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Diana Treščáková, Regina Hučková (eds.)

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PREDHOVOR

Milí čitatelia, dostáva sa vám do rúk zborník vedeckých prác, ktorý je výstupom z vedeckej konferencie Právo – obchod – ekonomika organizovanej Katedrou obchodného práva a hospodárskeho práva, Univerzity Pavla Jozefa Šafárika v Košiciach, Právnickej fakulty. Na jeho vzniku sa podieľali aj ďalšie pracoviská Právnickej fakulty UPJŠ, spolu s viacerými akademickými inštitúciami doma i v zahraničí. Vydanie zborníka bolo podporené Agentúrou na podporu výskumu a vývoja v rámci riešenia projektov: APVV 21 - 0336 „Analýza súdnych rozhodnutí metódami umelej inteligencie“ a APVV 23-0331 „Integrácia únie kapitálových trhov: zmena korporačného financovania a záchrana obchodných spoločností vo finančných ťažkostiach".

Editori vyjadrujú úprimné poďakovanie všetkým autorom za ich vedecké príspevky a recenzentom za ich podnetné pripomienky a odporúčania. Veríme, že v zborníku nájdete množstvo hodnotných a inšpiratívnych vedeckých článkov, ktoré obohatia odbornú diskusiu a prispejú k ďalšiemu rozvoju poznania v danej oblasti.

Za editorov: Diana Treščáková

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Perspectives for Digital Services Act enforcement in Slovakia reflecting the national authorities' case law on illegal content[3]

Perspektívy presadzovania nariadenia o digitálnych službách (DSA) na Slovensku so zohľadnením judikatúry vnútroštátnych orgánov týkajúcej sa nezákonného obsahu

Abstract

The Digital Services Act envisages the involvement of different national authorities in its enforcement, with main competences entrusted to Digital Services Coordinators designated by individual Member States. Nonetheless, other national authorities may also exercise their competences in relation to infringements and violations that constitute illegal content under the applicable regulation, especially competent courts or other public authorities adjudicating the different civil, administrative or criminal delicts committed in this regard. The objective of this paper is, therefore, to examine the potential for the enforcement of the Digital Services Act in the national context, reflecting the existing case-law of competent authorities prosecuting the illegal content dissemination on the Internet.
Keywords: *Digital Services Act, illegal content, enforcement, delict, case-law.*

Abstrakt

Nariadenie o digitálnych službách (Digital Services Act) predpokladá zapojenie rôznych vnútroštátnych orgánov do jeho presadzovania, pričom hlavné kompetencie sú zverené koordinátorom digitálnych služieb, ktorých určia jednotlivé členské štáty. Okrem nich môžu svoje právomoci uplatňovať aj ďalšie vnútroštátne orgány vo vzťahu k porušeniam a protiprávnym konaniam, ktoré predstavujú nelegálny obsah podľa príslušnej právnej úpravy, najmä príslušné súdy alebo iné verejné orgány rozhodujúce o rôznych občianskoprávnych, správnych alebo trestných deliktoch spáchaných v tejto súvislosti. Cieľom tohto článku je preto preskúmať potenciál presadzovania Nariadenia o digitálnych službách v národnom kontexte, so zohľadnením existujúcej judikatúry príslušných orgánov postihujúcich šírenie nelegálneho obsahu na internete.
Kľúčové slová: *Nariadenie o digitálnych službách, nezákonný obsah, presadzovanie, delikt, judikatúra.*

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INTRODUCTION

The regulation concerning the liability of intermediary service providers contained in the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (*'Directive on electronic commerce'*)[4] provided a legal basis for the unprecedented expansion of information society

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[4] *OJ L 178, 17.7.2000, pp. 1-16.*

services in the European Union digital landscape. This development was, however, simultaneously coupled with the dissemination of unlawful user-generated content, an issue exacerbated in recent years. The following calls for the revision of the existing regulation which would better reflect the role that information society service providers play in the circulation of illegal content online led to the adoption of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (*'Digital Services Act'*) aiming to "*contribute to the proper functioning of the internal market for intermediary services by setting out* ***harmonised rules for a safe, predictable and trusted online environment*** *that facilitates innovation and in which fundamental rights enshrined in the Charter, including the principle of consumer protection, are effectively protected*."[5] Digital Services Act stipulates harmonised rules on the provision of intermediary services in the internal market, focusing not only on the liability exemptions for intermediary service providers (which remain, in essence, unchanged as compared to the provisions of the Directive on electronic commerce, with slight alterations reflecting the case-law developed by the CJEU)[6], but extending the regulation through the establishment of rules on **specific due diligence obligations** tailored to different categories of intermediary service providers. To ensure the proper application of this regulation, the Digital Services Act also contains specific provisions on its implementation and enforcement, including rules on the cooperation and coordination between the competent authorities.

The objective of this paper is to examine the potential for the enforcement of the Digital Services Act in the national context, reflecting the existing case-law of competent authorities prosecuting illegal content dissemination on the Internet. The main research question stipulated in this regard is as follows: "*What is the perspective for the enforcement of the regulatory framework contained in the Digital Services Act on illegal content dissemination by competent national authorities within the national context?*" The formulated research question can be divided into the following research sub-questions:

1) "*What is the role of national authorities in the enforcement of the Digital Services Act?*"
2) "*Which tasks are assigned to the Digital Services Coordinator in the national context, focusing on its decision-making powers?*"
3) "*Which other national authorities are tasked with the prosecution of illegal content online a what conclusions can be drawn from the existing case-law in this regard?*"

This paper is organized into three sections. Section I examines the provisions of the Digital Services Act regarding its enforcement, focusing on the responsibilities of competent national authorities. Section II analyses the position of the Digital Services Coordinator and its regulation in the national law. Section III discusses the existing case-law of other national authorities tasked with the prosecution of illegal content within the national context, focusing on individual categories of illegal content. Section IV contains discussion and conclusion.

1. DIGITAL SERVICES ACT ENFORCEMENT BY NATIONAL AUTHORITIES

The Member State in which the main establishment of the provider of intermediary services is located shall have exclusive powers to supervise and enforce this Regulation, except for the powers entrusted to the Commission pursuant to Article 56 (2, 3 and 4) of the Digital Services Act. A key role in the enforcement of Digital Services Act is, therefore, entrusted to competent national authorities designated by individual Member States pursuant to Article 49 (1) of the Digital Services Act. These authorities are responsible for the supervision of providers of intermediary services falling under their competence and

[5] Article 1 (1) of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC ('Digital Services Act'). *OJ L 277, 27.10.2022, pp. 1–102.*

[6] See HUSOVEC, M. Rising above liability: the Digital Services Act as a blueprint for the second generation of global internet rules. In: Berkeley Technology Law Journal, 2023, Vol. 38, Issue 3. https://doi.org/10.15779/Z38M902431.

enforcement of this regulation. The Digital Services Act envisages two main categories of competent national authorities in this regard, specifically:

a) **the Digital Services Coordinator** responsible for all matters relating to the supervision and enforcement of this regulation in the corresponding Member State, and
b) **other competent authorities** assigned specific tasks or sectors by the Member State e. g. electronic communications, media or consumer protection, reflecting the domestic constitutional, organisational and administrative structure of the Member State. As the Digital Services Act "*covers so many areas, it will inevitably be a tool for many authorities with different types of expertise.*"[7]

Both categories of competent national authorities "*play a crucial role in ensuring the effectiveness of the rights and obligations laid down in this Regulation and the achievement of its objectives.*"[8]

Notwithstanding the number of other competent authorities assigned in this regard, the Digital Services Coordinator is responsible for ensuring coordination at national level and for contributing to the effective and consistent supervision and enforcement of this regulation throughout the European Union. If numerous authorities are designated by a Member State in addition to the Digital Services Coordinator, the Member State in question must ensure that the respective tasks of those authorities and of the Digital Services Coordinator are clearly defined and that they cooperate closely and effectively when performing their tasks. The deadline for the Digital Services Coordinators designation was set to 17 February 2024.[9]

The competences conferred on competent authorities by their corresponding Member State do not, however, include the power to adjudicate on the lawfulness of specific items of content.[10] The (un)lawful nature of specific content is determined through other measures and reflects the nature of the information in question. As regards the notion of illegal content, the first definition of this term was provided in the Commission's Communication titled 'Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms' that simply stated in this regard that „*what is illegal offline is also illegal online.*"[11] This general definition was further developed in Article 4 (b) of the Commission Recommendation (EU) 2018/334 on measures to effectively tackle illegal content online, according to which illegal content "*means any information which is not in compliance with Union law or the law of a Member State concerned*",[12] reflecting the possible differences in the definition of illegal content formulated in the national law of individual Member States. Concurrently it confirmed the fact that if certain information violates the provisions of the European Union law, it will be considered illegal regardless of the differences in the national legal systems. Following these efforts, Article 3 (h) of the Digital Services Act provided a new definition of illegal content, according to which this term covers "*any information that, in itself or in relation to an activity, including the sale of products or the provision*

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7 HUSOVEC, M. Principles of the Digital Services Act. Oxford: Oxford University Press, 2024. ISBN: 978-0-19-288245-5. P. 426.

8 Recital 111 of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC ('Digital Services Act'). *OJ L 277, 27.10.2022, pp. 1–102.*

9 As a number of Member States failed to designate their Digital Services Coordinators within the set timeframe (including Slovakia), the Commission initiated infringement proceedings through letters of formal notice, reasoned opinions and later referrals to the CJEU for not complying with their obligations set forth by the DSA. The current list of designated authorities can be found here: https://digital-strategy.ec.europa.eu/en/policies/dsa-dscs#1720699867912-1

10 Recital 109 of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC ('Digital Services Act'). *OJ L 277, 27.10.2022, pp. 1–102.*

11 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Tackling illegal content online. Towards an enhanced responsibility of online platforms. *COM (2017) 555 final.* P. 2.

12 Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online. *OJ L 63, 6.3.2018, p. 50–61.*

of services, is not in compliance with Union law or the law of any Member State which is in compliance with Union law, irrespective of the precise subject matter or nature of that law." In this regard, the determination of the illegality of content is not affected by the source of different legislative acts that define certain information as illegal, as both national and European Union legislation can give rise to content unlawfulness, the form in which the illegal information is contained, or the precise nature or subject matter of the legal provision from which the illegality of the information results. The Digital Services Act simultaneously "*does not distinguish between different types of infringement with respect to any of the obligations. This means that criminal offences, intellectual property rights violations and infringements of personal rights all face uniform compliance rules.*"[13] It also does not define individual categories of illegal content covered by it, but provides an illustrative list of content types concerned that include illegal hate speech or terrorist content, unlawful discriminatory content, the sharing of images depicting child sexual abuse, the unlawful non-consensual sharing of private images, online stalking, the sale of non-compliant or counterfeit products, the sale of products or the provision of services in infringement of consumer protection law, the non-authorised use of copyright protected material, the illegal offer of accommodation services or the illegal sale of live animals.[14]

2. THE ROLE OF DIGITAL SERVICES COORDINATORS

2.1. Requirements and powers of Digital Services Coordinators

Article 50 of the Digital Services Act formulates the following **requirements for Digital Services Coordinators** to be ensured by their corresponding Member States:

- impartial, transparent and timely performance of their tasks stipulated by this regulation,
- provision of all resources necessary to carry out their tasks, including sufficient technical, financial and human resources to adequately supervise all providers of intermediary services falling within their competence,[15]
- sufficient autonomy in managing their budget within the budget's overall limits, in order not to adversely affect their independence,
- complete independence when carrying out their tasks and exercising their powers in accordance with this regulation and freedom from any external influence, whether direct or indirect, while not seeking or taking instructions from any other public authority or any private party; this requirement shall not prevent the exercise of judicial review and shall also be without prejudice to proportionate accountability requirements regarding the general activities of the Digital Services Coordinators, such as financial expenditure or reporting to national parliaments, provided that those requirements do not undermine the achievement of the objectives of this regulation.

