not prove that the owner carried out its duty to maintain safety in such a manner that information on downing or breakage of a telecommunications line would be received within reasonable time, as would allow for preventing a road hazard.*[27]

24 Tampuu (n 12) 234.

25 For further information on the protected legal interests, see Nõmm (n 6) 96–106.

26 Tallinn Court of Appeal Judgment in Civil Case 2-06-9067 (16 December 2008). For purposes of clarity, it should be noted that the definition (existence) of the duty to maintain safety is referred to also in a few earlier decisions – for instance, in the Harju District Court judgement of 25 June 2007 in Civil Case 2-06-720 (para 10) and in the Tallinn Court of Appeal judgement of 9 April 2007 in Civil Case 2-05-15618 (para 11). However, these decisions do not say anything substantive or more detailed about the nature of the duties to maintain safety.

27 Tallinn Court of Appeal Judgment in Civil Case 2-09-32485 (28 October 2011).

In a decision dated 5 April 2012, the court of appeal discussed the duty to maintain safety on the part of the organiser of a kayak trip. The court held that, upon organising a kayak competition on rough seas, the organiser was under the obligation to ensure supervision of the safety of the participants in such a way that the location of all participants was observable at all times. The court of appeal was of the opinion that, while the defendant was not required to ensure that the kayaks of the participants did not capsize, the defendant had a duty to ensure sufficient monitoring for noticing the upturning of a kayak swiftly enough and ensuring that participants who have found themselves in trouble receive help and, thus, prevent threats to the participants' life.*[28]

In its judgement of 28 September 2012, the court of appeal discussed the duty to maintain safety with regard to a house-owner on whose immovable property a postman who had put a newspaper in a mailbox slipped on ice and suffered bodily injury: the court held that the defendant knew that the postman was delivering mail to the mailbox there and using the pathway in question to reach the mailbox on the property. Therefore, the defendant was required to take reasonably necessary appropriate and affordable measures to protect the claimant from falling while on the immovable and protect against related damage to his health.*[29]

With merely a handful of cases addressing such matters, the case law of the Estonian Supreme Court is nowhere near extensive as regards liability based on breach of the duty to maintain safety. The first time the Supreme Court referred to the duty to maintain safety in the reasons for a decision was with its judgement of 17 December 2012, where the court held that, given the general duty to maintain safety, the flat-owners (not the flat-owners' association) had a duty to remove snow and ice from the roof of the building in question and a duty to warn car-owners with regard to this. The court explained that, following the principle of good faith and the general duty to maintain safety, flat-owners must make every effort not to harm other persons while owning, possessing, and using their residential building. The flat-owners' association established by the owners of the residential building does not have such a duty.*[30]

Next, the Supreme Court discussed the duty to maintain safety on the part of the owner of a block of flats (in a situation wherein said person lets the flats), doing so in greater detail. The Supreme Court held that the defendant, who owned a block of flats, had created a dangerous situation for the victim because there was a hole in the wall along the stairwell of the building through which the claimant and other persons could fall – as, indeed, the claimant did – and that the lighting of the stairwell had been implemented in such a manner that it did not ensure safe descent for a person using the stairwell for the first time. The dangerousness arose from the combined effect of two factors: the hole and the lighting.*[31]

In addition, the Supreme Court has discussed the duty to maintain safety on the part of a skydiving organiser (a flight club). The Supreme Court held that the general duty of an organiser of parachute jumps is, in the most general sense, the organisation of safe parachute jumps and the sufficient training and instruction of jumpers. The chamber drew attention to the fact that, since the organisation of parachute jumps entails a heightened risk to the life and health of people, the organiser is under an extensive duty to maintain safety. Among others, the organiser has an obligation to warn the jumper against possible risks and to explain how to act in a situation of danger. In addition, the organiser must teach the participants how to perform a parachute jump and, before they make a jump, check whether the person in question has the required knowledge and skills. During a jump, it must be made certain that the person makes the jump correctly.*[32]

As demonstrated by the above case-law overview, the courts have assessed the existence and substance of the duty to maintain safety within the framework of relatively specific situations. In consequence, the case law to date is of relatively little help in foreseeing what the court will consider to be the substance of the duty to maintain safety in a different situation. For instance, in a recent case, the court had to assess the duty to maintain safety on the part of the owner of a public park because a tree had fallen in the park and

28 Tallinn Court of Appeal Judgment in Civil Case 2-10-55812 (5 April 2012).

29 Tallinn Court of Appeal Judgment in Civil Case 2-11-26543 (28 September 2012). The court cases are notable because at that time the Supreme Court had not yet said a word about liability stemming from a breach of the duty to maintain safety.

30 'Korteriühistu kohustused kahju hüvitamisel' (n 11) para 10.

31 'Mittevaralise kahju rahalise hüvitamine nõuded' (n 16) para 11. This case has been discussed in greater detail by J Lahe and I Kull – E Karner and BC Steininger, *European Tort Law Yearbook 2013* (De Gruyter 2014) 219–21. – DOI: https://doi.org/10.1515/tortlaw-2014-0110.

32 'Lepinguline kaitsekohustus. Käibekohustus' (n 18) para 24.

caused physical injuries to someone. In that case, the court of appeal, broadly speaking, decided that the owner of a public park has performed the duty to maintain safety with regard to visitors of the park if having hired an arborist and carried out maintenance cutting of the trees.[*33]

On the basis of the above-mentioned court decisions, it can nevertheless be clearly concluded that the concept of liability stemming from a breach of the duty to maintain safety is no longer unknown in Estonian case law and that the courts understand quite well which cases of causing unlawful damage call for its application.

5. The burden of proof for breach of the duty to maintain safety

A problematic question remaining in the framework of liability based on the duty to maintain safety is who bears the burden of proving a breach of the duty to maintain safety. According to the general rule in force in German law, the claimant must prove that the prerequisites for the claim are met.[*34] This means, first of all, proving of the objective elements of the act, which, as a rule, is indicative of unlawfulness as well. The tortfeasor must, in turn, prove the existence of liability-precluding circumstances.[*35]

In Estonian law, however, the situation is complicated by the fact that, under the LOA's Subsection 1050(1), the tortfeasor must prove the absence of fault, as there is a presumption of the tortfeasor's fault. Therefore, the Supreme Court has expressed the view that, since, according to the position generally recognised in the legal theory, the general duty to maintain safety means the duty of care; negligence is one of the forms of fault under Subsection 104(2) of the LOA; and, under its Subsection 1050(1), the fault of the person who caused unlawful damage is presumed, the defendant bears the burden of proving that the defendant did not breach the duty to maintain safety. For this burden of proof to be formed, the claimant must have proved that damage was caused in consequence of a threat created by the defendant and that the defendant's fault – i.e. a breach of the general duty to maintain safety – is not clearly precluded, given the circumstances of the case.[*36]

The line of argument taken by the Supreme Court is, in itself, understandable. However, given the structure of the general composition of tort, a breach of the duty to maintain safety is an element of unlawfulness rather than fault. One can argue that, in the event of liability based on a breach of the duty to maintain safety, unlawfulness and fault as prerequisites for liability are entwined or fused. Since the claimant must bear the burden of proof of unlawfulness, I find it a more logical solution to have the claimant prove, among other things, also the tortfeasor's breach of the duty to maintain safety.

Liability based on breach of the duty to maintain safety is, for the purposes of the structure of tortious liability, very similar to liability based on breach of a statutory duty (see clause 7 of the LOA's Subsection 1045(1)). If the claimant relies in its claim on breach of a safeguarding rule by the tortfeasor, the claimant must clearly prove breach of the respective safeguarding rule too. Demonstrating breach of the safeguarding rule may encompass, among other things, proving the fault of the tortfeasor, because the safeguarding rules of tort law usually require conduct constituting fault on the part of the obligated person. Therefore, there is a difficulty in seeing any fundamental difference between the two liability compositions, which may lead to a question of whether these two situations differing in the division of the burden of proof is indeed justified.

I find that placing the burden of proving a breach of the duty to maintain safety on the claimant would not make much of a difference with regard to the burden of proof in practice. For example, if A falls into an open manhole, A needs to demonstrate, if wishing to prove a breach of the duty to maintain safety, that there was an open manhole on B's immovable property and that A fell into it. Breach of the duty to maintain safety by B can be concluded from these circumstances. At the same time, B has an opportunity to, for

33 'Pargipidaja käibekohustus' [2020] Tallinn Court of Appeal Judgment in Civil Case 2-18-8345 (24 September 2020). At the time of writing of this article, the respective case was being adjudicated by the Supreme Court.

34 Säcker, Rixecker, and Oetker (n 8) s 823, marginal 89.

35 Hau and Poseck (n 15) s 823, marginal 42.

36 'Mittevaralise kahju rahalise hüvitamine nõuded' (n 16) para 10. Such a division of the burden of proof seems to be supported also by Tampuu (n 12) 235–36.

instance, prove at any time that B checked for the presence of manhole covers with sufficient regularity – i.e. that B made every reasonable effort to prevent the risk emanating from the manhole to third parties.

In conclusion, it could be argued that the fewer exceptions there are to the overall burden of proof, the clearer it is for the parties to the proceedings what they need to prove in order to defend their position.

6. Conclusion

Tortious liability based on breach of the duty to maintain safety, the core topic discussed in this article, is merely one example of how concepts developed in German legal scholarship and case law have reached Estonian legal practice. It can be argued that the definition, substance, and scope of application of the duty to maintain safety is looked at very similarly in German and Estonian case law.

Analysis of relevant Estonian case law enables one to conclude that the concept of liability based on breach of the duty to maintain safety has been successfully adopted by the Estonian courts. Naturally, the small number of court decisions does not allow one to draw extensive conclusions about whether the standard of conduct expected of persons by the courts (i.e. the standard of care) has become too high or low. Obviously, this is largely a matter of estimation.

According to Estonian case law, in contrast to German law, the burden of proof for breach of the duty to maintain safety lies with the tortfeasor. This difference can be explained with the aid of Subsection 1050(1) of the LOA, yet the justifiability thereof is subject to some doubt, especially visible when one compares liability based on breach of the duty to maintain safety with liability based on a safeguarding rule.

Finally, one can note with satisfaction that liability based on breach of the duty to maintain safety is a successful transplant from German to Estonian tort law. Perhaps the biggest threat to the application of such liability is that the courts will transform it into liability similar to strict liability. This might come about if the courts were to start substantiating the general duty to maintain safety as a duty to 'refrain from' harming another person or as a duty to 'ensure' non-harming of another person. From the decisions discussed in this article, it can be argued that this has not happened yet.

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Shareholder Exit in Estonian Private Limited Companies: Proposals of the Company Law Revision Working Group

1. Introduction

Because of its attractiveness, the private limited company is a widely used company form both in Estonia and in other European countries.[*1] Yet, the private limited company, being a closed company, has always been and always will be prone to conflicts between the majority and the minority shareholders.[*2]

Although many possible future shareholder conflicts could be alleviated by designing appropriate rules for resolving future disagreements into the articles of association or a shareholder agreement already when one is establishing a company, this may be difficult in practice. Failure to conclude a comprehensive statute or shareholders' agreement, one that foresees all possible future problems, can be explained, on the one hand, by the bounded rationality of shareholders, which underestimates future risks and, on the other hand, by the fact that the costs of producing complex contract documents may be too high for a small company.[*3] It must be noted also that, at the stage of setting up a company, future conflicts often are not foreseen or get overlooked. Furthermore, business relations are frequently intertwined with other types of close relationships (i.e. business partners are often also family members or good friends) that cannot be fully regulated by law. If the personal relations deteriorate, however, it is already too late for the shareholders themselves to regulate the problems.

Types of conflicts may vary, depending on whether the private limited company has a majority shareholder, the votes are divided equally between two shareholders, or there are voting blocs. The problems of a private limited company in a deadlock are undoubtedly more severe, since in this situation even the

1 According to German legal literature, there are more than a million private limited companies in Germany (there, GmbH entities); see F Wedemann, *Gesellschafterkonflikte in geschlossenen Kapitalgesellschaften* (Beiträge zum ausländischen und internationalen Privatrecht 99, Mohr Siebeck 2013) 1. – DOI: https://doi.org/10.1628/978-3-16-152541-4. The same is true for Estonia: in 2018, the country had nearly 200,000 private limited companies. See J Järve, 'Eesti ühingute statistiline ülevaade' ['Statistical Overview of Estonian Companies'] (2019) 6 <https://centar.ee/wp-content/uploads/2019/08/2019.06.13-Eesti-%C3%BChingute-statistiline-%C3%BClevaade-l%C3%B5plik-1.pdf> accessed 2 July 2021.

2 German legal literature has expressed the view also that, especially in small companies, conflicts between shareholders are easily encountered. See Wedemann (n 1) 1.

3 Wedemann (n 1) 61–80.

day-to-day management of the company may become hampered, while the problem in a private limited company with a majority shareholder tends to be that the majority abuses its rights and the minority responds, in turn, with obstruction, which is manifested mainly in various kinds of legal disputes that exhaust the company. Even if the court solves one legal dispute, it does not essentially resolve the conflict between the shareholders, since the only real solution for the arguing shareholders would be to not continue together in the same company. One can assume, therefore, that a private limited company needs proper exit rules that would not only benefit the shareholders but also protect the company.

In 2016, the Estonian Ministry of Justice launched the project for the Estonian Company Law Review.[*4] Among other issues, the aim of the project was to analyse that of the legal remedies available for minority shareholders to deal with the various types of conflict situation and the compatibility of existing remedies with the needs of practice and to propose, if necessary, amendments to existing law. In 2018, the working group of company-law experts[*5] presented its proposals for amendment of the law.[*6]

This article examines shareholder exit in a private limited company in current Estonian law in comparison with similar regulations of some other European countries. The comparison is based on German, Swiss, Belgian and Dutch law. These countries were selected for analysis by the working group too, on the grounds that Belgium and the Netherlands already have comprehensive regulation in place in this field, while the system of claims specific to Estonian private law, as well as Estonian civil procedural law, are based largely on German and Swiss law. The aim for the article is to give an overview of current Estonian law and the proposals put forth for resolving conflicts between shareholders by the working group of Estonian company law experts.

2. Current Estonian law

At present, Estonian company law has no general rules regulating a private limited company's shareholder exit. Estonian Commercial Code[*7] regulates only the exclusion of a shareholder in case he or she has materially breached his or her obligations. According to Section 167 (1) of the CC, a court may exclude a shareholder from a private limited company on an action brought by a private limited company if the shareholder has failed to perform his or her obligation to a significant extent without good reason or has otherwise significantly damaged the interests of the company and, despite a written warning from the company, has neither performed the obligation nor terminated the damage. Paragraph 167(2) of the CC provides that an action for the exclusion of a shareholder may be brought on behalf of a private limited company by shareholders whose shares represent more than half of the share capital, unless the articles of association require greater representation. According to Section 167(3) of the CC, if the shareholder is excluded, his or her share shall be sold by public auction or by other means determined by the court.

There are several problems related to the above-mentioned provisions. For example, there is lack of clarity with regard to what it means to 'bring an action on behalf of a private limited company'. It is also unclear whether the shareholders are special representatives of the company or does it merely mean that, before applying to the court, the shareholders must adopt a corresponding resolution. It has been noted in the legal literature that, on account of the mandatory nature of the regulations, it is probably not possible to stipulate an exclusion procedure different from this in the articles of association of the company.[*8] Likewise, the procedure of selling the share provided for in paragraph 3 is neither effective nor a means of granting the excluded shareholder a fair price for his or her share.

The exclusion of a shareholder has not featured very often in Estonian case law. The Supreme Court has stated in only one of its decisions that if a minority shareholder significantly harms the interests of a private

4 Ministry of Justice of Estonia, 'Ühinguõiguse kodifitseerimise lähteülesanne' ['Terms of Reference of the Company-Law Review'] (2016) <www.just.ee/sites/www.just.ee/files/uhinguoiguse_revisjoni_lahteulesanne_loplik_10.5.2016.pdf> accessed on 2 July 2021.

5 The authors of this article, alongside other Estonian legal scholars, were members of the above-mentioned working group.

6 Ministry of Justice of Estonia, 'Ühinguõiguse revisjoni analüüs-kontseptsioon' ['Analysis Concept for the Company-Law Review'] (2018) <www.just.ee/sites/www.just.ee/files/uhinguoiguse_revisjoni_analuus-kontseptsioon.pdf> accessed on 2 July 2021.

7 Commercial Code (äriseadustik). RT I, 04.01.2021, 46 (CC).

8 K Saare and others, *Ühinguõigus I. Kapitaliühingud* ['Company Law I: Limited Companies'] (Juura 2015), marginal note 1197.

limited company (e.g. if he or she tries to block the activities of the company), the majority shareholders may require his or her exclusion from the company.[*9]

Furthermore, there are currently no rules in Estonian law governing the right of a minority shareholder to demand exit from the company even when there are long-standing fundamental disagreements between shareholders. In such a situation, the only remedy would be, in essence, to bring these disagreements to an end via dissolution of the company, but if the shareholders do not adopt the respective decision, the disagreement may result in compulsory dissolution or even bankruptcy, which is a good solution for neither the shareholders nor the creditors. When a minority shareholder wishes to exit a private limited company, his or her only option is to sell the share. However, shares of a private limited company are, as a rule, not freely transferable.[*10] Therefore, the only one who might be interested in buying a minority share could be the majority shareholder, who is usually not interested in acquiring such a minority shareholding – after all, he or she already controls the company. Even if the majority shareholder does wish to buy out the minority, there is no reason to offer the minority a fair price for his or her share.

The Estonian legal literature has raised the question, however, of whether a shareholder's exit right could be derived from the fact that, fundamentally, the relations between shareholders are very similar to those between the parties to a long-term contract.

According to Section 196(1) of the Law of Obligations Act,[*11] each party in a long-term agreement may extraordinarily terminate the contract with good reason without giving advance notice, particularly if the party terminating the contract cannot reasonably be expected to continue performing the contract until the due date agreed upon when all the circumstances and the mutual interests of the parties have been taken into account. Paragraph 196(2) of the LOA provides that if the other party breaches his or her contractual obligation, the contract may be terminated only after the expiry of a reasonable period granted to the party having failed to fulfil his or her obligation and only if he or she does not remedy the breach within that period. The setting of an additional time limit is not necessary only if the breach is fundamental.[*12] According to Section 1(1) of the LOA, the general provisions of the LOA apply to all contracts and other multilateral transactions, as well as to contracts that, although not specified by law, are not contrary to the content and meaning of the law and to non-contractual relations. Hence, if the relationships that arise between the shareholders are to be regarded as a contract, Section 196 of the LOA, as a basis for extraordinary termination, should apply to the relations between a company's shareholders too.[*13] It is argued, therefore, that terminating the 'participation' in the company should be possible also.[*14]

In addition to the general provisions, this act regulates the partnership agreement.[*15] Therefore, one can ask whether the provisions of LOA regulating partnership agreement (at least the general regulations) could be applied to the relations of the shareholders of a private limited company. Namely, Section 597(1) of LOA provides that a partner has the right, at any time, to terminate a contract of partnership established for an unspecified term. In contrast, a contract of partnership that is entered into for a specified term may be terminated only with good reason. The primary reason in this regard shall be a material violation of an obligation by another partner. The above-mentioned right of termination is balanced by Section 597(4) of the LOA, which provides that the partnership agreement may not be terminated at a time when the dissolution of the partnership would unreasonably damage the lawful interests of the other partners. If a partner terminates a contract of partnership at such a time without good reason, the terminating party is required to compensate for any damage incurred by the other partners for this reason.[*16]

9 Supreme Court Civil Chamber Decision 3-2-1-197-11, para 35.

10 According to ss 149(1) and (2) of the CC, a shareholder may freely transfer a share to another shareholder. Upon transfer of a share to a third person, the other shareholders have a pre-emptive right to acquire the share.

11 Law of Obligations Act (Võlaõigusseadus). RT I, 04.01.2021, 19 (LOA).

12 Fundamental breach is defined in s 116 (2) of the LOA. One of the conditions is that the breach is fundamental if the non-performance of an obligation was intentional or due to gross negligence or if the non-performance of an obligation gives the injured party reasonable cause to believe that the injured party cannot rely on the other party's future performance.

13 U Volens and M Moor, 'Kas osanikul on õigus osaühingust välja astuda ja nõuda oma osa eest ühingult hüvitist?' ['Is the Shareholder Entitled To Withdraw from the Private Limited Company and Claim Compensation from the Company for His Share?'] (2012) X Juridica 765.

14 Ibid 764–66.

15 LOA, paras 596–618.

16 U Volens and M Moor (n 13) 766.

The approach described above may be theoretically correct, but Estonian case law has not confirmed the exit right of a shareholder of a private limited company. This is probably at least partly caused by the fact that a general principle of company law stipulates that, when resolving disagreements between shareholders, one must take into account not only the interests of the arguing parties but also the interests of the company and all its interest groups.[*17] Likewise, the above-mentioned general rules of the law of obligations are still to be applied only selectively. For example, in the event of extraordinary termination of an agreement, the usual rules on return of what was delivered under the contracts and on compensation therefore would not apply.[*18] Furthermore, rules on how to calculate the compensation to be paid to a leaving shareholder should be borrowed from somewhere else using the analogy of law.

It has been noted also that the legal relations between shareholders are similar to co-ownership, which likewise can be terminated (normally with no special reason needed).[*19] According to Section 76 (1) of Estonia's Law of Property Act[*20], a co-owner has the right to demand the termination of co-ownership at any time Although an agreement between the co-owners may exclude the right to terminate the co-ownership, termination can nevertheless be required if there is a substantial reason for it. Unlike in the case of extraordinary termination of a contract, the co-owner has a right to demand termination of the co-ownership only by the courts. These regulations are not applicable for a private limited company, though, and assets of the company as a legal person cannot be considered the property of the shareholders and therefore cannot be divided among them.

One can ask as well whether it is possible for a shareholder who wants to leave a private limited company to force the other shareholders to vote for a resolution that allows him or her to exit. Estonian private law represents the concept that a shareholders' decision is a special type of multilateral transaction, according to Section 67(2) of the General Part of the Civil Code Act[*21], or GPCCA, and a vote cast in a shareholder meeting is a declaration of intention according to its Section 33(1). Section 68(5) provides that if a person is obliged to make a declaration of intention with certain content, the declaration of intention can be replaced with a court decision obliging that person to make such a declaration of intention. The claim to oblige a person to make a certain declaration of intention is meant to be a special legal remedy in case a person is obliged to make a declaration of intention but does not fulfil the obligation to do so.[*22]

In the legal literature it has been pointed out that, in order to apply Section 68(5) of the GPCCA, three preconditions must be met. First, a shareholder must be obliged to vote in a certain way pursuant to law, the articles of association of the company, or the shareholders' agreement, and, secondly, the content of the decision to be made must be unambiguously identifiable. Finally, the court decision has to oblige the refusing shareholder to vote for the decision.[*23] It has been argued that it is possible that, in certain circumstances, a shareholder may have an obligation to vote in favour of a particular decision on the basis of the general principle of good faith.[*24] This view is expressed in Estonian case law also, as the Supreme Court has stated that the content of the shareholder relationship and the obligations arising therefrom are determined, in particular, by Section 32 of the GPCCA, which is why shareholders must respect the principle of good faith in their relations and take into account each other's legitimate interests.[*25] However, legal

17 This principle has been pointed out also in Estonian case law (e.g. Supreme Court Civil Chamber Decision 3-2-1-89-14, para 36).

18 According to s 189 (1) and s 196 (4) of the LOA, in the event of termination of a contract, each party may claim for return of that which it delivered under the contract and delivery of the fruits and other gains received if said party returns all property that has been delivered to it.

19 U Volens and M Moor (n 13) 765.

20 Law of Property Act (Asjaõigusseadus). RT I, 22.02.2019, 11.

21 General Part of the Civil Code Act (Tsiviilseadustiku üldosa seadus). RT I, 23.05.2020, 4 (GPCCA).

22 It has been noted in the legal literature that if a person fails to comply with the obligation to make a certain declaration of intention, it may be possible to exercise other remedies, particularly to make a claim for compensation of damages or to demand a contractual penalty provided for in the contract, but without s 68(5) of the GPCCA the enforcement of the obligation would not be possible; see P Varul and others, *Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne* (Juura 2010), Saare, s 68 Comm 3.5.1).

23 M Vutt, 'Osaniku ja aktsionäri hääletamiskohustus kui hääle kohtulahendiga asendamise eeldus' ['The Voting Obligation of a Shareholder as a Prerequisite for the Replacement of the Vote by a Court Decision'] (2017) VI Juridica 394.

24 According to s 32 of the GPCCA, the shareholders of a company shall act in accordance with the principle of good faith and consider each other's legitimate interests in their mutual relations.

25 Supreme Court Civil Chamber Decision 3-2-1-89-14, para 21; 3-2-1-65-08, para 26; 3-2-1-7-10, para 31.

scholars[*26] and case law[*27] too have pointed out that the obligation to vote is aimed primarily at safeguarding the interests of the company and that if the interests of the shareholders are incompatible with these, preference should be given to the general interest of the company.

It can be inferred from the foregoing that, although it is (at least) theoretically possible for a shareholder to obtain the necessary decision that allows him or her to withdraw by forcing other shareholders to vote in favour of said decision, such an exit option is nevertheless uncertain and, most importantly, costly and time-consuming. It is likely that the litigation will use up so much time and money that, by the time the court issues a decision that is favourable for the leaving shareholder, his or her share will no longer have any value.

The authors of this article are of the opinion that, at present, there are no clear rules in Estonian law that would allow a shareholder an exit from the company and that the only possible exit is through a share transfer, which may not be possible – or, even if possible, may occur under conditions that are extremely harmful to the shareholder.[*28] The case law attests to many legal disputes between shareholders, with most of them derived from broader conflict between the majority and the minority.[*29] Therefore, Estonian company law would benefit from legal regulation of shareholder exit. The authors find that the exit rules should be clear and foreseeable for the shareholders and should not be governed by case-law. Legal clarity would be ensured if the law were to define, at least in general terms, the reasons for which a shareholder may withdraw or be excluded, and the law should provide for a procedure for determining (and disbursing) compensation in a way that considers the interests of the company and its interest groups.

3. The private limited company shareholder's exit right in other countries

3.1. Germany

To choose appropriate examples when developing relevant legal provisions, the company-law revision working group began by analysing the law of Germany and of Switzerland, which have a legal system similar to Estonia's.[*30]

German company law is similar to its Estonian counterpart in containing no rules governing the exit rights of a shareholder of a limited liability company.[*31] It has been noted that if a shareholder wants to leave the company, he or she can only sell the share, either to third parties or to the company, or let the company acquire the share in accordance with Section 34(1) of the GmbHG[*32] and the articles of association of

26 M Vutt (n 23) 396.

27 For example, in its decision 3-2-1-89-14, para 36, the Supreme Court pointed out that the voting obligation is aimed in particular at ensuring the interests of the company and preventing it from losing its ability to act for reason of disagreements between shareholders.

28 The possibility of exit is currently regulated only with regard to special situations such as merger, division, and transformation. Art 404(1) of the CC stipulates that upon merger of companies of different classes, a shareholder of the company being acquired who opposes the merger resolution may, within two months after entry of the merger on the registry card of the acquiring company, demand that the acquiring company acquire the exchanged share or shares of the partner or shareholder against monetary compensation. Para 448(1) of the CC foresees the same rules for division and s 488(1) for transformation. The monetary compensation shall be equal to the sum of money that the shareholder would have received from the distribution of remaining assets upon liquidation of the company if the company had been liquidated at the time the merger, division, or transformation resolution was adopted.

29 For example, in 2017–19, the Supreme Court settled, in total, seven disputes between majority and minority shareholders of the same private limited company. See Supreme Court Civil Chamber Decision 2-16-18531, 2-16-3492, 2-16-15457, 2-16-11216 (twice), 2-16-9415, and 2-17-16390. In cases involving a typical shareholder conflict, there are several simultaneous litigation procedures, which include contesting shareholder resolutions, demanding information, and claiming compensation of damages.

30 The Estonian Supreme Court has expressed the view that similar laws and practices in other countries can be considered, at least in private law, as reference material for determining the meaning and purpose of Estonian law. The above applies primarily in situations wherein there is no practice of implementing a provision in Estonia while elsewhere practice has developed in the case of a similar provision. The Supreme Court noted that this consideration pertains primarily to countries with which Estonia has a broadly similar legal system and generally similar practice in the implementation of laws (see Supreme Court Civil Chamber Decision 3-2-1-145-04, para 39).

31 Gesellschaft mit beschränkter Haftung (GmbH).

32 Gesetz betreffend die Gesellschaften mit beschränkter Haftung in der im Bundesgesetzblatt Teil III, Gliederungsnummer 4123-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 16 des Gesetzes vom 22. Dezember 2020 (BGBl. IS 3256) geändert worden ist.

the company.[*33] Paragraph 61 of the GmbHG provides, additionally, that the company may be dissolved via a court ruling if the achievement of the corporate purpose becomes impossible or if there are other important reasons for dissolution rooted in the circumstances of the company. According to the legal literature, Section 61 is intended to compensate for the fact that a shareholder has no statutory right of withdrawal for good reason. The articles of association often do not provide for a right of withdrawal or exclusion of shareholders. The corporate documents often attach special requirements to the transferability of shares, which is otherwise free by law. Here, the right to apply for dissolution of the company is not, however, a right of every individual shareholder but merely a minority right, one that can be executed only by shareholders who own at least 10% of the share capital.[*34]

Nevertheless, German case law has affirmed the exit right of a shareholder based on the shareholder loyalty obligation, the basic principles for the protection of minority shareholders, and the extraordinary termination right of a party to a long-term legal relationship.[*35] In German legal literature, the right of exit for good reason is considered to be an inalienable right of a shareholder, a right that cannot be excluded or restricted but only extended or specified in the articles of association.[*36] This right can be exercised if there is a valid reason, if less onerous measures cannot be taken for the same end, and provided that the company retains its equity capital.[*37] Valid reasons consist of circumstances that make it unreasonable for the shareholder to remain in the company.[*38] The prerequisites for withdrawal are that the shareholder has fully paid his or her contribution to the share capital and that the compensation paid to the shareholder does not violate the principle of the equity capital's preservation. Otherwise, the shareholder cannot exit the company, but he or she can apply for its dissolution under Section 61(1) of the GmbHG.

Under German law, shareholders of companies in deadlock may also exercise the right of exit. Among the other valid reasons are significant changes in the legal and economic conditions of the company, a situation in which a private limited company is transformed into a subsidiary of a group of companies, and long-term oppression by majority shareholders.[*39] Not all disagreements between shareholders can be considered serious enough to justify exit, however. For example, it is not sufficient if the shareholder is, for some legal or factual reasons, unable to sell the share or if he or she just urgently needs money.[*40] Neither does mere persistent unprofitability of the company justify withdrawal, since this circumstance affects all shareholders in the same way. The same is true of a situation wherein the company lacks correct accounting.[*41] At the same time, the legal literature states that this category of remedies still is extremely rarely used and that most corporate conflicts in Germany are, for some reason, still being resolved through challenging of decisions.[*42]

One can conclude that there are no rules on the withdrawal and exclusion of shareholders in Germany, while the country's case law still recognises this right. Furthermore, a shareholder who owns at least 10% of the share capital is able, as a last resort, to demand the dissolution of the company through the courts.[*43] One of the reasons for which shareholder exit rules have not been introduced into German law is that these rules often are found in the articles of association of German companies.[*44]

33 A Heidinger, S Leible and J Schmidt (eds), *Kommentar zum Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbH-Gesetz)* (3rd edn, C.H. Beck 2017) s 34, Sosnitza, marginal note 43.

34 H Fleischer and W Goette, *Münchener Kommentar zum GmbHG* (2nd edn, C.H. Beck 2016), Limpert, s 61, marginal note 1.

35 H Wicke, *Beck'sche Kompakt-Kommentare. Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (4th edn, C.H. Beck 2020), Anh, s 34: 'Austritt und Ausschließung eines Gesellschafters', marginal notes 10–13.

36 BeckOK GmbHG/Schindler (46th edn 2020) s 34: 'GmbHG', marginal note 163.

37 Ibid s 34, marginal notes 171–75.

38 The German Federal Supreme Court has made several decisions on this matter, e.g. BGH, Urteil vom 1.4.1953 – II ZR 235/52. BGHZ 9, 157 [162]. – NJW 1953, 780; Urteil vom 16.12.1991 – II ZR 58/91. BGHZ 116, 359 [369]. – NJW 1992, 89.