The following Article 51 of the Digital Services Act stipulates in detail the **powers entrusted to Digital Services Coordinators** ensuring their ability to carry out their tasks under this regulation, which include:

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[13] BUITEN, M., C. The Digital Services Act from Intermediary Liability to Platform Regulation. In: JIPITEC 12 (5) 2021. P. 366. https://dx.doi.org/10.2139/ssrn.3876328.

[14] Recital 102 of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC ('Digital Services Act'). *OJ L 277, 27.10.2022, pp. 1–102.*

[15] Pursuant to Recital 111 of the Digital Services Act, the Member States are also entitled to establish funding mechanisms based on a supervisory fee charged to providers of intermediary services under national law in compliance with EU law, to the extent that it is levied on providers of intermediary services having their main establishment in the Member State in question, that it is strictly limited to what is necessary and proportionate to cover the costs for the fulfilment of the tasks conferred upon the competent authorities pursuant to this regulation, with the exclusion of the tasks conferred upon the Commission, and that adequate transparency is ensured regarding the levying and the use of such a supervisory fee.

1) the following **powers of investigation**, in respect of conduct by intermediary service providers falling within the competence of their Member State:

a) the power to require those providers and others[16] to provide information relating to a suspected infringement of this regulation without undue delay,
b) the power to carry out, or to request a judicial authority in their Member State to order, inspections of any premises that those providers or others use for purposes related to their trade, business, craft or profession, or to request other public authorities to do so, in order to examine, seize, take or obtain copies of information relating to a suspected infringement in any form, irrespective of the storage medium,
c) the power to ask any member of staff or representative of those providers or others to give explanations in respect of any information relating to a suspected infringement and to record the answers with their consent by any technical means.

2) the following **enforcement powers**, in respect of intermediary service providers falling within the competence of their Member State

a) the power to accept the commitments offered by those providers in relation to their compliance with this regulation and to make those commitments binding,
b) the power to order the cessation of infringements and, where appropriate, to impose remedies proportionate to the infringement and necessary to bring the infringement effectively to an end, or to request a judicial authority in their Member State to do so,
c) the power to impose fines, or to request a judicial authority in their Member State to do so, in accordance with Article 52 for failure to comply with this regulation, including with any of the investigative orders issued by the Digital Services Coordinator,
d) the power to impose a periodic penalty payment, or to request a judicial authority in their Member State to do so, in accordance with Article 52 to ensure that an infringement is terminated in compliance with an order issued or for failure to comply with any of the investigative orders issued by the Digital Services Coordinator,
e) the power to adopt interim measures or to request the competent national judicial authority in their Member State to do so, to avoid the risk of serious harm.

3) **the power to take further measures**, if all other powers pursuant to this provision to bring about the cessation of an infringement have been exhausted and the infringement has not been remedied or is continuing and is causing serious harm which cannot be avoided through the exercise of other powers available under European Union or national law:

a) to require the management body of providers, without undue delay, to examine the situation, adopt and submit an action plan setting out the necessary measures to terminate the infringement, ensure that the provider takes those measures, and report on the measures taken,
b) where the Digital Services Coordinator considers that a provider of intermediary services has not sufficiently complied with the requirements referred to in the previous point, that the infringement has not been remedied or is continuing and is causing serious harm, and that that infringement entails a criminal offence involving a threat to the life or safety of persons, to request that the competent judicial authority of its Member State order the temporary restriction of access of recipients to the service concerned by the infringement or, only where that is not technically

[16] Specifically, any other persons acting for purposes related to their trade, business, craft or profession that may reasonably be aware of information relating to a suspected infringement of this Regulation, including organisations performing the audits referred to in Article 37 and Article 75(2).

feasible, to the online interface of the provider of intermediary services on which the infringement takes place.[17]

The measures adopted by the Digital Services Coordinators in the exercise of their powers shall be **effective, dissuasive and proportionate**, having regard, in particular, **to the nature, gravity, recurrence and duration of the infringement** or suspected infringement to which those measures relate, as well as the **economic, technical and operational capacity of the provider** of the intermediary services concerned where relevant.[18]

2.2. The position of Digital Services Coordinator in Slovakia

In the national context, the position of the Digital Services Coordinator was entrusted to the **Council for Media Services**[19] whose mission is the promotion of public interest i.e. in relation to the provision of content sharing platforms, intermediary services, online intermediary services and search engine services, protection of freedom of expression, right to information and right to access to cultural values and education, and exercise of state regulatory powers in this regard.[20] The applicable legislation presumes the independent nature of this public authority and emphasizes the need for its transparency in relation to the objectives sought by it, particularly media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition.[21]

Pursuant to Article 110 (2) (b) of the Act No. 264/2022 Coll. on media services as amended, the competences of the Council for Media Services within the state administration include the supervision of compliance with obligations stemming from this act, as well as from other legislative acts, including the Digital Services Act. In this regard, the Act No. 264/2022 Coll. on media services contains provisions on the **supervision of intermediary service providers** (Articles 133a – 133g)[22], **sanctions** that may be imposed on these providers in cases of identified infringements (Articles 140 – 145b), and a specific **type of proceedings regarding the prevention of dissemination of illegal content** (Articles 151 – 153), focusing on the following categories of illegal content:

a) content that fulfils the characteristics of child pornography or extremist material,
b) content that incites to conduct that fulfils the characteristics of any of the terrorism offences,
c) content that approves conduct that fulfils the characteristics of any of the terrorism offences, or
d) content that fulfils the characteristics of the offence of denial and approval of the Holocaust, crimes of political regimes and crimes against humanity, the offence of defamation of a nation, race and belief or the offence of incitement to national, racial and ethnic hatred.[23]

The proceedings on the prevention of illegal content dissemination before the Council for Media Services are not directed towards individual infringers that publish and promote illegal content online but focus on **providers of content sharing platforms**[24] **or providers of other content services** that do

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17 Article 51 (1-3) of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC ('Digital Services Act'). *OJ L 277, 27.10.2022, pp. 1–102.*

18 Ibid. Article 51 (5).

19 Article 110 (3) of the Act No. 264/2022 Coll. on media services as amended.

20 Ibid. Article 109 (3).

21 Ibid. Article 109 (4).

22 In 2024, a new supervisory department was established, whose priorities in the initial stages were the recruitment of the necessary personnel and the setting up of new processes as a necessary prerequisite for the effective performance of the extended competencies given the Council for Media Services' designation as the national Digital Services Coordinator.

23 Article 151 (2) of the Act No. 264/2022 Coll. on media services as amended.

24 Pursuant to Article 9 (1) of the Act No. 264/2022 Coll. on media services as amended, a content sharing platform is an information society service, the main objective or one of the main objectives or essential purposes of which is to store

not require authorization under the Act No. 264/2022 Coll. on media services. Individual perpetrators are subject to other applicable legislation, specifically the provisions of the Act No. 372/1992 Coll. on delicts (e. g. delicts of extremism), or more likely the Act No. 300/2005 Coll. Criminal Code ('*Criminal Code*') (e. g. terrorism offences, extremism offences, hate crimes, offence of child pornography distribution, etc.).

The Council for Media Services can issue a decision on the prevention of illegal content dissemination, in which it imposes an **obligation** on the provider **to remove the illegal content** in question **and prevent its further dissemination,** if it is proven that such content constitutes illegal content and concurrently its dissemination endangers the public interest or constitutes a significant interference with the individual rights or legitimate interests of persons falling within the scope of the legal order of the Slovak Republic.[25] The transparency of the decision-making practice established by the Council for Media Services in this regard is ensured through the obligatory publication of information regarding the decisions issued on the regulator's website or in other suitable form. The issuance of a decision in this regard does not affect the right of the concerned content service user to seek protection of their rights before competent courts. So far, only one such decision has been issued in the national context, specifically the decision of the Council for Media Services No. RNO/1/2024 of 24 April 2024 in relation to the company Twitter International Unlimited Company,[26] which was ordered to remove a user post disseminated on the content sharing platform X and to prevent its dissemination within 5 days of the receipt of this decision. The reason for the imposition of these obligations was the fact that the user post concerned was assessed as illegal content fulfilling the characteristics of extremist material pursuant to Article 151(2)(a) of the Act No. 264/2022 Coll. on media services and the characteristics of the criminal offence of incitement to national, racial and ethnic hatred pursuant to Article 151(2)(d) of the corresponding act. Concurrently, the illegality of content in question was established on the basis of its infringement of the European Union law, specifically the violation of Article 1(1)(a) and (b) of the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law and Articles 1 and 7 of the Charter of Fundamental Rights of the European Union, as well as the infringement of international norms, in particular Article 2 (1) of the First Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

The Council for Media Services was also very active in relation to illegal content disseminated as a part of the first terrorist attack committed on the territory of Slovakia. On 12 October 2022, the perpetrator committed a terrorist attack on Zámocká Street in Bratislava directed against the members of the LGBTIQ+ community, killing two people and seriously injuring another person. This act was later classified as the particularly serious crime of terrorist attack pursuant to Article 419 of the Criminal Code. A few hours before the attack, the perpetrator published a 65-page document entitled "A call to arms" ('*manifesto*') on his Twitter account, in which he explained his racist, anti-Semitic and extremist motives that led him to commit this act. Given that the perpetrator repeatedly glorified criminal offences in the manifesto, defended them and incited others to commit terrorist offences, the document in question was classified as **terrorist content**. In order to prevent its dissemination online, the Council for Media Services monitored its presence within the services of the affected hosting service providers, including Facebook, Twitter, Telegram, YouTube and on selected web portals. This monitoring detected 26 unique URLs allowing users to either download the entire manifesto or its selected excerpts in 10 digital content repositories, the providers of which were notified of the presence of this content on their services. On 14 October 2022, the regulator in cooperation with the Centre for Combating Hybrid Threats of the Ministry of Interior of the Slovak Republic acted against three content repositories and

a large number of works or other protected subject-matters as defined in the Act No. 185/2015 Coll. Copyright Act uploaded by its users and to distribute them.

25 Article 153 (1) of the Act No. 264/2022 Coll. on media services as amended.

26 Available : https://rpms.sk/sites/default/files/2024-10/RNO_1_2024.pdf.

three channels on Telegram where this manifesto was being disseminated; as of 1 November 2022, the content concerned was removed from all repositories (DocDroid, MediaFire, Anonfiles), but not from Telegram.[27] As for other repositories concerned (Ulož.to, MEGA.nz and pomf.lain.la), their providers complied with the regulator's request to remove the illegal content in question. The MEGA.nz service provider also blocked the user account from which the manifesto was made available. Concurrently, the manifesto was disseminated on social media. As most hosting providers complied with the regulator's request to remove terrorist content, it was not necessary to issue orders to remove the content in question.[28] However, as the regulator itself stated in this context, "*given the number and nature of services for storing and subsequent sharing of content online, it is currently not possible to effectively monitor all digital platforms on which potentially illegal content related to the attack on Zámocká Street could be disseminated.*"[29] Furthermore, to ensure future monitoring of this terrorist content, it was also included (in the form of a *hash*) in the global database of terrorist content operated by the Global Internet Forum for Counter Terrorism (GIFCT). In the following examination of the role of online platforms in the dissemination of illegal content relating to this terrorist attack, several shortcomings were highlighted regarding the providers' response to the terrorist attack,[30] specifically the failure of platforms' content moderation systems to identify extremist, terrorist and hateful content published by the perpetrator before, as well as after the terrorist attack (the inability of providers to ensure the enforceability of their own rules for the use of their services is particularly highlighted in the smaller markets in which they operate, including Slovakia, where often only minimal resources are spent on content moderation), as well as the platforms' failure to moderate the so-called borderline content (e.g. content including slang, symbols or emoticons used to support the perpetrator and the terrorist attack committed) even after its notification by the users of their services.

In 2024, the Council for Media Services continued its efforts in the enforcement of Digital Services Act provisions, focusing primarily on the detection of illegal content and cooperation and communication with selected content sharing platforms (Facebook, Instagram, YouTube, TikTok and partially X) through the established escalation channels. To illustrate, in 2024 the regulator escalated 989 items of content to these platforms, most of which were directed towards Facebook (81%); as a result, the majority of content items escalated were removed (683) by the corresponding provider. Content, for which the regulator obtained no response and content resolved in other ways (warning, unavailable content) accounted for approximately 2% of the total volume of content escalated. The reported content categories covered fraudulent posts and profiles, including fraudulent advertising or profiles impersonating state institutions or politicians (65%), hateful content aimed at the Roma minority (10%) and content that attacked the integrity of elections, electoral processes or candidates (10%). The remaining content categories included illegal or harmful statements in connection with the attempted assassination of the Prime Minister of the Slovak Republic or various attacks on other minorities, e. g. members of the LGBTI+ community. Given the early stages of Digital Services Act enforcement by the Council for Media Services, it remains to be seen whether its efforts will significantly affect the volume or availability of illegal content within the national digital landscape. The current *status quo* can, however, be better assessed through the examination of the existing decision-making practice of other national authorities with competence to investigate and prosecute illegal content.

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[27] The Council for Media Services. Terrorist attack on Zámocká Street in Bratislava: immediate and preventive activities of the Council for Media Services to prevent the spread of illegal and harmful content. Report on the reactions of digital platforms to the attack and their role in the radicalization of the perpetrator. December 2022. P. 26.

[28] The Council for Media Services 2022 Annual Report. Annual transparency report on activities of the Council for Media Services under Regulation 2021/784 of the European Parliament and of the Council on addressing the dissemination of terrorist content online.

[29] Terrorist attack on Zámocká Street in Bratislava: immediate and preventive activities of the Council for Media Services to prevent the spread of illegal and harmful content. Report on the reactions of digital platforms to the attack and their role in the radicalization of the perpetrator. December 2022. P. 5.

[30] See e. g. 1) The Council for Media Services. The Bratislava Shooting. Report on the role of online platforms. Available: https://rpms.sk/sites/default/files/2023-03/CMS_RESET_Report.pdf.; 2) The Council for Media Services 2023 Annual Report. Available: https://rpms.sk/sites/default/files/2025-03/Vyrocna_sprava_za_rok_2023.pdf

3. CURRENT STATE OF ILLEGAL CONTENT PROSECUTION BY OTHER NATIONAL AUTHORITIES

Prior to the adoption of the Digital Services Act, the dissemination of illegal content on the Internet was regulated through different sector-based legislative acts adopted on the international, European Union as well as national level, often focusing on specific categories of illegal content. The application of such regulation in the national context required its implementation in the national legal order, concurrently determining the public authorities with competence to investigate and prosecute those found responsible for the dissemination of illegal content online. In this chapter, we examine the established decision-making practice on illegal content in the national context, focusing on the most prevalent categories of illegal content.[31]

3.1. Terrorist content

The prohibition of dissemination of terrorist content is contained primarily in the Directive (EU) 2017/541 on combating terrorism,[32] and the later adopted Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online.[33] In the national context, the applicable regulation can be found e. g. in the Article 140b of the Criminal Code that defines the category of criminal offences of terrorism, covering the individual types of material defined as terrorist content in Article 2 (7) of the Regulation (EU) 2021/784. This category of criminal offences falls under the competence of the Special Criminal Court pursuant to Article 14 (k) of the Act No. 301/2005 Coll. on Criminal Procedure. The practical application of this legislation in the Slovak republic is, however, rare. To illustrate, the offence of certain forms of participation in terrorism (Article 419b of the Criminal Code) which sanctions public incitement to commit terrorism offences, as well as public approval of such offences, has been detected by the competent law enforcement authorities in only a small number of cases annually, e. g. 5 cases in 2023.[34] Similarly, the data published by the General Prosecutor's Office of the Slovak Republic and the statistical yearbooks of the Ministry of Justice of the Slovak Republic record no more than one case of conviction of a person for committing this offence in the calendar years 2022 and 2023. Notwithstanding the example of terrorist content provided in chapter 2.2 of this paper, we were not able to identify other case-law focusing on the dissemination of this category of illegal content in Slovakia.

3.2. Extremist content, including xenophobic and racially motivated speech that publicly incites hatred and violence (hate speech)

The availability of extremist content, including hate speech, as defined in Article 130 (7) of the Criminal Code, has been a long-standing issue in the Slovak Republic.[35] Its prosecution is entrusted, primarily, to the competent law enforcement authorities and the Special Criminal Court pursuant to Article 14 (o) of the Act No. 301/2005 Coll. on Criminal Procedure, as it can be sanctioned either as the administrative delict of extremism pursuant to Article 47a (1) of Act No. 372/1990 Coll. on delicts, or as one of the extremist criminal offences defined in Article 140a of the Criminal Code. Case-law

[31] Closer examination of individual categories of illegal content and their regulation is contained in BACHŇÁKOVÁ RÓZENFELDOVÁ, L. Regulácia nezákonného obsahu a súvisiacich deliktov na internete. 1. vyd. Bratislava : C.H. Beck, 2025. ISBN 978-80-8232-063-6.

[32] See Article 5 of the Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. *OJ L 88, 31.3.2017, p. 6–21.*

[33] Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online. *OJ L 172, 17.5.2021, p. 79–109.*

[34] Criminality Statistics. Ministry of Interior of the Slovak republic. Available: https://www.minv.sk/?statistika-kriminality-v-slovenskej-republike-xml

[35] See LETKOVA, L. Trestné činy extrémizmu z pohľadu štatistiky a rozhodovacej praxe od roku 2017. Bratislava: C. H. Beck, 2023. ISBN: 978-80-8232-026-1.

regarding the criminal prosecution of the dissemination of such content has slowly developed, reflecting the rising amount of such content online. To illustrate, in the last five calendar years (from 1.1.2020 to 31.12.2024), the competent law enforcement authorities have investigated 98 instances of the criminal offence of extremist material distribution pursuant to Article 422b of the Criminal Code. In these cases, the authorities prosecuted primarily the dissemination of extremist content on social media (e. g. publication of such content on offender's public profile, as part of the discussion on other users' posts, in different groups created on the social network, etc.), the possession of extremist material in a form that allows it to be made available online (photographs, audio or visual-sound recordings) on external media, or offering such materials for sale and distribution, in particular by publishing advertisements on various e-commerce websites. Considering the amount of extremist content online, the number of cases investigated seems rather insufficient. The sanctions imposed included primarily a prison sentence (the execution of which was, in most cases, suspended for a probationary period), forfeiture of property, specifically electronic devices used for the commission of a crime, or the imposition of a pecuniary fine.

3.3. Child pornography

The illegality of child pornography is confirmed in numerous international, European as well as national legal norms. The Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, for example, establishes minimum rules concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes. In Slovakia, the applicable provisions are contained in the Criminal Code that criminalises production of child pornography (Article 368), its distribution (Article 369), possession of child pornography and participation in a child pornographic performance (Article 370) and sexual abuse (Article 201b). According to the available statistical data, in the last five calendar years the offence of child pornography distribution was identified by the competent law enforcement authorities in an average of 234 cases per year, which seems to be a relatively low number of investigated cases considering the amount of child pornography available online.[36] The number of persons convicted for this offence is similarly low (40 in 2024, 52 in 2023, 61 in 2022).[37] Based on the existing case-law in this regard, the competent courts sanction primarily the distribution of child pornography content through different communication applications (e.g. Messenger, Pokec, WhatsApp, Telegram, etc.), the publication of child pornography on the public profile of the offender's social media, the sending of such material through email or making it available through peer-to-peer (P2P) programmes. The sanctions imposed in this regard include primarily prison sentence, often suspended for a probationary period, forfeiture of property, or the imposition of a pecuniary fine.

3.4. Content in violation of the fundamental right to privacy and the right to personal data protection

The fundamental right to privacy is interpreted broadly, encompassing various aspects of the individual's private life, with its definition constantly evolving.[38] The most commonly prosecuted infringements of this right in the national context include the dissemination of images or video and audio recordings relating to a person without their consent, e. g. on social media, the unauthorized dissemination of information regarding private individuals concerning their private life that may include false or misleading statements capable of interfering with the protection of the personality of the person

[36] See WORTLEY, R. – SMALLBONE, S. Investigating Child Pornography. In: Internet Child Pornography. Causes, investigation and prevention. Praeger, 2012. P. 50-70. https://doi.org/10.5040/9798400671708.ch-004

[37] Statistical yearbooks of the Ministry of Justice of the Slovak republic. Available: https://www.justice.gov.sk/ministerstvo/analyticke-centrum/

[38] See PFISTERER VM. The Right to Privacy - A Fundamental Right in Search of Its Identity: Uncovering the CJEU's Flawed Concept of the Right to Privacy. German Law Journal. 2019;20(5):722-733. https://doi.org/10.1017/glj.2019.57

concerned, or the unauthorized dissemination of electronic communication of the user. Closely connected to the right to privacy is the fundamental right to personal data protection guaranteed by Article 8 of the Charter of Fundamental Rights of the European Union. The infringements of this right in the digital landscape that may be classified as illegal content and are subject to prosecution in the national context include, e. g. the unauthorized recording of data subjects through camera information systems, the unauthorized disclosure of personal data on the Internet, or the unauthorized sending of personal data to third parties via online communication tools.

The above provided examples of privacy and personal data protection infringements can be remedied through different civil (protection of personality pursuant to Article 11 of the Act No. 40/1964 Coll. Civil Code), administrative (e. g. delicts against civil co-existence pursuant to Article 49 of the Act No. 372/1990 Coll. on delicts) or criminal law instruments (e. g. criminal offence of unlawful disposition with data pursuant to Article 374 of the Criminal Code). The employment of these instruments is, however, rather sparse. The most complex case law in this regard was developed by the Office for Personal Data Protection of the Slovak Republic,[39] primarily focusing on the above-provided examples of personal data protection infringements. The failure to employ the available civil law protection measures may be due to numerous factors, including the length of court proceedings, the costs connected with them, or the unwillingness of competent courts to award damages able to prevent future infringements. As regards criminal law instruments, the available statistical data similarly confirms their insufficient employment in practice. The reason for this may be the inability to prove that the infringement in question achieved the level required to establish criminal liability, as Article 10 (2) of the Criminal Code specifies that "*it is not an offence if the seriousness of the act is negligible given the method of commission of the act, its consequences, and the circumstances under which such act was committed, the extent of the fault, and the intention of the offender*."