39 Heidinger and others (n 33) s 34, Sosnitza, marginal notes 52–54.

40 Ibid s 34, Sosnitza, marginal note 52.

41 Ibid s 34, Sosnitza, marginal note 54.

42 Wedemann (n 1) 564.

43 Estonian company law does not include the shareholder's right to apply for the dissolution of the company. Such a remedy is foreseen only for partnerships (per s 105(1) and 126 of the CC).

44 According to the German legal literature, in 2011 such rules existed in the articles of associations of 67% of companies with several shareholders. See Wedemann (n 1) 473.

3.2. Switzerland

In Switzerland, unlike in Germany, the shareholder's right to withdraw from the company is regulated to some extent. Paragraphs 822(1) and (2) of the Swiss Civil Code (*Obligationenrecht*), or OR*[45], provide that a shareholder may, for a good reason, apply to the courts for permission to withdraw from the company. The articles of association may grant a shareholder the right to withdraw and make this subject to certain conditions. According to Section 821(3) of the OR, a shareholder also has a right to apply to the courts to request the dissolution of the company when there is good cause. Instead of dissolution, the court may opt for an alternative solution that is appropriate and reasonable for the persons concerned, such as the payment of a financial settlement to the shareholder requesting dissolution, commensurate with the fair value of his capital contribution. The above-mentioned paragraphs of the OR also foresee the company's right to apply to the courts for the exclusion of a shareholder when there is a valid reason for this. In addition, the articles of association may provide that the shareholders may decide on the exclusion of a shareholder themselves.

According to the legal literature, Swiss law has significantly extended the judge's right to settle a case of this nature. In practice, however, this right has not been exercised extensively by the courts; i.e. the judges still tend to be conservative.*[46]

3.3. Belgium

For another point of view on the legal regulation of shareholder exit, the working group also examined Belgian law.

In Belgian company law (regulated in *Wetboek van vennootschappen*, or WV)*[47], the exit rights of a shareholder of a private limited company are regulated in articles 636–641.

The fundamental principle for shareholders' exit is that it is an *ultima ratio* remedy; it can only be used if other measures fail to solve the problem. The procedure is swift, with the aim being to resolve the conflict as soon as possible (it is a summary proceeding). The court has the power to decide whether there is a 'valid reason' for implementing such a measure. The rules governing the right of exit are mandatory, and shareholders cannot deviate from those rules by specifying otherwise in the articles of association.

According to Article 636 of the WV, one or more shareholders owning shares that, in total, have a nominal value or par value of 30% of the capital of the company may, for legitimate reasons, claim in court for another shareholder to transfer his or her shares to the plaintiff(s). After the summons has been served, the defendant may not dispose of his or her shares except with the consent of the court or the parties to the dispute. Except with regard to the right to dividends, the court may order that the rights attached to the shares to be transferred be suspended. There is no opening for appeal against these decisions (per Art. 638 of the WV).

The claim cannot be brought by the company or by a subsidiary of it. This remedy is often exercised in cases wherein a company has reached deadlock where it is not possible *per se* to 'blame either side' (or where, on the contrary, it could not be argued that both sides can be blamed in the same way).

In Belgian case law, valid reason exists when, for example, a significant threat to the interests of the company or its sustainability is present and in situations that fall under the British Unfair Prejudice Rule*[48]

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45 Schweizerisches Zivilgesetzbuch (Fünfter Teil: Obligationenrecht) vom 30. März 1911 (in effect from 1 February 2021) <www.fedlex.admin.ch/eli/cc/27/317_321_377/de> accessed 2 July 2021.

46 Wedemann (n 1) 573.

47 Wetboek van vennootschappen. Opgeheven door W 2019-03-23/06, art 34, 084; Inwerkingtreding : 01-05-2019 en uiterlijk op 01-01-2020; zie overgangsbepaling: art 38 tot 44 (2019) <www.ejustice.just.fgov.be/cgi_loi/change_lg_2.pl?language=nl&nm=1999A09646&la=N> accessed 2 July 2021.

48 This remedy was already in place in the law of the UK as far back as in 1948, and before the corporate-law reform of 2006 it was regulated by arts 459–561 of the Companies Act. The Companies Act in effect since 2006 (available at <www.legislation.gov.uk/ukpga/2006/46/contents>) also provides for such a remedy; namely, art 994 foresees that a shareholder may apply to the court on grounds that the company's affairs are being, or have been, conducted in a manner that is unfairly prejudicial to the interests of members generally or such that an actual or proposed act or omission by the company is, or would be, so prejudicial. The shareholders whose rights are affected may represent all or only some of the shareholders, but the condition that must be met if they are to bring charges is that at least the rights of the petitioner have been violated. This remedy is considered to be complex and flexible because the court has the right to assess various aspects of the company's business

(e.g. cases of abuse caused by the majority at the expense of a minority or situations wherein a minority maliciously blocks decisions necessary for the activities of the company). Any material breach of the obligations of the shareholder may constitute valid reason. Such infringement might occur, for instance, in a situation wherein the shareholder has not honoured the commitment to participate in the increase of capital or in a situation in which the shareholder is expected to be active but instead shows complete passivity with regard to the company's affairs. Significant personal disputes between shareholders (which may be connected with, for example, a divorce) also constitute valid reasons.[*49]

The price at which a share must be disposed of has to be fair. It is determined by the court, usually relying on an expert. The case law demonstrates the use of several distinct methods to determine the price. Often, the DCF method[*50] is used, but sometimes the value of the share is determined on the basis of accounting value instead. It is also common for the court to ask an expert to calculate the value by using several methods and then calculate the value as an average of the figures produced.[*51]

Under Belgian law, the principle 'all or nothing' applies. That is, once a shareholder has initiated the proceeding, he or she cannot end it on the grounds that he or she does not agree with the compensation specified; neither is it possible to transfer his or her share after the initiation of proceedings.[*52]

3.4. The Netherlands

In the Dutch Civil Code[*53], the exit options for a shareholder of a closed company are regulated in articles 2:336–2:343.[*54] Where Belgium's provisions governing exit rights are relatively compact and clear, Dutch law is more complicated.

According to Dutch law, one or more shareholders, who solely or jointly have provided at least one third of the issued share capital, may make a claim in court from another shareholder who, through his conduct, is harming or has harmed the interests of the company in such a way that continuation of his share ownership cannot reasonably be tolerated any longer, such that he or she is to transfer his or her shares to the plaintiff(s) (see articles 2.336 and 2.341 of the BW). Article 2:336(2) of the BW, similarly to Belgian law, foresees that the claim may not be presented by the company itself or a subsidiary of it. If the aggrieved shareholder is an investment firm that only holds the shares, it can present the above-mentioned claim only if the actual shareholders agree.[*55]

Article 2:337(1) of the BW must also be regarded as an essential provision, according to which, if the articles of association or a shareholders' agreement features an arrangement for resolving such disputes, it is not possible to appeal to that arrangement in derogation from the law to the extent that it makes the transfer of shares impossible or extremely difficult. According to Article 2:338(1) of the BW, the defendant may not, during the court procedure,[*56] dispose of or encumber his or her shares without the plaintiff's consent. However, if the plaintiff refuses to consent to this action, the court may, at the defendant's request, give that consent if the defendant has a reasonable legitimate interest in it.

operations and simultaneously resolve different types of conflict. See further details provided by M Vutt, *Systematics of Shareholder Remedies – Origins and Developments* (2010) XVII Juridica International 194.

49 A Bertrand and A Coibion, 'Shareholder Suits against the Directors of a Company, against Other Shareholders and against the Company Itself under Belgian Law' (2009) 6(2–3) European Company and Financial Law Review 270, 295–96. – DOI: https://doi.org/10.1515/ecfr.2009.270.

50 The discounted cash flow method is used also to calculate the compensation paid to minority shareholders in the event of take-over, and it has also been considered appropriate in Estonian case law. See Supreme Court Civil Chamber Decision 3-2-1-145-04, para 34.

51 Bertrand and Coibion (n 49) 297.

52 See H de Wulf, 'Exit Rights and Forced Exits in Belgium' (presentation at the conference Commercial Code 20: Experiences and Development Opportunities of Estonian and European Company Law, Tartu, 22–23 October 2015) <www.oi.ut.ee/sites/default/files/oi/hans_de_wulf.pptx> accessed 2 July 2021.

53 'Dutch Civil Code (Civil Code of the Netherlands)' (English translation) <www.dutchcivillaw.com/civilcodegeneral.htm> accessed 2 July 2021 (BW).

54 The relevant rules are situated in the part of the BW that regulates the rules for resolving disputes between shareholders.

55 According to art 2:336(3), the District Court of the domicile of the company has exclusive jurisdiction in the first instance over the right of action. An appeal against its decision may be lodged only with the Enterprise Chamber (*ondernemingskamer*) of the Amsterdam Court of Appeal.

56 Meaning from the moment of the defendant having received the case materials until the entry into force of the court decision.

Under Dutch law, experts shall be involved in the procedure. Article 2:339(1) of the BW provides that the court is to appoint one or more experts responsible for drawing up a written opinion on the value of the shares in question. Where an arrangement related to the assessment of the value of shares applies between parties on the basis of the articles of association or the shareholders' agreement, the experts shall make their report with due observance of that arrangement. If, however, the rules foreseen in the articles of association or in the contract would lead to a manifestly unfair result in the effort to determine the fair value, the court may disregard it (per Art. 2:340(3) of the BW).

Article 2:341(1) of the BW sets forth the rules on alienation of the shares, and according to those regulations the plaintiff must transfer his or her share within two weeks from the date on which the final decision has been served to the defendant. Similarly, the applicant is obliged to pay a fixed value (price) for the shares at the time of receiving them. If other shareholders have joined the original claimant in the proceedings, they are entitled to the same right as the applicant. The transfer of the holding is to be in line with the initial proportion of the holding to the maximum extent possible (Art. 2:195 of the BW).

Article 2:343 of the BW regulates the reverse procedure, the withdrawal. A shareholder who has been somehow damaged by the actions of other shareholders in such a way that he or she cannot reasonably be expected to continue to participate in the company may bring an action against the other shareholders for exiting the company while demanding that the other shareholders acquire his or her shares. In certain circumstances, it is possible to bring such an action against the association also, but the rules foreseen for the acquisition of a company's own shares must be followed. In general, the withdrawal requirement is subject to the same principles as an exclusion application. The terms for a special procedural measure stipulated in Article 2:343(3) of the BW provide that, where a claim is brought against a shareholder, the latter shareholder may summon another shareholder or the company if he or she holds that such a claim should have been brought against them. Article 2:343(4) provides that, where a court determines the value of a share, it may, at the applicant's request, increase the price to a reasonable extent if a reduction in the value determined was linked to the actions of the defendant or someone else and the court concludes that the impairment should not be entirely borne by the claimant.

3.5. Summary of the experience of other countries

It is apparent from the above that countries with a private law system similar to Estonia have approached shareholder exit differently. In Germany, it is possible to apply to the court for the dissolution of the company. At the same time, German case law affirms the shareholder's right to leave the company for good reason or to exclude a shareholder from the company for good reason. This is justified by the fact that every party to a long-term legal relationship must be able to terminate that relationship if there is valid reason. In Switzerland too, there are rules on the dissolution of the company but, in addition to that, the right of exclusion and that of withdrawal are regulated. It has been noted, however, that the latter rules have not been fully implemented in practice. In the Netherlands, there is a complex and not very well-functioning set of rules on shareholder exit, while, finally, Belgium, on the other hand, has relatively simple and functional legislation in this domain.

One can conclude, therefore, that, though the solutions may be different, all of the European countries considered have, at least to some extent, established shareholder exit regulations.

4. Proposals of the working group for amendment to Estonian company law

As a result of Estonian company law revision, the working group proposed repeal of the provision currently regulating a shareholder's exclusion and inclusion of new exit rules in the law, which would provide new, clear provisions for shareholder exit. The proposal covers both the shareholder's right to withdraw from the company for good reason and the possibility of applying for the exclusion of some shareholders from the company when good reason exists.[*57] In October 2019, the working group for revision of Estonian company

[57] 'Ühinguõiguse revisjoni analüüs-kontseptsioon' (n 6) 742.

law presented a draft law for amending the Commercial Code. This comprises regulations addressing all of the above-mentioned subjects.*[58]

Under the proposed amendments, a shareholder may be excluded if there is valid reason for exclusion, which may be, in particular, activities by that shareholder that significantly jeopardise the achievement of the company's objective and the existence of other circumstances that, in light of all the circumstances and mutual interests, render it impossible to reasonably expect the private limited company to tolerate the future 'membership' of the shareholder in question. The draft also provides an illustrative list of circumstances that justify the exclusion of a shareholder. For instance, a shareholder may be excluded if he or she causes significant damage to the interests of the company. Said damage should, at least in general, be long-term and systematic if it is to qualify. Long-standing and insurmountable disagreements between shareholders that hamper the company's activities may form another valid reason.

The shareholder cannot be excluded, however, if the negative consequences that threaten the company could be overcome through other reasonable measures. What remedies are reasonable in a particular case depends on the situation and, in the event of a dispute, is to be decided by the court. In this setting, a shareholder who opposes the exclusion can demonstrate that there exist such reasonable measures as rule out the right of exclusion.

Shareholders holding at least 50% of the votes associated with the shares has the right to apply to the court for the exclusion of another shareholder. Therefore, an exclusion application can be submitted in cases of a company experiencing deadlock. A minority shareholder, on the other hand, cannot claim the exclusion of a majority shareholder, and 50% of the shareholding giving the right to submit an application takes into account all the votes in the company.*[59]

If the court excludes the shareholder, the decision must include the statement that the shareholder shall be deemed excluded once he or she receives compensation in the amount determined by the court in the same procedure. So long as this compensation has not been paid to the shareholder, the shareholder retains all shareholder's rights. If the compensation cannot be paid because its payment would be against the rules on the preservation of equity capital, the shareholder cannot be excluded; however, the shareholder(s) who initiated the exclusion procedure can apply to the court in this case for the dissolution of the company.

If there is a dispute as to the amount of compensation, it is to be determined by the court in the same court procedure. The compensation must be fair, since, in essence, the exclusion of a shareholder constitutes expropriation as that shareholder loses his or her ownership. The draft law provides that the compensation must, as a rule, correspond to the value of the share at the time the court order on the shareholder's exclusion is issued.

However, since the majority, by virtue of their controlling position, have an opportunity to reduce the compensation to be paid to the shareholder by decreasing the value of the share before court proceedings even begin (during their planning) and can continue to reduce it during the trial, the court is given the right to consider a time frame other than the time of the decision when determining the amount that constitutes fair compensation. When determining the amount of the fair compensation, the court may calculate it using any method of assessment that, under the circumstances, is the fairest. The principle is that the compensation must guarantee the excluded shareholder full economic compensation for the loss of his or her share and for the intervention in ownership.

The draft law also foresees the requirement to maintain equity capital. This means that, when paying compensation to a shareholder, the private limited company must comply with the requirements for the preservation of equity capital laid down by law.*[60] Ultimately, the equity-retention rule means that it may not always be possible to exclude a shareholder in the event of material assumptions being fulfilled. If compensation cannot be paid because its payment would bring the company into conflict with the requirements for the preservation of equity capital, the shareholder(s) who submitted the application for exclusion have the right to file an application in non-contentious proceedings and demand the dissolution of the company.

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58 'Ühinguõiguse revisjoni töörühma eelnõu' ['Draft Law of the Commercial Code Amendment Act'] (13.1.2020) <www.just.ee/sites/www.just.ee/files/ariseadustiku_ja_teiste_seaduste_muutmise_seadus.pdf> accessed 2 July 2021.

59 One of the reasons the majority shareholder cannot be excluded is that doing so would probably contradict the obligation to maintain equity capital.

60 According to the specification of requirements for the maintenance of equity capital (s 171(2) ((1)) of the CC), the net assets of the private limited company (total assets minus total obligations shown under liabilities on the balance sheet) are not allowed to be less than one half of the share capital or less than the amount of share capital specified in s 136 of the CC.

The draft law foresees rules for the withdrawal of a shareholder too, in circumstances in which there is valid cause. The right to withdraw is a minority right. A majority shareholder cannot withdraw from a company (because doing so in a manner compliant with the equity-retention requirements would be impossible), and also he or she seldom is interested in leaving a company he or she already has control over. To withdraw, the shareholder must submit a declaration of intention to the management board of the company. If the company does not object, it is not necessary to apply to the courts. If, however, the company considers the conditions for withdrawal not to be met, the company has the right to request court establishment of the nullity of the withdrawal.

A shareholder has the right to withdraw from a private limited company only if valid reason for doing so exists and, therefore, given all the circumstances and mutual interests, he or she cannot reasonably be expected to stay in the company. Valid reason exists, for example, in case the company has taken measures that, from the position of the withdrawing shareholder, result in a change in legal or economic relations within the company to an unreasonable extent. A valid reason can be any substantial restructuring that significantly infringes the rights of the shareholder wishing to withdraw. There may be valid reason also in a situation in which the majority has maliciously and purposefully (i.e. without real need) started to increase the share capital to a significant extent, thereby expressing a desire to 'dilute' the aggrieved shareholder's participation such that it becomes so marginal that he or she can no longer exercise even the most basic minority rights. In contrast, a valid reason would not exist when, for example, the shareholder wishes to sell his or her share but is unable to do so or if the shareholder has a claim against the company arising from contractual relations between the shareholder and the company. A shareholder shall not be entitled to withdraw if he or she can sell his or her shares at a fair price and thus leave the company.

Another vital condition is that the withdrawing shareholder must receive fair compensation for his or her share. The amount of compensation due shall be pinned to the time of withdrawal. If there is no dispute between the parties, the leaving shareholder does not need to go to court. If, on the other hand, the private limited company does not agree to the payment of compensation or to the amount determined for it, the shareholder may exercise a right to apply to the court and demand the compensation be determined and paid. The court has the right to take into account timing other than the time of submission of the application for withdrawal when determining what constitutes fair compensation – for example, it might do so in a situation wherein the economic situation of the private limited company has deteriorated significantly in the meantime because of objective factors beyond the control of the majority.

The exclusion of a shareholder must simultaneously comply with the requirement to maintain equity capital. Hence, even if there is a valid reason for withdrawal, the shareholder cannot withdraw if the payment of compensation would fall foul of the equity capital rules. In this case, the shareholder wishing to withdraw has the right to apply for the dissolution of the company.

In addition, the draft law enables the shareholders to introduce rules on exclusion or withdrawal in the articles of association that differ from rules provided by law.*[61]

Finally, the draft law is designed to introduce the possibility of applying for the dissolution of the company in case grounds for the exclusion or withdrawal of a shareholder exist when it is not possible to comply with the requirements for the maintenance of equity capital. Accordingly, the dissolution of a private limited company is possible but only if the material assumptions made in relation to exclusion or withdrawal hold true. If the court has established that there is no valid reason for the exclusion or withdrawal of the shareholder, it is not possible to terminate the private limited company. Under the proposed amendments, the right to apply for dissolution cannot be excluded or modified via the articles of association.

[61] However, the requirements set forth for maintaining the equity capital are mandatory; that is, the articles of association shall not provide that a shareholder may be excluded or that the shareholder may withdraw even if the payment of the associated compensation would contradict the rules for preserving the equity capital.

5. Conclusions and future developments

During the review, the working group were in no disagreement as to whether such rules would be necessary in future Estonian law. Current law neither provides sensible solutions for resolving conflicts between the majority and the minority shareholders nor includes remedies for a company in deadlock. This situation cannot be considered acceptable in contemporary company law. Experience shows that the existing remedies are clearly insufficient. Being embroiled in various legal disputes only creates a burden on the company and thereby reduces the value of its shares or, in the worst case, leads to the dissolution or even bankruptcy of the company. Of course, shareholder exit rules are not a miracle cure for all possible problems, as this remedy is suitable only for companies in a relatively good economic situation that are able to pay compensation to the exiting shareholder. Every exit is accompanied by costs that burden the company to some extent. At the same time, practice shows that when shareholders attempt to resolve a conflict via other legal remedies, most actions are simply ones of protest that encumber the company even further.

Analysis of the law of other countries shows that the necessary rules in themselves can be laid down by law. Although there are currently theoretical possibilities for the exclusion and withdrawal of shareholders in Estonia, they have not been actualised in case law. Legal clarity is a value in its own, and in order to reach this objective, it is justified to introduce appropriate rules.

When drafting the proposals, the working group did not use the law of any particular country as a model. The proposed rules are combinations that synthesise the relevant regulations of several countries, considering, among other factors, the principles of Estonian law of obligations and civil procedure. The courts have been given an extensive right to substantiate the validity of the reasons for the exclusion and withdrawal of a shareholder, considering the circumstances of the particular case. In this respect, the proposed approach does not differ from the law of other countries, since it is not possible to resolve cases of this kind without discretion of the court.

The authors of this article admit that introducing the proposed rules probably necessitates specialist judges who are able to assess whether there is a valid reason for the exclusion or withdrawal of a shareholder in a particular case, along with whether the private limited company would remain in compliance with the law's requirements for the maintenance of equity capital after payment of the requisite compensation to the departing shareholders. However, the authors are of the opinion that the proposed solutions should help to bring at least some ongoing disputes between shareholders to an end and, thereby, avoid the dissolution or insolvency of the relevant private limited company in these cases.

At the time of writing, no official draft law has been submitted yet, so it is not known whether the proposals for amendments will be adopted. But the authors are of the opinion that legal regulation of shareholder exit is a fundamental necessity for improvement of Estonian company law.

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Protecting Trade Mark Proprietors Against Unfair Competition in EU Trade Mark Law

1. Introduction

The importance of modern trade marks has been seen in their economic role of reducing consumer search costs.[*1] In particular, the trade mark enables the consumer to identify the product sought by distinguishing it from other, similar products.[*2] In addition to the origin of the goods, the trade mark provides the consumer with information on their characteristics,[*3] enabling him or her to assess the quality of the products offered under the same trade mark. In consequence, trade marks have become a *de facto* guarantee of a certain quality of the goods or services. This in turn motivates businesses to offer good and uniform quality, ultimately fostering competition on the basis of the quality of goods.[*4] To protect the ability of trade marks to perform this role, they need protection against the use by third parties of similar signs in ways that could create confusion on the part of the consumers. Ensuring such protection has traditionally been the role of trade mark law.

In addition to helping consumers make purchasing decisions, trade marks can be a valuable commercial tool for businesses. They can be used to create an attractive image of the goods or services that they designate, through advertising and marketing. Over time, a trade mark can gain a meaning that, apart from designating the goods or services, conveys certain characteristics and values (e.g. a luxury lifestyle, adventure, or youth).[*5] Through this, the trade mark acquires a selling power – i.e. the ability to attract

1 On the role of trade marks in reducing search costs, see WM Landes and RA Posner, 'Trademark Law: An Economic Perspective' (1987) 30 JL & Econ 265. – DOI: https://doi.org/10.1086/467138.

2 For this reason, Drescher has compared the trade mark to a signal; see TD Drescher, 'The Transformation and Evolution of Trademarks – From Signals to Symbols to Myth' (1992) 82 Trademark Rep 301, 323–324.

3 On the characteristics for which trade marks provide information to the consumer, see A Griffiths, 'Quality in European Trade Mark Law' (2013) 11 Nw J Tech & Intell Prop 621, 625–627.

4 Landes and Posner (n 1) 269, 270, 280. See also Griffiths (n 3) 631, 635–637.

5 Drescher calls it the myth associated with the trade mark; see Drescher (n 2) 328. On the use of trade marks to communicate information, see also C Davies, 'To Buy or Not To Buy: The Use of a Trade Mark As a Communication Tool Rather Than As a Link between a Product and Its Source – a Further Consideration of the Concept of Dilution' (2013) 35(7) EIPR 373.

and retain customers.[*6] By increasing the value of the designated goods in the eyes of consumers, the trade mark may allow its proprietor to charge a higher price for them. The latter makes the proprietor vulnerable to commercial practices of third parties that either attempt to damage the trade mark's attractive force or take advantage of its status and reputation without putting in the necessary effort and investment. Such practices can harm the trade mark proprietor's business and distort competition, thus constituting unfair competition.

This article shows how EU trade mark law has developed from protecting consumers against confusion to extending the protection to the business value of trade marks and protecting their proprietors against commercial practices that damage or unfairly exploit this value.[*7] At the same time, the Court of Justice of the EU (CJEU) has been careful to allow those practices that can be deemed acceptable as part of fair competition. Thereby, EU trade mark law is increasingly becoming an EU law of unfair competition regarding practices involving the use of trade marks. The article is an attempt to explain these developments by looking at the reasons for specific policy choices and decisions of the CJEU, as well as the wider context of EU law dealing with unfair competition. In due course, the reader is given an understanding of how EU law addresses the protection of the commercial value of trade marks.

2. Prevention of unfair competition as prevailing consideration in shaping the rights of trade mark proprietors in EU trade mark law

In the EU, the trade mark proprietor's exclusive rights are set out in Art. 10(2) of the Trade Marks Directive[*8] (TMD) and Art. 9(2) of the EU Trade Mark Regulation[*9] (EUTMR). These provisions lay down conditions for trade mark infringement that differ on the basis of whether the sign used by the third party and the goods or services for which it is used are identical or similar to those for which the trade mark is protected and whether the trade mark has acquired a reputation. In all cases, the use must be in the course of trade[*10] and in relation to goods or services[*11]. In order to ensure the same protection for trade mark proprietors in all member states, the CJEU has striven to give a uniform interpretation of the 'use' that the proprietor may prohibit.[*12] Recent case law has shown a great emphasis on considerations related to unfair competition in shaping the content and scope of the exclusive rights of the trade mark proprietor. These are most prevalent in the so-called functions theory, which has been applied to determine infringement of all trade marks, including the so-called simple marks, and the additional layer of protection granted to trade marks with a reputation. Both cases are examined next.

2.1. Simple trade marks – the functions theory as a means to protect fair competition

The legal protection provided for in Art. 10(2)(a) and (b) TMD and Art. 9(2)(a) and (b) EUTMR extends equally to simple and reputed trade marks. Pursuant to Art. 10(2)(a) TMD and Art. 9(2)(a) EUTMR, the proprietor of a registered trade mark is entitled to prevent all third parties not having his consent from

6 According to Schechter, this is the most important function of the trade mark; see FI Schechter, 'The Rational Basis of Trademark Protection' (1927) 40 Harv L Rev 813, 825, 828, 830–831. – DOI: https://doi.org/10.2307/1330367.

7 The author has previously addressed the development of the functions of trade marks in the Estonian legal literature; see G Lepik, 'Kaubamärgi ülesanded ja kaitse Euroopa kaubamärgiõiguses' (2020) 5 Juridica 401.

8 Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (Text with EEA relevance) [2015] *OJ L336/1*.

9 Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (Text with EEA relevance) [2017] OJ L154/1.

10 On this requirement, see Case C-206/01 *Arsenal Football Club* [2002] ECR I-10273, para 40; Case C-772/18 *A (infringement by importing ball bearings)* (ECLI:EU:C:2020:341) paras 23–25.

11 An indicative list of such situations is in art 10(3) of the TMD. See joined cases C-236/08 to C-238/08 *Google France and Google* [2010] ECR I-02417, para 72; Case C-17/06 *Céline* [2007] I-07041, para 23.

12 TMD, Recital 10; *Arsenal Football Club* (n 10) paras 44–45.

using in the course of trade, in relation to goods or services, any sign where the sign is identical to the trade mark and is used in relation to goods or services that are identical to those for which the trade mark is registered (hereinafter 'double identity'). When there is no double identity but the sign used by the third party is at least similar to the trade mark and is used in relation to goods or services that are at least similar to the goods or services for which the trade mark is registered (hereinafter 'double similarity'), the proprietor of the trade mark is entitled to prevent such use pursuant to Art. 10(2)(b) TMD and Art. 9(2)(b) EUTMR if there exists a likelihood of confusion on the part of the public, including the likelihood of association between the sign and the trade mark. The wording of the provisions and recitals suggests that the protection afforded to the trade mark proprietor in the event of double identity is absolute, whereas in the case of double similarity only the trade mark's function of indicating origin is protected,[*13] meaning that the proprietor must prove the existence of a likelihood of confusion on the part of the public.[*14] In practice, however, the CJEU has begun to limit the protection afforded under the double identity rule in order to take into account the wider context of competition.

2.1.1. The trade mark as a guarantor of origin and quality – protecting consumers against confusion

According to Recital 16 of the TMD and Recital 11 of the EUTMR, the function of the protection afforded by a trade mark is in particular to guarantee the trade mark as an indication of origin. As early as the 1970s, the CJEU clarified that the essential function of the trade mark is to guarantee the identity of the origin of the marked product to the consumer or end-user by enabling him or her, without any possibility of confusion, to distinguish the product or service from others, of another origin.[*15] The Court later clarified that for the trade mark to be able to fulfil its essential role in the system of undistorted competition, it must offer a guarantee that all goods or services bearing it have been manufactured or supplied under the control of a single undertaking, which is responsible for their quality.[*16] The latter aspect of trade marks has been referred to as their quality function, forming part of the origin function.[*17]

In the early 2000s, the CJEU began developing the so-called functions theory. It held that the exclusive right under Art. 10(2)(a) TMD is intended to enable the trade mark proprietor to protect his specific interests as proprietor – i.e. to ensure that the trade mark can fulfil its functions. Thus, he can exercise this right only if the third party's use of an identical sign affects or is liable to affect the functions of the trade mark, particularly its essential function of guaranteeing to consumers the origin of the goods.[*18] In particular, the interests of the trade mark proprietor are not affected if reference to the trade mark is made for descriptive purposes to reveal the characteristics of a product and not to indicate its origin.[*19] On the other hand, there is an adverse effect on this function when consumers are likely to interpret the sign used by the third party as designating the undertaking from which the third party's goods originate and said use creates the impression that these goods come from the trade mark proprietor or an undertaking economically linked to it.[*20] Overall, the criteria used in the assessment largely correspond to those applied under Art. 10(2)(b) TMD.

Thus, in EU trade mark law, the origin function of trade marks has always played a central role in justifying the legal protection afforded to trade mark proprietors and in determining its scope. In connection with this essential function, the Court also recognised the quality function of trade marks. Although

13 See TMD, Recital 16; EUTMR, Recital 11. Cf Case C-93/16 *Ornua* (ECLI:EU:C:2017:571) para 29; Case C-223/15 *combit Software* (ECLI:EU:C:2016:719) para 27.

14 Case C-292/00 *Davidoff* [2003] ECR I-00389, para 28; Case C-291/00 *LTJ Diffusion* [2003] ECR I-02799, paras 48–49; Case C-245/02 *Anheuser-Busch* [2004] ECR I-10989, para 63.

15 Case 102/77 *Hoffman-La Roche v Centrafarm* [1978] ECR 01139, para 7.

16 Case C-10/89 *CNL-SUCAL v HAG* [1990] ECR I-03711, para 13. For later cases, see Case C-299/99 *Philips* [2002] ECR I-05475, para 30; *Arsenal Football Club* (n 10) paras 47–48.

17 See Opinion of AG Jacobs in Case C-337/95 *Parfums Christian Dior v Evora* (ECLI:EU:C:1997:222) para 41; Opinion of AG Mengozzi in Case C-487/07 *L'Oréal and Others* (ECLI:EU:C:2009:70) para 53.

18 *Arsenal Football Club* (n 10) paras 51–52.

19 Case C-2/00 *Hölterhoff* [2002] ECR I-04187, paras 16–17.

20 *Anheuser-Busch* (n 14) para 60; Case C-48/05 *Adam Opel* [2007] ECR I-01017, para 24. On application of these criteria in the case of advertising, see G*oogle France* (n 11) paras 89–90; Case C-323/09 *Interflora and Interflora British Unit* [2011] ECR I-08625, para 45.

the relevant EU instruments did not limit the functions that trade marks could perform,[*21] and the CJEU tended to refer to them in the plural, for many years the Court did not mention any other function in assessing the scope of the exclusive rights afforded to trade mark proprietors.