3.5. Content infringing intellectual property rights

Infringements of intellectual property rights, such as copyright or trademark rights, present another example of illegal content that may be sanctioned through instruments of civil, administrative, as well as criminal law in the national context. As regards copyright infringements that may be classified as illegal content, these are usually sanctioned as a criminal offence of copyright infringement pursuant to Article 283 of the Criminal Code. The available case-law covers infringements such as the unauthorized making available of copyrighted works via peer-to-peer (P2P) networks, unlawful storage of copyrighted content on file hosting servers and the subsequent publication of links to such content on various discussion forums, usually with the aim to gain financial compensation for each download of the content made available in this manner, or the unauthorized publication of copyrighted content online in another manner, e. g. on different websites or Internet forums.[40] In relation to trademark violations that may be classified as illegal content, these usually cover cases, in which the offender creates, purchases or in another way procures imitations or counterfeits of different goods or services that are offered for sale online, often through advertisements published on different e-commerce platforms. In this case, despite the possibility of criminal law protection based on the Article 281 of the Criminal Code, only a handful of cases can be identified, in which the competent authorities chose to prosecute such infringements. The lack of employment of civil or administrative protection measures may be due to similar factors as defined in the previous chapter – length and costs of court proceedings, low probability for the awarding of damages, etc.

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[39] See BACHŇÁKOVÁ RÓZENFELDOVÁ, L. – SOKOL, P. – HUČKOVÁ, R. – MESARČÍK, M. Personal data protection enforcement under GDPR – the Slovak experience. In: International Data Privacy Law, Vol. 14, Issue 3, 2024. https://doi.org/10.1093/idpl/ipae008

[40] See BACHŇÁKOVÁ RÓZENFELDOVÁ, L. Prosecution of copyright infringements as a criminal offence in Slovakia. In: Journal of Intellectual Property Law & Practice. Vol. 17, No. 12 (2022). ISSN 1747-1532. P. 1023-1031. https://doi.org/10.1093/jiplp/jpac103

3.6. Other categories of illegal content

Despite the prevalence of the above examined categories of illegal content in the international, European Union as well as national regulation, other specific examples of illegal content can be identified in the national context. These include for example the promoting or operating of gambling websites without the necessary license granted by the Gambling Regulatory Authority, the dissemination of political content during election moratorium (48 hours before voting) by a political party, political movement, coalition of political parties and political movements and/or individual candidates, that falls under the competence of the State Commission for Elections and Control of Political Party Financing, harmful content pursuant to Article 27b (3) of the Act No. 69/2018 Coll. on Cybersecurity, the blocking of which may be ordered by the National Security Office[41], content whose dissemination meets the factual basis of the crime of spreading alarm messages under the Article 361 of the Criminal Code, etc. In this regard, the involvement of other state authorities can be expected, reflecting the specific nature of the illegal content in question and procedures established to ensure the enforcement of the applicable regulation.

CONCLUSION

Digital Services Act presumes an active involvement of national authorities in the enforcement of its provisions, distinguishing between the specific position of the Digital Services Coordinator with powers to investigate, enforce and take further measures against the dissemination of illegal content on the Internet in respect of conduct by intermediary service providers falling within its competence, and the role of other competent authorities assigned specific tasks or sectors by individual Member States. Following the designation of the Council for Media Services as the national Digital Services Coordinator, an effort to reflect the role of intermediaries in illegal content dissemination online can be identified, a notion rarely seen before on the national level. The developing practice of this national authority focused, so far, on the creation of escalation channels and a closer cooperation with selected intermediaries, aiming to ensure detection and removal of illegal content within its competence. The examination of the previous case-law established in this regard by other competent authorities confirmed the former focus of state authorities, specifically law enforcement and courts, on individual infringers, disregarding the position of intermediaries in illegal content distribution. Certain commonalities can also be found in the decision-making practice of national courts in relation to the prosecution of illegal content through the instruments of criminal law. These include, for example, the fact that the competent courts often adopt their decisions in the form of an agreement on guilt and punishment or a criminal warrant that lack detailed justification, failing to provide information on the facts that the court deemed proven, evidence the court's merits are based on or considerations the court observed during the assessment of the performed evidence, limiting the analysis of the established case-law in this regard. Moreover, despite the fact that the perpetrator is found guilty in most cases of illegal content prosecution, the punishment imposed in this regard seems insufficient (prison sentence suspended for a probationary period, forfeiture of property, the imposition of a low pecuniary fine), therefore failing to serve as a deterrent for future infringements. The main difference in the analysed case-law relates to the number of cases prosecuted by competent authorities, as certain categories of illegal content seem to have received more attention (child pornography, extremist content) than others. Nonetheless, if considered in its entirety, the number of cases of illegal content prosecution in the national context remains low, especially considering the amount of illegal content available online. The expected shift in focus from individual infringers to intermediaries providing the space for illegal content dissemination will,

[41] See SOKOL, P., BACHŇÁKOVÁ RÓZENFELDOVÁ, L. Content blocking mechanism in cybersecurity: Slovakia case study. *EURASIP J. on Info. Security* 2025, 4 (2025). https://doi.org/10.1186/s13635-025-00190-x

hopefully, prove more effective in the fight against illegal content, as the existing approach has, so far, had only a limited impact on the availability of illegal content online.

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Vývoj antitrustu na pozadí širšího cílového regulatorního zmatení

The evolution of antitrust amidst the background of broader target regulatory confusion

Abstrakt

Ze samotné podstaty antitrustového práva pramení střet protikladných společensko-politických a ideologických představ o roli státu v ekonomice. Za přihlížení smířlivějších konvertitů z obou stran tu nalézají kolbiště horliví a přesvědčení liberální odpůrci jakékoliv regulace hospodářské soutěže s neméně zapálenými příznivci masivní regulace. Žádná ze stran přitom není schopna předložit spolehlivé vědecké důkazy pro svá tvrzení. Širší sociální a jiné ohledy prosazuje v současnosti i soutěžní politika a rozhodovací praxe EU. Celá řada oněch specifičtějších cílů nesoutěžní povahy je však spíše jen prospěšnými vedlejšími účinky ochrany soutěže. Antitrust by se měl soustředit na svůj nejvlastnější cíl: chránit funkční konkurenční prostředí. Neměl by se politicky libovolně instrumentalizovat k dosažení mimosoutěžních cílů, které lze lépe řešit přímou regulací. Žádné právní odvětví ani žádná část právní regulace se nevyhne přirozenému vývoji v reakci na měnící se společenské podmínky. Nesmí však ztratit svou podstatu a hlavní funkci a rozplynout se v operativním mikromanagementu aktuálních problémů.
Klíčová slova: *antitrust; neo-brandeisianství; udržitelnost; nový soutěžní nástroj; genderová mýlka.*

Abstract

Antitrust law naturally brings about a clash of different views on the role of the state in the economy. On one side are liberals who oppose any regulation of competition, and on the other are those who strongly support government intervention. Both sides have their supporters, but neither has provided solid scientific evidence to fully back up their arguments. Recently, EU competition policy has started to reflect broader social goals as well. However, many of these goals are not the main purpose of antitrust rules—they are more like positive side effects. The main focus should remain on maintaining a healthy competitive environment. Antitrust rules shouldn't be used as a political tool to achieve other goals that are better handled through direct regulation. Of course, every area of law has to evolve as society changes. But even so, it should keep its core purpose and not turn into a system that tries to manage every small issue in detail.
Keywords: *antitrust; neo-brandeisianism; sustainability; new competition tools; gender fallacy.*

JEL Classification: K20, K21

ÚVODEM

V příspěvku se zamýšlím nad některými koncepčními problémy, s nimiž se potýká antitrustová regulace u nás i ve světě. Jde však jen o jeden z projevů širšího jevu. Stále se množící počet, šíře a hloubka různých regulací (včetně té antitrustové) je nejen reakcí na rostoucí společenskou entropii, ale také nechtěným důvodem jejího růstu. S cílem nebudit dojem nečinnosti ve střetu s nejrůznějšími současnými výzvami se šíří pseudodoporučení na „léčbu", a to v podobě lacinéhо mediálního klišé tzv. hodnotové politiky a hodnotového práva. V pozadí stojí snaha některé aktuálně „žádoucí" cíle a hodnoty preferovat na úkor jiných, resp. ty tradiční označit za překonané či dnes již podřadné.[1] Jako by politika

[1] Tak se např. zdůrazňuje nutnost zpružnění antitrustové regulace v reakci na mnohačetné změny ve společnosti a v ekonomice, u nichž trh selhává, protože neumí vyřešit negativní externality; mluví se o hledání nové „teorie újmy", zahrnující i dříve nezdůrazňované hodnoty (mj. sebeurčení jednotlivců či těžko uchopitelné mezigenerační a mezinárodní

a právo právě takové („hodnotové“) vždycky nebyly samotnou svojí podstatou. Vždy přece prosazovaly hodnoty a zájmy, někdy sporné, podivné, pojímané v různé míře prosazování individualismu či kolektivismu, (anti)humanismu a (anti)demokratismu.

Nejde ani dnes o nic nového pod sluncem, ale jen o novou verzi „nátěru“ odvěkého ideového střetu, jen s použitím jiných aktuálních prostředků k dosahování jinak nazvaných zástupných cílů. Již delší dobu[2] se dá například pozorovat snaha o nahrazení parametrické regulace prosoutěžního prostředí politickým prosazováním konkrétních krátkodobých cílů. Dnes např. pod takovými programovými hesly jako „Clean, Just and Competitive Transition“, což je oficiální název portfolia příslušné eurokomisařky Ribery, namísto dřívějšího názvu „komisaře pro soutěž.“ Samotné slovo „soutěž“ v názvu portfolia schází a soutěž je očividně podřízena něčemu jinému. Právo se tak stává jakousi převodovou pákou konkrétních politik, kvůli jejichž dosažení se instrumentalizuje a ohýbá,[3] namísto toho, aby se dosahování těch cílů řídilo obecnými pravidly, která by právní regulaci nezbavovala jejího smyslu coby obecného právního rámce.

Z celého vějíře problémů, s nimiž se potýká současná veřejnoprávní úprava ochrany soutěže, vybírám brizantní diskusi o samotných cílech antitrustu (oživení neobrandeisiánského směru v diskusi s ordoliberálním pojetím antitrustu). Od svého hlavního cíle, jímž tradičně bylo udržení funkční soutěže v zájmu ochrany spotřebitelského blahobytu, se má antitrust posouvat k plnění nejrůznějších rádoby progresivních společenských cílů, jako např. tzv. celkové (nejen environmentální) udržitelnosti nebo genderové vyváženosti, byť by se to mělo stát za cenu ztráty jeho vlastní funkčnosti. Antitrust by se tedy měl používat jako jakýsi rychle mobilizovatelný a vcelku univerzální nástroj k použití namísto toho, aby se promyšleně a pracně přijímaly specializované a vyvážené veřejnoprávní regulace k dosažení specifických společenských cílů. Tento vývoj pokládám za potenciálně nebezpečný a nedoporučeníhodný. Dokládám to jen na několika konkurenčních hodnotově společenských cílech, jimž by se neměla funkčnost antitrustu obětovat.

1. ANTITRUST JAKO NÁSTROJ PRÁVNÍ REGULACE, ALE I JEJÍ OBJEKT

1.1. Politické přetahování mezi neoklasickým a neobrandeisiánským antitrustem

Evropské soutěžní právo zaznamenalo velký rozkvět v 70. a 80. letech 20. století v souvislosti s posilováním snah o evropskou integraci a jednotný trh, fungující v podmínkách svobodné soutěže. Tyto

spravedlnosti). Srov. PODSZUN, R.: *Das Leitbild des wertgebundenen Wettbewerbs*. WuW 2024, Nr. 10, s. 507 n. V příspěvku využívám i některé pasáže z mých kapitol použitých v kolektivní monografii KUPČÍK, J. a kol.: Moderní soutěžní právo a ekonomie. Praha: C. H. Beck, 2024, 854 s.