2.1.2. Recognition of other functions – protecting the business value of trade marks

As early as the 1990s, it was argued that, in addition to guaranteeing origin and quality, trade marks have other functions, which might be termed communication, investment, or advertising functions and which arise from the investment in the promotion of the mark. While these functions can be seen as derivatives of the origin function, they were regarded as values that deserve protection in their own right.[*22] Eventually, the CJEU too was ready to accept that the approach whereby the trade mark proprietor could prevent the use of his trade mark only if that use undermines its origin function does not take sufficient account of the various roles of trade marks in reality.[*23] In *L'Oréal and Others*, the CJEU reiterated its earlier view that the proprietor of a trade mark can exercise his exclusive right under what is now Art. 10(2)(a) TMD only if a third party's use of the sign affects or is liable to affect the functions of the trade mark. However, unlike in previous rulings, the Court noted that the functions of a trade mark include, in addition to its main function of guaranteeing to consumers the origin of the goods or services, other functions – in particular, those of guaranteeing the quality of the goods or services in question and of communication, investment, or advertising.[*24] This position was soon reiterated in subsequent decisions, including under the EUTMR.[*25]

As to the advertising function of a trade mark, the CJEU has stated that it is that of using a mark for advertising purposes designed to inform and persuade consumers. Accordingly, the proprietor of a trade mark is entitled to prohibit a third party from using an identical sign without the proprietor's consent, where that use adversely affects the proprietor's use of its mark as a factor in sales promotion or as an instrument of commercial strategy.[*26] In practice, however, the CJEU has given a narrow scope to the advertising function. The Court has clarified its nature in the context of the Google 'AdWords' referral service, holding that the use of a sign identical to another person's trade mark in such contexts is not liable to have an adverse effect on the advertising function of the trade mark.[*27] Although such use of a sign obliges the proprietor of that mark to intensify its advertising in order to maintain or enhance its profile with consumers, the purpose of the trade mark is not to protect its proprietor against practices inherent to competition. In the Court's view, internet advertising on the basis of keywords corresponding to trade marks constitutes such a practice in that its aim, as a general rule, is merely to offer internet users alternatives to the goods and services of the proprietors of those trade marks.[*28] Also, it does not deprive the proprietor of the opportunity to use his trade mark effectively to inform and persuade consumers.[*29]

The trade mark's investment function includes the possibility for the proprietor to employ the trade mark in order to acquire or preserve a reputation capable of attracting potential customers and retaining their loyalty, by means of not only advertising but also various other commercial techniques.[*30] This function is adversely affected when the use of an identical sign by a third party, such as a competitor, substantially interferes with the proprietor's use of its trade mark to acquire or preserve such a reputation. When the trade mark already enjoys a reputation, the investment function is adversely affected where the use

21 On the contrary, their recitals referred to the function of the protection afforded to trade marks as 'in particular' to guarantee the trade mark as an indication of origin.

22 Opinion of AG Jacobs in *Parfums Christian Dior* (n 17) para 42.

23 AG Trestnjak listed 12 functions performed by trade marks in his Opinion in Case C-482/09 *Budějovický Budvar* (ECLI:EU:C:2011:46); see para 63, note 26.

24 Case C-487/07 *L'Oréal and Others* [2009] ECR I-05185, para 58.

25 E.g. *Google France* (n 11) paras 77–79; *Interflora* (n 20) para 38.

26 *Google France* (n 11) paras 91–92; Case C-129/17 *Mitsubishi Shoji Kaisha and Mitsubishi Caterpillar Forklift Europe* (ECLI:EU:C:2018:594) para 37.

27 G*oogle France* (n 11) paras 93–94, 98; Case C-558/08 *Portakabin* [2010] ECR I-06963, paras 32–33.

28 *Interflora* (n 20) paras 56–58.

29 Ibid [59]; *Google France* (n 11) paras 96–97.

30 *Interflora* (n 20) paras 60–63; *Mitsubishi Shoji Kaisha* (n 26) para 36.

affects that reputation and thereby jeopardises its maintenance.[*31] In a similarity to its approach to the advertising function, the CJEU has laid down a strict standard for what constitutes undermining the investment function. Provided that the use of an identical sign by a third party takes place as part of fair competition, it is not sufficient for establishing an adverse effect on the trade mark's investment function that the proprietor is merely obliged to adapt its efforts to acquire or preserve an attractive reputation. For example, internet advertising on the basis of an identical keyword is allowed, provided that the ad neither confuses consumers as to the origin of the goods or services nor adversely affects the trade mark's advertising function.[*32] It is easier to imagine an adverse effect on the investment function in a situation in which the trade mark has already acquired a good reputation, since in that case the conduct of a competitor may damage that reputation. For example, in the case of luxury goods, the reputation of the trade mark may be damaged if, in the course of advertising, a third party places the trade mark in a context that might seriously detract from the image the trade mark proprietor has succeeded in creating around his trade mark.[*33] In some cases, the reputation of a trade mark may be damaged also by the characteristics of the third party using it. The CJEU has further limited reliance on this function by holding that the proprietor of a trade mark cannot rely solely on the fact that the use of an identical sign by a competitor may prompt some consumers to switch from goods or services bearing that trade mark.[*34] It follows that the damage to the reputation of the trade mark must be likely to affect the behaviour of the average consumer of the relevant goods or services.

The communication function of a trade mark has not been clarified by the CJEU. Recognition of this function is consistent with the fact that a trade mark can convey to consumers information on factors other than the origin of the goods or services that it designates, such as the non-physical characteristics of the product or the company that produced it (e.g. quality, reliability, or luxury).[*35] Such information may become part of the brand image as a result of considerable investment by the trade mark proprietor in advertising and promotion. Thus, it is argued, the capacity of the trade mark to act as a communication tool carrying a broader marketing message merits protection in itself.[*36] However, without further clarification by the CJEU, it is unclear how to distinguish the protection of this function from the recognition of the quality and investment functions of trade marks, especially if goods' quality is understood to include their intangible characteristics[*37].

2.1.3. The functions theory as a balancing mechanism to protect fair competition

At first glance, the approach taken by the CJEU in requiring damage to the functions of a trade mark as a condition for infringement under Art. 10(2)(a) TMD seems questionable, as the Directive grants trade mark proprietors protection that is absolute in the event of double identity[*38]. It has been found superfluous to require adverse effects on any function of the trade mark.[*39] From that point of view, the Court has restricted the protection of trade marks in the event of double identity.[*40] The reason for this may be the desire to consider and balance the competing interests and fundamental rights of all parties, rather than give trade mark proprietors absolute protection.[*41] The limitations of the trade mark proprietor's exclusive rights under Art. 14 TMD and the EUTMR are narrow and exhaustive and do not provide much space for

31 Ibid.

32 *Interflora* (n 20) paras 64, 66.

33 Case C-337/95 *Parfums Christian Dior v Evora* [1997] ECR I-06013, para 47. Cf *Interflora Inc v Marks & Spencer Plc* [2013] EWHC 1291 (Ch) [274]. For examples of cases when the context of the sale may damage the reputation of the trade mark, see Opinion of AG Jacobs in *Parfums Christian Dior* (n 17) para 51; Case C-59/08 *Copad* [2009] ECR I-03421, paras 57–59.

34 *Interflora* (n 20) para 64.

35 Opinion of AG Mengozzi in *L'Oréal* (n 17) para 54.

36 Ibid.

37 See *Copad* (n 33) paras 24–26; *Parfums Christian Dior* (n 33) para 45.

38 TMD, Recital 16; EUTMR, Recital 11. See also *Interflora* (n 20) para 36.

39 E.g. C Morcom, 'Trade Marks and the Internet: Where Are We Now?' (2012) 34(1) EIPR 52.

40 L Bently and others, *Intellectual Property Law* (5th edn, OUP 2018) 1117. – DOI: https://doi.org/10.1093/he/9780198769958.001.0001.

41 Opinion of AG Poiares Maduro in *Google France and Google* (ECLI:EU:C:2009:569) para 102; Opinion of AG Kokott in Case C-46/10 *Viking Gas* (ECLI:EU:C:2011:222) paras 59–68.

weighing different interests. Therefore, the CJEU has begun to balance these interests under the double identity rule, disregarding such adverse effects on the trade mark proprietor's interests as are outweighed by someone else's competing interests.[*42] Among other criteria, as can be seen from the examples above, the functions theory has made it possible to take into account, in the infringement analysis, the objective of protecting fair and reasonable competition[*43].

At the same time, by accepting additional functions besides the origin function, the CJEU has recognised that a trade mark is not just a symbol providing information about the origin and expected quality of a product or service but also an instrument of commercial strategy used by businesses for various purposes. It is, however, questionable whether it is justified to take these additional functions into account in assessing infringement of simple trade marks. Advertising, investment, and communication functions are performed mostly by trade marks with a reputation, for the protection of which Art. 10(2)(c) TMD and Art. 9(2)(c) EUTMR provide a separate basis. It is argued that recognition of these functions in assessing infringement under the double identity rule leads to the protection of simple trade marks from undermining of functions they do not perform.[*44] The prevailing view of academics is that in the case of simple trade marks, only the essential function of indicating origin should be protected.[*45] The European Commission proposed clarifying that only the origin function is relevant under the double identity rule,[*46] but this proposal did not find approval in the proceedings that led to the adoption of the current TMD and EUTMR. Conversely, the CJEU has explicitly held that these other functions are not limited to trade marks with a reputation but can also be performed by a simple trade mark in so far as its proprietor uses it to that end – in particular, for purposes of advertising or investment.[*47]

Recognition of these other functions may also reflect a desire to protect the proprietors of trade marks that have not yet acquired an attractive reputation from acts or practices of competitors that may impair their ability to use these trade marks for this purpose. Otherwise, the proprietors of simple trade marks would not be adequately protected against acts of unfair competition. For example, if in the event of double identity the proprietor were protected only against adverse effects to the origin function, he would normally not be able to prohibit a third party from using a sign identical to the trade mark for referring not to the third party's own goods or services but to those of the trade mark proprietor (e.g. in comparative advertising). While such uses may negatively affect the commercial interests of the proprietor and distort competition, it is generally not possible to establish an adverse effect on the origin function of the trade mark.[*48] The risk of blurring the scope of protection between simple and reputed trade marks is reduced by the fact that, as the examples cited above show, the CJEU has set a high threshold for accepting that a function other than that of indicating origin has been adversely affected. In doing so, the Court appears to have sought a middle ground that would ensure adequate protection of the interests of the trade mark proprietor but also a sufficiently flexible framework for taking into account the legitimate interests of competitors by not prohibiting practices that are part of reasonable competition. It could be argued that the CJEU has shaped the protection of simple trade marks with a view to protecting fair competition.

42 According to Ohly, this was indicated by the approach of the Court in *Google France*, see A Ohly, 'Keyword Advertising or Why the ECJ's Functional Approach to Trade Mark Infringement Does Not Function' (2010) 41(8) IIC 879, 881. The functions theory has been described as an overarching limitation complementing art 14 TMD; see A Kur, 'Trade Marks Function, Don't They? CJEU Jurisprudence and Unfair Competition Practices' (2014) 45(4) IIC 434, 442–443. – DOI: https://doi.org/10.1007/s40319-014-0200-4.

43 Cf Kur (n 42) 442–443.

44 E.g. M Senftleben, 'Trade Mark Protection – a Black Hole in the Intellectual Property Galaxy?' (2011) 42(4) IIC 383, 385.

45 Max Planck Institute for Intellectual Property and Competition Law, *Study on the Overall Functioning of the European Trade Mark System* (Munich, 15.2.2011) 103, para 2.184. Cf M Senftleben, 'Function Theory and International Exhaustion – Why It Is Wise To Confine the Double Identity Rule to Cases Affecting the Origin Function' (2014) 36(8) EIPR 518. – DOI: https://doi.org/10.2139/ssrn.2356772; Ohly (n 42) 881. Cf Kur (n 42) 438.

46 Commission, 'Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (recast)' COM (2013) 0162 final, 7.

47 *Interflora* (n 20) paras 39–40.

48 *Study on the Overall Functioning of the European Trade Mark System* (n 45) 103, para 2.180.

2.2. Trade marks with a reputation – protection against unfair dilution

For trade marks with a reputation, Art. 10(2)(c) TMD provides extended protection relative to that of simple trade marks. Under this provision, the proprietor of a trade mark that has a reputation in the Member State is entitled to prevent third parties from using in the course of trade, in relation to goods or services, signs identical to, or similar to, the trade mark, irrespective of whether these are used in relation to goods or services identical to, similar to, or not similar to those for which the trade mark is registered, where use of the sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.*[49] Thus, while the scope of protection of a trade mark is generally limited to the goods or services in respect of which it is registered, marks with a reputation are also protected against the use of similar signs in relation to dissimilar goods or services. The CJEU has stated that infringements of the exclusive rights conferred on the proprietors of trade marks with a reputation are a consequence of a certain degree of similarity between the mark and the sign, by virtue of which the relevant section of the public makes a connection between the sign and the mark – i.e. establishes a link between them without confusing them.*[50] The extended protection applies where said sign is used without due cause in a way resulting in at least one of the three types of harm to the trade mark.

The protection against detriment to the distinctive character, also referred to as 'dilution', 'whittling away', or 'blurring', is intended to protect the mark's ability to identify the goods or services for which it is registered and used as coming from the proprietor of that mark. This is done by prohibiting the use of similar signs by third parties where that use could lead to 'dispersion of the identity and hold upon the public mind' of the trade mark and thus undermine its ability to raise immediate association with the goods or services for which it is registered.*[51] It has been accepted that the more unique the mark and the stronger its reputation, the greater the threat to its distinctive character.*[52] This protects famous trade marks from becoming commonplace or a generic name for certain goods or services.*[53] Detriment to the repute of the mark, also referred to as 'tarnishment' or 'degradation', is caused when the goods or services for which the identical or similar sign is used by the third party may be perceived by the public in such a way that the trade mark's power of attraction is reduced when, for example, they possess a characteristic or quality that is liable to have a negative impact on the image of the mark.*[54] This should include situations wherein the goods offered by the third party are of poor or uneven quality, as well as cases in which the trade mark proprietor's own goods are advertised or sold in a context seriously detracting from the prestigious image and aura of luxury that the proprietor has succeeded in creating around his trade mark*[55]. The concept of 'taking unfair advantage of the distinctive character or the repute of the trade mark', also referred to as 'parasitism' or 'free-riding', is related to the advantage taken by the third party when, in consequence of the use of an identical or similar sign, the image of the mark or the characteristics it projects are transferred to the goods identified by this sign. This approach protects the proprietor of a trade mark with a reputation against third parties seeking to 'ride on the coat-tails' of that mark in order to benefit from its power of attraction, its reputation and prestige, and to exploit the marketing effort expended by its proprietor in order to create and maintain the image of that mark.*[56]

The scope of application of this ground for infringement has been extended over time. Under the earlier Directives 89/104/EEC and 2008/95/EC, granting extended protection to trade marks with a reputation was left optional for the member states.*[57] The current TMD makes it mandatory to ensure such protection. Furthermore, when the wording of Art. 5(2) of the earlier directives, as well as Regulation 207/2009, on EU trade marks, limited the application of the ground of dilution to cases where a sign identical or similar to the trade mark has been used in relation to dissimilar goods or services, the CJEU extended its application to

49 See also EUTMR, art 9(2)(c).

50 *L'Oréal* (n 24) para 36; Case C-408/01 *Adidas-Salomon and Adidas Benelux* [2003] ECR I-12537, paras 29, 31.

51 Case C-252/07 *Intel Corporation* [2008] ECR I-08823, para 29; *L'Oréal* (n 24) para 39.

52 *Intel* (n 51) paras 69, 74; Case C-375/97 *General Motors* [1999] ECR I-05421, para 30.

53 Opinion of AG Jääskinen in *Interflora and Interflora British Unit* (ECLI:EU:C:2011:173) paras 80–83.

54 *L'Oréal* (n 24) para 40.

55 *Parfums Christian Dior* (n 33) paras 45–47. For examples, see note 33.

56 *L'Oréal* (n 24) paras 41, 48–49.

57 Art 5(1) and (2). This was confirmed by the CJEU in Case C-48/05 *Adam Opel* [2007] ECR I-01017, para 33.

cover also cases wherein the mark is used in relation to identical or similar goods or services[*58]. Since 2015, this position has been codified in Art. 10(2)(c) TMD and Art. 9(2)(c) EUTMR.

The additional protection afforded to the proprietors of trade marks with a reputation, alongside the gradual increase of its relevance in EU trade mark law, can be explained by the wish to ensure protection against unfair competition in the EU. From the perspective of trade mark law, the justification of such an extension of the protection against dilution is questionable, since the extended protection afforded to reputed trade marks has traditionally been seen as intended for cases in which the proprietor cannot rely on the likelihood of confusion as a ground for infringement.[*59] However, it must be accepted that when a trade mark with a reputation is used in relation to identical or similar goods or services, this use may also cause damage to its distinctive character (e.g. through it becoming a generic name) or repute (e.g. degrading comparative advertising) or may unfairly exploit its distinctive character or repute (e.g. use of a keyword in a referral service to promote imitations). The aim in protecting trade marks with a reputation against blurring, tarnishment, and free-riding is to protect the efforts and investment of the proprietor in creating a trade mark with a positive image and independent economic value (goodwill).[*60] Damaging or taking unfair advantage of these attributes can be regarded as constituting dishonest commercial practices. Therefor, from the perspective of ensuring undistorted and fair competition, it is justified to protect the proprietor of a trade mark with a reputation equally in cases involving use in relation to identical, similar, or dissimilar goods or services.

Despite extending its scope of application, the CJEU has interpreted the infringement ground of dilution in a way that takes into account the interests of third parties, the actual adverse effects on the trade mark proprietor, and thus the fairness of the third party's act in its specific circumstances. For example, in *Interflora* the CJEU stated that not every use of a trade mark with a reputation by a third party in relation to identical goods contributes to turning that mark into a generic term. For example, this is not the case when the selection of an identical or similar sign as a keyword in an internet referencing service merely serves to draw attention to the existence of an alternative product or service, provided that the advertisement triggered by the use of this keyword enables the reasonably well-informed and reasonably observant internet user to tell that the goods or services offered originate not from the proprietor of the trade mark but from a competitor.[*61] To make the establishment of dilution even more burdensome, the CJEU has required the proprietor to show that the use of an identical or similar sign has had an impact on the market by way of an actual or likely change of the average customer's behaviour.[*62] The need to assess the use of an identical or similar sign in the context of competition is evident in the case of comparative advertising. It is generally accepted that comparative advertising can stimulate competition between suppliers of goods and services to the consumer's advantage.[*63] Thus, it is not surprising that the CJEU has found that the use of a trade mark with a reputation in comparative advertising that satisfies the conditions laid down in Art. 4 of the MCAD does not constitute violation of the proprietor's rights even if the advertiser benefits from the force of the trade mark in attracting the attention of the public to the advertising, as such use and any advantage gained through it are consistent with fair competition.[*64]

An important limitation to relying on the protection afforded by Art. 10(2)(c) TMD is the requirement that, for this protection, the use of the sign be without 'due cause'. This concept is intended to strike a balance between the exclusive rights of the trade mark proprietor and the interests of third parties,[*65] and it has been used in practice to enable third parties to pursue practices that are within the limits of normal competition. For example, the CJEU has acknowledged that where a competitor of the proprietor of a trade mark with a reputation selects that trade mark as a keyword in an internet referencing service, the purpose of that use is to take advantage of the distinctive character and repute of the trade mark.[*66] However, the

58 Case C-292/00 *Davidoff* [2003] ECR I-00389.

59 JT McCarthy, 'Proving a Trademark Has Been Diluted: Theories or Facts?' (2004) 41 Hous L Rev 713, 730–732; cf art 16(3) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299 (TRIPS Agreement).

60 Cf Opinion of AG Jääskinen in *Interflora* (n 53) para 50.

61 *Interflora* (n 20) paras 79–81.

62 *Intel* (n 51) para 77. See also *Interflora* (n 20) para 83.

63 Recital 6 of Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (Codified version) (Text with EEA relevance) [2006] OJ L376/21 (MCAD).

64 *L'Oréal* (n 24) paras 72, 79; Case C-533/06 *O2 Holdings ET O2 (UK)* [2008] ECR I-04231, para 45.

65 Case C-65/12 *Leidseplein Beheer and de Vries* (ECLI:EU:C:2014:49) para 46.

66 *Interflora* (n 20) paras 85–87.

Court has considered that where the advertisement displayed on the basis of said keyword puts forward an alternative to the goods or services of the proprietor of the trade mark without offering a mere imitation, without causing dilution or tarnishment, and without adversely affecting the functions of the trade mark at issue, such use falls, as a rule, within the ambit of fair competition so is not without 'due cause'.[*67] The intention of the third party has been considered relevant in assessing whether a use has a 'due cause'. For example, the proprietor of a trade mark with a reputation may be obliged to tolerate the use of a similar sign if that sign was in use before the trade mark application was filed and is being used in good faith.[*68]

3. The recent developments in context – should EU trade mark law take the role of EU unfair competition law of trade marks?

The need to ensure effective protection against unfair competition in EU member states arises from Art. 10*bis* of the Paris Convention,[*69] reiterated in Art. 2 of the TRIPS Agreement. The Paris Convention's Art. 10*bis*(2) defines an act of unfair competition as any act of competition contrary to honest practices in industrial or commercial matters, while paragraph 3 includes a list of practices that, in particular, should be prohibited. Their common aspect has been seen as lying in 'the attempt (by an entrepreneur) to succeed in competition without relying on his own achievements in terms of quality and price of his products and services, but rather by taking undue advantage of the work of another or by influencing consumer demand with false or misleading statements'.[*70] Although only such uses by unauthorised third parties of signs identical or similar to trade mark as create confusion between competitors should directly fall under Art. 10*bis*(3)(1),[*71] paragraph 3 does not set out an exhaustive list of dishonest practices.[*72] The Model Provisions against Unfair Competition[*73], prepared by WIPO for its implementation, also include a rule prohibiting any act or practice that damages, or is likely to damage, the goodwill or reputation of another's enterprise, inclusive of damage or likely damage resulting from dilution of the goodwill or reputation attached to a trade mark, regardless of whether said act or practice causes confusion.[*74] Several national systems too extend the protection connected with unfair competition to cover dilution, denigrating another trader, and free-riding on another's efforts or reputation.[*75]

Art. 10*bis* of the Paris Convention does not require the enactment of specific legislation to fight unfair competition but enables its form and content to reflect the different traditions and approaches of national systems.[*76] In the EU, protection against unfair competition is fragmented. There are directives on specific aspects of unfair competition, such as prohibiting unfair commercial practices directed toward consumers (e.g. the Unfair Commercial Practices Directive[*77], UCPD), regulating advertising (the MCAD), and

67 Ibid [89]–[91]; *Google France* (n 11) paras 102–103.

68 *Leidseplein Beheer and de Vries* (n 65) paras 55–56, 60.

69 Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference (20 March 1883) 828 UNTS 305.

70 'Protection against Unfair Competition – Analysis of the Present World Situation' (1994) WIPO publication 725(E) 24, para 31.

71 Pursuant to art 10*bis*(3)(i), the prohibited practices include 'all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor'.

72 On acts not expressly mentioned in art 10*bis*, see 'Protection against Unfair Competition' (n 70) paras 48–68.

73 (1996) WIPO publication 832(E).

74 The Model Provisions, art 3(1) and (2)(i).

75 'Protection against Unfair Competition' (n 70) paras 48, 54–60.

76 See M Höpperger and M Senftleben, 'Protection against Unfair Competition at the International Level – the Paris Convention, the 1996 Model Provisions and the Current Work of the World Intellectual Property Organisation', in RM Hilty and F Henning-Bodewig (eds), *Law against Unfair Competition: Towards a New Paradigm in Europe?* (Springer-Verlag Berlin Heidelberg 2007) 61, 63. – DOI: https://doi.org/10.1007/978-3-540-71882-6_3.

77 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (Text with EEA relevance) [2005] OJ L149/22.

ensuring the protection of trade secrets[*78]. Even now, there is no general instrument regulating commercial practices that, although not directly harming consumers, may hurt competitors and business customers.[*79] Accordingly, the member states have been able to follow different routes. For example, in Estonia, the Restriction of Unfair Competition and Protection of Business Secrets Act[*80] (RUCPBSA) provides a general prohibition of unfair competition and a list of three examples, including disclosure of misleading information and disparagement of a competitor or its product or service.[*81] Germany adopted its new Act against Unfair Competition[*82] (UWG) in 2004, replacing the UWG 1909. The UWG contains a general provision for prohibiting unfair commercial practices and provides examples of such practices. It offers specific rules on certain types of practices and regulates the legal consequences of violation of the Act.[*83] In France, claims arising from acts of unfair competition can be brought under the general provisions of the Civil Code on civil liability.[*84] In contrast, the UK, which until only recently was also an EU Member State,[*85] does not recognise a general tort of unfair competition. Instead, it has been considered compliant with Art. 10*bis* of the Paris Convention by virtue of a combination of legal mechanisms, including consumer protection legislation, the common law torts of passing off and malicious falsehood, and the equitable claim for breach of confidence.[*86]

These examples show that the measures taken in European countries to implement Art. 10*bis* of the Paris Convention and the level of specificity of the regulation differ considerably, thus potentially also leading to differences in outcome between similar cases. Therefore, the first merit of taking into account considerations connected with the fairness and honesty of the relevant business practices when applying EU trade mark law is its effect of harmonising the EU unfair competition law with regard to acts and practices involving the use of trade marks. As indicated above, such acts as result in deception of consumers or damage to the trade mark proprietor as a result of harm to reputation or of dilution of goodwill are an important category of dishonest practices that Art. 10*bis* of the Paris Convention is designed to fight. A uniform EU-level approach to these practices is desirable as, unlike many other types of unfair business practices, the conditions for the use of trade marks have a direct impact on the internal market as they affect the cross-border circulation of goods and provision of services. As the law of trade marks is already harmonised in the EU, it is reasonable to attempt to achieve the relevant goals of unfair competition law in the same framework, instead of a possible parallel system. Furthermore, as the CJEU has held that the TMD effects complete harmonisation of the rules related to the rights conferred by a trade mark,[*87] it is questionable whether it would even comply with EU law if national courts were to extend or, worse, limit the exclusive rights conferred by a trade mark by reference to national unfair competition law.[*88]

As mentioned above, two types of unfair practices that directly involve the use of trade marks are regulated on the EU level by the MCAD and UCPD, the first prohibiting misleading advertising and the second

78 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Text with EEA relevance) [2016] OJ L157/1.

79 Recital 8 of the UCPD calls on the Commission to carefully examine the need for Community action in the field of unfair competition beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects of unfair competition. Thus far, no such proposal has been made.

80 RT I, 07.12.2018, 2.

81 RUCPBSA, §3(2)1).

82 *Gesetz gegen den unlauteren Wettbewerb* in the version published on 3 March 2010 (BGBl. IS 254), which was last amended by art 1 of the law of 26 November 2020 (BGBl. IS 2568).

83 For an overview of the UWG as adopted in 2004, see D W, 'A New Act against Unfair Competition in Germany' (2005) 36(4) IIC, 421; M Finger and S Schmeider, 'The New Law against Unfair Competition: An Assessment' (2005) 6 German LJ 201. – DOI: https://doi.org/10.1017/s2071832200013572. Note that the UWG has been amended since its adoption.

84 Arts 1240 and 1241 of the new provisions of the *Code Civil* created by *Ordonnance* n°2016-131 of 10 February 2016.

85 Although the UK withdrew from the EU on 31 January 2020, its laws related to the protection of trade marks are still in line with EU law. Because of its differences in legal tradition from continental Europe, as well as extensive case law on trade marks, the UK is a useful reference country for trade mark matters in Europe.

86 R Arnold, 'English Unfair Competition Law' (2013) 44 IIC 63, 65. – DOI: https://doi.org/10.1007/s40319-012-0010-5; Bently (n 40) 926.

87 E.g. Case C-661/11 *Martin Y Paz Diffusion* (ECLI:EU:C:2013:577) para 54.

88 In *Martin Y Paz Diffusion*, the CJEU held that limiting the rights of the trade mark proprietor was allowed only on the grounds arising from the TMD; ibid [55]. For criticism of this approach, see Kur (n 42) 448–453.

prohibiting unfair commercial practices directed toward consumers. Taking into account the definition of 'misleading advertising' in Art. 2(b) MCAD and the features to be taken into account in the assessment,[*89] the Directive prohibits, *inter alia*, confusing use by third parties of a sign identical or similar to a trade mark in advertising. The MCAD also establishes requirements for comparative advertising, requiring it not to, *inter alia*, discredit or denigrate, create confusion with, or take advantage of the reputation of a competitor's trade mark.[*90] The UCPD prohibits practices that deceive or are likely to deceive the average consumer in relation to, *inter alia*, the commercial origin of the goods or the rights of the trader, such as ownership of IP rights, along with certain confusing practices involving the marketing of a product.[*91] However, trade mark proprietors often benefit little from these instruments in practice. First, the thresholds for the conditions for violation of the rules contained therein are relatively high. For example, violation of the requirements of the UCPD presupposes that the average consumer is influenced or likely to be influenced to enter into a transaction that he or she would not otherwise have.[*92] More importantly, however, neither the MCAD nor the UCPD contains an efficient enforcement regime for safeguarding the interests of trade mark proprietors. Art. 11(1) UCPD and Art. 5(1) and (2) MCAD permit the member states to opt for administrative enforcement to ensure compliance with the requirements of these directives and do not require them to confer a private right of action on persons having a legitimate interest in ensuring compliance with their provisions, including competitors. Thus, the directives have retained different national systems in the field of enforcement.[*93] A choice in favour of administrative enforcement was made in the UK[*94] and has been made also in, for instance, Estonia[*95]. It has been argued that there is no private right of action on grounds of violation of the provisions transposing the MCAD and UCPD in the UK.[*96] Such grounds may exist under the Estonian law of delict pursuant to §1043 and §1045(1)7) and (3) of the Law of Obligations Act[*97] if at least one of the purposes of the rules implementing the relevant provisions of the EU directives in the Advertising Act or the Consumer Protection Act is to protect competitors against damage arising from such acts.[*98] On the basis of the articles setting out the objectives for those directives and the recitals, it is clear that, while this may be the case for the MCAD, which is aimed at protecting traders against misleading advertising and distortion of competition, the purpose of the UCPD is to protect consumers.[*99] Even among those the member states where taking private legal action for enforcing the requirements of the MCAD and UCPD is possible, the legal remedies available and the conditions for their use may differ. For example, under the German UWG, which, *inter alia*, transposes the directives,[*100] the injured party is entitled to sue for ceasing of an illegal commercial practice and claim compensation for damage, but said rights are limited to direct competitors.[*101]

Accordingly, the second aspect of value in handling cases of unfair business practices involving the use of trade marks under the law of trade marks is a solid mechanism of private enforcement established in the EU for IP rights infringements. In particular, the treatment of such practices as trade mark infringements

89 Including any information that the advertisement contains on the commercial origin of the goods or the rights of the advertiser, such as IP rights; see MCAD, art 3(a) and (c).

90 MCAD, art 4(a), (d), (f), and (h).

91 UCPD, art 6(1)(b), (f), and (2)(a).

92 Ibid. See also art 5(1) and (2) of the UCPD. According to Recital 11 of the UCPD, the Directive prohibits those unfair commercial practices that distort consumers' economic behaviour.

93 See C Handig, 'The Unfair Commercial Practices Directive – A Milestone in the European Unfair Competition Law?' (2005) 16 Eur Bus L Rev 1117, 1131.

94 Arnold (n 86) 68. See regulations 13, 15, and 18 of the Business Protection from Misleading Marketing Regulations 2008 (SI 2008/1276); regulations 19 and 26 of the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277).

95 See: §30 of the Advertising Act (RT I 2008, 15, 108; RT I, 01.07.2020, 13); §61 and §64 of the Consumer Protection Act (RT I, 31.12.2015, 1; RT I, 04.01.2021, 14).

96 Arnold (n 86) 69–71.

97 RT I 2001, 81, 487; RT I, 04.01.2021, 19.

98 Such a condition for claiming compensation for damages resulting from a violation of an obligation arising from the law has been reiterated in the case law of the Supreme Court. See, e.g. judgments of the Civil Chamber of 17.12.2012, 3-2-1-161-12, para 11; 06.06.2018, 2-16-14655/24, para 14.1.

99 MCAD, art 1 and recitals 3, 4, and 9; UCPD, art 1 and recitals 6, 8, 11, and 23. Cf Arnold (n 86) 69, arguing that the directives protect the public in general, not a limited class of persons.

100 UWG, fn 1.

101 UWG, s 8(1) and (3)1); s 9; s 2(1)3).

invokes the availability of remedies and procedures provided for in Directive 2004/48/EC[*102] (the IPRED). While the member states are free to extend, for internal purposes, the provisions of the IPRED to include acts involving unfair competition, the binding force of the Directive is limited to infringement of IP rights.[*103] Considering the disadvantages of enforcement by public authorities, such as the constraints posed by the resources and priorities of the enforcement authorities, one finds that the possibility of private enforcement is an inexpensive and efficient solution for strengthening the fight against unfair competition.[*104] It also ensures compensation for traders who have been adversely affected by the unfair conduct, helping to minimise its effect on competition.

4. Conclusions

To protect trade mark proprietors against commercial practices of third parties that could hinder the use of the trade mark in informing and attracting customers, negatively affect its selling power, or exploit its attractive force, the EU legislator and the CJEU have broadened the protection afforded under trade mark law to cover such acts. At the same time, the CJEU has searched for the right balance between the exclusive rights of trade mark proprietors and the interests of third parties, attempting to maintain the conditions of normal competition. As a result, EU trade mark law is increasingly becoming the EU law of unfair competition with regard to practices involving the use of trade marks. In light of the lack of harmonisation of unfair competition law in the EU, at least pertaining to practices that affect businesses, this approach helps to ensure the necessary degree of harmonisation while avoiding a parallel system of protection. Compared to existing EU instruments of unfair competition law, which also prohibit certain uses of trade marks, the widening of the scope of protection afforded under trade mark law provides trade mark proprietors with an efficient mechanism for enforcing their rights. All in all, the developments discussed in this article can be welcomed both from the perspective of trade mark proprietors and from that of other market participants.

[102] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Text with EEA relevance) [2004] OJ L157/45.

[103] IPRED, art 3 and recital 13.

[104] It has proven successful under the German UWG; see W (n 83) 431–432.

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Bank Recovery and Resolution Measures' Restrictive Effects on Appealing Against Them

1. Introduction

With the Bank[*1] Recovery and Resolution Directive (BRRD)[*2], the framework for recovery and resolution for credit institutions was established in the euro area with date of transposition at the start of 2015. The recovery and resolution framework was envisaged as taking care of situations that supervision has failed to prevent, and, ironically, the greater the supervisory failure, the more successful the resolution may appear.[*3] Within this new framework, new tools and powers were established for authorities involved both in bank recovery proceedings and in resolution proceedings[*4], which differ, whether extensively or to a lesser degree, from those within the pre-existing prudential supervision framework. While these new recovery and resolution frameworks may have noble, although competing, objectives[*5] and have been argued to contribute to stabilising the EU financial system[*6], the specific protective actions a credit institution may take to defend itself from unlawful application of the new measures have not been harmonised on the EU level. Article 85 of the BRRD, in its sections 2 and 3, established the general rule that the member states must ensure that appeal procedures are in place for both crisis prevention measures[*7] and crisis management measures. At the same time, that article's Section 4 imposes significant restrictions on the appeal procedures – in essence, prohibiting interim relief and limiting the remedies for a wrongful decision or action on the part of the resolution authority to compensation for the losses suffered. Moreover, the nature and

1 While 'bank' and 'credit institution' may have different scopes of meaning, this has no effect in the context of the article. Therefore, 'bank' and 'credit institution' are used interchangeably.

2 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms [2014] OJ L173/190.

3 For a practical example, see Mikaella Yiatrou, 'The Myth of Cypriot Bank Resolution "Success": A Plea for a More Holistic and Less Costly Supervision & Resolution Approach' (2017) 18 European Business Organization Law Review 503, 504 and 530. – DOI: https://doi.org/10.1007/s40804-017-0080-4.

4 Pamela Lintner, 'De/centralized Decision Making under the European Resolution Framework: Does Meroni Hamper the Creation of a European Resolution Authority?' (2017) 18 European Business Organization Law Review 591, 592. – DOI: https://doi.org/10.1007/s40804-017-0082-2.

5 On competing objectives of the BRRD, see Edoardo Martino, 'The Bail-In beyond Unpredictability: Creditors' Incentives and Market Discipline' (2020) 21 European Business Organization Law Review 789, 791, 803, and 821. – DOI: https://doi.org/10.1007/s40804-020-00188-7.

6 On the stabilising effect of the BRRD, see Giovanni Covi and Ulrich Eydam, 'End of the Sovereign-Bank Doom Loop in the European Union? The Bank Recovery and Resolution Directive' (2020) 30 Journal of Evolutionary Economics 5. – DOI: https://doi.org/10.1007/s00191-018-0576-2.

7 This includes recovery measures – see the BRRD, art 2(1)(101).

outcomes of these new measures themselves have profound material influence on the effectiveness of the credit institution's defensive actions. One key property of the measures is a restrictive effect on the credit institution's independent decision-making and on the management's loyalty toward the shareholders and the credit institution, which, in turn, exerts a negative influence on motivation to appeal against harmful unlawful administrative acts adopting the same measures. As there have been calls for expanding the single resolution regime to cover also non-bank participants in the financial sector[*8], these factors should be considered with regard to the whole financial sector.

This article concentrates on direct impacts that specific measures available to authorities in bank recovery and resolution proceedings have on the possibilities available to a bank for deciding to appeal against application of the measure in question. That is, might the result of respective specific administrative powers in either recovery or resolution proceedings make it impossible for a bank to defend itself from unlawful application of these powers? Objective legal justice – in the sense of mounting a challenge to unlawful measures targeted at an entity and claiming compensation for related damages – is presumed to be in the interest of the entity whose interests the management should pursue. While there are pragmatic or materialist reasons for which this path to defending oneself from an unlawful action may not always be followed in practice, such situations and influences are not covered by the scope of this article. Applying the presumption that eliminating the injustice, whether or not any material damage is involved, is considered the most beneficial action for the entity and, accordingly, the expected goal from the management's perspective.

The nature of the key issue of loyalty is addressed in the first chapter. Because recovery can be considered a distinguishable concept preceding resolution[*9], the effects of key measures taken in the bank's recovery are examined in the second chapter, before the effects of measures employed in bank resolution are addressed, in the third chapter. With this groundwork laid, the enforceability of the declared rights of appeal in the context examined can be assessed and conclusions stated.

2. Interest in challenging unlawful administrative acts

In normal circumstances, a credit institution operates its business as an independent entity with its individual units in the corporate structure each fulfilling the specific dedicated functions. Here, we regard the units and their members or participants to be responsible for running the credit institution and, hence, the ultimate decision-making authority. The EU legislation defines a credit institution's management body as the body or bodies appointed in accordance with national law that are empowered to dictate the institution's strategy, objectives, and overall direction and that oversee and monitor management decision-making, with inclusion of those persons who effectively direct the business of the institution.[*10] With regard to overseeing and monitoring management decision-making, a management body is defined as the management body in its supervisory function[*11], and 'senior management' is considered to refer to those natural persons who exercise executive functions within the institution and who are responsible for, and accountable to the management body for, the day-to-day management of the institution.[*12] For the national dual-board systems traditionally prevailing in civil-law countries[*13], or separation of functions within a management body, the Member State must identify the responsible bodies or members.[*14] For example, in Estonia's dual-board

8 Danny Busch and Mirik BJ van Rijn, 'Towards Single Supervision and Resolution of Systemically Important Non-Bank Financial Institutions in the European Union' (2018) 19 European Business Organization Law Review 302. – DOI: https://doi.org/10.1007/s40804-018-0107-5.

9 On recovery as a distinguishable concept, see Märt Maarand, 'The Concept of Recovery of Credit Institutions in the Bank Recovery and Resolution Directive' (2019) 28 Juridica International 103. – DOI: https://doi.org/10.12697/ji.2019.28.12.

10 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJ L176/338 (CRD IV), art 3(1)(7).

11 CRD IV, art 3(1)(8).

12 CRD IV, art 3(1)(9).

13 Kathrin Johansen and others, 'Inside or Outside Control of Banks? Evidence from the Composition of Supervisory Boards' (2017) 43 European Journal of Law and Economics 31, 31–32. – DOI: https://doi.org/10.1007/s10657-014-9463-y; on mixed systems, see, for example, Caspar Rose, 'Board Composition and Corporate Governance – a Multivariate Analysis of Listed Danish Firms' (2006) 21 European Journal of Law and Economics 113, 114–115.- DOI: https://doi.org/10.1007/s10657-006-6645-2.

14 CRD IV, art 3(2).

system, the supervisory board has relatively broad planning, organisation, approval, and supervisory powers, also seeing to the election and removal of the management board's members, but does not have the capacity for external representation.[*15] In this context, the senior management, holding the mandate for external representation and appeals in the name of the bank, are in focus. It is important to point out also that the BRRD's focus is clearly on protecting the general stability of financial markets[*16] and that it does so, as is made evident in chapters 2 and 3 below, by harmonising those public administrative powers that may interfere with and override the management under company-related civil law.

For management bodies and the members thereof, there are harmonised minimum requirements that must be met if they are to qualify for the position, both as individuals and collectively. These are commonly referred to as the fit and proper requirements.[*17] Specifically, the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) have set out loyalty as a relevant skill for members of the management bodies in their joint guidelines addressed to both supervisory authorities and credit institutions.[*18] The EBA and ESMA have defined loyalty, in Annex II to the Joint Guidelines (under point h), as identifying with the undertaking and having a sense of involvement; showing that one can devote sufficient time to the job and can discharge his or her duties properly, defending the interests of the undertaking and operating objectively and critically; and recognising and anticipating potential conflicts of personal and business interest. Moreover, paragraph 82(b) of the Joint Guidelines sets out as an aspect of the independence of mind, that the members of the management body must not have conflicts of interest to an extent as would impede their ability to perform their duties independently and objectively. Sources of conflicts of interest have been further detailed, in paragraph 84 of the same guidelines, as encompassing at least economic interests, a relationship with holders of qualified holdings, personal and professional relationships with the staff, other current or previous employment of a relevant sort, personal and professional relationships with relevant external stakeholders, memberships in body or ownership of a body or entity with interests that are in conflict with those of the entity in question, and political influence or political relationships. Within the context of this article, the elements of loyalty specified here may be infringed by the measures taken within the bank recovery or resolution frameworks, and, more precisely, conflicts of interest may arise between a manager's personal interest in the unlawful administrative act remaining in effect and the presumed interest of the credit institution in appealing against said act. Acting counter to the bank's interest in appealing an unlawful recovery or resolution act while the outcomes stemming from the relevant act may be beneficial for the manager's personal interests would demonstrate the manager to be clearly unfit for the position.

According to paragraph 85 of the Joint Guidelines, all actual and potential conflicts of interest at management-body level should be adequately communicated, discussed, documented, decided on, and duly managed by the management body (i.e. the necessary mitigating measures should be taken), and a member of the management body should abstain from voting on any matter with regard to which that member has a conflict of interest. However, the first conflict of interest follows from the regulations themselves, according to which managers' conflicts of interest must be managed primarily by the managers and management bodies themselves.[*19] They are usually, in turn, supervised by the authority adopting the measures, which may have created the conflict of interest in the first place.[*20] Moreover, the existence of a conflict of interest

15 *Äriseadustik*, RT I 1995, 26, 355, § 309(1) and § 316-317; on differences of boards in Estonian legal theory, see Andres Vutt and Margit Vutt, 'Duties and Liability of the Members of the Supervisory Board of Limited Companies in Estonia: The First Cases from the Supreme Court of Estonia' (2017) 26 Juridica International 66. – DOI: https://doi.org/10.12697/ji.2017.26.07.

16 Financial stability is mentioned in the recitals of the BRRD at least 42 times. For references to the objectives more specifically, see the BRRD, art 3(7), plus recitals 3–8, 18, 29, and 40; Commission, 'Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council Establishing a Framework for the Recovery and Resolution of Credit Institutions and Investment Firms' SWD (2012) 166 final 4, 19–21 (Impact Assessment).

17 European Securities and Markets Authority, European Banking Authority, 'Joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body' EBA/GL/2017/12 (26 September 2017) (Joint Guidelines); European Banking Authority, 'Guidelines on Internal Governance' EBA/GL/2017/11 (21 March 2018); European Central Bank, 'Guide to Fit and Proper Assessments' (May 2018).

18 Joint Guidelines, para 61 and Annex II(h).

19 CRD IV, art 88; European Banking Authority, 'EBA Guidelines on Internal Governance' EBA/GL/2017/11 (21 March 2018), paras 23(l) and 33(g), Sections 11, 12, and 16.

20 Prudential supervision, recovery, and resolution, may, *de facto*, be all conducted by the same authority on national level – BRRD, recital 15, art 2(1)(21), 3(1) and 3(3); Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms [2013] OJ L176/338 (CRR), art 4(1)(40).

is indisputable if any of the measures at issue should have the material effect of removing the managers or transferring management powers to the supervisory or resolution authority – for complete fulfilment of the proper management functions, that authority should then challenge its own act. Thus, material effects of bank recovery and resolution measures on the independent and loyal decision-making connected with challenging these measures can arise from two aspects of the situation: conflict of interest at the level of individual managers and conflict of interest arising from the authority itself taking over the management functions.

3. Effects of measures in bank recovery

3.1. Recovery planning and early intervention measures

As stated above, the concept of bank recovery can be distinguished from the prudential framework and the concept of resolution. More specifically, the function of bank recovery occupies a space between the framework, on the one hand, and the resolution framework, on the other, and is made up of three integral components – recovery planning, early intervention measures, and two additional measures targeted directly at the bank's management bodies.[*21] The same competent authority that is responsible for the prudential supervision is responsible also for taking measures within the recovery framework.[*22] This part of the article is devoted to recovery planning and early intervention measures, while the next subchapter addresses the additional measures.

The first component of the recovery framework, the recovery planning, leaves the responsibility primarily with the credit institution – it must devise and maintain a recovery plan in line with certain principles[*23] to address a hypothetical crisis scenario in a hypothetical manner.[*24] The recovery plans are *ex ante* plans of steps for later implementation, which may bring in difficulties of its own.[*25] The competent authorities lack legal capacity to change the recovery plans directly but can address deficiencies in recovery planning by applying indirect measures targeted at recovery plans, the entity's risk profile, its funding, or governance.[*26] These measures do not entail any significant conflict for the managers or give direct managerial powers to the competent authorities. No negative effects on challenging such measures are present in the current context.

The second integral component of the recovery framework is the early intervention measures. According to the Impact Assessment of the BRRD, the early intervention mechanism was designed for the competent authorities' use for obliging banks to undertake certain measures to avert major problems while leaving the control of the institution in the hands of its management.[*27] This provides assurance that at least the objective was not to give the competent authority any direct managerial powers. Also, the EBA has issued guidelines delimiting the triggers for applying early intervention measures.[*28] However, effects on managers' personal loyalty are still possible. With the novelty of the recovery measures having been examined previously[*29], the next step is to identify and assess the effects of early intervention measures on conflicts of interest with specific regard to appealing against the adoption of these measures.

Article 27(1)(a) of the BRRD lays out the first early intervention measure, a recovery-specific measure that can be summarised as requiring an institution to activate parts of the recovery plan or to update the plan. According to Article 5(1) of the BRRD, the main objective for recovery plans is to restore the entity's financial position following a significant deterioration of its financial situation. Annex A to the BRRD lists the set of 20 elements that a recovery plan must include at minimum. Of these elements, only the one that entails activating arrangements and measures to restructure business lines may be seen as potentially tied in

21 Maarand (n 9) 110.

22 Ibid 106.

23 For these core principles, see ibid 106–107.

24 Sven Schelo, *Bank Recovery and Resolution* (2nd edn, Kluwer 2020) s 3.01.

25 Costanza A Russo, 'Resolution Plans and Resolution Strategies: Do They Make G-SIBs Resolvable and Avoid Ring Fence?' (2019) 20 European Business Organization Law Review 736, 738. – DOI: https://doi.org/10.1007/s40804-018-0127-1.

26 BRRD, arts 5 and 6; Maarand (n 9) 108.

27 Impact Assessment, 83.

28 European Banking Authority, 'Guidelines on Triggers for Use of Early Intervention Measures Pursuant to Article 27(4) of Directive 2014/59/EU' EBA/GL/2015/03 (29 July 2015).

29 Reference from here on regarding the novelty of the early intervention measures involved is based on Maarand (n 9).

with some personal interests of managers. When one takes into account the division of responsibilities and individual managers' accountability in the banking industry[*30], each manager could be seen as potentially interested in the benefits that unlawful activation of the recovery plan might bring to divisions under his or her responsibility, relative to other divisions. Two other early intervention measures have similar potential effects: requiring changes to the business strategy (covered in Article 27(1)(f) of the BRRD) and requiring changes to the legal or operational structures (covered in Article 27(1)(g) of the BRRD). While a negative effect on motivation to appeal on the part of managers responsible for business benefits may theoretically exist, the other managers may be considered equally motivated to challenge the activation of such arrangements, if not more so. Therefore, the theoretical negative impact may be regarded as limited in extent.

Under Article 27(1)(b) of the BRRD, the competent authority may require the management body of the institution to examine the situation, identify measures to overcome any problems, and draw up an action programme and a timetable for its implementation. Resembling the prudential power to require a plan to restore compliance with prudential requirements[*31], it can be inferred that neither does the outcome entail any significant novel impact on a manager's personal interests nor does the competent authority take over the management duties. The power to require the management body to draw up a plan for negotiation on restructuring of debt in accordance with the recovery plan, established via Article 27(1)(e) of the BRRD, and the power to require information, established under Article 27(1)(h) of the BRRD, can be seen also as purely burden-creating requirements that, in essence, do not impose any significant conflicts of interest with regard to the decision to appeal.

The next early intervention measure, set out in Article 27(1)(c) of the BRRD, enables the competent authority to require the bank's management body to convene or, if the management body fails to comply with the imposition of that requirement, directly convene a meeting of shareholders, set the agenda for this, and require certain decisions to be considered for adoption. The main focus in creating this power seems to have been on increasing capital in emergency situations.[*32] As seen, the competent authority's powers are layered by intensity of intervention – imposing an obligation is the first stage, and taking over specific direct powers from the management is the second one. The first stage may bring limited effects on individual managers that are similar to those of the first intervention measure discussed above. The second step, however, involves usurping the management body's functions and directly exercising its powers. This is not in accordance with the initial objective of obliging banks to act while leaving the control in the hands of the bank's management, so the core of the concept differs from that for the first step and the other measures covered thus far. Yet, in that the managers are not removed from their positions or stripped of their powers by this measure alone, the presumed effects on appealing can be considered identical to the first step's. While the effects are limited to individual managers who might benefit, every manager and the management body as a whole retain their capacity to appeal against adoption of the measure in question.

The final early intervention measure – to require one or more members of the management body or the senior management to be removed or replaced if found unfit to perform the corresponding duties as established under Article 27(1)(d) of the BRRD – is similar to the power, covered by Article 16(2)(m) of the SSM Regulation[*33], of, at any time, removing people from the management bodies when they do not fulfil the fit and proper requirements. Although the objective is the same, the language of the article and that of the proposal for the SSM Regulation[*34] indicate that in the prudential framework the authority should be able to directly remove the managers, while the BRRD implies, especially in contrast against the similar resolution power[*35], placing this obligation on the credit institution, which should itself decide on the removal to comply with the obligation. This interpretation is further supported by Recital 39 of the BRRD, according to which shareholders should retain full responsibility for the institution and control of it throughout the recovery and early intervention phases, except when a temporary administrator has been appointed by the competent authority,

30 Paul Davies and Klaus J Hopt, 'Non-Shareholder Voice in Bank Governance: Board Composition, Performance and Liability' (2018) No 413 ECGI Working Paper Series in Law, 7–8. – DOI: https://doi.org/10.2139/ssrn.3226244.

31 CRD IV, art 104(1)(c); SSM Regulation, art 16(2)(c).

32 Impact Assessment, 36–37, 79, 209 and 238.

33 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63.

34 Commission, 'Proposal for a Council Regulation Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions' COM (2012) 511 final, 5.

35 Cf BRRD, art 63(1)(l), per which 'the resolution authorities shall have the following resolution powers: the power to remove or replace the management body and senior management of an institution under resolution'.

and under which they should no longer retain such responsibility once the institution has been put under resolution. The managers shall stay in their positions until the obligation to remove them has been fulfilled. This means that the credit institution retains its decision-making power to challenge such a measure and appeal against it. Moreover, the institution's decision-making bodies can and should act as a filter between the competent authority's goal of removing the manager and the end result, which should block unjustified demands from the competent authority by appealing and not complying with them. Since execution may not be compelled by the institution when the relevant prudential supervisory power is exercised, the approach within the recovery framework is far less intrusive than the approach in the prudential framework – surprisingly so.

In conclusion, the recovery planning and early intervention measures, if transposed correctly by the member states, should not give the competent authorities any new powers that create a direct consequence of rendering appeals impossible. Although some measures may have an indirect effect on motivation to appeal, the effect in this regard is limited. If these measures do not produce satisfactory results, the additional recovery measures may come into play. Then, the results might be very different.

3.2. Additional recovery measures

The recovery framework includes two additional measures available to competent authorities. With the first of these, Article 28 of the BRRD provides for another basis for removing managers: the competent authority may, if the measures considered in the previous subchapter prove insufficient to reverse the deterioration of the institution, require the removal of the senior managers or the entire management body. Interestingly, the initial proposal for the BRRD[*36] did not include this power but it does give additional freedom to the competent authority by citing the deterioration of the credit institution as the only precondition. The main difference from the similar early intervention measure addressed above is the absence of the prerequisite of the member or management body being unfit for the duties. Here, no deviation from the principle of obliging the institution to make the relevant decision can be detected; therefore, the managers should remain in place as representatives of the bank who may appeal against such action. However, there is no guarantee of the member states acknowledging the distinction of obliging the entity to act vs. applying direct power. For example, the Estonian legislation seems to fail to make this distinction, seemingly giving the competent authority direct power to remove managers itself as the mechanism of early intervention.[*37] Where national laws do not follow the principle of the institution retaining control and, instead, grant the state's competent authority the power to dismiss managers directly, as the Estonian case seems to exemplify, unlawful application of the measure that involves removing the management in its entirety would leave the bank without any representatives who could appeal against the unlawful removal of the managers. Thus, the bank may be unlawfully stripped of the representation by which it could and should appeal against the same unlawful removal; meaning the conventional mechanism by which the measure may be challenged by management bodies becomes inadequate. It may be argued also that removing some of the managers could leave the remaining managers acquiescent to the competent authority's actions for fear of losing their own position. A highly negative impact on the remaining managers' motivation to appeal seems obvious in this case.

The second additional measure, set out in Article 29 of the BRRD, takes things a step further – if the requirement to remove some or all of the managers is deemed to be insufficient for remedying the situation, competent authorities may appoint one or more temporary administrators for the institution. Paragraphs 1 to 4 of this article specify that appointing and removing a temporary administrator must be exclusive powers of the competent authorities; that, subject to the competent authority's discretion, a temporary administrator may either replace the management body of the institution temporarily or work on a temporary basis alongside the management body of the institution; and that said powers may include some or all of the powers of the management body of the institution as specified in the institution's statutes and under national law, among them the power to exercise some or all of the administrative functions of the management body of the institution. Regarding this measure, the initial proposal for the BRRD encompassed only replacement

[36] Commission, 'Proposal for a Directive of the European Parliament and of the Council Establishing a Framework for the Recovery and Resolution of Credit Institutions and Investment Firms and Amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010' COM (2012) 280 final (proposal for the BRRD).

[37] *Finantskriisi ennetamise ja lahendamise seadus*, RT I, 19.03.2015, 3, 52, § 36(7).

of the management[*38], and the Impact Assessment refers that the nomination of such a person would in most cases mean the removal of the existing managers.[*39] This indicates that replacement was regarded as the default option, while the added possibility of the management retaining some powers may create further options in some situations. It is obvious that a temporary administrator, presumably having consented to hold the position, has no motivation to appeal against the act that put him or her in that position and, in fact, finds the arrangement favourable personally. It can be presumed that the temporary administrator has an interest in keeping the act in force and retaining the position, regardless of unlawfulness. Hence, if the management is entirely replaced, again the logic whereby the institution's representatives are responsible for appeals fails to work – there is an interest exactly opposite that of countering unlawfulness.

The foregoing analysis of the provisions shows it to be possible for managers to be nominally left in place while the power of representation is stripped from them and conferred on a temporary administrator, with the same detriment to appeals. Interestingly, Article 29(8) of the BRRD provides that, subject to the preceding Article 28, the appointment of a temporary administrator shall not prejudice the rights of the shareholders in accordance with Union or national company law. Recital 40 of the BRRD implies, further, that the appointment of a temporary administrator should not unduly interfere with rights of the shareholders or owners or procedural obligations established under Union or national company law. The Impact Assessment even implies that the temporary administrator should act in accordance with the decisions of the general meeting of shareholders.[*40] As the main way shareholders can usually influence their institution to appeal against an act is by appointing managers to do so and in that the relevant powers have been conferred on a temporary administrator, the opportunity to enforce such guarantees seems to be limited from the shareholders' perspective. Also, with the possibilities that the BRRD provides for limiting the temporary administrator's powers, per Articles 29(1) to 29(3); for subjecting temporary administrators' acts to prior consent by competent authorities per Article 29(5); and the right to remove a temporary administrator at any time and for any reason per Article 29(4), the competent authority possesses full control of the bank managers' and the temporary administrator's powers and actions – including actions against its acts. While the Impact Assessment characterises the appointment of such a temporary manager as an intrusive though efficient measure that should be applied only in exceptional cases[*41], the fact remains that the target credit institution is stripped of any capacity to fight back against unlawful application of such power.

Analysis reveals that the additional recovery measures provided for may have a substantially different outcome than the measures that may be applied in recovery planning and early intervention. The bank's right of appeal may become only declarative since the very application of power at issue may remove the capacity to appeal. The concerns expressed by industry players about such measures in the early intervention stage[*42] seem to be well founded.

4. Effects of key measures in bank resolution

While the recovery framework extends the powers of competent authorities compared to the extensive pre-existing prudential framework, the concept of uniform resolution procedure with resolution powers and resolution authorities was created only with the BRRD, which is accompanied by the Single Resolution Mechanism (SRM) Regulation.[*43] While during the recovery phase the control should stay in the hands of the credit institution's management, the approach taken in resolution is the opposite – the authorities take over the decision-making, with far-reaching resolution measures.[*44] By their very nature, the resolution actions created with the BRRD and the SRM Regulation bring infringements of rights of shareholders and

38 Proposal for the BRRD, 10–11 and 67.

39 Impact Assessment, 35.

40 Ibid. Note that the term used for the temporary administrator in the proposal for the BRRD and the Impact Assessment is inconsistent with the final text of the BRRD – the term initially used was 'special manager' – a term later transferred to a resolution measure of art 35 of the BRRD.

41 Ibid 36.

42 Ibid 222–223.

43 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund [2014] OJ L225/1.

44 BRRD, recital 39; Impact Assessment, 83; Maarand (n 9) 108.

creditors.[*45] The BRRD includes a vast set of central powers, along with preparatory and ancillary supportive powers linked to bank resolution, from which resolution authorities can choose at their discretion in line with the resolution strategy devised for the individual institution.[*46] This chapter's scope is limited to key resolution measures available to resolution authorities in connection with resolution proceedings. These are related to general-application resolution tools, general resolution powers, special management, and persons exercising resolution powers.

4.1. General resolution tools

Under the BRRD's Article 37(3), four resolution tools make up the umbrella for resolution powers: sale of business, a bridge institution, asset separation, and bail-in. The sale of business tool involves the resolution authority's power of forced sale of the institution's shares (or other instruments of ownership) or all or any assets, rights, or liabilities to a third party while leaving the benefits to the owners of the shares or other instruments of ownership and to the institution.[*47] The bridge institution tool is similar in essence, but the ownership is transferred to a 'bridge institution'[*48], which is according to Article 40(2) of the BRRD defines as a special dedicated legal person wholly or partially owned by public authorities and controlled by the resolution authority. The asset separation tool, in turn, is the power of forcibly transferring the institution's assets, rights, or liabilities to one or more asset-management vehicles[*49], which, is according to Article 42(2) of the BRRD likewise a special dedicated legal person owned wholly or partially by public authorities and controlled by the resolution authority. The main difference between these three tools from the bank's point of view involves the receiver – respectively, an independent third party, a bank under the resolution authority's control, or an asset management vehicle under resolution authority's control. According to Article 2(1)(57) of the BRRD, the bail-in tool is a mechanism for effecting a resolution authority's exercise of write-down and conversion powers in relation to liabilities of an institution under resolution in accordance with Article 43 of the BRRD. Hence, the bail-in tool is fundamentally different from the other resolution tools in its inclusion of direct losses, which, according to Article 44(9)(a) should be borne firstly by shareholders and then by creditors of the institution in order of preference. It is interesting that, while the credibility of the bail-in tool in particular has been identified as essential for banks' optimal debt structure and for ruling out extreme leverage[*50], it has also been criticised as too complex to work in reality.[*51] None of the resolution tools in general, *per se*, directly exerts negative effects with regard to the interests of members of the management bodies in appealing the application of the tool. Indirect impact connected with an individual manager's responsibilities is not out of the question, but the effect of such an impact on appealing the application of a resolution tool is limited similarly to the impacts accompanying early intervention measures.

4.2. General resolution powers

General resolution powers have been granted to the resolution authorities for purposes of application of the resolution tools[*52] in such a manner that resolution authorities will have powers to take control of an institution that has failed or is about to fail, take over the role of shareholders and managers, transfer assets and liabilities, and enforce contracts.[*53] According to Article 63(2) of the BRRD, the general resolution powers

45 Jens-Hinrich Binder, 'Proportionality at the Resolution Stage: Calibration of Resolution Measures and the Public Interest Test' (2020) 21 European Business Organization Law Review 453. – DOI: https://doi.org/10.1007/s40804-019-00143-1.

46 Tobias H Tröger, 'Too Complex to Work: A Critical Assessment of the Bail-In Tool Under the European Bank Recovery and Resolution Regime' (2018) 4 Journal of Financial Regulation 35, 19. – DOI: https://doi.org/10.1093/jfr/fjy002.

47 BRRD, art 2(1)(58), 38 and 39.

48 BRRD, art 2(1)(60) and 40.

49 BRRD, art 2(1)(60) and 42.

50 On the bail-in tool's effect on a bank's debt structure and leverage, see Luca Leanza and others, 'Bail-In vs Bail-Out: Bank Resolution and Liability Structure' (2021) 73 International Review of Financial Analysis. – DOI: https://doi.org/10.1016/j.irfa.2020.101642.

51 On the complexity of the bail-in tool, see Tröger (n 44).

52 BRRD, art 63(1); Impact Assessment, 122.

53 Proposal for the BRRD, 12.

must not be subject to any prior approvals or consents from any person or shareholders, except if a member state has decided to apply *ex-ante* judicial approval or pre-approval by competent ministry for decisions with direct fiscal impact, nor subject to even any procedural requirements to notify any person or publish any notice. This results in another layer of complexity standing in the way of the managers' fulfilment of their expected obligation to challenge unlawful application of the resolution powers.

Although the high-level view of applying the resolution tools may not, *per se*, reveal a meaningful negative impact on the interest in appealing, specific powers of the resolution authority under the BRRD may still entail such an intrinsic threat. Article 63(1)(a) provides for the resolution authority's power to demand information; Articles 63(1)(c) and (d) reiterate the right to transfer ownership of shares, other instruments, rights, assets, and liabilities; Articles 63(1)(e) to (k) address more specific powers encompassed by the bail-in tool; and Article 63(1)(m) articulates the right to require the competent authority to assess the buyer of a qualifying holding in a timely manner with exceptions to timelines set in the prudential requirements of CRD IV and MiFID II[*54]. In the main, the naming of the powers of the resolution authorities repeats the resolution tools' description, albeit in more detail, or otherwise does not bring in any meaningful direct conflicts of interest connected with challenging the adoption of such powers.

However, Article 63(1)(b) of the BRRD stipulates a key power for the resolution authorities – that of taking control of an institution and exercising all the rights and powers conferred upon the shareholders, the other owners, and the management body of the institution under resolution. It is obvious that a resolution authority when acting in the stead of the management body of a credit institution would never appeal against its own acts. Moreover, such a broad power could permit withdrawal of any appeals that former or remaining managers have set in motion or might initiate, thereby resulting in complete breakdown of defending the bank's rights via the mechanism of management actions.

Another prominently specified power is set out in Article 63(1)(l) of the BRRD: according to which the resolution authority may remove or replace the management body and senior management of an institution under resolution. In the previous subchapter, addressing the competent authority's power to require the removal of the senior managers or the entire management body, it is proposed that Estonian legislation could include a fundamental deviation from the core principle of recovery framework by giving the competent authority power to directly remove managers. As Article 63(1)(l) of the BRRD grants a similar right of directly removing some or all of the managers to the resolution authority, it is identical in outcome. Should this action be performed unlawfully, the conventional defence of the bank by managers is inadequate in a situation wherein the unlawful act removes the very managers who should exercise their – now removed – powers to challenge that act. Even if not all managers are removed, the situation may have a highly negative impact on the remaining managers' motivation to appeal any acts removing other managers.