[2] Nepříznivě zapůsobila např. snaha bývalého francouzského presidenta Sarkozyho na Lisabonské mezivládní konferenci již v červnu 2007 zříci se při budoucích reformách smluvního sytému EU „nezkreslené soutěže“ jakožto cíle Evropských společenství. Směřovalo by to evidentně k posílení odvětvově politických a národně egoistických změn na úkor hodnoty funkčního společného trhu, pro nějž je ovšem soutěž mezi podniky naprosto zásadní. Šlo jen asi o neuváženou (nebo možná i „uváženou“ jako „zkušební balonek“) politickou deklaraci, motivovanou snahou o zvýšení odvětvově politických a národně egoistických snah velkých států na úkor funkčního společného trhu. Na praxi národních ani komunitárních soutěžních úřadů a soudů se však naštěstí nic nezměnilo. Břitké odmítnutí těchto destruktivních snah viz RITTNER, F.: *Der – unverfälschte – Wettbewerb: Grundlage und Ziel der EG*, WuW 2007, Nr.10, str. 967. Podobnou motivaci asi měl (a „hodnotovou recidivu“ představoval) rozruch kolem fúze Alstom/Siemens, neschválené Evropskou komisí v únoru 2019. Francouzská a německá vláda intervenovaly politicky razantně proti onomu rozhodnutí s argumentem, že by schválení fúze bývalo mohlo vytvořit silné evropské hráče, konkurenceschopné na světovém trhu vysokorychlostních vlaků, zkresleném přítomností konkurentů podporovaných cizími státy. Politické návrhy směřovaly tehdy dokonce k přeformování strukturálního rámce přezkumu fúzí. Evropská rada jako bytostně politický orgán podle nich bývala měla dostat pravomoc zvrátit rozhodnutí Komise o neschválení fúze. Srov. Lexology LIDC, 15. 12. 2020: European industrial policy vs. European competition law: what´s the direction of travel? Dostupno na https://www.lexology.com/library/detail.aspx?g=e8b369e1-66e3-412a-b592-16ccc2e65541. Naštěstí z těchto návrhů sešlo. Nicméně recidiva není vyloučena. Německý kancléř Merz nedávno kritizoval právě kvůli této kauze evropskou kontrolu fúzí. Ve skutečnosti se však Alstomu i Siemensu daří v železničním odvětví dobře i přes neschválenou fúzi. Máme tak v EU nepřekvapivě dva konkurující si „šampióny“ a obávaná čínská konkurence, hlavně kvůli níž se evropští rivalové chtěli původně spojit, prý výrazně zaostává. Srov. MUNDT, A.: *Bonn, Brüssel, Washington – Wohin geht das Wettbewerbsrecht?* WuW 2025, Nr. 3, s. 121.

[3] Dřívější „móda“ MEA a „adhocismus“, které dnes již poněkud vychladly.

cíle se považovaly za slučitelné a sledovaly se současně. Neoliberální akcenty a vzývání svobodných trhů zesílily v 90. letech minulého století zejména v reakci na rozpad tzv. reálně socialistických režimů ve střední a východní Evropě. Evropské soutěžní právo bylo druhém intelektuálně ideového obohacení nově se utvářejících tržních ekonomik a výrazně k jejich vývoji přispělo. Jejich soutěžní právo se významně harmonizovalo na základě asociačních dohod ještě před budoucím formálním přistoupením k ES.[4]

Neoklasické pojetí hospodářské soutěže, kladoucí důraz na její svobodu a pokládající soutěž za cíl sám o sobě, nebylo nikdy slepě přijímáno kvůli slepé víře v až mýtické autoregulační schopnosti trhu, které přitom v historii opakovaně selhávaly. V USA se za presidentství R. Reagana politicky výrazně prosadila neoliberální tzv. Chicagská škola (v čele s R. Borkem, G. Beckerem, R. Posnerem, G. Stiglerem, F. Easterbrookem, H. Demsetzem). Ta odmítala vícečetnost sociálně ekonomických cílů soutěžního práva a stavěla se jen za zvýšení celkového a spotřebitelského blahobytu a zvýšení efektivnosti jednotlivých podniků na základě ekonomické analýzy. Bývá někdy označována za proponenta sociálního darwinismu propagujícího přežití těch nejschopnějších. Zásahy státu do tržní struktury se striktně odmítaly. Tato škola tak vlastně rezignovala na společenskopolitický cíl kontroly moci prostřednictvím hospodářské soutěže a používala nejasně definované pojetí efektivnosti založené na selektivních empirických datech. V popředí stála mikroekonomická efektivnost jednotlivého podniku a ordoliberální myšlení o širších společenských funkcích soutěže bylo potlačeno.[5] Propagovala se širokospektrální ekonomizace pohledu na svět. Tendence k prosazování tzv. více ekonomického přístupu k soutěžnímu právu zaměřenému na maximalizaci okamžitého spotřebitelského prospěchu, které se přenesly i do Evropy, se nepochybně inspirovaly tímto myšlenkovým směrem.[6]

Oponentní pozici představovala tzv. Harvardská škola (P. Areeda, H. Hovenkamp, L. Sullivan), jež se vyvíjela v interakci se školou chicagskou a v reakci na její úzce ekonomizující přístup. Na rozdíl od ní zdůrazňovala mnohem větší počet ekonomických i mimoekonomických cílů soutěžního práva v delším časovém horizontu nežli okamžitý či krátkodobý spotřebitelský blahobyt (mj. rozdělovací spravedlnost, suverenitu a sebeurčení spotřebitele, technický pokrok, decentralizaci hospodářské moci) a stavěla se (v opozici ke škole Chicagské) za státní soutěžní politiku vůči koncentracím podniků.

Někteří komentátoři konstatují, že antitrustové orgány v USA potřebují velkou dávku adrenalinu, aby se probudily ze zaklení Chicagské školy, kvůli němuž nezabránily velkým technologickým společnostem v akvizicích stovek firem a začínajících podniků (startupů), z nichž některé bývaly mohly vyrůst v jejich významné konkurenty.[7]

1.2. Aktuální vývoj a směřování

V dnešní době se tento "liberálně-sociálnější" směr myšlení prezentuje (L. Khan,[8] T. Wu, J. Kanter) jako tzv. neobrandeisiánské hnutí,[9] tvrdící, že koncentrace soukromé ekonomické moci je nebezpečná z

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4 Srov. ŠMEJKAL, V.: *Soutěžní politika a právo Evropské unie 1950 – 2015*. Praha: Leges, 2015, s. 161 n.

5 Srov. SCHMIDT, I.: *Wettbewerbspolitik und Kartellrecht*. 7.Aufl., Stuttgart: Lucius & Luciuss, 2001, s. 23.

6 Tzv. modernizace soutěžního práva a uplatňování tzv. více e ekonomického přístupu k antitrustu na přelomu tisíciletí nezapřou právě tuto inspiraci.

7 Tak GILBERT, R. J.: *The American Innovation and Choice Online Act: Celler-Kevaufer*. Conurrentialiste, https://www.networklawreview.org/gilbert-innovation-choice-act/. Občas se v této souvislosti používá neblahé spojení se slovem „revoluce". Srov. FRANCIS, D.: *Reflections on the revolution in antitrust.* Journal of Antitrust Enforcement, 2023, Nr.11, s.185 n. Uvážlivější komentátoři hovoří neexaltovaně spíše o „reformě". Srov. FOX, E.: The battle for reform of US antitrust law. Journal of Antitrust Enforcement, 2023, 11, s. 179 n. O „revoluci" v antitrustu (pro změnu revoluci „Reaganově) se ostatně hovořilo i před čtyřiceti lety, při ideovém a politickém pohybu protisměrném (srov. tamtéž, s. 182).

8 KHAN, L.: *The New Brandeis Movement: America´s Antimonopoly Debate*. Journal of European Competition Law and Practice, 2018, Nr. 9, s. 131.

9 Jeho odpůrci je posměšně označují jako „hipsterský antitrust". Jméno Louise Brandeise, soudce Nejvyššího soudu Spojených států amerických z počátku 20. století, se používá kvůli soudcovu odsudku ekonomické koncentrace, kterou označil za „prokletí velikosti". Brandeis pokládal monopoly z jejich samotné podstaty za škodlivé pro blaho zaměstnanců a inovace v podnikání.

ekonomických, politických a sociálních důvodů. Tento „postchicagský" tábor se přimlouvá se za to, aby se za pomoci antimonopolního práva zlepšila přespříliš koncentrovaná struktura trhů, které narušují či vylučují konkurenci, vedou k nerovnosti příjmů, narušují práva spotřebitelů, negativně ovlivňují zaměstnanost a mzdy apod. Antitrustové právo se chápe i politologicky a konstitucionalisticky a pokládá se za podstatnou součást demokratického politického systému. Zdůrazňuje se známá skutečnost, že žádné "neutrální" antitrustové právo neexistuje a že pravidla i praxe soutěžního práva jsou vždy věcí politického rozhodnutí.[10] Antitrustové právo se ovšem na druhé straně může „rozpustit" kvůli své politicky proponované služebnosti ve prospěch široce pojímané "sociální spravedlnosti", resp. tzv. „sociálního rozměru soutěžního práva."[11]

Popírá se jednostranná orientace soutěžního práva na spotřebitelský blahobyt prosazovaný Chicagskou školou. Širší sociální a jiné ohledy bere v současnosti za vlastní (ve zřejmé inspiraci neobrandeisiánským myšlením) i soutěžní politika a rozhodovací praxe EU. Tento „sociálnější antitrust" se však nedá – ani přes některé excesivní tendence – zbrkle a zjednodušeně diskvalifikovat jen jako přehnaně ambiciózní nástroj k dosahování všemožných sociálních cílů typu snižování nerovnosti nebo vyváření pracovních příležitostí. Naopak jsou si jeho zastánci vědomi toho, že antitrust je třeba opět zaměřit na struktury a na širší soubor opatření k hodnocení tržní síly a opětovně jej zacílit na soutěžní proces[12] a vrátit se k jasnějším pravidlům (k normativně systémovému přístupu[13], resp. ke „zdravému rozumu") namísto rozhodování podle nejasných a sporných ekonomických modelů budoucích cenových dopadů.

V tomto kontextu se ordoliberální antitrust založený Franzem Böhmem[14] a vycházející z proslulé formule „zajištění svobody prostřednictvím omezení svobody" shoduje s obavou neobrandeisiánců z „excesivní velikost", která svobodu na trhu podrývá nebo ničí a jež nepředstavuje jen ekonomický, ale i politický problém. Koncepční střet se však nevede o to, zda je excesivní velikost škodlivá, ale o prostředky, jak s ní bojovat – jestli státně administrativními plánovacími zásahy a cenovou politikou, nebo spíše soutěží, tedy tím „nejgeniálnějším nástrojem v dějinách ke zbavení moci" (F. Böhm), resp. (obvykle) nějakým pragmatickým kompromisem.[15]

Současné peripetie soutěžní politiky ve vztahu k technologickým gigantům vedou k dramatickému vývoji ve střetu mezi aktivismem a zdrženlivým konzervatismem. Některé návrhy na obranu proti jejich rostoucí hospodářské (a postupně se politizující) moci (ex ante regulace zakázaného nekalého jednání[16]) v Evropě již platí.