4.3. Special management

Article 35 of the BRRD gives resolution authorities the power to appoint a special manager to replace the management body of the institution. The special manager may have almost total power over the institution: per Article 35(2) of the BRRD, the special manager shall have all the powers of the shareholders and the management body of the institution; however, the special manager may only exercise such powers under the control of the resolution authority. When comparing this mechanism to the temporary administrator addressed in Article 29 of the BRRD, where following the shareholder decisions and company law is generally expected, Article 35(3) states specifically that for special management, promoting resolution objectives overrides any other duty of management in accordance with the statutes of the institution or national law, insofar as they are inconsistent.

According to Article 35(4) of the BRRD, resolution authorities may set limits to the action of a special manager or require that certain acts of the special manager be subject to the resolution authority's prior consent, and resolution authorities may remove the special manager at any time. Just as with the temporary administrators covered in the previous chapter, it is evident that the person(s) consenting to act as special manager have a specific interest in **not** contesting being appointed to said position and replacing the management board, even if such an act might be unlawful. Moreover, since – as is quite evident – the resolution

[54] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments [2014] OJ L173/349.

authority can limit the special manager's powers or require consent therefrom, the resolution authority may gain full control over the credit institution's decisions, including decisions on appealing against acts by a resolution authority.

4.4. Persons exercising resolution powers

While it is stressed that resolution authorities should be able to exercise control over the institution under resolution so as to operate the institution and handle its activities and services with all the powers of its shareholders and management body, the same Article 72(1) of the BRRD creates the possibility of the control being exercised either directly by the resolution authority or indirectly by one or more persons appointed by the resolution authority. This provision, which gives resolution authorities the option to appoint a third party acting on their behalf, differs from the temporary administration covered in chapter 2 of the article and from the special manager addressed by subchapter 3.3 in that it provides for an option of appointing a person to exercise the resolution powers as such, which is fundamentally different from managing a credit institution through the recovery or resolution. However, as the person appointed will have all the powers of the institution's shareholders and management bodies and has a clear interest in not contesting an act that results in his or her appointment, the target institution's ability to appeal against appointment of such a person is, ultimately, similarly hampered.

Lastly, with the above-referenced Article 51(2) of the BRRD reiterates the right to name a person, in accordance with Article 72(1) with the specific objective of drawing up and implementing a business reorganisation plan. Resolution authorities have this power in any case under the general rule of the latter section of the BRRD, and it seems not to grant any extra rights to the resolution authority. Therefore, such an article of law itself seems redundant, as do specific referrals to it as a separate power of the resolution authority. Even if treated as a standalone power, it entails exactly the same implications for appealing against the application of such power as the measure discussed above of naming a person to exercise the resolution powers.

5. Conclusion

Bank recovery is based on the fundamental principle of leaving the bank in control. While in recovery the control may be relinquished to the recovery authority, the credit institution as a legal person with its own interests remains in existence. This should also reserve to it the possibility of freely deciding whether to fight back against unlawful application of recovery and resolution actions. This possibility does exist with regard to most of the recovery and resolution measures provided for, which may have only some limited impact in terms of managers' conflicts of interest. However, in some of the cases of recovery and resolution examined, the legal logic in which the credit institution is a person free to decide via its management whether to protect its interests breaks down. The resolution measure of appointing temporary administrators has a profound effect on the bank's ability to challenge such a measure, should it be unlawful, as clearly neither the temporary administrators appointed nor the competent authorities have an interest in challenging said competent authority's act of taking this measure so long as they maintain full control over the credit institution's actions. The resulting effects from the key resolution measures are even more profound, with a similar outcome in the domain of conflicts of interest. While the application of resolution tools may not entail conflicts of interest and create impediments to appealing against application of the tools *per se*, at least two of the general resolution powers can be unlawfully applied in such a manner that, in consequence of those powers' application, the possibility of the addressee bank challenging such application is, in essence, dissolved. Likewise, the resolution measure of appointment of a special manager has the effect of, to any practical extent, removing the addressee's ability to appeal effectively against such an appointment, as does the appointment of persons exercising resolution powers. It can be concluded that, in several cases, the express right to appeal declared for the credit institutions as the addressees of resolution or recovery measures is fictitious.

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The Relationship between EU Law and Fundamental Principles of Estonian Substantive Criminal Law

1. Introduction

In the field of criminal law, the treaties of the European Union[*1] enshrine a carefully negotiated balance of powers. According to Article 4(2) of the Treaty on the Functioning of the European Union (TFEU), competence in the area of freedom, security, and justice is shared between the member states and the European Union. Although the Lisbon Treaty expanded the latter's criminal-law competence, it also codified general agreement that European Union legislation should not have the effect of changing the member states' legal systems and altering the fundamental characteristics of their criminal law.[*2] Article 67(1) TFEU even states that in constituting the area of freedom, security, and justice the European Union shall respect the individual legal systems and traditions of the member states. Article 83 TFEU, which allows the adoption of minimum rules pertaining to the definition of criminal offences and sanctions, likewise demonstrates that the member states have agreed to approximate their substantive criminal law to only a certain extent.

Although the EU has no explicit competence to harmonise national principles of criminal law, there are many ways in which the EU law and national criminal law are interconnected more deeply than just at the level of minimum standards adopted from directives. Article 6(3) of the Treaty on European Union (TEU) states that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and proceeding from the constitutional traditions common to the member states, shall constitute general principles of the union's law. The Charter of Fundamental Rights of the European Union (or 'the Charter') sets forth principles of criminal law that correspond to the ones guaranteed by the ECHR.[*3] That means that the principles of substantive criminal law are recognised and interpreted in the case law of the Court of Justice of the EU (CJEU)[*4] and, therefore, EU law does have the capacity to affect principles of substantive criminal law – via a back door.

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1 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326.

2 André Klip, *European Criminal Law: An Integrative Approach* (3rd edn, Intersentia 2016) 178–180.

3 Piet Hein van Kempen and Joeri Bemelmans, 'EU Protection of the Substantive Criminal Law Principles of Guilt and Ne Bis in Idem under the Charter of Fundamental Rights: Underdevelopment and Overdevelopment in an Incomplete Criminal Justice Framework' [2018] 9(2) New Journal of European Criminal Law 248, 252–254. – DOI: https://doi.org/10.1177/2032284418778146.

4 On the competence of the CJEU, see Klip (n 2) 133–136.

This article examines the relationship between EU law and fundamental principles of Estonian substantive criminal law. The discussion begins with explanation of how the dialogue among the European Court of Human Rights (ECtHR), the CJEU, and the member states shapes the standard of protection of human rights and the principles of criminal law that are protected by the ECHR. Next, the analysis brings in the controversial position of the fundamental principles of substantive criminal law in the EU legal order, since the Treaty of Lisbon made the Charter legally binding but at the same time introduced a special 'emergency-brake' procedure to protect the fundamental principles of member states' criminal law. The final portion of the paper narrows the focus to five principles specific to substantive criminal law that are derived from the fundamental principles[*5] articulated in the Estonian Constitution[*6] and have equivalents in human-rights law: the principle of legality of criminal law, the principle of retroactive application of the more lenient criminal law, the proportionality principle, *ultima ratio*, and the principle of individual guilt.[*7] The existence of the equivalent of these five principles in EU criminal law is examined in aims of demonstrating that the relationship between EU law and the individual principles of substantive criminal law is not uniform. As it would be beyond the scope of this article to offer an exhaustive list of the fundamental principles of criminal law, the analysis concentrates on these five principles, which together form the foundation for a set of various sub-principles and rules of Estonian substantive criminal law.[*8] While the analysis does not cover principles of criminal procedure, one should bear in mind that they may manifest aspects with significance for substantive criminal law.[*9]

2. Estonian criminal law in the regulatory triangle

Although the competence to adopt criminal law has traditionally belonged to the state, the European Convention on Human Rights and the case law of the ECtHR have significantly restricted the power to adopt criminal law and influenced the development of national principles of criminal law.[*10] In a difference from the domain of criminal-law procedure, the human rights do not directly influence substantive criminal law but do entail restrictions to criminalisation and the application of sanctions.[*11] Also, the states must criminalise certain acts if they wish to protect human rights, and failure to do so constitutes a breach of human-rights obligations.[*12]

Similarly to the ECHR, the Charter specifies fundamental rights, all of which are potentially relevant for substantive criminal law in that their articulation imposes limits to the kinds of conduct the legislator may criminalise, and principles that are of specific relevance for substantive criminal law.[*13] The ECHR sets minimum standards, and the EU may opt for a higher level of protection within the limits set forth for application of the Charter.[*14] Therefore, the criminal-justice systems of the member states of the EU are shaped by the regulatory triangle in which the domestic level, the EU, and the Council of Europe's legal order interact.[*15] The member states of the EU may choose a higher standard of protection than the ECHR's

5 Human dignity, democracy, the rule of law, the social state, and the Estonian identity are acknowledged as the fundamental principles of the Constitution. See Madis Ernits and others, 'The Constitution of Estonia: The Unexpected Challenges of Unlimited Primacy of EU Law' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (The Hague: T.M.C. Asser Press 2019) 889. – DOI: https://doi.org/10.1007/978-94-6265-273-6_19.

6 Eesti Vabariigi põhiseadus [The Constitution of the Republic of Estonia], RT I, 15.05.2015, 2.

7 The impact of the EU law on the principles of jurisdiction (ss 6-9 of the Penal Code) is not covered by this article. On jurisdiction-related principles in EU criminal law, see Klip (n 2) 208–218.

8 On the elements of crime derived from the principle of legality of criminal law and the principle of guilt, see Jaan Sootak, 'The Concept of Crime and Estonian Criminal Law Reform' [1996] I Juridica International 55–62.

9 On the dual nature of the principle of *ne bis in idem*, see Jaan Sootak, *Karistusõigus. Üldosa* (Juura 2018) 119–121.

10 John AE Vervaele, 'European Criminal Justice in the European and Global Context' [2019] 10(1) New Journal of European Criminal Law 7, 8–10. – DOI: https://doi.org/10.1177/2032284419840708.

11 Steve Peers, *EU Justice and Home Affairs Law, Volume II: EU Criminal Law, Policing, and Civil Law* (OUP 2016) 172. – DOI: https://doi.org/10.1093/acprof:oso/9780198776840.001.0001.

12 Ibid.

13 Van Kempen (n 3) 248, 252–254.

14 John AE Vervaele (n 10) 9–10.

15 Ibid.

as long as they ensure fulfilment of their obligations under European Union law and the national rules do not undermine the uniformity and effectiveness of the EU legal order.[*16]

However, the road by which fundamental rights entered the union's law has been rocky. In *Stork*[*17], the CJEU refused to consider the argument that a decision by the High Authority of the Economic Coal and Steel Community breached basic rights that were protected under German law.[*18] The CJEU changed its approach in the *Stauder*[*19] case, by stating that fundamental rights are enshrined in the general principles of European Community law protected by the Court.[*20] The Maastricht Treaty formally recognised human rights as part of EU law, and the Charter was drafted and proclaimed in the wake of the adoption of the Amsterdam Treaty.[*21] The Lisbon Treaty rendered the Charter legally binding, and human rights were identified as a foundational value in Article 2 of the TEU.[*22]

The Estonian criminal-justice system was built in the domain of the regulatory triangle described above. After the 20 August 1991 restoration of independence, Estonia started to reconstruct its justice system and reform its criminal law with the goal of integrating Estonia into the European legal system and creating a regime of criminal law that is based on the rule of law.[*23] Two important steps in this process were adopting the Constitution of the Republic of Estonia[*24] and ratifying the ECHR[*25]. The new Penal Code entered into force on 1 September 2002.[*26] According to Section 3 of the Estonian Constitution, the generally recognised principles and norms of international law had become an inseparable part of the Estonian legal system. From the decisions of the Supreme Court of Estonia from 30 September 1994[*27] and 24 March 1997[*28], one can conclude that generally recognised principles of European law were considered fundamental to the Estonian legal system even prior to the country's accession.[*29] The Supreme Court of Estonia continued the EU-friendly approach after Estonia acceded to the European Union, on 1 May 2004.[*30] Before Estonia's accession to the EU, the relationship between the Estonian Constitution and EU law received great attention in the academic literature. Legal experts debated the function and role of Estonian constitutional principles in the European legal order and the way the Constitution should be amended.[*31] Although accompanied by much criticism, a pragmatic choice was made in favour of a separate Constitution Amendment Act (CAA).[*32] The CAA features a 'protective clause' stating that Estonia may belong to a European Union that respects the fundamental principles of the Estonian Constitution.[*33] As the CAA did not address difficult questions about the impact of the EU legal order on the Constitution of Estonia, the debate over the hierarchy of law within the EU legal order continues to flare up again from time to time.[*34] Also, the question of

16 Ibid.

17 Case 1/58 *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community* [1959] para 17. ECLI:EU:C:1959:4.

18 Gráinne de Búrca, 'The Road Not Taken: The EU As a Global Human Rights Actor' [2011] 105 AJIL 21. – DOI: https://doi.org/10.5305/amerjintelaw.105.4.0649.

19 Case 29/69 *Stauder v City of Ulm* [1969] ECLI:EU:C:1969:57.

20 De Búrca (n 18) 21–23.

21 Ibid 25.

22 Ibid 1.

23 Jaan Sootak and Priit Pikamäe, 'Estonian Criminal Law: Reform As a Path to Independence' [2000] 8(1) European Journal of Crime, Criminal Law and Criminal Justice 61-78. – DOI: https://doi.org/10.1163/15718170020519049; Julia Laffranque, 'European Human Rights Law and Estonia: One- or Two-way Street?' [2015] 23 Juridica International 4-5. – DOI: https://doi.org/10.12697/ji.2015.23.01; Jaan Sootak, 'Estonian Criminal Law As a Component of International Criminal Law' [1998] 3 Juridica International 53–54.

24 Eesti Vabariigi põhiseadus [The Constitution of the Republic of Estonia], RT 1992, 26, 349.

25 Inimõiguste ja põhivabaduste kaitse konventsioon [Convention for the Protection of Human Rights and Fundamental Freedoms], RT II 1996, 11, 34.

26 Karistusseadustik [Penal Code], RT I 2001, 61, 364.

27 Decision of the Constitutional Review Chamber of the Supreme Court of 30 September 1994 in case III-4/A-5/94.

28 Decision of the Administrative Law Chamber of the Supreme Court of 24 March 1997 in case 3-3-1-5-97.

29 Julia Laffranque, 'Co-existence of the Estonian Constitution and European Law' [2002] 7 Juridica International 19–24.

30 Ernits and others (n 5) 887–900.

31 Ibid 890–897.

32 Julia Laffranque, 'A Glance at the Estonian Legal Landscape in View of the Constitution Amendment Act' [2007] 12 Juridica International 56–57.

33 Ibid.

34 Madis Ernits and Andra Laurand, 'Kolmanda akti tõus ja langus' [2017] 1 Juridica 13–17.

whether and to what extent the Estonian Constitution should be interpreted in light of the Charter continues to cause disputes among the country's lawyers.[*35]

3. The controversial position of the fundamental principles of substantive criminal law in EU law

The position of the fundamental principles of criminal law in EU law remains contested. The EU has no explicit competence to harmonise principles of criminal law – Article 83 TFEU permits only the adoption of minimum rules addressing the definition of criminal offences and sanctions.[*36] Because the member states were concerned over the far-reaching changes that the Treaty of Lisbon introduced for criminal law, they even created special get-out clauses for exceptions from ordinary legislative procedure.[*37] Articles 82(3) and 83(3) allow the member states to pull an emergency brake if they conclude that a particular draft directive would affect fundamental aspects of their criminal-justice system.[*38] Although academics do not fully agree on the prerequisites for pulling the emergency brake, there is consensus that use of the emergency brake in accordance with Article 83(3) is justified in cases wherein the proposal for a directive would affect fundamental principles of the Member State's substantive criminal law.[*39] The wording of the emergency-brake clause suggests that the scope is wider, covering not only principles of criminal law but, in fact, any important elements and characteristics of the Member State's criminal-justice system.[*40] Still, the Member State should demonstrate why the relevant legal norm is considered fundamental to its criminal-justice system.[*41]

However, these obstacles set up in the TFEU to stop EU law from influencing fundamental principles of the member states' substantive criminal law are somewhat of a fiction. The Treaty of Lisbon confers on the Charter, which covers principles of criminal law, legally binding status within the EU legal system, and the CJEU enjoys full competence over the former third-pillar law.[*42] The preliminary-ruling procedure provided for in Article 267 TFEU enables the CJEU to ensure uniform interpretation of EU law.[*43] In addition, the general principles of European Union law, which have even been described as EU law's equivalent of the concept of dark matter for their ability to develop over time, enable the union's legal order to evolve.[*44] While some of the general principles of EU law created and applied by the CJEU have been codified in the treaty, others remain unwritten.[*45] The nature of the general principles of EU law points to the relationship between EU primary law and national criminal law as not engraved in stone. Before the Lisbon Treaty,

35 See Hent Kalmo, 'Põhiseaduse põkkumine Euroopa Liidu põhiõiguste hartaga' [2016] 3 Juridica 147-164; Uno Lõhmus, 'Repliik. H. Kalmo. Põhiseaduse põkkumine Euroopa Liidu põhiõiguste hartaga' [2016] 4 Juridica 292–293.

36 Klip (n 2) 178–185.

37 J-C Piris, 'The Lisbon Treaty: A Legal and Political Analysis' (Cambridge Studies in European Law and Policy, CUP 2010) 184-185. – DOI: https://doi.org/10.1017/cbo9780511762529.

38 Upon pulling of the brake, the ordinary legislative procedure shall be suspended. After discussion, in cases of consensus the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. Within the same time frame, in the event of disagreement instead and if at least nine member states wish to establish enhanced co-operation on the basis of the draft directive involved, they shall notify the European Parliament, the Council, and the Commission accordingly. See arts 82(3) and 83(3) of the TFEU.

39 Kaie Rosin and Markus Kärner, 'The Limitations of the Harmonisation of Criminal Law in the European Union Protected by Articles 82(3) and 83(3) TFEU' [2018] 26(4) European Journal of Crime, Criminal Law and Criminal Justice 316–327. – DOI: https://doi.org/10.1163/15718174-02604003.

40 Ibid.

41 Ibid.

42 Klip (n 2) 133–136, 251–256.

43 Ibid.

44 Armin Cuyvers, 'General Principles of EU Law' in Emmanuel Ugirashebuja and others (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill 2017) 217–220. – DOI: https://doi.org/10.1163/9789004322073.

45 Ibid.

the CJEU positioned fundamental rights among the general principles of EU law.[*46] As the Charter is now legally binding in the EU, the position of the fundamental rights needs clarification by the CJEU.[*47]

The impact of the Charter on the member statess' criminal law is dependent on the scope of the Charter's application. According to Article 51(1) of the Charter, its provisions are addressed to the institutions, bodies, offices, and agencies of the European Union with due regard for the principle of subsidiarity and to the member states only when they are implementing union law. Article 51(2) stresses that the Charter does not extend the field of application of European Union law beyond the powers specified for that union or either establish any new power or task for the union or modify powers and tasks from what is defined in the establishing treaties. Earlier case law identified the CJEU's control over respect for fundamental rights as covering the measures adopted by the member states executing EU law and the measures adopted by the member states in line with the derogations expressly pertaining to fundamental rights and freedoms provided for by those treaties.[*48] One can conclude that, at least since the *Fransson* case[*49], a bond exists between EU competencies and national law whenever inconsistency between domestic legislation and fundamental rights protected at the EU level represents an impediment to the implementation of EU law in the relevant field.[*50] As EU law must always be implemented and applied in a manner honouring fundamental rights, Article 51(1) covers all cases wherein a linking *tessera* exists within EU law.[*51] With *Siragusa*[*52], the CJEU listed specific points to be checked for purposes of assessing whether a connection between the national legislation under challenge and EU law truly exists: a) whether that legislation is intended to implement a provision of EU law; b) the nature of said legislation; c) whether it is aimed at objectives other than those covered by EU law, even if it could indirectly affect EU law; and d) whether there are specific rules of EU law on the matter in question that might affect it.[*53] In conclusion, the national law has to be interpreted in light of the Charter if the legislation falls within the scope of EU law. The question of whether it does can itself be posed to the CJEU by means of the preliminary-reference procedure.

4. Fundamental principles of Estonia's substantive criminal law and their equivalents in EU law

Each of the subsections below examines one particular principle specific to substantive criminal law that is derived from the fundamental principles of the Estonian Constitution and has its equivalent in human-rights law. This examination of the existence of equivalence for the principle of legality of criminal law, the principle of retroactive application of the more lenient criminal law, the proportionality principle, *ultima ratio*, and the principle of individual guilt reveals that numerous questions as to the meaning and scope of these principles at union level remain unaddressed by the CJEU. According to Article 52(3) of the Charter, the minimum standard of protection provided by the Charter can be assumed on the basis of case law of the ECtHR, but the rest is open to the CJEU's interpretation.[*54]

46 Uno Lõhmus, 'Põhiõigused ja Euroopa Liidu õiguse üldpõhimõtted: funktsioonid, kohaldamisala ja mõju' [2011] 9 Juridica 639–642.

47 Ibid.

48 Valeria Scalia, 'Protection of Fundamental Rights and Criminal Law: The Dialogue between the EU Court of Justice and the National Courts' [2015] 3 Eucrim 102. – DOI: https://doi.org/10.30709/eucrim-2015-013.

49 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] paras 16-31. ECLI:EU:C:2013:105.

50 Scalia (n 48) 102-105; Kalmo (n 35) 152–156.

51 Ibid.

52 Case C-206/13 *Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo* [2014] para 25. ECLI:EU:C:2014:126.

53 Scalia (n 48) 102-105; Kalmo (n 35) 152–156.

54 Van Kempen (n 3) 250–252.

4.1. The principle of legality of criminal law

Although influenced by the legal order of the Council of Europe and of the EU from the beginning, the constitutional principles of Estonian substantive criminal law have a national origin and scope. The principle of legality of criminal law (expressed in Latin as *nullum crimen, nulla poena, sine lege scripta, stricta, praevia*), itself a sub-principle of the wider principle of the rule of law[*55], is considered to be the cornerstone of Estonian criminal law.[*56] It is enshrined in the Constitution's Section 23 (part 1 and the first sentence of part 2) in conjunction with Section 13(2).[*57] Section 23(1) of the Constitution states that no-one may be convicted of an act that did not constitute a criminal offence under the law in force at the time the act was committed, and Section 23(2)'s first sentence adds that no-one may be subjected to a penalty that is more severe than whatever was applicable at the time the offence was committed. As for Section 13(2), it provides that the law shall protect everyone from the arbitrary exercise of state power. The elements of the principle of legality of criminal law are stated in Section 2, parts 1 and 4, and Section 5 of the Penal Code[*58].[*59]

Article 49 of the Charter sets forth both the principle of legality and that of proportionality of criminal offences and penalties. Academic literature has distinguished substantive legality per Article 49 of the Charter from procedural legality under Article 52(1) of the Charter.[*60] Still, the shorthand 'principle of legality' prevails for the principle enshrined in Article 49, both in the literature and in the case law of the CJEU.[*61] Article 49(1) of the Charter states: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.' Also, the principle of legality has long been recognised by the CJEU as a general principle of EU law.[*62] The CJEU case law addressing the principle of legality has been criticised for adhering to the minimum standard of protection with regard to the principle of legality.[*63]

In the *M.A.S. and M.B.* case[*64], the CJEU demonstrated that the principle of legality is of different scope between EU law and Italian constitutional law: the legality principle in EU law protects only rules of substantive criminal law, not the extension of a limitation period by the national legislature and its immediate application.[*65] In a contrast against *Melloni*[*66], the CJEU allowed the Italian criminal courts to conform to their own national standards of protection even though doing so impaired the effectiveness of EU law in the field of the fight against fraud affecting EU financial interests.[*67] The CJEU emphasised the direct effect of Article 325 (1 and 2) of the TFEU but also reiterated the general obligation of national courts to respect the fundamental rights and gave the national legal system space to apply the principle of legality in national proceedings.[*68] In consequence, the CJEU avoided a direct constitutional

55 Ernits and others (n 5) 907–908.

56 Mario Truu, 'Pilk karistusõiguse lähtele: määratletuse põhimõttest süüteokoosseisu sõnastamisel ja tõlgendamisel' [2019] 9 Juridica 671; Eerik Kergandberg, Saale Laos, and Heili Sepp, 'Paragrahv 23' in Ülle Madise (ed), *Eesti Vabariigi Põhiseadus, kommenteeritud väljaanne* (2020).

57 Ernits and others (n 5) 920.

58 Karistusseadustik [Penal Code], RT I, 10.07.2020, 18.

59 Kergandberg and others (n 56).

60 John AE Vervaele, *European Criminal Justice in the Post-Lisbon Area of Freedom, Security and Justice* (Università degli Studi di Trento 2014) 260.

61 See Klip (n 2) 196–202; Johannes Keiler and David Roef (eds), *Comparative Concepts of Criminal Law* (Intersentia 2019) 85–106.

62 Maria Kaiafa-Gbandi, 'The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law' [2011] 1 European Criminal Law Review 21–23. – DOI: https://doi.org/10.5235/219174411798862640; Klip (n 2) 196–197.

63 Mikhel Timmerman, 'Balancing Effective Criminal Sanctions with Effective Fundamental Rights Protection in Cases of VAT Fraud: Taricco' [2016] 53(3) CML Rev 792.

64 Case C-42/17 *MAS and MB* [2017]. ECLI:EU:C:2017:936.

65 Francesco Viganò, 'Melloni Overruled? Considerations on the "Taricco II" Judgment of the Court of Justice' [2018] 9(1) New Journal of European Criminal Law 18–23. – DOI: https://doi.org/10.1177/2032284418760926.

66 Case C-399/11 *Melloni* [2013] paras 63–64. ECLI:EU:C:2013:107.

67 Viganò (n 65).

68 Valsamis Mitsilegas, 'Judicial Dialogue in Three Silences: Unpacking Taricco' [2018] 9(1) New Journal of European Criminal Law 38–42. – DOI: https://doi.org/10.1177/2032284418761062.

clash and the Italian Constitutional Court guaranteed that its position on the legality principle could not be jeopardised.[*69]

4.2. The principle of retroactive application of the more lenient criminal law

Section 23(2) of the Estonian Constitution, in its second sentence, stipulates that if, subsequent to the commission of an offence, the law provides for a lighter penalty, the lighter penalty shall be applied. This section in conjunction with Section 12(1), which states that all people are equal before the law, forms a basis for the principle of retroactive application of the more lenient criminal law. The same is stated in Section 5(2) of the Estonian Penal Code. It is considered to be a separate principle from the *nullum crimen, nulla poena, sine lege scripta, stricta, praevia* enshrined in Section 23 (in part 1 and the first sentence of part 2).[*70]

The principle of retroactive application of the more lenient criminal law has been recognised also as among the general principles of EU law, by the CJEU[*71]. Article 49(1) of the Charter contains the same principle. In *Scoppola v. Italy*, the ECtHR deviated from the case law established by the European Commission in the case *X v. Germany* and affirmed that Article 7, Section 1 of the convention guarantees not only the principle of non-retrospectiveness of stricter criminal law but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law.[*72] The ECtHR expanded the meaning of Article 7(1) while referring to Article 49(1) of the Charter and the *Berlusconi and Others* case, wherein it was held that this principle formed part of the constitutional traditions common to all member states.[*73] In response to this judgement by the ECtHR, many member states had to adopt a more generous approach to the principle of the applicability of the more lenient criminal law.[*74] It is evident, therefore, that the Charter has already affected member states' criminal law.

4.3. The principle of proportionality and *ultima ratio*

The principle of proportionality, which is also an element of the rule of law, has a key role in criminalisation and sentencing law.[*75] The principle of proportionality is anchored in Section 11 of the Constitution of Estonia, which states: 'Rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and must not distort the essence of the rights and freedoms restricted.' The Supreme Court of Estonia has stressed that criminal law as a whole is required to be in compliance with the principle of proportionality.[*76] The *ultima ratio* principle, under which appealing to criminal law is permitted only as a last resort, has been categorised as subsidiary to the principle of proportionality in academic literature.[*77] The Supreme Court of Estonia has stressed the significance of the principle of *ultima ratio* by identifying it as one of the most important principles of criminal law.[*78]

The principle of proportionality has secured its place in the union's legal order as a general principle of EU law that has many dimensions.[*79] It is expressed explicitly in the establishing treaties: Article 5(4) of the TEU states that '[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives

69 Ibid.

70 Kergandberg and others (n 56).

71 Case C-420/06 *Jager* [2008] para 59. ECLI:EU:C:2008:152; see also Klip (n 2) 203–204.

72 *Scoppola v Italy* [GC] (No. 2) no. 10249/03, ECHR 17 September 2009, para 109.

73 Ibid para 105.

74 Van Kempen (n 3) 252–254.

75 Hans Joachim Hirsch, 'Õigusriikliku karistusõiguse aktuaalsed probleemid' [2004] 3 Juridica 162–163.

76 Decision of the Criminal Chamber of the Supreme Court of Estonia (20 February 2007) in case 3-1-1-99-06, para 22.

77 Hirsch (n 75) 162; Nils Jareborg, 'Criminalization As Last Resort (*Ultima Ratio*)' [2004] 2(2) Ohio State Journal of Criminal Law 532.

78 Decision of the Criminal Chamber of the Supreme Court of Estonia (9 November 2018) in case 1-17-6580, para 11.

79 Joanna Długosz, 'The Principle of Proportionality in European Union Law As a Prerequisite for Penalization' [2017] 7 Adam Mickiewicz University Law Review 283–298. – DOI: https://doi.org/10.14746/ppuam.2017.7.17; Anabela Miranda Rodrigues, 'Fundamental Rights and Punishment: Is There an EU Perspective?' [2019] 10(1) New Journal of European Criminal Law 18–19.

of this Treaty'. Article 49(3) of the Charter states that the severity of penalties must not be disproportionate to the criminal offence, and its Article 52(1) specifies that any limitation to the exercise of rights and freedoms recognised by the Charter must be consistent with the principle of proportionality, with limitations to be undertaken only if they are necessary and genuinely in line with either objectives of general interest that are recognised as such by the European Union or the need to protect the rights and freedoms of others. The function of the principle of proportionality is to control the manner in which the European Union exercises its powers in relation to the member states and individuals and also to assess the activities of those states.[*80]

Although the principle of proportionality is unquestionably a core principle of EU law, its application in the field of criminal law has been criticised in academic writings. The CJEU has received criticism for not acknowledging the different meaning of proportionality in the framework of law-making.[*81] Also, the way in which the EU legislator has set repressive minimum standards for maximum penalties has raised great concern among academics.[*82] Whether this process sufficiently accounts for the differences between the member states' sanction systems is debatable, so questions arise as to whether there are systematic problems in EU criminal law from the perspective of the principle of proportionality.[*83]

On the union level, the *ultima ratio* principle can be linked to the principle of proportionality but also to that of subsidiarity.[*84] *Ultima ratio* in EU law is recognisable in the principle of subsidiarity and in the limits the TFEU sets for the approximation of substantive criminal law.[*85] Although *ultima ratio* has been recognised in several legal acts and in the practice of the CJEU, it is left to be developed mainly in legal scholarship with a national undertone.[*86] Therefore, it is questionable whether the classic formulation of *ultima ratio*, which emphasises the repressive nature of the criminal-justice system and positions criminal law as the last resort of the legislator, is going to survive in the context of EU criminal law.[*87]

4.4. The principle of individual guilt (*nulla poena sine culpa*)

The principle of individual guilt[*88] (*nulla poena sine culpa*) is considered an Estonian constitutional principle in that it is rooted in the principles of human dignity and the rule of law.[*89] The latter are both enshrined in Section 10 of the Constitution and recognised as fundamental principles of the Constitution.[*90] Specifically, the Supreme Court of Estonia referred to the principle of individual guilt and its roots in the principles of human dignity and the rule of law in case 3-4-1-13-15.[*91] The elements of the principle of individual guilt are listed in Section 32 and Section 56(1) of the Penal Code.[*92]

The principle of guilt has received minimal attention in EU law and remains underdeveloped above national level, differing in meaning on the basis of the Member State whose law is involved.[*93] Similarly to the ECHR in this respect, the Charter makes no specific provisions related to the principle of guilt.[*94] The

80 Długosz (n 79).

81 Ester Herlin-Karnell, 'What Principles Drive (or Should Drive) European Criminal Law?' [2010] 11(10) German Law Journal 1125-1126. – DOI: https://doi.org/10.1017/s2071832200020137; Matthias Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation' [2006] 12(4) European Law Journal 503. – DOI: https://doi.org/10.1111/j.1468-0386.2006.00330.x.

82 Długosz (n 79) 283-298; Helmut Satzger, 'The Harmonisation of Criminal Sanctions in the European Union – A New Approach' [2009] 1 Eucrim.

83 Ibid.

84 Sakari Melander, 'Ultima Ratio in European Criminal Law' [2013] 3(1) *Oñati Socio-legal Series* 42, 46-58; Długosz (n 79) 289–298; Rodrigues (n 79) 18.

85 Melander (n 84).

86 Ibid.

87 Ibid.

88 Also referred to in the shorter form 'principle of guilt'. See U Lõhmus, 'Kas kokkuleppemenetlus on kooskõlas karistusõiguse süüpõhimõttega?' (2014) 7 Juridica; Sootak (n 9) 372.

89 Lõhmus (n 88) 547.

90 Ernits and others (n 5) 889.

91 Decision of the Constitutional Review Chamber of the Supreme Court of Estonia (23 September 2015) in case 3-4-1-13-15, para 39.

92 Sootak (n 9) 372.

93 Van Kempen (no 3) 253–257, 263–264.

94 Ibid.

ECtHR's case law on Article 6(2) (on presumption of innocence) and Article 7 (on the principle of legality) contains elements that are relevant with regard to substantive criminal law's principle of guilt, but the ECHR does not explicitly protect a principle of guilt for substantive criminal law.[*95] Since articles 48 and 49 of the Charter are equivalent to the above-mentioned provisions of the ECHR, they should provide at least the same amount of protection.[*96]

In competition-related cases, the CJEU has recognised the principle of guilt 'as typical of criminal law' by stating that criminal liability without the subjective element of guilt is compatible with European Union law.[*97] In its future practice, the CJEU should recognise the principle of guilt as a distinct general principle of EU law or give this principle a stronger foundation in the union's law on the basis of Article 48 and Article 49 of the Charter.[*98] The imposition of objective criminal liability in secondary law indicates a lack of respect for the principle of guilt in the legal order of the union.[*99] As the influence of EU law on domestic criminal law grows, the underdevelopment of the principle of guilt at union level is becoming more problematic and might even lead to weakening of this principle in the member states' criminal law.[*100]

5. Conclusion

EU law affects national principles of criminal law on many levels. Estonian criminal law is shaped by the regulatory triangle wherein the ECtHR, CJEU, and Member State courts interact. While many aspects of the relationship between EU law and national constitutions remain debatable, the impact of European Union law on national criminal law has increased remarkably since Lisbon: the Charter, which articulates principles of criminal law, is now legally binding in the EU, and the CJEU's jurisdiction has expanded to the former third-pillar area. Where national legislation falls within the scope of EU law, it has to be interpreted in light of the Charter; however, the case law of the ECtHR on the principle of retroactive application of the more lenient criminal law demonstrates that the Charter still can indirectly influence the principles of substantive criminal law expressed in a purely domestic law.

The principles of legality, proportionality, and retroactive application of the more lenient criminal law, which are considered to be fundamental principles of Estonian substantive criminal law, are all well-founded principles of EU law. They are recognised as general principles of union law and enshrined in the Charter of Fundamental Rights. In contrast, *ultima ratio* and the principle of individual guilt, other principles with constitutional standing in Estonian law, are not explicitly mentioned in the Charter. Although both are recognised in the case law of the CJEU and perceived to be attached to other general principles of EU law in legal dogmatics, they continue to be developed mainly at national level. Clearly, then, the relationship between EU law and the individual respective principles of substantive criminal law is not uniform. In particular, the underdevelopment of the principle of individual guilt on the union level has raised concerns among scholars, because this state of affairs could lead to the weakening of this principle on national level.

Many questions as to the meaning and scope of the principles of criminal law covered by the Charter remain unanswered, as they have not been addressed by the CJEU. The CJEU has so far shown willingness to supply only a minimum standard of protection for principles of substantive criminal law in the course of searching for balance between protection of fundamental rights and effectiveness of EU law. Although the CJEU avoided a constitutional clash in *M.A.S. and M.B.*, the judgement shows that the different meaning and scope of the principles of substantive criminal law on union level can potentially lead to conflicts between the member states' and European Union law.

95 Kaiafa-Gbandi (n 62) 30; Van Kempen (n 3) 253–256.

96 Ibid.

97 Van Kempen (n 3) 256.

98 Ibid 257–258.

99 Kaiafa-Gbandi (n 62) 32.

100 Van Kempen (n 3) 253–257, 263–264.

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Russian Approaches to the Right of Peoples to Self-Determination: From the 1966 United Nations Covenants to Crimea

1. Introduction

The 2014 annexation of Crimea and its incorporation into the Russian Federation (RF) marked Russia's departure from its otherwise consistent support for the territorial integrity of states (with the exception of the cases of South Ossetia and Abkhazia). Looking at the Soviet past, one realises that, likewise, the Soviets were flexible in their use and promotion of the notion of self-determination during the de-colonisation era. Through their efforts, a clause on self-determination was included in two major United Nations (UN) treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR)[*1] and the International Covenant on Civil and Political Rights (ICCPR).[*2] Nevertheless, they refused to acknowledge the existence of similar issues within their territories.

Given the situation outlined above, a research problem can be identified in the contradiction visible in Russia's contemporary approach to the right of peoples to self-determination as manifested in the case of Crimea and its relationship to the Soviet approach to self-determination in the era of de-colonisation. Legal discussion of the subject has generally neglected analysis of the situation in light of the Soviet past, where Russia's current legal thinking is rooted. The objective for this article, therefore, is to fill the gap by looking at Russian theory and practice related to the right of peoples to self-determination from a historical-legal perspective. The article traces the roots of the Soviet approach to self-determination in the 1960s and that of Russia after the annexation of Crimea, and it articulates the links between the Soviet and the Russian approach to that right. The hypothesis for the study was that the current Russian approach to the right of peoples to self-determination resembles the Soviet one in its legal flexibility characterised by self-interest, hypocrisy, and double standards.

Such analysis is especially topical in that Russia remains involved in several regional secessionist conflicts wherein self-determination is exploited as a key argument for separation, including but not limited

1 International Covenant on Economic, Social and Cultural Rights. New York, 13.12.1966, entering force on 3 January 1979.

2 International Covenant on Civil and Political Rights. New York, 16.12.1966, entering force on 23 March 1976.

to the cases of Transnistria, South Ossetia, and Abkhazia.[*3] The study employed a legal-historical method to connect the dots between the past and present, with a comparative method utilised for understanding the differences between the Soviet and Western approach and for ascertaining the links between the Soviet and the current Russian approach to self-determination. Moreover, the article presents a summary from analysis of 51 official documents from 2014 to 2020, a corpus reflecting the most relevant speeches and interviews given by Russia's high-ranking officials on justification of Crimea's annexation. The project of analysing the meaning of these political speeches and messages in the context of Russia's international legal framing of the Crimea situation is perhaps the main contribution to the literature and discussion.

2. From Wilsonian to Bolshevik ideas of self-determination

Tracing the evolution of self-determination throughout the 20th century from a vague principle into a firm right in international law reveals three main phases: 1) Wilsonian, 2) de-colonisation, and 3) post-colonial.[*4] Among the figures identified as playing a key role in establishing the liberal-democratic idea of self-determination are such thinkers as 'Mill and Mazzini, Wilson and Rousseau'.[*5] The Wilsonian concept of self-determination became a guiding principle during the great powers' negotiations on the future of the erstwhile Austro-Hungarian and Ottoman empires.[*6] Nevertheless, it remained a political principle as the clause promising the application of self-determination was ultimately omitted from the final draft of the Covenant of the League of Nations and did not culminate in the development of a general norm of international law at this stage.[*7]

Alongside Wilson, Lenin was among the earliest proponents of self-determination. Dmitry Baratashvili claimed that Lenin provided the scientific foundation for the link between the democratic world and the recognition of the right of peoples to self-determination.[*8] Nevertheless, Lenin's understanding from the very beginning was that, though self-determination entails secession, the ultimate goal was the integration of nations into a socialist world and not their independence.[*9] Hence, the Bolshevik party utilised the concept of self-determination for 'the liquidation of capitalism and the construction of socialism'.[*10] The Bolsheviks believed that the issue of self-determination was fully resolved within the Soviet Union and that the Union of Soviet Socialist Republics (USSR) was created on a foundation of the voluntary unification of all nations through the exercise of their right to self-determination.[*11]

The hypocrisy of such thinking was revealed through their practice. For instance, self-determination was cited as a basis for recognising the independence of several states in the 1920–1921 Soviet peace treaties.[*12] In one example, Article 2 of the Tartu Peace Treaty, signed between Soviet Russia and the Republic of Estonia on 2 February 1920, proclaimed the recognition of Estonia's independence on the basis of the right of peoples to self-determination, which granted Estonia the right to secession.[*13] Nevertheless, throughout the independent existence of Estonia, the Bolsheviks employed all means at their disposal 'to subvert the

3 Christopher J Borgen, 'Law, Rhetoric, Strategy: Russia and Self-Determination before and after Crimea' (2015) 91 ILS 266.

4 Hurst Hannum, 'Rethinking Self-Determination' (1993) 34(1) VaJIntlL 67.

5 Daniel Philpott, 'In Defense of Self-Determination' (1995) 105(2) Ethics 355. – DOI: https://doi.org/10.1086/293704.

6 Milena Sterio, *The Right to Self-Determination under International Law: 'Selfistans', Secession and the Rule of the Great Powers* (Routledge 2013) 10. – DOI: https://doi.org/10.4324/9780203083963.

7 Ibid.

8 Dmitrij I Baratashvili, 'Princip ravnopravija i pravo narodov rasporjazhat'sja svoej sud'boj' ['The Principle of Equality and the Right of Peoples To Control Their Own Destiny] in A Nikolaj Ushakov (ed), *Konstitucionnye osnovy vneshnej politiki SSSR i mezhdunarodnoe pravo* ['Constitutional Foundations of USSR Foreign Policy and International Law'] (Nauka 1985) 202.

9 Lauri Mälksoo, 'The Soviet Approach to the Right of Peoples to Self-Determination: Russia's Farewell to Jus Publicum Europaeum' (2017) 19(2) JHIL 14. – DOI: https://doi.org/10.1163/15718050-19231035.

10 Grigory Tunkin, *Theory of International Law* (William E Butler tr, Cambridge 1974) 8. – DOI: https://doi.org/10.4159/harvard.9780674434165.

11 Ibid 10–11.

12 Mälksoo, 'The Soviet Approach to the Right of Peoples to Self-Determination' (n 9) 8.

13 Tartu Peace Treaty, Tartu, 2 November 1920, entering force on 30 March 1920, art 2.

power in Estonia'.[*14] They eventually Sovietised Estonia in line with their approach to Latvia, Lithuania, and Romania's Bessarabia upon conclusion of the Molotov–Ribbentrop pact (on 23 August 1939) and created the appearance of the so-called reunification being entirely voluntary.[*15] They refused to admit that in 1940 the Baltic States acceded to the Soviet Union under the pressure of a Soviet ultimatum of 'approval or annihilation'.[*16] Moreover, the Soviet authorities fabricated an official narrative according to which they had liberated these states from pro-fascist governments.[*17]

3. The USSR and promotion of the right of peoples to self-determination in the era of de-colonisation

For contextualising the Soviet approach to self-determination in the de-colonisation era, it is important to mention that Marxism, which was the foundation of Soviet legal thinking, saw law as an instrument of the oppression of one social class by another.[*18] Moreover, existing legal provisions were subjected to Soviet interpretations, and the Soviets developed a unique, anti-Western understanding of international law.[*19] A kind of thinking wherein the issue of self-determination was resolved in the Soviet Union was crystallised in the de-colonisation era when the USSR took the lead in championing this right at international level. Nevertheless, 'in the Western liberal sense (emphasizing democracy and human rights) there was no "internal self-determination' within the USSR".[*20] Despite this, the USSR started promoting self-determination internationally, casting itself as the original initiator of de-colonisation.[*21] They were very much successful in this endeavour, partly because, as Dmitry Grushkin has noted, by the end of World War II, the role of the USSR was growing stronger internationally and the voice of the Soviets mattered more than ever before.[*22] Soviet legal scholar Grigory Tunkin, for example, argued that self-determination became a recognised principle of international law through the 'persistent struggle of the Soviet Union and other progressive forces'.[*23] Eventually, an article on self-determination was included in the UN Charter, in line with the proposal of the Soviet delegation.[*24] In the eyes of Soviet legal scholar Igor Blishchenko, this exemplified the triumph of the USSR against the colonial system of imperialism.[*25] Later, the Soviets insisted on inclusion of self-determination in the 1948 Universal Declaration of Human Rights also; however, this was prevented by the Western colonial powers, who argued that the principle would pose a danger to public order and the interests of other states.[*26]

The Soviets nevertheless managed to continue their promotion of a self-determination agenda and played a decisive role in drafting the two major UN General Assembly (UNGA) resolutions on de-colonisation.[*27] These were the Declaration on the Granting of Independence to Colonial Countries and Peoples,

14 Silvia P Forgus, 'Soviet Subversive Activities in Independent Estonia (1918–1940)' (1992) 23(1) JBS 29. – DOI: https://doi.org/10.1080/01629779100000261.

15 Mälksoo, 'The Soviet Approach to the Right of Peoples to Self-Determination' (n 9) 12–13.

16 Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 258.

17 David Kirby, 'Incorporation: The Molotov–Ribbentrop Pact' in Graham Smith (ed), *The Baltic States* (Palgrave Macmillan 1996) 77. – DOI: https://doi.org/10.1007/978-1-349-14150-0_4.

18 Anna Isaeva, 'Contradictions and Incompleteness in Russian Legal Discourses' in Sean P Morris (ed), *Russian Discourses on International Law* (Routledge 2019) 31. – DOI: https://doi.org/10.4324/9781315123837-3.

19 Lauri Mälksoo, 'Russian Approaches to International Law' (OUP 2015) 4.

20 Mälksoo, 'The Soviet Approach to the Right of Peoples to Self-Determination' (n 9) 17.

21 Tero Lundstedt, 'The Changing Nature of the Contemporary Russian Interpretation of the Right to Self-Determination under International Law' in Sean P Morris (ed), *Russian Discourses on International Law* (Routledge 2019) 197–99. – DOI: https://doi.org/10.4324/9781315123837-10.

22 Dmitry Grushkin, *Pravo Narodov Na Samoopredelenie: Ideologija i Praktika* ['The Right of Peoples to Self-Determination: Ideology and Practice'] (Zven'ja 1970) 8.

23 Tunkin (n 10) 61.

24 Lundstedt (n 21) 202.

25 As cited by Bill Bowring, *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power* (Routledge 2013) 85. – DOI: https://doi.org/10.4324/9780203490211.

26 Tunkin (n 10) 64.

27 Ibid.

adopted via UNGA resolution 1514[*28], and resolution 1541.[*29] This accomplishment was accompanied by the so-called Salt Water Thesis, which stipulated that self-determination may be invoked only by those territories that are geographically separate from the colonising power, or the ones divided from it by blue water.[*30] This favoured the Soviets greatly, as it meant that self-determination would not be exercised in opposition to their interests.

As the project continued, a critical point for the advancement of self-determination as a right in international law was the inclusion of a relevant provision in the 1966 UN treaties, the ICESCR and ICCPR.[*31] Before this, the Soviets maintained their insistence that self-determination had already been fully expressed in the USSR and criticised Western European powers for their imperial and colonial realities, all the while objecting to any similar criticism levelled at themselves.[*32] The Western states, for their part, opposed any provision for self-determination as they pursued their colonial interests, but they did eventually acknowledge the possibility of secession in the colonial context.[*33] The prevailing understanding was that, while the covenants entailed non-colonised peoples' entitlement to a form of internal governance within their mother state, these peoples did not acquire a right to seek independence.[*34] Colonised peoples were understood to be granted the right to freely decide their international status and determine their political fate.[*35]

The main objection to the inclusion of a clause on self-determination in the twin covenants had to do with hypocrisy: these would not apply to the people within the USSR and had been applied only to Finland in the former Tsarist Empire.[*36] Blishchenko's counter to this argument was the statement that within the USSR the republics enjoyed autonomy.[*37] Nevertheless, as scholar Bill Bowring noted, Blishchenko failed to mention the cases in which the Soviets resorted to force or threat of force to coerce certain nations to join the Soviet Union.[*38] The notion that self-determination was fully actualised within the USSR was articulated also by Baratashvili, who argued that the resolution of the question of nationalities within the USSR was among the greatest achievements of socialism.[*39] Meanwhile, the Soviets once again called their commitment to self-determination into question with the 1969 military invasion of Czechoslovakia[*40], which has been characterised as directing 'highly intense coercion against the territorial integrity and political independence of Czechoslovakia'.[*41] For justification, they produced an unsigned document implying that Czech leaders had 'invited' the Warsaw Pact forces to enter Czechoslovakia.[*42]

4. The right of peoples to self-determination in the post-colonial era

To understand the contradictions found in Russia's approach to self-determination in our times, it is important to identify the position of international law on self-determination in the post-colonial era. One document that encapsulates these developments is the Declaration on Principles of International Law Concerning

28 Declaration on the Granting of Independence to Colonial Countries and Peoples, UN General Assembly A/RES/1514(XV), adopted 14 December 1960, art 2.

29 Addressing principles that should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the UN Charter, UN General Assembly A/RES/1541, adopted on 15 December 1960.

30 Jeff Corntassel, 'Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse' (2008) 33(1) Alternatives 108. – DOI: https://doi.org/10.1177/030437540803300106.

31 ICCPR (n 2); ICESCR (n 1).

32 Mälksoo, 'The Soviet Approach to the Right of Peoples to Self-Determination' (n 8) 16.

33 Helen Quane, 'The United Nations and the Evolving Right to Self-Determination' (1998) 47(3) ICLQ 543. – DOI: https://doi.org/10.1017/s0020589300062175.

34 Sterio (n 6) 11.

35 Ibid 11.

36 As cited by Bowring (n 25) 84.

37 Ibid.

38 Ibid.

39 Baratashvili (n 8) 205.

40 David W Paul, 'Soviet Foreign Policy and the Invasion of Czechoslovakia: A Theory and a Case Study' (1971) 15(2) ISQ 178. – DOI: https://doi.org/10.2307/3013548.

41 Richard M Goodman, 'The Invasion of Czechoslovakia: 1968' [1969](4) Int Lawyer 57.

42 Ibid 44.

Friendly Relations and Co-operation among States, or FRD.[*43] *Inter alia*, the FRD criticises directing the use of force against the exercise of the right to self-determination; nevertheless, it also prioritises the principle of the territorial integrity of states.[*44] Meanwhile, the inverted reading of the safeguard clause of the FRD gave rise to the theory of 'remedial secession'.[*45] The proponents of this theory assume the possibility of secession for a group of people in exceptional circumstances in the event that multiple grievances are present, though the theoretical and practical foundations for such a theory are, in reality, very weak.[*46]

Furthermore, a provision for self-determination had been included in the Helsinki Final Act in 1975.[*47] That said, it must be read in the context of the principles of the inviolability of frontiers and the territorial integrity of states.[*48] The latter view was later confirmed in the 1990 Paris Charter.[*49] Finally, the reluctance to accept secession outside the de-colonisation context was reflected also in the context of discussions of the right of indigenous peoples to self-determination, which eventually resulted in the adoption of the 2007 UNGA Declaration on the Rights of Indigenous Peoples.[*50]

Overall, throughout its development, the concept of the right of self-determination has been at constant odds with the principle of territorial integrity of states, which lies at the core of the contemporary international legal system and is rooted in the doctrines of *uti possidetis juris* and *terra nullius*.[*51] The clash between self-determination and territorial integrity is significant in the case of external self-determination – i.e. secession. States traditionally disapprove of secession because encouragement of territorial separation is perceived to be dangerous.[*52] While secession is not a recognised right in international law, it is not prohibited either.[*53] Secession is regulated by the legal provisions for self-determination and territorial integrity. International law does not prohibit consensual secession as long as it is exercised under constitutional processes.[*54] As for unilateral secession, it is allowed only in the context of de-colonisation and arguably in the case of reclaiming a territory subject to unjust military occupation.[*55] All in all, in the post-colonial era, the dominant understanding is that self-determination is a procedural right that may not amount to a right to internal or external self-determination.[*56]

5. Russia's approach to the right of peoples to self-determination before the annexation of Crimea

If one is to understand the relationship between Russia's approach to self-determination in the case of Crimea and the Soviet approach in the de-colonisation era, it is vital to establish the links between Russian and Soviet legal thinking. After the collapse of the Soviet Union, Russia pledged to maintain legal continuity with the Soviet Union, inheriting its rights and obligations in line with the doctrine of state

43 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations UN General Assembly A/RES/26/25 (XXV). 24.11.1970.

44 Ibid.

45 For more details on remedial secession theory, see Allen Buchanan, 'Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law' (OUP 2004). – DOI: https://doi.org/10.1093/0198295359.003.0001; James Summers, 'Relativizing Sovereignty: Remedial Secession and Humanitarian Intervention in International Law' (2010) 1 STAIR; Jure Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice' (2010) 6(1) STAIR 2010.

46 Vidmar (n 45) 50.

47 Final Act of Helsinki, Organization for Security and Co-operation in Europe (Conference on Security and Co-operation in Europe, 1 August 1975).

48 Hannum (n 4) 29.

49 *Charter of Paris* for a New Europe (Conference on Security and Co-operation in Europe, *Paris,* 21 November *1990*) 5.

50 Declaration on the Rights of Indigenous Peoples, UN General Assembly A/RES/61/295, adopted 2 October 2007.

51 Joshua Castellino, 'Territorial Integrity and the Right to Self-Determination: An Examination of the Conceptual Tools' (2008) 33 Brook J Intl L 520.

52 Vend P Nanda, 'Self-Determination under International Law: Validity of Claims to Secede' (1981) 13(2) Case W Res J Intl L 264.

53 Hannum (n 4) 42.

54 Buchanan (n 45) 338.

55 Ibid 333.

56 Jan Klabbers, 'The Right To Be Taken Seriously: Self-Determination in International Law' (2006) 28(1) HRQ 189. – DOI: https://doi.org/10.1353/hrq.2006.0007.

continuity.[*57] Moreover, it retained the Soviet federal formula and understanding of self-determination, hence deeming the issue of self-determination resolved within the federation and applicable only to other states.[*58] Although Russia abandoned Soviet ideology in favour of capitalist fundaments,[*59] the ghost of Soviet legal thinking could not be exorcised from the post-Soviet space immediately.[*60] Russian doctrine was not submitted to dialogue in which Western discourse was granted equal footing, so it remained shielded from the latter influence.[*61] Also, current Russian legal doctrine suffers in general from disregard for fundamental theoretical issues related to the history of international law and self-determination.[*62] Accordingly, Russia's current approach to self-determination remains firmly rooted in Soviet legal thought.

The overall picture that emerges is that in 1991–2013 Russia maintained strong opposition to recognising self-determination outside the colonial context.[*63] In the 1990s, its main concern was secessionist aspirations of nationalities within its territories, Chechnya in particular.[*64] Eventually, the Russian Constitutional Court reiterated the longstanding position in two major decisions, pertaining to Tatarstan and Chechnya, by ruling against the possibility of secession.[*65]

The situation changed over time, in line with major geopolitical disruptions in the region. The 1990s and early 2000s were significant for institution-building and expansion in the West, which Russia perceived as a threat.[*66] It is against the backdrop of these developments that the secessionist conflict escalated in Kosovo in 1999. This was followed by a NATO intervention that led to deterioration in relations between Russia and the West.[*67] Upon Kosovo's 2008 declaration of independence, Russia, in its written submission to the International Court of Justice in the *Kosovo* proceedings, explicitly argued against the possibility of legitimate secession based on secession in fact, though this occasion did mark the first time Russia made reference to the argument of remedial secession.[*68] Even though Russia did not accept the possibility of remedial secession for Kosovo, it did imply that secession is possible in general, albeit under highly specific conditions.[*69] Meanwhile, the years since Russia's invasion of Georgia in 2008 witnessed a significant shift from arguments based on territorial integrity to ones related to the protection of co-nationals or co-ethnics.[*70]

6. Russia's approach to self-determination after the 2014 annexation

6.1. Background on the annexation of Crimea

The annexation of Crimea in 2014 followed a series of events that Russia perceived as a threat directed against its various positions in its so-called sphere of influence. Specifically, Ukraine's attempt to sign an Association Agreement with the EU was anything but acceptable to Russia. Moscow believed that inciting a dispute framed as one of self-determination would hinder Ukraine's integration into Europe.[*71] Russia annexed Crimea in March 2014. Among the events following this act were armed intervention by Russian

57 WE Butler, 'Foreign Policy Discourses As Part of Understanding Russia and International Law' in Sean P Morris (ed), *Russian Discourses on International Law* (Routledge 2019) 177. – DOI: https://doi.org/10.4324/9781315123837-9.

58 Lundstedt (n 21) 197.

59 Vladislav L Tolstykh, 'The Nature of Russian Discourses on International law' in Sean P Morris (ed), *Russian Discourses on International Law* (Routledge 2019) 10. – DOI: https://doi.org/10.4324/9781315123837-2.

60 Isaeva (n 18) 43.

61 Tolstykh (n 59) 11.

62 Ibid 15.

63 Theodore Christakis, 'Self-Determination, Territorial Integrity and Fait Accompli in the Case of Crimea' (2015) 75(1) ZaöRV/ Heidelberg JIL 1.

64 Borgen (n 3) 245.

65 Christakis (n 63) 9.

66 Borgen (n 3) 265.

67 Oksana Antonenko, 'Russia, NATO and European Security after Kosovo' (1999) 41(4) Survival 124. – DOI: https://doi.org/10.1080/713660137.

68 Borgen (n 3) 245.

69 Ibid.

70 Ibid 246.

71 Ibid.

forces in the form of 'little green men',[*72] a referendum, and a declaration of Crimean independence.[*73] According to the officially reported results, 96.77% voted for unification with the RF.[*74]

After the referendum, Russia's President Putin signed an executive order to recognise Crimea, and, once the relevant bodies had been informed that local Crimean institutions had proposed joining the RF, the agreement on incorporation of the Republic of Crimea into the RF was signed. In the meantime, Ukraine's Constitutional Court stated that such a change in territory would be possible only upon a country-wide Ukrainian referendum and that only Ukraine's parliament possessed the authority to call for such a referendum. Consequently, the Constitutional Court mandated that the Crimean authorities repeal the referendum decree. Clearly, the Crimea case revolved around the complexities of violations of domestic and international legal norms.[*75]

6.2. Critical analysis of Russia's arguments pertaining to a Crimean right to self-determination

Russia followed its annexation of Crimea by embarking on legitimising Crimea's cause for self-determination, with utmost confidence. The general line of Russia's argumentation is expressed in the 18 March 2014 address of President Putin.[*76] Analysis of a corpus of 51 official documents identified Russia's justification narratives as including both legal and non-legal arguments. The arguments fall into two main classes: issues related to self-determination and secession (referendum, Ukrainian violations of human rights, the Kosovo precedent, and self-determination) and other arguments (political crisis in Ukraine, Crimea after 2014, the West being to blame, Crimea's history, and protecting compatriots).

6.2.1. Arguments related to self-determination and secession

Self-determination: Representing the annexation of Crimea as a case of self-determination was important for Russia. Illustrating this, Russia's foreign minister, Sergei Lavrov, claimed that during the Cold War the two opposing blocs had agreed on the principles enshrined in the Final Act, emphasising 'respect for people's right to self-determination [and] respect for the sovereignty and territorial integrity of states'.[*77] Furthermore, Russia's ambassador to Indonesia at the time argued that the realisation of self-determination by Crimeans was achieved per Article 1 of the UN Charter.[*78] At the same time, while discussion of self-determination continued in the post-colonial era, there is still not enough support for expression of secession outside the decolonisation context. While there is support for its validity in the context of decolonisation, Crimea falls outside that context. Interesting references to sovereignty and territorial integrity were made elsewhere. Putin's interpretation of sovereignty is noteworthy in that he claimed: '[I]f a country opts for this and wants to cede part of its sovereignty, it's free to do so. […] [I]f Ukraine joins, say, NATO, NATO's infrastructure will move directly toward the Russian border, which cannot leave us

72 Shane Reeves & David A Wallace, 'The Combatant Status of the 'Little Green Men' and Other Participants in the Ukraine Conflict' (2015) 91 Int Law Stud 393.

73 Thomas D Grant, 'Annexation of Crimea' (2015) 109(1) AJIL 68. – DOI: https://doi.org/10.5305/amerjintelaw.109.1.0068.

74 Ibid 69.

75 Ibid 69–71.

76 'Obrashhenie Prezidenta Rossijskoj Federacii. Oficial'nye setevye resursy Prezidenta Rossii' ['The Address of the President of the Russian Federation: Official Internet Resources of the President of Russia'] (18 March 2014) <http://kremlin.ru/events/president/news/20603> accessed 10 February 2020. All translations from Russian into English are by the author of this article unless otherwise indicated.

77 Interview with Foreign Minister Sergey Lavrov for the Russiya-1 TV television programme *An Evening with Vladimir Solovyov* (Embassy of the Russian Federation to the UK, 25 December 2014). See <www.rusemb.org.uk/foreignpolicy/2864> accessed 10 February 2020.

78 'Vystuplenie Posla Rossijskoj Federacii v Indonezii M.Ju.Galuzina v Universitete Indonezii na seminare 'Krizis na Ukraine i ego vlijanie na Jugo-Vostochnuju Aziju', g. Depok, 29 aprelja 2014 goda, MID Rossijskoj Federacii' ['Speech of Ambassador of the Russian Federation to Indonesia MY Galuzin at the University of Indonesia's Seminar 'The Crisis in Ukraine and Its Impact on South-East Asia', Depok, 29 April 2014, Ministry of Foreign Affairs of the Russian Federation (MID)'] (15 May 2014) <www.mid.ru/web/guest/maps/id/-/asset_publisher/zaMdV5V4XUmC/content/id/60258> accessed 8 February 2020.

indifferent.'*[79] Thus, Russia's sovereignty was aggrandised and construed to be more important than that of Ukraine.

Referendum: Russian officials often argued that the unification of Crimea with Russia took place after the Crimeans opted for self-determination via a referendum by an overwhelming majority.*[80] In reality, the way the referendum in Crimea was held attracted widespread criticism, as it was organised in a manner that pointed to a predetermined result.*[81] In any case, international law does not confer any special status on referenda; neither has a role for them been supported by the international community in the absence of backing from the parent state.*[82] In the case of Crimea, only the Ukrainian Constitution could confer a right on Crimea to decide its political future by referendum.*[83] In addition, the referendum was preceded by use (or at least threat of use) of military force by Russia.*[84]

Ukraine's violations of human rights: Russian officials argued that the decisions of those behind the coup ran counter to the interests of the Russian-speaking population of Ukraine.*[85] Special emphasis was given to the elimination of the official status of the Russian language.*[86] While there is no denying that there have been human-rights violations in Ukraine—specifically targeting the Tatar minority—these violations were not grave and systemic.*[87] In the wake of the Soviet Union's dissolution, ethnic Russian were not subjected to assimilation and the Russian language has been used to a large extent in Ukraine as a second language.*[88] This theme is particularly interesting in light of the grim human-rights situation in Russia itself, which has been well-documented throughout recent decades.*[89] This makes Russia's concerns about Ukraine's violations of human rights hypocritical. Also, the theme of human-rights violations is closely linked to the remedial secession theory, which is widely contested. Finally, even if Ukraine had violated the human rights of Crimeans and even if secession were possible from the perspective of the remedial secession theory, secession would still be understood only as a remedy of last resort, pursued only after all other efforts are proven fruitless.*[90] In contrast, no attempts were made to resolve the crisis in Crimea in good faith. That is, as others have noted, 'even if a problem had existed in Crimea of a type justifying remedial secession, the situation was not ripe for secession in March 2014'.*[91]

The Kosovo precedent: With another line of argument, despite opposing the independence of Kosovo, Russia went on instrumentalising the Kosovo case for its interests.*[92] For example, Russian officials argued that the advisory opinion of the International Court of Justice on Kosovo declared that there had been no violation of international law when the region was separated from its parent state.*[93] In this

79 Interview of Vladimir Putin with Radio Europe 1 and the TV channel TF1 (from Official Internet Resources of the President of Russia, 4 June 2014) <http://en.kremlin.ru/events/president/news/45832> accessed 9 February 2020.

80 'Interv'ju Posla Rossii v Makedonii O.N.Shherbaka zhurnalu 'Kapital' 5 ijunja 2014 goda. MID Rossijskoj Federacii' ['Interview of Russia's Ambassador to Macedonia, ON Shcherbak, with *Capital* Magazine on 5 June 2014, MID'] (6 June 2014) <www.mid.ru/web/guest/maps/mk/-/asset_publisher/Bx1lWHr8ws3J/content/id/56878> accessed 8 February 2020.