V poslední době sílí hlasy po posílení specifických odvětvových regulací a po odstranění umělé dělby na zásahy *ex ante* a reakce *ex post*. Soutěžeschopnost a férovost na digitálních trzích se dá podle nich docílit nikoliv *jen* předběžnou regulací, *nebo* následnými zásahy proti subjektům chovajícím se protisoutěžně, ale *kombinací* obou způsobů intervence. Za překonané se pokládají snahy zachovat jedinou soustavu hodnot (orientace antitrustu jen na spotřebitele, nebo na soutěž, nebo na obojí) a klade se důraz na souběžné sledování více hodnot. Má jít o přechod k regulatornímu překryvu, který se projevil

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10 Tak FRANCIS, D.: op. cit., s 187.

11 Termín používá např. LIANOS, I.: *„Polycrisis" and the changing „Life" of Competition Authorities*. WuW 2024, Nr. 2, s. 62.

12 Srov. KHAN, L.: op. cit., s. 131.

13 Požaduje se návrat k širšímu využívání normativních hledisek a odklon od analýz dopadů „případ od případu" ve prospěch „robustních domněnek nezákonnosti" – srov. FRANCIS, D., op. cit., s. 186.

14 BÖHM. F.: *Das Problem der privaten Macht*. Die Justiz, 1927, Bd. III, s. 324–345.

15 V reakci na situaci, kdy si úzká technologická podnikatelská elita začíná osobovat politickou moc a začíná státům „přerůstat přes hlavu", kdy se množí nejrůznější ekologické a sociální externality hospodářských rozhodnutí a vzrůstá nedůvěra v tržní samoregulaci, se evidentně modifikují i proporce mezi přímou administrativní odvětvovou regulací a všeobecnou úpravou soutěžního prostředí antitrustovými předpisy. Srov. mj. trend zavádění tzv. nových soutěžních nástrojů, které mají za cíl podchytit možná ohrožení soutěže již preventivně (srov. ŠMEJKAL, V.: *Jednotný trh plný nových soutěžních nástrojů*. Antitrust 2025, č. 1, s. 11 – 16). A navíc i samotná aplikace antirustového práva do sebe „vtahuje" prosazování širších aktuálních společenských cílů a priorit.

16 Ta se chápe jako nový standard neobrandeisianismu, zaváděný již dříve ve Federal Trade Commission v USA - srov. LAMBERT, T. A,: *Neo-Brandeisianism: A Policy at War With itself*. The Journal of Corporation Law 2024, Vol. 49, N. 2, s. 347 n.

v Nařízení DMA[17] a jenž by se měl do budoucna stát pravidlem, a ne výjimkou.[18] Projevuje se poznatek, že požadavek spravedlnosti a poctivosti se nevztahuje jen na rozdělování a jeho výsledek, ale i na samotné *chování*.[19]

Reakce neobrandeisianismu na rostoucí ekonomickou moc technologických gigantů se zosobnila v tzv. prohlášení z Utahu z konce r. 2019.[20] To je vedeno snahou reagovat na společenské výzvy (a tedy nejen s ohledem na ekonomickou efektivitu) zavčasu „…spíše ostrým skalpelem nežli čekat na překvapení, až reformátoři nabrousí svoje sekery". Znepokojení však vzbuzuje přehnaně ambiciózní a všeobjímající sociálně inženýrská proklamace,[21] že antitrust je „prostředek k prosperující a demokratické společnosti a nástroj jak pro vytváření příležitostí, tak pro rozdělování bohatství a moci", který by neměl mít důvěru v tržní samoregulaci a měl by se více obávat nedostatečných zásahů nežli zásahů nadměrných.

Na takové úkoly totiž antitrust nestačí a není na ně ani vybaven a mohl by být lehce použit jako zástěrka libovolných politických projektů. Politické intervence a metody politicky podbarveného personálního výběru na pozice v příslušných agenturách nejsou vyhrazeny zástupcům jednoho či druhého ideového směru, ale jsou všeobecné (a také určitě nejde jen o aktuální vývoj po vítězství D. Trumpa; dálo se to i za vlády demokratů).[22]

Právní intervence mohou být použity *ex ante*, nebo *ex post*; ty prvé zavánějí předpojatostí a ideologičností. Předběžná opatrnost není v tomto případě rovna snaze regulovat vše, co je možno, ale jen to, co je nezbytné. Regulace by neměla mrazit technologický vývoj, ale korigovat jeho důsledky pro soutěž a blahobyt spotřebitele v nezbytných případech a v nezbytné míře.[23]

Antitrust vzniknuvší jako právní nástroj k omezení soukromé hospodářské moci se v současnosti zmítá v mnoha turbulencích ohrožujících jeho funkčnost z obou krajních stran. Ať již jde o vlivy digitalizace, enviromentálních problémů, geopolitických změn, infekční inflace, anebo řady tzv. progresivních společenských hodnot (mluví se dokonce o jakési kumulativní „polykrizi"). To klade otazníky nad udržitelností zásad tradiční ordoliberální svobodné soutěže. Otřesy vyvolané mj. covidovou pandemií vedly ke zvýšení jednotkové ziskovosti v relaci ke zvýšení jednotkové nákladovosti,[24] což vyvolává redistribuční napětí a snahu odstranit redistribuční neférovost, jež jsou svou povahou sociálně revoluční. Antitrust je tedy v neustálém pohybu a zdá se, že aktuálně je to spíše směrem od víry v samoregulační schopnosti soutěže na svobodném trhu a že se více kloní k víře v uvědomělé celospolečenské řízení a v dopřednou (*ex ante*) regulaci.

2. UDRŽITELNOST, SPRAVEDLNOST A DALŠÍ VÁBNIČKY V KONTEXTU OCOHRANY SOUTĚŽE

2.1. Cílové konflikty – nic nového pod sluncem, ale nová je snaha o prioritizaci externích cílů

Společenská atmosféra posledních několika dekád klade zvýšený důraz na propagaci (a nezřídka propagandu) tzv. udržitelnosti, mezigenerační spravedlnosti genderové vyváženosti a dalších etických

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[17] Nařízení (EU) 2022 ze 14. září 2022 (Digital Markets Act), OJ L265/1. Přehled mezinárodní diskuse o vztahu DMA a soutěžního práva a komentáře k ní podávám v práci BEJČEK, J.: *Má DMA regulatorní a/nebo soutěžní "DNA"?* Časopis pro právní vědu a praxi. Brno: Masarykova univerzita, 2024, roč. 2024, č. 3, s. 453–481.

[18] Tak KUENZLER, A.: *Third-generation of competition law*. Journal of Antitrust Enforcement 2023, 11, s. 135, 138.

[19] Proto roste kasuistická regulace *ex ante* zakázaných postupů tržně silných subjektů vůči slabším, typu DMA nebo nekalých obchodních praktik ve vztahu ke spotřebitelům.

[20] Prohlášení je dostupné na https://prospect.org/economy/the-utah-statement-bulwark-against-private-power-antitrust/.

[21] Tamtéž.

[22] D. Trump vydal mj. exekutivní příkaz, aby všechna rozhodnutí americké antitrustové autority (Federal Trade Commission) podléhala jeho schválení. Podle DAYEN, D.: *The New Antitrust Consensus, The American Prospect* z 20. 2. 2025, dostupno na https://prospect.org/economy/2025-02-20-new-antitrust-consensus/. Zdůvodněním těchto kroků ze strany některých zastánců hnutí MAGA má být argument, že „tyrany.com" není lepší než „tyrany.gov".

[23] Tomuto nekončícímu sporu dodává brizanci současné přelomové období nových výzev a příležitostí, s nimiž je soutěžní právo konfrontováno.

[24] Srov. TURNER, V.: *Why competition Authorities must act now against „greedflation*". Dostupno na https://blog.beuc.eu/why-competition-authorities-must-act-now-against-greedflation/.

hledisek. Diskuse o těchto otázkách je rozsáhlá[25] a již dnes téměř nepřehledná; je navíc očividně zatížena ideologickými předpojatostmi a zbytečně se polarizuje. Ti, kteří jsou proti rozmývání speciální antitrustové regulace, motivovanému ideovým zdůvodněním, nejsou proto přece nepřáteli ekologie, spravedlnosti, udržitelnosti či genderové rovnosti.

Můžeme pozorovat stále silnější tlaky na rozšíření katalogu širších společenských cílů, které by antitrust podle některých aktivistů měl sledovat a podporovat. Jelikož se doba mění a antitrust se prý musí měnit s ní, jsme svědky pokusů o jeho zásadní přehodnocení, které by mělo zahrnovat posouzení vztahů mezi antitrustem a médii, udržitelností, lidskými právy, genderem a soukromím.[26]
Hrozí však nebezpečí, že se zapomene na to, že *původním* a osvědčeným účelem antitrustu je sloužit jako nástroj k odstranění strukturálních příčin tržní síly a poskytnout obranu proti behaviorálním narušením hospodářské soutěže.

2.2. ESG

Antitrust by měl chránit nejen blahobyt spotřebitelů (ať už je definován jakkoli), ale i proces soupeření, byť je obtížné jej operacionalizovat nebo dokonce měřit. Dokonce i v USA (jakožto kolébce ekonomického a spotřebitelského přístupu k antitrustu) můžeme však pozorovat snahy zahrnout do katalogu cílů růst mezd a zaměstnanosti a snižování příjmové nerovnosti, zvyšování sociální odpovědnosti podniků (*Corporate Social Responsibility, Environmental Social Governance*) atd.

Faktory *ESG* mají do budoucna mít důležitější roli v oblasti akvizic, dotací, investic či úvěrů. Společnosti, které mohou prokázat dobré výsledky na poli *ESG*, budou mít konkurenční výhodu. Znamená to ale kontaminaci (rozšíření, obohacení, zkreslení?) tradičních ekonomických hledisek posuzování a vnášení obtížně hodnotitelných kvalitativních mimoekonomických kritérií do rozhodování.

To je analogické dopadům snah o vymaňování antitrustového práva z jeho údajné „bubliny“[27] a o rozšiřování jeho cílů o taková zadání, která sotva může naplnit ve standardních podmínkách předvídatelnosti, právní jistoty a nezbytné stability podnikatelského prostředí. Jde mj. o potenciálně extrémně zatěžující nové povinnosti přenesené na bedra antitrustových úřadů vybavených k úplně odlišnému typu aktivit a v situacích, v nichž evidentně selhávají i nesrovnatelně k tomu lépe vybavené instituce. Co by tato iniciativa přinesla „lidstvu v situaci existenční hrozby, společnosti, životnímu prostředí a planetě“ při „boji proti (*SIC*!) klimatické změně“[28], není jasné, ale docela spolehlivě se dá očekávat zvýšení intervenční moci politiků a politizace a „adhocizace“ soutěžního práva a jeho rozmělnění.

O dobrých úmyslech a morálním zázemí proponentů těchto a podobných názorů není důvod apriorně pochybovat, i když nelze vyloučit, že i tady hrají roli „také“ (totiž ne-li *především*) zájmy ekonomické. Dobrý ideál cílené regulace centrálního zajištění obecného blahobytu je jen druhem ideologie, podobně jako ideál konkurence jako řídícího principu tržní ekonomiky. Převaha té ideologie tržní je však podložena přesvědčivými empirickými důkazy o zásadní funkčnosti; ta „centralizovaná snaha o obecný blahobyt“ je sice empiricky podložena také, ale s „opačným znaménkem“.