81 Vasile Rotaru & Miruna Troncotă, 'Continuity and Change in Instrumentalizing 'the Precedent': How Russia Uses Kosovo To Legitimize the Annexation of Crimea' (2017) 17(3) J Southeast Eur Black Sea Stud 13. – DOI: https://doi.org/10.1080/14683857.2017.1348044.

82 Borgen (n 3) 249.

83 Ibid.

84 For more details on the questions related to the use of force and Crimea, see Grant (n 73) 77–87.

85 'Interv'ju Posla Rossii v Shvecii V.I.Tatarinceva «Krym vsegda prinadlezhal Rossii», opublikovannoe v gazete «Aftonbladet» 20 ijulja 2014 goda. MID Rossijskoj Federacii' [Interview of the Ambassador of Russia to Sweden V.I. Tatarintsev 'Crimea has always belonged to Russia', published in the newspaper 'Aftonbladet' on July 20, 2014, (MID)] (22 July 2020) <www.mid.ru/web/guest/maps/se/-/asset_publisher/Nr26tJIotl7z/content/id/677071> accessed 9 February 2020.

86 'Vystuplenie Postojannogo predstavitelja Rossii pri OON V.I.Churkina na zasedanii General'noj Assamblei OON, N'ju-Jork, 27 marta 2014 goda. MID Rossijskoj Federacii' ['Statement by VI Churkin, Permanent Representative of Russia to the UN, at a Meeting of the UN General Assembly, New York, 27 March 2014'] (MID) (27 March 2014) <www.mid.ru/web/guest/general_assembly/-/asset_publisher/lrzZMhfoyRUj/content/id/68754> accessed 9 February 2020.

87 Grant (n 73) 74.

88 Ibid.

89 Halya Coynash & Austin Charron, 'Russian-occupied Crimea and the State of Exception: Repression, Persecution, and Human Rights Violations' (2019) 60(1) Eurasian Geogr Econ 28–53. – DOI: https://doi.org/10.1080/15387216.2019.1625279.

90 Grant (n 73) 76.

91 Ibid 77.

92 Interview with Vladimir Putin for the German television channel ARD (from Official Internet Resources of the President of Russia 17 May 2014) <http://en.kremlin.ru/events/president/news/47029> accessed 9 February 2020.

93 'Vystuplenie Posla Rossijskoj Federacii v Indonezii M.Ju.Galuzina' (n 78).

context, the most important point is that, after having opposed recognition of Kosovo's independence and having blamed the Western states for opening a Pandora's box of secessionist movements, Russia employed the same argument to justify the annexation of Crimea, in a way contradicting its previous words and actions. The general understanding is that the grounds for equating the cases of Kosovo and Crimea are very weak.[*94]

6.2.2. Other arguments

Political crisis in Ukraine, blaming the West, and protecting compatriots

Featuring in the recurring themes were portrayal of the political crisis in Ukraine as a direct threat to the country's Russian-speaking population in general and Crimea in particular. Specifically, the main argument was that, in light of the 'changing political situation, which threatened violation of the rights and freedoms of people', the people of Crimea had no alternative to secession.[*95] Furthermore, the attempt of the EU to sign an Association Agreement with Ukraine was deemed unacceptable for Russia[*96], in addition to which Russia saw the political crisis as manufactured by the West to destabilise the region.[*97] In this light, Russia constructed itself as a defender of the Russian-speaking population in Ukraine.[*98]

From the perspective of international law, however, the political crisis in Ukraine did not authorise Russia to interfere in the affairs of the country or annex its territories. Although international law's prohibition of the use of force is not absolute and Article 51 of the UN Charter does specify that it is permitted for reasons of self-defence if an armed attack is perpetrated against a member of the UN[*99], scholars conclude that 'the prohibition against acquisition of territory by threat or use of force [...] is not subject to qualification'.[*100] This principle is reflected in the 1974 UNGA Definition of Aggression[*101] and renders Russia's claimed justifications for the annexation of Crimea void – as scholars conclude 'justifications for an armed intervention, even if accepted, are not justifications for the forcible acquisition of territory'.[*102] Also invalid is Russia's attempt to argue the invasion's legality on the basis of an invitation from Victor Yanukovych.[*103] While a state may invite another state to render assistance, the consent of the inviting state must be clear. In the Crimea case, in contrast, the validity of the invitation by Yanukovych was widely contested.[*104]

94 The validity of the Kosovo/Crimea parallel has been discussed in depth by Rotaru and Troncotă (n 81).

95 'Interv'ju Posla Rossii v Litve A.I.Udal'cova gazete 'Respublika', 3 janvarja 2015 goda, MID Rossijskoj Federacii' ['Interview of Ambassador of Russia to Lithuania AI Udaltsov with the Newspaper *Republic,* MID'] (13 January 2015) <www.mid.ru/web/guest/maps/lt/-/asset_publisher/ePq2JfSAWgY2/content/id/1547665> accessed 14 February 2020.

96 'Poslanie Prezidenta Rossijskoj Federacii V.V.Putina Federal'nomu Sobraniju, Moskva, Kreml', 4 dekabrja 2014 goda, MID Rossijskoj Federacii' ['Annual Address of Vladimir Putin, President of the Russian Federation, to the Federal Assembly, Moscow, the Kremlin, 4 December 2014, MID'] (4 December 2014) <www.mid.ru/web/guest/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/807311> accessed 14 February 2020.

97 'Interv'ju Ministra inostrannyh del Rossii S.V.Lavrova programme «Voskresnoe vremja», Moskva, 30 marta 2014 goda. MID Rossijskoj Federacii' ['Interview of Russian Minister of Foreign Affairs Sergey Lavrov for the Programme *Sunday Time*, Moscow, 30 March 2014, MID'] (30 March 2014) <www.mid.ru/web/guest/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/68426> accessed 8 February 2020.

98 'Interv'ju Posla Rossii v Italii S.S.Razova dlja radioprogrammy "Corriere diplomatico" gosteleradio Italii "RAI Radio 1", 19 ijunja 2014 goda, MID Rossijskoj Federacii' ['Interview of Russia's Ambassador to Italy SS Razov for the Radio Programme *Corriere Diplomatico*, by Italian State Radio and Television Outlet RAI Radio 1, 19 June 2014, MID'] (23 June 2014) <www.russia.org.cn/ru/news/intervyu-posla-rossii-v-italii-s-s-razova-dlya-radioprogrammy-corriere-diplomatico-gosteleradio-italii-rai-radio-1/> accessed 8 February 2020.

99 Charter of the United Nations, San Francisco, 26 June 1945, entering force on 24 October 1945, art 51.

100 Grant (n 73) 77.

101 Definition of Aggression, UN General Assembly A/RES/3314, 14.12.1974, art 5, para 3.

102 Grant (n 73) 77.

103 Ibid 83.

104 Ibid.

Revisionist history and Crimea after 2014

Most of the Russian documents discussing the Crimea case depict the intervention as righting historical wrongs, with claims that 'in 2014, historical justice triumphed'[*105]. That is, 'Khrushchev's historical mistakes and voluntarism were corrected without a single shot or sacrifice'[*106] in the transfer of Crimea from Russia to Ukraine in 1954. Some officials even reached as far back as the 19th century, to argue that Crimea has always been Russian.[*107] Moreover, to rationalise the reunification of Crimea as the right decision, Russian officials claimed that Crimea's situation had improved in the wake of incorporation into Russia.[*108] The historical arguments are problematic, given the risks connected with the clash between subjective and instrumentalist interpretations of the situation, put forth by different actors.[*109] Were history valid justification, then Russia should have been reminded that the Russian Empire 'conquered Crimea from the Ottoman Empire or that the Tatar Khanate had a longer history in Crimea than Russia'.[*110]

Overall, Russia's attempt to exploit legally and extralegally grounded arguments to present the annexation of Crimea as a case of self-determination was not straightforward, because it proceeded from flawed legal foundations.

7. Conclusion

The discussion here illustrates that, even in the earliest stages of the concept's development, the Bolshevik and the Wilsonian ideas of self-determination diverged: the former was based on socialism, and the latter was grounded in liberal-democratic thought. While the Soviets were the first to bring the principle into bilateral international treaties, in practice they tried to reclaim the territories of the Russian Empire. Here, hypocrisy flourished in the gap between theory and practice. The West at least was up-front and consistent in its refusal to accept the possibility of national minorities' secession for reason of self-determination, thus displaying less hypocrisy. Furthermore, during the era of de-colonisation the Soviets held that the issue of self-determination was resolved within their territories, with self-determination being for victims of colonialism. While the Western states too were hypocritical, prioritising their own interests while giving lip service in other directions, they were unlike Russia in that they did not propose and push for such legal standards as they would not be able/willing to uphold.

With the transition from the Soviet Union, Russia, just as the Soviet Union had, deemed the issue of self-determination resolved within the frames of federalism; however, the situation in Chechnya and in Tatarstan, for example, posed serious challenges to this kind of thinking. Throughout 1991–2013, Russia strongly opposed interpreting self-determination as valid outside a colonial context. However, after Kosovo's declaration of independence, Russia started gradually allowing for the possibility of secession beyond such a context. The fact that, exactly as the Soviets had, Russia perceived the issue of self-determination to be resolved within its territory, gave Russia the confidence to criticise Western actions in Kosovo and later argue for a Crimea's right to self-determination.

As for the resonance between the Soviet and Russian approach to self-determination, several patterns were identified. In the case of Crimea, Russia appealed to self-determination for territorial expansion, which

105 'Vystuplenie Postojannogo predstavitelja Rossii pri OON V.I.Churkina' (n 86).

106 'Interv'ju Posla Rossii v Indii A.M.Kadakina gazete «The Hindu», opublikovannoe 21 ijulja 2014 goda, MID Rossijskoj Federacii' ['Interview with Russia's Ambassador to India A Kadakin for *The Hindu*, published on 21 July 2014, MID'] (25 May 2014) <https://www.mid.ru/web/guest/maps/in/-/asset_publisher/EpJ5G4lcymvb/content/id/676722> accessed 15 February 2020.

107 'Pis'mo Posla Rossii v Kazahstane M.N.Bocharnikova v otvet na interv'ju i kommentarii posla Velikobritanii v Kazahstane, MID Rossijskoj Federacii' ['Letter from Russia's Ambassador to Kazakhstan MN Bocharnikov in Response to Interviews and Comments from the British Ambassador to Kazakhstan, MID'] (3 April 2015) <www.mid.ru/web/guest/maps/kz/-/asset_publisher/44tjMzWwjAFr/content/id/1528340> accessed 14 February 2020.

108 'Interv'ju Posla Rossii v Albanii A.R.Karpushina albanskomu telekanalu 'ABC News', Tirana, 16 sentjabrja 2017 g, MID Rossijskoj Federacii 2017' ['Interview of Russia's Ambassador to Albania AR Karpushin for the Albanian TV Channel 'ABC News', Tirana, 16 September 2017, MID'] (18 September 2017) <www.mid.ru/web/guest/maps/al/-/asset_publisher/U6lx5jp8oEzV/content/id/2864874> accessed 12 February 2020.

109 Rotaru & Troncotă (n 81) 13.

110 Ibid.

reflected Russian anxiety in response to EU/NATO eastward expansion. Thus, Russia, just as the Soviets did, instrumentalised self-determination in line with its self-interest. Furthermore, in a similarity to the Soviet approach visible in the era of de-colonisation, the case of Crimea showed Russia resorting to double standards by contending that the issue of self-determination was resolved in Russia and that Ukraine, not Russia, had issues with self-determination. Most likely, Russia would not show the same confidence were Chechnya and Tatarstan to revive their secessionist aspirations.

Additionally, the study revealed that Russia tried to justify its acts in Ukraine with the language of international law. Among other things, Russia invoked a claimed invitation by Yanukovych as legal grounds for intervention. This was contested by the international community. It was in the same style that the Soviets had intervened in Czechoslovakia and, as justification, produced the unsigned document implying that Czech leaders had invited the Warsaw Pact forces in. Earlier, the Soviets had refused to admit that the Baltic States had acceded to the Soviet Union in 1940 only under the threat of force, with a fabricated narrative of liberation. In these cases, coercion was applied against other states' territorial integrity and political independence. This was far out of line with the Western understanding of self-determination.

Given what is outlined above, there is support for the hypothesis that the Russian approach to the right of peoples to self-determination in the case of Crimea resembles the Soviet approach in its legal flexibility expressing self-interest, hypocrisy, and double standards. For Russia and the Soviet Union both, the main point of departure was the perception of possessing greatness, power, and sovereignty that merit precedence over other states'. In both cases, the prevailing thinking was that the issue of self-determination was resolved within the territories of the nation (whether the USSR or the RF) and that it was only other states that had problems in this regard. Hence, both situations implied double standards domestically and internationally.

Thus, one can conclude that, with the annexation of Crimea, Russia, similarly to the Soviet Union, started putting forth significant challenges to the universality of international law on self-determination. Nevertheless, caution is warranted with regard to the question of whether Russia has laid claim to a unique anti-Western approach to international law or not. Arguably, seven years is not enough time for clarifying such inferences. Finally, the findings from the study demonstrate that the historical perspective derived from comparative analysis considering the Soviet approach reveals nuances that otherwise are hard to spot. Hence, renewed discussion of the influence of Soviet international legal thinking on that of contemporary Russia is clearly warranted.

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Reflections on the COVID-19 Restrictions in Belgium and the Rule of Law[*1]

'Discipline to be effective must be optional.'
— Lord Birrell of Blatherstone[*2]

1. Introduction

1.1.

The start of the COVID-19 pandemic has elicited an astonishingly uniform response from states the world over. Their actions have ranged from recommending particular practices (e.g. social distancing), through mandating various precautions (e.g. masks and quarantine), to imposing full-blown restrictions on personal and economic liberty (travel bans, curfews, lockdowns, border closures, etc.).

Indeed, nearly all countries[*3] have resorted to seemingly identical measures of closure and control, although with intensities that have varied with time and place[*4]. At the end of February 2021[*5], no fewer than six EU member states still had a ban in force on non-essential travel to and from their territory, a practice that had already come under (albeit impotent) scrutiny from the European Commission.[*6]

1 Although there is no determiner 'some' in the title, this article is not intended to provide the reader with an exhaustive account of the topic, which would be impossible for reason of space limitations in any case. Studying the Belgian example is justified by the country's representative approach to the pandemic and the legal complexity thereof.

2 The fictional British Minister of Justice created by Saki (HH Munro), 'The Easter Egg' in *Collected Short Stories of Saki* (Wordsworth Editions 1993) 138.

3 Actually, the only exceptions that spring to mind are Sweden and some states in the USA during the first wave of the pandemic.

4 We may note among the restrictions the banning of all non-essential movement (in Belgium), strict confinement to one's home (in France, Spain, and Italy), forbidding of mass gatherings and festivals (in all countries considered), and curfews (in France, Belgium, and the Netherlands). The Blavatnik School of Government at Oxford University has introduced a convenient tool that compares and quantifies the restrictions in 180 countries, available at <https://covidtracker.bsg.ox.ac.uk/stringency-scatter>accessed 27 February 2021. At that time, Afghanistan ranked at the bottom of the strictness table, with a score of 12% whereas Estonia was rated 60% of the maximum.

5 This article was written in late February 2021 and updated in early August.

6 The member states concerned were Belgium, Sweden, Germany, Hungary, Finland, and Denmark. See <www.schengenvisainfo.com/news/eu-commission-urges-six-member-states-to-remove-some-of-their-covid-19-border-restrictions/> .

Odd though it may seem, these unprecedented restrictions of traditional liberties in 2020[*7] have met both in Belgium and in the European Union with precious little criticism by the press, limited political opposition and only a handful of protest marches and riots[*8].

Likewise, judicial review of the restrictions has been rather limited. This too seems odd, given the sensitive debate about the role of the judiciary and their perceived juristocracy and judicial activism[*9].

Of course, there had been warnings of dire consequences, from various quarters, but none too much In Germany, former President of the German Federal Constitutional Court Hans-Jürgen Papier admonished in an interview[*10]: 'As a constitutional lawyer, I could never have imagined that such intense restrictions on freedom would be decided by the second power, the executive [...]. The people in this country are not subjects.'

In Italy, the Tribunale Ordinario di Roma ruled in December 2020 that several of the measures carried out were illegal, even within the context of the country's state of emergency: 'There is no constitutional or other legal basis that gives the Council of Ministers the power to declare a sanitary emergency [...]. It follows that all resulting administrative measures are unlawful.'[*11]

In France, in turn, two hundred prominent lawyers published an open letter[*12] declaring the following: 'As lawyers, we also warn in particular about twisting the law. Any state of exception, even justified by an exceptional health situation, implies a risk of drift. Thus our law is now subject to the technical-scientific injunction of doctors and the Scientific Council, who impose their vision to the detriment of a more global political vision which must balance different interests.'

1.2.

In the present paper, we will try to make sense of this constellation of phenomena by addressing both the legality of the restrictions enacted in Belgium and their legitimacy, considered in a broader, philosophical context.

To this end, we begin with a general outline of the requirements of the rule of law in times of a pandemic, then scrutinise the restrictions implemented by the Belgian federal government.

Naturally, the proverbial elephant in the room here is the unprecedented predominance of the executive power, acting by its own device (or, rather, at the instigation of virologists[*13]), for most measures have been implemented without large amounts of international co-operation, with precious few consultation of the legislative power, sometimes within conveyed emergency powers but always with far reaching consequences for the rights and liberties of the individual.

In the concluding part attention is paid to the possibly huge ramifications for some areas of wider debate in the philosophy of law and its classic *topoi* such as the boundaries between ethics and law, utilitarianism, *trias politica*, constitutionalism, sovereignty, and the rule of law.[*14]

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7 In particular, the following fundamental rights are at issue: freedom of religion and belief (art 9 ECHR and art 10 EU Charter); the right to private life, including family life and inviolability of the home (art 8 ECHR and art 7 EU Charter); freedom of assembly and demonstration (art 11 ECHR and art 12 EU Charter with regard to assembly); freedom of education (art 2 ECHR and art 14 EU Charter); the right to property (art 1 of First Protocol (EP) ECHR and art 17 EU Charter); freedom to conduct business (art 16 EU Charter); and freedom of movement (art 2 of Protocol 4 ECHR and art 45 EU Charter).

8 Note the stark difference from the fury of the *gilets jaunes* in France and other political upheaval in recent years.

9 For a vigorous attack, see J Sumpton, 'Judicial and Political Decision-making: The Uncertain Boundary' (FA Mann Lecture) (2011) Judicial Review Vol. 16 (4). – DOI: https://doi.org/10.5235/108546811799320844. Contra: S Sedley, 'Judicial Politics' (2012) 34 London Review of Books 15 Judicial Review. – DOI: https://doi.org/10.5235/108546812801228103.

10 See <www.nzz.ch/international/hans-juergen-papier-warnt-vor-aushoehlung-der-grundrechte-ld.1582544?reduced=true> accessed 13 July 2021.

11 Tribunale Ordinario di Roma of 16 December 2020, 45986/2020, via <www.cassazione.net> accessed 13 July 2021.

12 See <www.spectator.co.uk/article/libert-an-open-letter-by-200-french-lawyers-protesting-against-lockdown> accessed 13 July 2021.

13 In Belgium, imminent changes in policy have routinely been announced initially on television, by the advising virologists, rather than through their publication in the state gazette.

14 One need not emphasise that clear delimitation of these topics is not always possible; for instance, while the pan-medicalisation of society as criticised by André Comte-Sponville (<www.challenges.fr/economie/andre-comte-sponville-face-a-la-crise-du-coronavirus-gare-au-pan-medicalisme_704287> accessed 13 July 2021) is an ethics issue, the questions of mandatory vaccination and vaccine passports touch upon legal and economic issues as well.

The final remark deals with the effect of the restrictions on the unspoken social contract between the people and the state. Until very recently, personal freedom, understood as the absence of coercion, was so central to the self-understanding of the proud Western citizen that absolutely nobody, with the exception of Peter Sloterdijk[*15], could have predicted the current state of affairs, which resembles fifty shades of lockdown.

The question remains open as to whether the repeated lockdowns of 2020 and 2021 will go down in history as a unique set of events never to be repeated again or as a watershed moment between a previously free society and a permanent state of crisis management that knows no politico-legal boundaries.

2. The *Rechtsstaat* in times of emergency

2.1.

In his *Grundlinien der Philosophie des Rechts*, G.W.F. Hegel sought to integrate subjective rights of the individual with the rational authority of the state. In doing so, he captured the core project of modern political thought, to 'combine the right of subjective liberty with the collective authority of society without subsuming either pole to the other'[*16].

The ensuing concept of the *Rechtsstaat*[*17], articulating state power and law as the fundamental principles of political philosophy, sits right at the heart of modern legal and political self-understanding, together with the notion of democracy.

In spite of the notion's centrality, there exists no authoritative definition of the concept *Rechtsstaat* and different approaches may be taken to the concepts of separation of powers and constitutional review amongst others[*18].

It is nonetheless possible to identify some core elements and consensus on a minimum set of criteria that any *Rechtsstaat* should meet. The foremost criterion is that a *Rechtsstaat* does not hold unchecked authority for it is subordinated by its own positive law. In other words, the principle of legality prevails.

The second requirement is the differentiation of government power into a legislature, an executive arm, and a judiciary. Thirdly, a legal remedy and recourse to an independent judiciary is required.

Usually, these three formal principles are supplemented by two substantive approaches: equality before the law and fundamental rights. This inclusion of substantive criteria of justice, even extra-legal values, has led to the concept of material *Rechtsstaat*.

The old discussions about formal legality and substantive legitimacy, about law versus justice, are no longer centred on natural law concepts but rather, they find their expression in the rights discourse, introducing a 'thick' type of (international) legitimacy based on fundamental rights.

The terms Rechtsstaat and 'rule of law' are not an identical match but are nonetheless frequently used as interchangeable concepts. For instance, EU publications do not problematise the term Rule of Law at all but simply use it as the mere translation of Rechtsstaat and its equivalents in other languages.

Neil McCormick has pointed out the (obvious) distinction that the *Rechtsstaat* presupposes the existence of a state, which is not necessarily a constitutive requirement for the Anglo-Saxon rule of law, in which the courts play a pivotal role[*19]. Also, under the rule of law, the state is subordinated to a plurality of sources

15 Quite early on in the pandemic, on 18 March 2020, the German philosopher predicted that the Western system would become as authoritarian as the Chinese response, per <https://lepoint.fr/politique/sloterdijk-le-susteme-occidentalva-se-relever-aussi-autoritaire-que-celui-de-la-chine-18-03-2020-2367624_20.php> accessed 13 July 2021.

16 R Fine: 'Hegel's Critique of Law: A Re-appraisal' in R De Lange and K Raes (eds), *Plural Legalities: Critical Legal Studies in Europe* (Recht en Kritiek, 1991) 239.

17 In his book *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*, from 1832, Robert von Mohl (1799–1875) expressed the notion of opposition between the *gesetzmässige Verwaltung* of the law-abiding administration in a *Rechtsstaat* and the arbitrariness of government in the *Obrigkeitsstaat*, or authoritarian state.

18 E-W Böckenförde, 'The Origin and Development of the Concept of the Rechtsstaat' in E-W Böckenförde, *State, Society and Liberty* (1991); R Grote, 'Rule of Law, Rechtsstaat and État de droit' in C Starck (ed), *Constitutionalism, Universalism and Democracy – a Comparative Analysis* (1999); K Tuori, 'Four Models of the Rechtsstaat' in W Krawietz and W von Wright (eds), *Oeffentliche oder private Moral. Festschrift für Garzon Valdes* (1992).

19 N McCormick, 'Der Rechtsstaat und die Rule of Law' [1984] Juristen-Zeitung 65; M Bennett, 'The 'Rule of Law' Means Literally What It Says: The Rule of the Law: Fuller and Raz on Formal Legality and the Concept of Law' (2007) 32 Australian Journal of Legal Philosophy 90.

and principles, some of which might even be external or pre-political even to the point of being assimilated to moral principles.

These differences notwithstanding, the *Rechtsstaat*-concept is compatible with the generally accepted irreducible minimum content of the rule of law as famously formulated in Joseph Raz's famous principles for the rule of law[*20].

2.2.

The primary feature of any law-based state is the subjugation of government to standards of substantive and procedural legality, even during a pandemic. This continuing normativity has been clearly spelt out by numerous international institutions.

As early as April 7, 2020, barely a month after the general outbreak of the pandemic, the Council of Europe issued a document titled 'Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis: A Toolkit for Member States Available in Different Languages', which highlights the obligations of the contracting states[*21]. In this document, the council gives a brief but comprehensive overview of the permissible derogations from the states' obligations in times of emergency and repeats that it is for each state to assess what measures are necessary and to judge whether the intended measures warrant a derogation, in which case a notification has to be submitted to the Secretary General of the Council of Europe. The measures may of course come under assessment by the European Court of Human Rights (ECtHR)[*22].

It is reiterated that a derogation under Article 15 is not contingent on formal declaration of a state of emergency; rather, any derogation must have a clear basis in domestic law (the principle of legality) in order to protect against arbitrariness and must be strictly necessary for fighting the public emergency (proportionality-principle).

The rule of law has to be respected and the emergency measures and general powers to issue decrees both need to be limited in time. Restrictions on freedoms guaranteed by articles 8, 9, 10, and 11 are permissible only if they are established by law and proportionate to the protection of health. In contrast, indefinite perpetuation of the exceptional powers of the executive is impermissible.

A further principle specified in this connection is that the emergency measures must achieve their purpose with minimal intervention in the normal rules of decision-making: parliaments must retain the power to verify whether the emergency powers of the executive are still justified, and, likewise, the core function of the judiciary – in particular, that of the constitutional courts – should be maintained.

The last but by no means least principle articulated in the document is that certain articles such as those on the right to life (Article 2) and the prohibition of torture and inhuman or degrading treatment/punishment (Article 3) must never be subject to any derogation.

Finally, the toolkit rounds out the discussion by issuing a reminder of the positive obligation of the signatory states to cope with infectious diseases by taking all necessary emergency measures in cases of epidemics (in line with Article 11 of the European Social Charter).

Warnings have been issued also with regard to derogations from the International Covenant on Civil and Political Rights (ICCPR), adopted by United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966. In May 2020, the Human Rights Treaties Branch of the UN released a toolkit addressing treaty-law perspectives and jurisprudence in the context of COVID-19. Its opening paragraphs remind the user in no uncertain terms of the principles set forth in the ICCPR and nine other UN treaties and covenants shielding rights of particular groups in society:

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20 J Raz, 'The Rule of Law and Its Virtue' in *The Authority of Law: Essays on Law and Morality,* Oxford, 1979). – DOI: https://doi.org/10.1093/acprof:oso/9780198253457.003.0011.

21 Council of Europe, 'Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis: A Toolkit for Member States Available in Different Languages'; see <www.coe.int/en/web/echr-toolkit> accessed 13 July 2021.

22 In the jurisprudence of the European Court of Human Rights, matters of health-care policy, 'in particular as regards general preventive measures, are in principle within the margin of appreciation of domestic authorities who are best placed to assess priorities, use of resources and social needs' and 'it is not excluded that a positive obligation might arise to eradicate or prevent the spread of a particular disease or infection' (*Shelley v UK* 23800/06 (ECtHR, 4 January 2008). See also *Öneryildiz v Turkey* 48939/99 (ECtHR, 30 November 2004); *Kolyadenko e.a. v Russia* 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 (ECtHR, 28 February 2012).

> The challenges unfolding with the COVID-19 pandemic impact the whole spectrum of human rights. This includes abuse of derogations, protection of vulnerable groups and people deprived of their liberty, women's rights, minorities as well as economic, social and cultural rights. In the midst of a sanitary crisis, as the one generated by the spread of COVID-19, it is essential to ensure the enjoyment of all human rights, without discrimination.
>
> As the High Commissioner has stated, 'an emergency situation is not a blank check to disregard human rights obligations'. More than ever, States must uphold the obligations that they are legally bound to meet under the treaties they have ratified.

The ICCPR allows for limited derogation in cases of health emergencies, in keeping with the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, set forth by the International Commission of Jurists (ICJ)[*23].

Last but not least, the European Commission's 2020 Report document on the rule-of-law situation in the European Union[*24], released on 30 September 2020, reminds the member states, on page 2:

> The rule of law is enshrined in Article 2 of the Treaty on European Union as one of the common values for all Member States. Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.

It continues with a statement that the

> particular circumstances of 2020 have brought additional challenges to citizens' rights, and [that] some restrictions on our freedoms, such as freedom of movement, freedom of assembly or freedom to conduct a business, had to be applied to address the COVID-19 pandemic. Effective national checks and balances upholding respect for the rule of law are key to ensuring that any such restrictions on our rights are limited to what is necessary and proportionate, limited in time and subject to oversight by national parliaments and courts.

2.3.

The clear warnings to the signatory states of these international treaties have been duly matched by equally clear and eloquent opinions from national administrative courts, amongst others the Dutch and Belgian highest administrative courts.

At the request of the Dutch Parliament, the Dutch Council of State, or *Raad van State*, issued a concise yet clear 'Advice on the constitutional aspects of the intended crisis measures'[*25].

In the advice, the Council of State admonished that in order to be allowed to restrict fundamental rights, the requirements set by the Constitution and treaties must be met. An important requirement in treaties is that restrictions be sufficiently clear and necessary for the purpose they serve. The Constitution requires that restrictions always be traceable to a specific law in a formal sense. These requirements are cumulative. It is also important that the corona measures also guarantee fundamental rights. For example, it follows from the Constitution and treaties that the government must actively promote and protect the right to health and the right to life.

The Council of state's Advisory Division has established, further, that 'the power to radically restrict fundamental rights in a (model) regulation does not, strictly speaking, correspond to the specific legal basis

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23 N Sun, 'Applying Siracusa: A Call for a General Comment on Public Health Emergencies' (Viewpoint) [2020] (23 April) https://www.hhrjournal.org/2020/04/applying-siracusa-a-call-for-a-general-comment-on-public-health-emergencies/> accessed 13 July 2021.

24 Commission, 'Rule of Law Report – the Rule of Law Situation in the European Union' COM (2020) 580 final; see <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0580&from=EN> accessed 13 July 2021.

25 Advice of 7 May 2020, available in Dutch at <www.raadvanstate.nl/?ActLbl=w04-20-0139-vo&ActItmIdt=121106> accessed 13 July 2021.

required by the Constitution for the restriction of fundamental rights'. It was stated that a case could be made, 'however, that in the acute, concrete and life-threatening initial phase of the pandemic, the government has sufficed with a more general legal basis'; that said, 'the emergency ordinances cannot provide a basis for a ban on meetings in the strict private sphere'.

The advice pointed out also that '[t]he longer this situation lasts, the longer the legal sustainability of the emergency ordinances. That is why the government has rightly decided to make a temporary law that will replace the emergency ordinances in the short term'.

When, likewise, the Belgian government applied for special powers, that country's Council of State (*Raad van State* or *Conseil d' Etat*) had to express its opinion on the legality of the proposal for a law, which it produced in plenary session[*26].

Although its Opinion of 25 March 2020 fielded several technical and logical objections and clarifications, the main point of focus was the council's insistence that the executive entity must always check whether the decision is in accordance with the higher standards of the law: the Constitution and the international treaties. The latter were deemed particularly relevant with regard to isolation measures, restrictions on freedom of movement, measures limiting contacts between members of the same family, the closure of schools and universities, etc.

The council's advice features the specific conclusion that the respect shown for private and family life; freedom of thought, conscience, and religion; freedom of expression and assembly and of association; and the right to education must be in accordance with the fundamental rights as protected by the European Convention on Human Rights (ECHR).

Also, the measures must be necessary (though not absolutely necessary) in the interests of the country's security, public security, the economic well-being of the country, the protection of public order and prevention of criminal offences, the protection of health, or the protection of the rights and freedoms of others.

Moreover, the regulatory instruments envisioning interference with these rights must always be clear, foreseeable in their effect, and proportionate to the objectives pursued.

Hence, one can conclude that neither the Dutch nor the Belgian Council of State's advice differs from what is articulated in the above-mentioned toolkits, advices and opinions issued by the international institutions.

All the various opinions presented, both international and national, above render it crystal clear that an executive power does not operate in a legal vacuum and does not enjoy free rein to combat a pandemic by whatever means.

On the contrary, it appears that the executive power's actions have to meet the cumulative criteria set forth by the relevant bodies, which can summed up as:

(a) to act within the constraints set out by the law;
(b) to act in accordance with the values of democracy and fundamental rights;
(c) to operate under the control of independent and impartial courts;
(d) to ensure that the restrictions on the rights are limited to what is necessary and proportionate.

3. Assessment of Belgium's COVID-19-based restrictions

3.1.

At the advent of the crisis, Belgium was ruled by a caretaker minority government that did not command a majority in Parliament. Political convention is for such a government to refrain from introducing new or far-reaching policies. Nonetheless, this government reacted to the crisis in largely the same hyper-dynamic vein as the neighbouring countries – i.e., by closing the nation's borders and schools and by shutting down its hospitality and culture industries, alongside all shops deemed non-essential. Moreover, all non-essential movement outside the home was forbidden from 18 March 2020 onward. Thus, the so-called first lockdown began.

[26] Belgian Council of State, Opinion 67.142/AV, of 25 March 2020.

Only *post factum* did the government ask Parliament for special powers to legitimise these actions. Parliament duly obliged and retroactively conferred special powers on it*[27] for a span of three months, from 28 March, thereby granting more power to a minority caretaker government than a regular majority government normally would have possessed in normal times

The summer of 2020 ushered in some relaxation to the restrictions, but 18 October 2020 brought the reintroduction of a great number of restrictions, accompanied by a new measure not seen since the German occupation: a general curfew in force between midnight and five o'clock in the morning.*[28] In other new rules, the number of personal contacts allowed was reduced to just one person per occasion indoors and four people outdoors*[29]. From 18 February 2021, non-essential travel to and from Belgium was forbidden once more, under a ban that lasted until 19 April 2021.

In the meantime, the special powers had expired and a new government (commanding a regular majority in Parliament) had come into office (doing so on 1 October 2020). Therefore, the restrictions imposed in autumn 2020 will have to be judged within the framework of the regular legislative process.

3.2.

According to the formulation of the four criteria we have distilled from the international advice and toolkits on the rule of law during a pandemic, the foremost criterion for the government is to always act within the constraints set out by the law.

It has to be noted that the Belgian Constitution does not allow its suspension, not even partially (per Article 187 of the co-ordinated version of 17 February 1994). Therefore, a state of emergency shall not be proclaimed. Moreover, at the outbreak of the pandemic, Belgium did not have a special law dealing with health emergencies. Parliament handed special powers to the government for the initial three months in 2020, but no material constraints were set forth. No special powers were requested or given in autumn 2020. In addition, a pandemic-related bill was not proposed by the government until 3 March 2021 and was finally enacted on 15 July 2021.

Therefore, in autumn 2020 it was up to the government to react to the pandemic by exercising its ordinary regulatory powers under Article 108 of the Constitution: the King (i.e. the Government) 'makes the decrees and takes the decisions necessary for the implementation of the laws, without ever being allowed to suspend the laws themselves or grant exemption from their implementation'.

The Constitution does not, however, provide that a single minister could be granted the power to act in a regulatory capacity, let alone restrict fundamental rights. In practice, ministerial decrees are typically used to set out technical details, not to regulate*[30].

In contrast, though, virtually all COVID-19-related restrictions were introduced via several ministerial decrees (usually issued by the Minister of the Interior) rather than by royal decree (decided upon by the entire government) or a law proper (enacted by Parliament)*[31].

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27 The law of 27 March 2020 empowering the King to take measures to combat the spread of the COVID-19 virus, published in the *Moniteur Belge/Staatsblad* (the official gazette) on 30 March 2020. According to Belgian constitutional practice, a special-powers act is characterised by the granting of a power of regulation to the executive (dubbed 'the King'), who, in the exercise of that power, may supplement and amend laws via application of wide discretionary power. The legal basis for this is art 105 of the Constitution, which states that the King has no power other than the power expressly granted to him by the Constitution and by the special laws enacted under the Constitution itself. Any special-powers law must meet the following conditions: there must be exceptional factual circumstances that determine the limits of the period during which special powers may be granted; secondly, the special powers are to be assigned for a limited term only; the powers conferred on the King must be precisely defined with respect to purposes and objectives, as well as with regard to the matters with regard to which measures may be taken and their scope; the legislator must respect supranational norms, international norms, and constitutional rules of jurisdiction when granting special powers; and the law may not prejudice the division of powers among the (federal) state, the communities, and the regions.

28 This is the curfew imposed nationwide by the federal Minister of the Interior. Said ban was extended to 10pm by regional governments in the Brussels capital area and the Walloon region (the French-speaking part of the country). The federal and regional curfews stayed in place until 8 May 2021.

29 The new Minister of the Interior's micro-management even made it to the Washington Post: 'Belgians can invite guests for Christmas dinner, but only one can use the bathroom' https://www.washingtonpost.com/world/2020/12/02/belgium-coronavirus-christmas-bathroom/.

30 P Goffaux, *Dictionnaire de droit administratif, Brussels,* 2016, 355; VC Behrendt, M Vrancken, *Principes de droit constitutionnel belge, Bruges,* 2019, 340.

31 In French *Arrêté ministeriel*, *Arrêté royal* and *Loi,* respectively. In Dutch *Ministerieel Besluit*, *Koninklijk Besluit*, and *Wet*.

The first problem of legality, therefore, is the wrong type of instrument used to bring in the restrictions, notably a decree by a single minister rather than a decree by the assembled government.

The second problem involves the legal basis for these ministerial decrees. Invoked as their basis was the Civil Security Law of 15th May 2007, which allows the Minister of the Interior, when there is a threat of calamitous events, catastrophe, or disaster, to prohibit any displacement or movement of the population where said prohibition is aimed at ensuring the protection of the population. Reference was made also to the Civil Protection Law of 31 December 1963 and the Police Function Law of 5 August 1992.

The problem with these law is that they were unequivocally intended for acute, local emergencies (e.g. floods, gas leaks) as opposed to deep and protracted interference with an entire population. Competence established on this basis was therefore stretched beyond limits. Indeed, plenty of constitutional lawyers, as well as every bar association in the country, have questioned the legal foundations of the government measures based on ministerial decrees[*32].

The government too clearly recognises this issue, as evidenced by it finally having submitted a Pandemic Law proposal to Parliament (on 3 March of this year)[*33].

3.3.

The second element, respect for the values of democracy and fundamental rights, cannot be disconnected from the fourth, limitation of the restrictions on rights to only what is necessary and proportionate.

The curtailing of the fundamental rights by the restrictions is obvious, but the legality thereof depends entirely on whether the restrictions in question are correctly established by law and strictly proportionate to the protection of health.

As was pointed out in the above-mentioned opinions from the Council of Europe, the European Commission, and the Human Rights Treaties Branch of the UN, restrictions on fundamental rights are admissible only if they are imposed in pursuit of a legitimate aim necessary in a democratic society and if the grounds for the restriction are relevant with regard to the objective pursued.

One can easily imagine that protecting the right to health of the citizens is a relevant objective, if not a duty, of the government. However, if the restrictions are to be legal, they must also be proportional to the aim pursued, and if there are other ways of achieving this that are less restrictive to our rights and freedoms, the latter measures must be adopted.

Confining all members of the population to their domicile at night would appear out of proportion to the stated goal because, for the aim of reducing the number of house parties and drunken gatherings (the goal that the preamble of the corresponding ministerial decree explicitly states for the measure), a less intrusive ban on groups gatherings would have sufficed.

The same is true for the blanket ban on foreign travel. This, in turn, seems disproportional since a quarantine and testing system (already in place) should have been sufficient to stop the import of viruses of foreign origin. Both the curfew and the travel ban were introduced to facilitate control and policing, and they added few other benefits[*34].

In assessing the proportionality of the restrictions, it is also important to bear the **time factor** and the material circumstances in mind. With the first lockdown, the aim was to reduce the burden on the hospitals and the health sector in general. Here, the precautionary principle may have been rightly cited as the rationale for lockdown measures: as there were indeed insufficient face masks and other personal protective

[32] Available at <https://plus.lesoir.be/354163/article/2021-02-10/20000-avocats-rappellent-le-gouvernement-ses-devoirs-democratiques> accessed 13 July 2021. This open letter was particularly candid and harsh by Belgian genteel political standards, *viz* 'Some seem to believe that a social order can be adapted based on what scientists or policy-makers believe is necessary, desirable, or reasonable. They are wrong. In a democracy, the social order is based on rules and procedures defined in particular by the Constitution and European or international treaties. This order can be adjusted, but only according to the rules provided. Otherwise, the door is open to arbitrariness, abuse of power and ultimately tyranny.'

[33] At the of editing, the Spanish Constitutional Court declared the first lockdown unconstitutional because in Spain too, the wrong legal mechanism was used (a mere state of 'health alarm' instead of the required 'state of emergency' imposed by the constitution) <www.reuters.com/world/europe/spanish-court-says-covid-19-state-emergency-was-unconstitutional-2021-07-14>accessed 8 August 2021.

[34] A cynic might assert that the government singled out these two measures because of their marginal effect on most people's lives thereby allowing the government to appear to act strongly without actually hurting many of its voters.

equipment available, strong measures such as total lockdown[*35] seemed warranted to impede the spreading of the new, unknown virus.

Indeed, the pandemic was new at that time, and little was known about the virus's virulence. Herein lies a strong argument in favour of proportionality during the first wave of the pandemic, in the spring of 2020.

In the meantime, however, many of the medical parameters have changed for the better: the availability of protective equipment; vaccination of the clinically vulnerable, now well underway in all EU member states; and, last but not least, hospital treatment, improvements to which have further reduced the mortality rate, which was already low in the general population anyway[*36].

In a wider context, the financial burden on the treasury, the crippling of the economy, and the psychological damage to the population should have been taken into consideration too, since the cost of these factors has risen dramatically over time.

In other words, the parameters of the pandemic have changed to such an extent that any blanket lockdown has by now, in the current wave of the epidemic, lost most of its initial rationale, such that the prolonged suspension of civil liberties appears to be disproportionate to the actual health threat for the general population.

This is clearly not the view shared by many governments, though, including Belgium's. Rather, it seems to have become the aim of the government and its advisory bodies to maintain the measures stubbornly or reintroduce them in aims of achieving a society with zero SARS-CoV-2 infections.

It bears repeating here that the treaties allow a large margin of appreciation[*37] with regard to the escape clauses for 'public health' and 'public order'. As there are arguments *pro* and *contra*, it will be interesting to see how the European Court of Human Rights and other jurisdictions will rule on related matters when and if they have their final say in this respect.

3.4.

The third criterion, acting under the control of independent and impartial courts, has posed no problem, since courts have been open for operation throughout the pandemic and remained accessible under normal rules, distancing requirements and delays notwithstanding.

It should be noted that Belgium's administrative supreme court, the Council of State, has not stricken down provisions of the ministerial decrees, with the sole exception of the blanket ban on church gatherings[*38].

On 21 March 2021, the Court of first Instance in Brussels declared all the COVID-19 restrictions void and illegal in summary proceedings and gave the government 30 days to develop appropriate modifications (in case 2021/14/C). This decision was revisited by the Brussels Court of Appeal (in case 2021/KR/17) on 7 June 2021 because the first judge had overstepped the bounds of authority by making general rules and by exceeding the limits of the framework for summary proceedings.

However, the Court of Appeal ruled also that, although the ministerial decrees in question do have a *prima facie* legal basis, this legal basis might be flawed if interpreted in light of the ECHR. According to the Court, there is a problem with the constitutionality of the measures too, because the power to restrict the fundamental rights rests in the hands of a single minister. Furthermore, the imposition of criminal

35 Apart from infringing fundamental rights, some restrictions were downright inimical to human nature itself. Being barred from visiting elderly family in retirement communities, assisting parents in their final hours, attending funerals of loved ones, etc. seem particularly cruel and inadmissible.

36 In Belgium, the numbers on 10 July 2021 stood at 1,093,700 infections and 25,198 fatalities. See <https://covid-19.sciensano.be/sites/default/files/Covid19/Meest%20recente%20update.pdf> accessed 13 July 2021.

37 A Legg, 'The Margin of Appreciation in International Human Rights Law: Deference and Proportionality', Oxford, 2012, DOI: https://doi.org/10.1093/acprof:oso/9780199650453.001.0001, as reviewed by A Von Staden (2013) 13 (4) Human Rights Law Review 795.

38 The Belgian Council of State has turned down all but one summary appeal against the lockdown decrees: case numbers 249.315, of 22 December 2020; 217.674, of 28 May 2020; 248.131, of 8 August 2020; 248.162, of 8 August 2020; and 248.819, of 10 October 2020. Not only did the council state that there were no *prima facie* illegalities in the decrees (without discussing the margin of appreciation), but it even suggested *proprio motu* that art 23,3,2° of the Belgian Constitution puts the state under the obligation to protect public health. The only exception here was case 249.177, of 12 December 2020, in which the ban on all religious services apart from burials and marriages (with maximum attendance of 15 people) was deemed unreasonable. In this instance, the council ordered the government 'not to limit the collective expression of religion in an unreasonable manner'.

sanctions on the sole basis of ministerial decrees has been deemed unconstitutional. Still, the Court decided not to rule on these matters but leave them to the Constitutional Court of Belgium, before which are pending several cases.

Other cases in this domain are still awaiting trial, though some rulings have already been issued by lower courts. Courtrai and Charleroi (dealing with refusal to pay the fines specified for breach of the restrictions) have declared the ministerial decrees invalid[*39].

4. The 'new normal' and the ramifications for the philosophy of law

What will this bold reaffirmation of the political over the law and the concomitant disregard for the rule of law hold for future dealings between the government and the citizenry once the pandemic is overcome? Will the unspoken social contract based on the liberal *Rechtsstaat* survive, or will a 'new normal' emerge? In other words, what will the new equilibrium look like once the phases of acute crisis management and stabilisation have run their course?

According to Niels Bohr's classic tongue-in-cheek analysis, 'predictions are very difficult, especially if they are about the future'. With the crisis far from over, it is too early to assess the changes in the superstructure of intellectual reception. That said, several prophecies and observations about likely topics and controversies in academia and general society alike seem permitted.

The first topic one might identify for academia is a reawakening of the national state as the prime field of reference. Hitherto problematising the transformative decline of the sovereign state and the emergence of the European Union as a 'polycentric, pluri-systemic, multi-state legal order',[*40] the literature may have to prepare for a U-turn. During the pandemic, governments and populations alike considered not the European Union (let alone the world community) but the national state to be their sole frame of reference for protection and isolation[*41]. Borders were abruptly closed without prior consultation, and at some point medical equipment for intra-community export was confiscated for national use. The EU institutions stood idly by and were unable to resuscitate European solidarity. Add to this the chilling debacle of the joint procurement of vaccines early 2021, and it is clear that the waning of the national state and the emergence of a European *demos* seems further away than ever.

A second perspective that will have to be adjusted is the spectre of a juristocracy[*42] through rampaging judicial review. The academic fear of judges determining the scope and boundaries of policy has evaporated before our eyes. With few exceptions, the courts have shown great understanding for government COVID-19 policies and have emphasised that the executive power possesses a wide margin of appreciation with regard to the proportionality of its actions.

The third shock one can point to is that the discourse of fundamental rights, hitherto seemingly written in stone, did not stand up to the commandment of the hour, instead the doctrine of '*Salus patriae suprema Lex (est)*' made a come-back[*43]. Moreover, the majority of the population seemed and seems to be quite prepared to make a trade-off between freedom and security[*44].

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39 Tribunal de Police du Hainaut, Charleroi division, 20CI12105, 21 September 2021; Rechtbank van Eerste Aanleg West-Vlaanderen, Courtrai,divsion, 21K000402, 21 May 2021.

40 N McCormick, *Questioning Sovereignty,* Oxford, 1999, 105. – DOI: https://doi.org/10.1093/acprof:oso/9780198268765.001.0001.

41 On 9 July 2021, Malta announced, in clear defiance of the EU Vaccination Passport scheme, that it would be closing its borders to anybody who has not been vaccinated twice.

42 C Gearty, *Can Human Rights Survive?*, Cambridge, 2002. – DOI: https://doi.org/10.1017/cbo9781139167369.007; R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*(2006) International Journal of Constitutional Law, 4(3), 581-586. – DOI: https://doi.org/10.1093/icon/mol020. P Neil, 'The European Court of Justice: A Case Study in Judicial Activism', 1995, London, European Policy Review: P Praet, 'Politisierung des Rechts oder Verrechtlichung der Politik – Diskurs der Grundrechte' (2007) 38 Rechtstheorie (Heft 2/3) 367.

43 Translated as 'the welfare of the fatherland is the supreme law'.

44 D De Coninck, L d'Haenens Leen, and K Matthijs, 'Perceptions and Opinions on the COVID-19 Pandemic in Flanders, Belgium: Data from a Three-Wave Longitudinal Study' (2020), 32, Elsevier Data in Brief, October 2020, 106060. – DOI: https://doi.org/10.1016/j.dib.2020.106060. Even after the pandemic, a sizeable chunk of the population would choose to

These are phenomena that will no doubt be studied for a long time to come. All it has taken is one pandemic (not even of the worst possible kind), and entire libraries about the inviolability of human rights and the decline of the national state can be relegated to *Makulatur*, waste paper.

Another observation is that virtue ethics[*45] have made a sudden return to public discourse. In the modern worldview, law became increasingly disconnected from substantial ethics, to the extent that everything not prohibited was *ipso facto* permitted. Hereby, ethics became consigned to private realms – reduced to a matter of opinion, so to speak[*46]. The state was supposed to be neutral and not favour any life choice over another. This attitude has changed amid the continuous appeal to the solidarity of the population and with vociferous disapproval of anti-social, egoistic behaviour[*47]. Holiday travellers are pilloried by public opinion, and leading Belgian virologist Erica Vlieghe has exhorted complainers to 'stop whining'[*48].

In another observation, one can detect a rise of medical collectivisation and the technocracy of virologists[*49]. This new type of collectivisation has already manifested itself in three ways: 1) people are prohibited from engaging in risky behaviour, because of the burden on hospitals and the risk of virus transmission, 2) individuals are not permitted to procure their own vaccines on the private market, with inoculation being managed by government agencies instead, and 3) the entire population is urged to get vaccinated for the sake of society. The introduction of an overriding precautionary principle and of the mantra 'follow the science' among politicians has led to rule by virologists, epidemiologists, and other such experts, whose recommendations get rubber-stamped by politicians. This situation gives rise to the same sort of accountability problems witnessed with the EU comitology system: who appoints these experts, and to whom are they accountable?

A phenomenon related to this is another step toward technological surveillance. Society has once more moved further toward a *panopticum* of all citizens and their digitalised data (from track-and-trace systems, passenger-locator forms, quarantine paperwork, vaccination passports, etc.). Simultaneously, the introduction of vaccination requirements[*50] creates tension with the non-discrimination principle enshrined in all constitutions in the world and the supranational treaties on human rights. Refusal to be vaccinated or demonstration of medical contraindications to vaccination among a significant portion of the population[*51] is leading to division of the population into two categories: those who have the right to unencumbered travel and those who do not. As more and more countries introduce domestic vaccination requirements for museum and restaurant visits, this will tendency will only grow stronger.

At the level of underlying philosophy, one can also identify issues pertaining to the use of utilitarianism as the guiding principle for government policy. From the very beginning of the crisis, states have taken up arms against the virus, mobilising all assets at their disposal and stating that the aim is a society free from the SARS-CoV-2 virus. The imposition of restrictions was justified under the utilitarian credo 'the greatest security for the greatest number'.

However, a wide calculus of the overall benefits and costs of this policy was never presented[*52]. From a utilitarian position, policies should always consider both the overall benefit (the number of human lives saved or, more accurately, the number of additional years of life saved) and the overall cost (including

keep the restrictions in place, per <www.ipsos.com/ipsos-mori/en-uk/majority-britons-support-extending-certain-covid-19-restrictions-not-forever> accessed 13 July 2021.

45 A MacIntyre, *After Virtue* (1985), Notre Dame; M Sandel, *Liberalism and the Limits of Justice (1982)* Cambridge.

46 JW Harris, *Legal Philosophies* (1997), London; B Oppetit, *Droit et modernité* (1998), Paris. – DOI: https://doi.org/10.3917/puf.oppet.1998.02.

47 F Bellazzi and K von Boyneburgk, 'COVID-19 Calls for Virtue Ethics' (2020) 7 (1) Journal of Law and the Biosciences , Isaa056. – DOI: https://doi.org/10.1093/jlb/lsaa056.

48 https://www.vrt.be/vrtnws/nl/2021/02/28/erika-vlieghe-oproep> accessed 13 July 2021.

49 F Horton, 'Offline: The Coming Technocracy' (2020) 396 The Lancet 1869. – DOI: https://doi.org/10.1016/s0140-6736(20)32668-4.

50 At the time of writing, in February 2021, it had already become reality in Israel and was part and parcel of the British government's so-called roadmap to freedom. At the European summit of 25 February 2021, the EU leaders made advances toward an EU-wide vaccination passport, which became reality on 1 July 2021 (under the EU Digital COVID-19 Certificate Regulation).

51 This is all the more explosive because the anti-vaccination movement in Western Europe appears to be particularly strong among ethnic minorities. In the particularly multi-ethnic city of Brussels, nursing staff in large numbers (put at up to 40%) continue to refuse vaccination, a much higher percentage than in the rest of the country.

52 B Peterson, 'How We Reason about COVID Tradeoffs' [2020] (62) The New Atlantis 69.

future loss of life that arises from delays to medical care, along with the economic damage and psychological harm caused). In the case of COVID-19, gigantic cost items were disregarded. This is very odd, because the same calculus routinely takes place when rules are being introduced in such domains as road safety, health and safety at construction sites, and allocation of scarce medical resources. Apparently, there now exists some sort of inverted 'quantum utilitarianism' whereby the sheer gravity of the problem distorts all other parameters.

In an eighth remark, we can point to the looming state of permanent emergency alluded to above. According to Carl Schmitt[*53], sovereignty lies in the power to proclaim an exception to the existing order. This is exactly what has happened with the lockdown and assorted policies: the executive arm has asserted its power and been rewarded for so doing via the public approval of the scared masses. That is, a powerful incentive is evident at the first signs of a future epidemic, or even a sneeze, to disregard the old-fashioned-seeming criticisms connected with the rule of law and temporarily lock society down once more, thereby relegating freedom to the realm of nostalgia and oblivion.

The ninth lesson in our catalogue is that of the danger of state interventionism. In view of the past two decades' experiences with the creeping constriction of privacy in life in the name of multiple noble causes (anti-terrorism, anti-discrimination, anti-fraud, etc.), there exists a danger that, in a decade or so, the dramatic pandemic responses of 2020–2021 will prove to have been merely the dress rehearsal for much greater intervention in our sphere of day-to-day living – e.g. related to restrictions in the name of ecological targets for combating carbon emissions and climate change[*54].

Some authors have already grasped the new possibilities and have instrumentalized for their own goals. Among them is eco-philosopher Bruno Latour[*55], who stated:

> The first lesson the coronavirus has taught us is also the most astounding: we have actually proven that it is possible, in a few weeks, to put an economic system on hold everywhere in the world and at the same time, a system that we were told it was impossible to slow down or redirect. […]
>
> What we need is not only to modify the system of production but to get out of it altogether. We should remember that this idea of framing everything in terms of the economy is a new thing in human history. The pandemic has shown us the economy is a very narrow and limited way of organising life and deciding who is important and who is not important. If I could change one thing, it would be to get out of the system of production and instead build a political ecology.

Likewise, anti-globalist and nationalist movements have sought to capitalise on the current crisis. They would like to see the global, open architecture of society reversed.

The tenth lesson from the pandemic is the extra-ordinary pace of ever-changing public policies whereby measures that seemed unimaginable one week become public policy the next.

Two evolutions spring to mind here. First, there is the recent introduction for domestic vaccine passports in crowded places such as bars, theatres and trains. At the time of writing this paper half a year ago, this seemed *anathema* to citizens and politicians alike but now, at the time of revision, the movement is picking up speed. Countries such as Danmark, France, Italy, Israel already bulldozered over liberal principles and subject their people to legal documentation in order to live a normal life[*56].

Secondlt, there is the urge for mandatory vaccination. At present, overall mandatory vaccination is not on the table in any European country yet but it has already been introduced in Greece and France for health-care-workers[*57]. Likewise, in the US, several big corporations have made it a prerequisite for returning to

53 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (translation from the German original from 1922, 1985). Another insight from this book might be its articulation of the ascension of public health, an apotheosis that has seen it rise to become the overriding 'theological' first principle or dogma and the equating of vaccination scepticism with heresy.

54 Drieu Godefridi has warned against ecologism, or the totalitarian branch of the ecology movement. See *The Green Reich: Global Warming to the Green Tyranny* (Louvain-la-Neuve 2019).

55 Article originally published in French in the AOC online culture newspaper on 29 March 2020. English translation available at <www.theguardian.com/world/2020/jun/06/bruno-latour-coronavirus-gaia-hypothesis-climate-crisis> accessed 13 July 2021.

56 <https://www.liberation.fr/international/pass-sanitaire-face-au-covid-19-que-fait-le-reste-du-monde-20210805_27IBAOAWABGD5IQD7267L5WGWQ/> accessed 8 August 2021.

57 <https://www.lefigaro.fr/flash-actu/le-passe-sanitaire-et-la-vaccination-des-soignants-valides-par-le-conseil-constitutionnel-20210805>accessed 6 August 2021.

the work-floor. In all likelihood, this drive will further pick-up speed and expand to other countries and categories of people as-well. This is would constitute a very illiberal move but not necessarily an illegal one because, as Anja Krasser[*58] reminds us, 'compulsory vaccination may interfere with Article 2 ECHR, undeniably interferes with several aspects protected under Article 8 ECHR, and may conceivably interfere with Article 9 ECHR', provided no proper justification is given. Conversely, 'an interference is justified if it is based on an appropriate legal basis (prescribed by law), pursues a legitimate aim and is necessary in a democratic society'.

5. The road ahead

In view of all these topics, the ultimate question is not whether society will be transformed but whether the new normal of COVID-19-related restrictions constitutes a mere quantitative change or, rather, qualitative transformation of the tie between state and society.

The discussion above leads one to conclude that the ultimate lesson from the COVID-19 crisis will have had less to do with the temporary suspension of fundamental rights or with the assumption of powers by the executive than with the shaken trust between citizens and government. Indeed, virtually all Western governments have smoothly crossed a boundary that no-one a year ago would have thought it possible to step over: there has been an about-face from a literally and figuratively free society without borders[*59] to a permanent state of emergency in which fundamental rights have become conditional.

According to Allister Heath[*60], there is indeed a paradigm shift, a '1914 moment' as he calls it:

> The travel bans and quarantine hotels are this new philosophy's first, most shocking manifestation. For the first time since the mid-Forties, governments are preventing citizens from leaving their countries via hard borders. In Britain, it is now against the rules to go on holiday, and guarded hotel quarantines are being imposed on citizens returning from high-risk countries. This policy will surely be extended drastically as more mutant virus strains pop up across the world [...]. In just nine months, border shutdowns have gone from inconceivable impositions in the modern, easyJet world to one of the state's key public health tools. Whether one believes this new approach to be vital to save lives, or a calamity, is irrelevant: it is the new normal. Travel bans and quarantine hotels won't be a one-off. There will be more outbreaks of infectious diseases in the near future, and also false alarms, and they will all be accompanied by crippling restrictions.

In all fairness, one has to admit that there are mitigating circumstances in at least some sense: the curtailing of hereditary freedoms occurred in response to a crisis of the utmost seriousness[*61], it continues to receive the acceptance and support of the majority of the population[*62], and – notwithstanding conspiracy theories – there is no proof that the restrictions were carried out by sinister design.

However, it is something altogether different whether the executive power is at the origin of a myriad of legal 'technicalities' or whether it sets itself up in the place of the constitutional legislator, places society in shackles, and thereby thoroughly undermines both the letter and the spirit of the law.

Lord Sumpton cut to the core of the problem when stating that 'governments who can simply turn social existence on and off at will [...] treat us as passive instruments of state policy'.[*63]

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58 A Krasser, 'Compulsory Vaccination in a Fundamental Rights Perspective: Lessons from the ECtHR', ICL Journal (2021) 15:2, 207-233. – DOI: https://doi.org/10.1515/icl-2021-0010. See also n 22.

59 According to Peter Sloterdijk, unlimited mobility or kinetics, both in daily life and in politics, is the credo of modernity, per Eurotaoism. Zur Kritik der politischen Kinetik, (1989), Frankfurt/M.

60 See <www.telegraph.co.uk/news/2021/01/27/covid-1914-moment-post-cold-war-globalised-order/> accessed 13 July 2021.

61 Although in hindsight some nuance is evident with regard to the total death toll relative to the total number of infected persons, the vast majority of whom are asymptomatic. COVID-19 has displayed nowhere near the lethality of other epidemics such as the medieval Black Death or the Ebola virus in central Africa.

62 According to Foucault, power is not to be confounded with force, where the latter is the one-sided exercise of violence for the sake of control. Power resides in the acquiescence of the ruled, in that it justifies itself through truth claims; see Michel Foucault, 'Politics and Reason' in Lawrence Kritzman (ed), *Michel Foucault: Politics, Philosophy, Culture* (1988) 84.

63 See <www.telegraph.co.uk/opinion/2020/12/19/simple-truth-lockdowns-do-not-work/> accessed 13 July 2021.

He does not suggest that a dark plan is being hatched by the current governments either, but he is right in fearing the implied danger of experiments by 'apprentice sorcerers'*[64] going awry. After all, this has happened before, as with the late Weimar Republic's tinkering with Article 48 of the German Constitution and its cavalier attitude toward presidential emergency decrees, an attitude that was soon to be recycled in 1933 by a very different breed of politician*[65].

Therefore, it is always prudent to be on guard against the subtle beginnings of any new authoritarianism, 'especially if its presents itself as benign because', as Janet Daley puts it, 'the case for overthrowing it seems so much less urgent and the pretext for maintaining it so apparently virtuous'.*[66]

64 A famous theme in literature, spanning more than two thousand years, from *The Liar* by Lucian of Samosata (in the second century BC) via Goethe and Dukas to Walt Disney's *Fantasia* (1940).

65 Issued right after the Reichstag fire, the *Verordnung des Reichspräsidenten zum Schutz von Volk und Staat* of 28 February 1933 (RGBI I, S. 83) served as legal cover for the first wave of suppression by the Nazis.

66 <https://www.telegraph.co.uk/news/2021/07/24/scared-wits-covid-paranoia-britons-long-repent-submit-controlled/?li_source=LI&li_medium=liftigniter-rhr>.

Abbreviations

AI	Artificial Intelligence
APA	Administrative Procedure Act
ASP	application-service-providing
BC	Building Code
BGB	German Civil Code (Bürgerliches Gesetzbuch)
BGH	German Federal Court of Justice (Bundesgerichtshof)
BPR	Baltisches Privatrecht
BRAO	Bundesrechtsanwaltsordnung
BRRD	Bank Recovery and Resolution Directive
BVerfG	Bundesverfassungsgericht
CC	Commercial Code
CESL	Common European Sales Law
CISG	United Nations Convention on Contracts for the International Sale of Goods
CJEU	Court of Justice of the EU
CRD	Capital Requirements Directives
CRE	Constitution of the Republic of Estonia
DAAD	German Academic Exchange Service
DAS	Digital Signature Act
DCD	Digital Content Directive
DCFR	Draft Common Framework of Reference
EBA	European Banking Authority
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EGBGB	Einführungsgesetz BGB
ESMA	European Securities and Markets Authority
EUTMR	EU Trade Mark Regulation
EZGB	Estnischen Zivilgesetzbuches
FIS	Fédération Internationale De Ski
GDPR	General Data Protection Regulation
GG	Basic Law of Germany
GPCCA	General Part of the Civil Code Act
GVG	German Courts Constitution Act
ICCP-CA	International Chamber of the Paris Court of Appeal
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
LOA	Law of Obligations Act
LPA	Law of Property Act
NCC	Netherlands Commercial Court
NCC Rules	Rules of Procedure of the Netherlands Commercial Court
NCCA	NCC Court of Appeal
OOP	Estonian Once-Only Principle
OR	Swiss Civil Code (Obligationenrecht)
PA	Planning Act
RAG	Rechtsanwaltsgesetz
RBerG	Rechtsberatungsgesetz
RBerMißG	Rechtsberatungsmissbrauchsgesetz
RDG	Rechtsdienstleistungsgesetz
RDV	Rechtsdienstleistungsgesetz
RUCPBSA	Restriction of Unfair Competition and Protection of Business Secrets Act
SCE	Supreme Court of Estonia
SGD	Sales of Goods Directive
TFEU	Treaty on the Functioning of the European Union
TMD	Trade Marks Directive
UCPD	Unfair Commercial Practices Directive
UNIDROIT	Internationalen Institut für die Vereinheitlichung des Privatrechts in Rom
UWG	Act against Unfair Competition
WV	Belgian company law
ZPO	German Code of Civil Procedure