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[25] Kromě stovek a tisíců článků a studií lze uvést koncepčnější monografie HAUCAP, J., PODSZUN, R., ROHNER,T., RÖSNER, A.: *Competition and sustainability : economic policy and options for reform in antitrust and competition law*. Cheltenham, UK: Edward Elgar Publishing, 2024, 240 s. NOWAG, J. (Ed.) *Research Handbook on Sustainability and Competition Law.* Cheltenham, UK: Edward Elgar Publishing, 2024, 577 s.

[26] CAPOBIANCO, A.: *The Ghost of Competition past, present, future.* WuW 2021, Vol. 50, No 7–8, s. 387.

[27] Srov. HOLMES, S., MEAGHER, M.: *A sustainable future: how can control of monopoly power play a part?* European Competition Law Review, 2023, Issue 1, s. 16.

[28] Podobně pateticky se uzavírá seriál od výše cit. autorů (HOLMES, MAGHER) v E.C.L.R. 2013, č. 4. s. 161 (*A sustainable future: how can control of monopoly power play a part? Part III: Using merger control to intervene before the problems arises or get worse*). Mimoto je snaha bojovat (a to prostřednictvím práva) proti klimatické změně domýšlivě ambiciózní a nerealistická podobně jako již polozapomenutá snaha některých dřívějších pokrokářů „poroučet dešti, větru a bouři...“

Přiznávám, že jsem zastáncem ideologie konkurence jako nepostradatelného nástroje samoregulace a že *jsem* hodnotově zaujatý. To není cynismus – ten spatřuji spíše v opačném přístupu: totiž v zastírání hodnotové zaujatosti.

2.3. Udržitelnost

K tradičním cílovým konfliktům[29] se v posledních letech přidaly nové a možná ještě kontroverznější konflikty než dříve.[30] Cíl ochrany účinné soutěže se v praxi střetává s řadou konkrétnějších cílů převážně mimosoutěžní povahy, které jsou podloženy různými politickými důvody, a jejichž sledováním se někdy zdůvodňuje nutnost specifické sektorové (odvětvové) regulace nebo alespoň výjimky ze soutěžních pravidel.

Zpravidla se uvádějí cíle jako blahobyt (celkový, spotřebitelský, výrobců, ev. jejich kombinace); ochrana spotřebitele (zejm. kvůli jeho asymetrické informovanosti); ochrana malých a středních podniků (jakožto „podhoubí" budoucí konkurenceschopnosti nebo prostě jako ochrana „té slabší strany"); ochrana specifických skupin výrobců; podpora integrace trhu; ekonomická svoboda; boj s inflací; poctivost a spravedlnost, ekvita, individuální ochrana soutěžitelů; sociální důvody, zejména ochrana trhu práce; politické důvody, včetně záruk politické svobody (např. zajištění názorové plurality médií); ochrana životního prostředí; strategické důvody sektorové průmyslové a obchodní politiky; zdravotně politické a hygienické důvody; aspekty energetické, dopravní a jiné infrastrukturní politiky; úspora nákladů; podpora technického rozvoje; podpora mezinárodní konkurenceschopnosti domácích soutěžitelů; kulturně politické důvody.[31]

Tento indikativní "seznam" cílů nemá jasnou a jednoznačnou strukturu a hierarchii. Dokonce ani judikatura EU není v této věci jednoznačná. Některé cíle se částečně překrývají, některé jsou plně zahrnuty v jiných a některé jsou protichůdné a neslučitelné. Některé sledují těžko definovatelný neekonomický prospěch, jiné podporují integraci evropského trhu nebo ochranu spotřebitele, svobodu hospodářské soutěže nebo různé sociální hodnoty. [32] Volání po jakémsi větším či lepším „pořádku" v této oblasti vedlo k touze po "celistvějším právu hospodářské soutěže".[33]

K těmto cílům se nedávno přidaly aspirace na prosazování a ochranu dalších společensky důležitých hodnot, na které by soutěžní právo mělo dbát jako na jeden za svých úkolů; mj. se prosazuje módní heslo udržitelnosti. Je velmi široké a jeho hranic téměř nedohlédneme. Jde o neuchopitelně rozmlžený pojem, jenž dokáže do sebe oportunisticky vtahovat (nebo naopak ze sebe vylučovat) téměř vše, co se zrovna hodí, nebo naopak nehodí.

Zdaleka se netýká jen otázek životního prostředí, jehož ochrana má ještě docela uchopitelná hlediska a kritéria, ale má mnohem širší záběr, který v některých pojetích neskrývá přímo sociálně inženýrské

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[29] BEJČEK, J.: *Cílové konflikty v soutěžním právu*. Právník 2007, roč. 146, č. 6, s. 663 n. ZIMMER, D. (ed.). *The Goals of Competition Law*. Cheltenham: Edward Elgar, 2012.

[30] "Binární volba" mezi intervencí a neintervencí na základě zkušeností, ideologie a/nebo oportunismu by údajně měla být nahrazena jakýmsi tzv. „komplexním antitrustem". Slibuje se zavedení nových pozitivních zpětných vazeb, které vytvoří novou dynamiku hospodářské soutěže, aby bylo možné pochopit, kdy a proč se trhy vyvíjejí ve smyslu prozatímní formy kontroly trhu. Mělo by se zlepšit chápání nejistoty.Viz PETIT, N. – SCHREPPEL, T.: *Complexity-Minded Antitrust.Internet Law*; Kooijmans Institute, VU Amsterdam, 7. března 2022, s. 20, 24-25. To by bylo hezké, kdyby to nevedlo k ještě většímu rozptylu a vágnosti spojené s libovůlí při posuzování. Zejména proto, že „tržní hospodářství" je dnes spíše teoretickým modelem pro abstraktní studium než realitou. Bylo zdeformováno rozbujelým systémem různých dotací, ideologicky motivovaných rozsáhlých regulací a obrovských sociálních transferů. Onen „komplexně pojatý antitrust" konflikt cílů neřeší - pouze jej skrývá pod neproniknutelnou rouškou „komplexnosti". V jejích „kalných vodách" však mohou lovit různě motivovaní „rybáři".

[31] Blíže včetně odkazů na příslušné prameny srov. BEJČEK, J. op. cit. (2007), s. 663–689.

[32] Srov. LIANOS, I. *Some Reflections on the Question of the Goals of EU Competition Law*. UCL London. Research Papers. 2013, Issue 3, s. 2–64.

[33] Ibid., s. 64. Holistický přístup znamená, že jednotlivé části něčeho jsou vzájemně propojené a lze je vysvětlit pouze s ohledem na celek. To je při regulaci ekonomiky a společnosti obecně velmi žádoucí, ale naráží to na problém rozpoznatelnosti všech relevantních vlivů a jejich operacionalizace a vyvážení. Z tohoto důvodu a za účelem zvýšení právní jistoty a předvídatelnosti zavedlo právo hospodářské soutěže také užší a lépe identifikovatelné a měřitelné cíle.

ambice, jež nemohou zůstat bez dopadu na právo hospodářské soutěže. Zahrnuje dokonce i biologickou rozmanitost, zdraví, dobré životní podmínky hospodářských zvířat, spravedlivý (?) obchod, spravedlivé (?) pracovní podmínky včetně ochrany dětské práce a práva zakládat odbory a lidská práva (?); vstupuje do ní také třeba i udržitelnost fiskální a finanční, ale i omezení plýtvání s potravinami a přístup ke zdravým a výživným potravinám.[34] Udržitelnost se "definuje" (či spíše "rozprostírá") v rámci jakéhosi "holistického konceptu" dokonce i jako "vnitro- a mezigenerační spravedlnost".[35] To z tohoto pojmu činí nebezpečně ohebný a téměř "univerzální" morálně hodnotový a ideologický nástroj bez operacionalizovatelných kontur vhodných k předvídatelnému použití.

Úkol sledovat a prosazovat takto (ne)vymezenou udržitelnost považuji za zjevně příliš ambiciózní cíl, který by kladl na soutěžní úřady nároky na úrovni vlády nebo snad jakéhosi novodobého "Výboru pro veřejné blaho", ale rozhodně nároky nerealistické a vyšší, než je žádoucí. A hlavně vyšší, než je zvládnutelné kapacitně, ale i z hlediska formální i věcné kompetence soutěžní autority. Ekologické ohledy se přece z hlediska antitrustu promítají do soutěžně relevantní ochoty spotřebitele platit za ekologické výrobky a služby vice nežli za ty neekologické (neudržitelné)[36] a lze je pokládat za (empiricky zjistitelnou) součást agregátního "spotřebitelského blahobytu". Tím samozřejmě zůstává nedotčena možnost specifické veřejnoprávní regulace ekologických a hygienických standardů, za něž by však neměl funkčně "zaskakovat" antitrust za cenu narušení či popření svého smyslu a společenského cíle.

2.4. Genderová indoktrinace

Ani soutěžní právo zřejmě neuniklo pozornosti genderové „intelektuální módy", která již pronikla do mnoha oblastí života. Otázkou je, jak rozlišit mezi atraktivními a krátkodobými snahami být konformní s panujícím diskursem, a skutečně relevantními aspekty s dopadem na soutěžní právo. Mnozí z nás jsou znepokojeni pokusy kontaminovat antitrustovou kontrolu neorganickými, cizorodými a vesměs nevhodnými ideovými hledisky namísto řešení těchto otázek na obecně-politické úrovni, případně adekvátními (typicky sektorovými) legislativními prostředky.

K tomuto komplexnnějšímu tématu se tu vyjadřuji pouze z užšího pohledu antitrustu. Moje východisko je konzervativní a opírá se o tradiční dělbu práce mezi jednotlivými státními orgány a mezi jednotlivými odvětvími práva. Pokud se například tvrdí, že ženy platí vyšší ceny za řadu podobných výrobků,[37] lze přece totéž říci o jakékoli skupině spotřebitelů, včetně mužů, spotřebitelů v důchodu - bez ohledu na jejich pohlaví, a příslušníků různých etnických, kulturních, sexuálních a jiných menšin. Není však jasné, proč a jak by se mělo právo hospodářské soutěže zabývat tímto jemným rozdílem, který je z konkurenčního hlediska irelevantní.[38]

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[34] Srov. LECCHI, E.: *Sustainability and EU merger control*. European Competition Law Review, 2023, Issue 2, s. 72.

[35] Tak HAUCAP, J., PODSZUN, R., RÖSNER, T., OFFERGELD, P. *Wettbewerb und Nachhaltigkeit: Reformoptionen für ein nachhaltiges Kartellrecht.* WuW 2023, Nr. 6, s. 303.

[36] K tomu srov. Např. LANGER, M., PAHA, J.: *Ökonomische Aspekte der Unerlässlichkeit von Wettbewerbsbeschränkungen und der Quantifizierung von Nachhaltigkeitseffizienzen*. WuW 2024, Nr. 1, s. 20 – 26.

[37] Mluví se obrazně o tzv. „*pink tax*" (srov. GEORGIE, N.: *At first blush – taking a competiiton lens to healthcare pink taxes.* Journal of European Competition Law&Practice 2025, Nr. 2, s. 115. Uvádí se příklad růžového holicího strojku „pro ženy", který je dražší nežli patrně srovnatelný strojek „pro muže" jen kvůli své barvě.To je však otázka nikoliv ochrany soutěže, ale nanejvýš ochrany spotřebitele před případnou manipulativní nekalou obchodní praktikou (nebo jde jen o standardní využití psychologie a preference zákaznic?). Situace, v níž se konstatuje, že dezodorant pro muže a ženy (případ Unilever/Sara Lee , M. 568, 2010) patří na dva oddělené relevantní trhy, se pokládá uměle za genderový aspekt antitrustu. Přitom jde jen o korektní (a jen náhodou genderově specifikované) vymezení věcně relevantního trhu s ohledem na (ne)zaměnitelnost výrobků, podobné např. při segmentaci výrobků pro děti a dospělé, pro diabetiky a zdravé apod.

[38] Podobně jako je irelevantní a uměle rozdělující „genderově specificky" zkoumat, zda příklon k ordoliberalismu či neobrandeisiánství a odklon od chicagské školy (ostatně vrtkavý, srov. situaci v USA před druhým zvolením D. Trumpa a po něm; pozn. JB) není způsoben tím, že několik špičkových pozic v antitrustové politice i teorii zaujímá více žen (např. tehdejší předsedkyně US FTC Lina Khan, senátorka Amy Klobuchar, dřívější eurokomisařka Margrethe Vestager a několik vůdčích akademiček jako Eleanor Fox či Fiona Scott Morton). Srov. rozumné stanovisko jedné z nich, brilantní profesorky

Soutěžní politika je tradičně genderově slepá. Takzvaná "genderově inkluzivní politika hospodářské soutěže" je novinkou, která však v poslední době kromě svého propgandisticky chytlavého názvu hledá i obsah. Tak například můžeme číst výzvy, aby orgány pro hospodářskou soutěž zasahovaly proti genderové nerovnosti, která vede ke snížení blahobytu spotřebitelů.

I ušlechtilý a bohulibý záměr může být na škodu, pokud se zahalí závojem klišé a nesmyslných pojmů, které jsou účelově naroubovány na vše, co je v dosahu. Některé předsudky, fráze a způsob, jakým jsou v této souvislosti kladeny otázky, jsou až trapné, dehonestující a dokonce snad jdou za hranu diskriminace podle pohlaví.[39]

Tyto otázky jsou z hlediska analýzy hospodářské soutěže irelevantní a mělo by to tak zůstat. Navíc vnášejí do společenské atmosféry zárodky umělé segregace na základě pohlaví a přispívají k postupné společenské dezintegraci, již tak těžce zkoušené preferováním nejrůznějších minoritních skupin. Pokud například dochází k určité cenové diskriminaci na základě pohlaví, měla by být řešena prostředky ochrany spotřebitele, a nikoliv právem hospodářské soutěže**.**

Dokonce jsem si všiml pokusu analyzovat blahobyt *žen*, nikoliv blahobyt spotřebitelů jako celku (OECD). *Ad absurdum* by se dal spotřebitelský blahobyt dále segmentovat na blahobyt seniorů, blahobyt etnických či rasových skupin atd. Myslím, že tudy cesta nevede.[40]

Jeden ze zdrojů, na který odkazuji,[41] uvádí, že ženy jsou údajně méně náchylné ke koluzím.[42] To (pokud se to prokáže) může být zajímavé ze sociálně psychologického nebo kriminologického hlediska a může to mít důsledky pro opatření k dodržování pravidel hospodářské soutěže, ale sotva to má vnější dopad a soutěžněprávní relevanci.[43] Je to srovnatelně relevantní (nebo spíše irelevantní) z hlediska antitrustu, jako kdybychom zkoumali protiprávní tendence jiných libovolně definovaných skupin, např. podle jejich etnické příslušnosti, rasy, náboženství, politické orientace atd.

Nehledě na to, že přisuzování vybraných individuálních osobnostních charakteristik (např. menšího sklonu ke kartelizaci) příslušníkům určitých skupin jako nějakých *statistických* jednotek je politicky i eticky velmi sporné a metodologicky pochybné.[44] V historii byla podobná skupinová diskriminace opakovaně tragicky zdiskreditována. Nemyslím si, že nastal čas se o to znovu pod jinými hesly pokoušet, navzdory lákavé vyhlídce být "pokrokový" a prostě "*in*".

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a současně generální advokátky SDEU: KOKKOT. J.: *A Female Approach to Competition Law?* WuW 2023, Nr. 10, s. 523 n.

[39] Jako například slovní spojení "méně výkonní podnikatelé-muži"; "převážně mužští majitelé firem"; "je u firem, které vedou ženy, větší nebo menší pravděpodobnost, že zkrachují?"; "vedly by firmy s větší nebo menší pravděpodobností k žádosti o shovívavost?" atd., jež se používají se bez uzardění (resp. v tištěné podobě se žádné uzardění nezobrazilo) v publikaci PIKE, CH.: *What's Gender Got to Do with Competition Policy? OECDONTHELEVEL*, dostupno na https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3487588.

[40] Nevím, jestli by ÚOHS měl zájem, potenciál a schopnosti testovat a analyzovat tak komplexní, mnohovrstevnou a v podstatě neuchopitelnou hodnotu, jako je ženský blahobyt. Pokud ano, nechtěl bych být v roli člena rozkladové komise...

[41] HAUCAP, J., HELDMANN, CH., RAU, H.: *Die Rolle von Geschlechtern für Wettbewerb und Kartellrecht.* WuW 2021, Vol. 50, No 7-8, s. 408 – 412.

[42] Někdy se tvrdí, že z tohto hlediska je rizikovým faktorem genderová nerovnováha v orgánech korporací a mezi jejich klíčovými součástmi. Kdyby se třeba zjistilo, že ženy koludují stejně jako muži, nebo dokonce více, vyústilo by to snad v požadavek vyloučit je ze statutárních orgánů korporací? To určitě nikoliv, protože rovnost pohlaví je požadavek deontologickýý, a nikoliv utilitárně konsekvencionalistický (neuplatňuje se až na základě toho, co by způsobil v praxi, ale jakožto etický axiom). Shodně MONTI, G.: *Gender and Competition Law: an exploration of feminist perspectives.* Journal of European Competition Law&Practice 2025, Nr. 2, s. 70.

[43] Hodnota konstatování (ROHR, S. E., BLASCHCZOK, J. M.: *Diversity and cartel governance*. Journal of European Competition Law&Practice 2025, Nr. 2, s. 105), že „vysoká úroveň genderové homogenity může (!) být klíčovým (!) faktorem stabilizace kartelů v průběhu času“ se asi kvalifikuje sama...

[44] Sem patří i právně irelevantní postřehy a klišé o tom, že prý ženy myslí spíše na pokračování vztahů, zatímco muži na práva; muži prý méně domýšlejí důsledky svých jednání nežli ženy; muži prý mají menší sklon omlouvat morálně odpudivé jednání; muži prý činí morální rozhodnutí abstraktněji, zatímco ženy více v historickém kontextu; mužské prostředí je prý více konfliktní, soutěživé a abstraktní, zatímco ženské je prý kooperativnější, konkrétní a pečující (srov. výčet a kritiku MONTI, op. cit., s. 75). Metodologická pochybnost této jednorozměrnosti, neopodstatněné paušalizace a bezkontextové vazby osobnostních vlastností jen na pohlaví (či „gender“?) jsou očividné; prostá empirie každého z nás je zpochybňuje.

A v zájmu politické korektnosti raději ponechám stranou provokativní otázku, zda je skutečně možné mluvit o "genderovém" přístupu. Pouze upozorňuji na pokrytectví; mají tvrzené argumenty souviset se (sociálně a psychologicky podmíněným a subjektivně pociťovaným) „pohlavím“ (resp. „genderem“), nebo s opravdovým pohlavím (biologicky determinovaným, „klasickým“ binárním: „kolečko se šipkou nahoru, nebo s křížkem dolů“)?

Pokud by se podobná ideově-intelektuální „cvičení“ zaváděla, mohli bychom zvětšit už tak dost vysokou přeregulovanost. V důsledku by se mohlo rozmělnit právo hospodářské soutěže jakožto nástroj ochrany hospodářské *soutěže* a postupně se přetvořit v nástroj, který má napomoci dosažení jiných (údajně „nadřazených“) *sociálních* cílů.

Přes evidentní politickou a ekonomickou instrumentalitu antitrustu by bylo pohodlné a oportunistické vymluvit se na ni a konstatovat jen, že antitrust je nepřehledný, nejistý, neuniverzální, proměnlivý a specifický pro konkrétní země a konkrétní dobu.[45] To by se z něj také mohl stát druh univerzálního *politického* nástroje bez právních kvalit, připraveného vždy k případnému použití na základě arbitrárního zvážení, zda jej použít či ne, ev. v jaké intenzitě.

3. SOUTĚŽNĚ POLITICKÉ DILEMA

Jak vidno jen z několika uvedených příkladů, cíl ochrany účinné hospodářské soutěže se v praxi střetává s řadou specifičtějších cílů nesoutěžní (a někdy spíše ideologické) povahy, jejichž sledování někdy odůvodňuje potřebu výjimek z pravidel hospodářské soutěže.[46] Domnívám se, že takové cíle jsou spíše jen reflexí nebo prospěšnými vedlejšími účinky než bezprostředními cíli, kterých by měl dosahovat stát v soutěžně relevantních situacích. Příslušné státní orgány by se měly omezit na ochranu efektivního fungování konkurenčního procesu a vyhnout se nadregulaci, neboť funkční trhy mají autokorekční schopnost. Právo na ochranu hospodářské soutěže by se mělo soustředit na svůj nejvlastnější cíl: chránit právě takové funkční konkurenční prostředí. Nemělo by se podle politické libovůle modifikovat a instrumentalizovat k dosažení mimosoutěžních „všespolečenských“ konkurenčních cílů, které lze lépe řešit přímou regulací příslušných oblastí.[47]

Sociálně odpovědné soutěžní úřady konají jistě záslužnou práci, ale zejména v oboru své kompetence, věcné působnosti a certifikované expertízy. Je nutná ostražitost před plíživým rozšiřováním jejich působnosti o nové poslání či mise, typicky pod hesly lepšího životního prostředí, méně nerovnosti nebo i více respektu k právům zvířat.

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[45] FOER, A., DURST, A.: *The multiple goals of antitrust*. The Antitrust Bulletin 2018, Vol. 63, issue 4, s. 494 – 508.

[46] Tak nedávno (14.7.2025) vydala Evropská komise stanovisko k dohodě o udržitelnosti ve francouzském vinařském odvětví (dostupno na https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1832).
Toto stanovisko se týká dohody o stanovení orientačních cen vína vyrobeného v souladu s normami pro vína z ekologického zemědělství a vína s vysokou environmentální hodnotou (*Haute Valeur Environnementale, „HVE“*) ve francouzském regionu Occitanie. Taková koordinace cen mezi výrobci a odběrateli vína ve velkém by bez dalšího byla zakázanou kartelovou dohodou. Jejím cílem je motivovat příslušné výrobce k zachování jejich udržitelných výrobních postupů (a to i za cenu narušení soutěže mezi nimi). V rámci plánované dohody budou orientační ceny stanoveny na úrovni pokrývající náklady na produkci v souladu s jednou ze dvou příslušných norem udržitelnosti (ekologická nebo HVE), kromě ziskové marže ve výši až 20 % těchto nákladů, aby měli producenti motivaci k udržitelnému způsobu produkce. Orientační ceny budou stanoveny na ročním základě pro každou normu a pro šest odrůd hroznů. Dohoda bude platit po dobu dvou let. Komise zejména dospěla k závěru, že navrhovaná dohoda má za cíl přispět k několika cílům udržitelnosti a uplatňovat normy udržitelnosti a že jakékoli možné omezení hospodářské soutěže vyplývající z dohody je nezbytné pro dosažení těchto norem. Neodpustím si jizlivý komentář: slovo „udržitelnost“ se tu používá spíše jako zaklínací vyviňující formulka. Obsah nemá vůbec nic společného s udržitelností v ekologickém slova smyslu. Jde tu o udržitelnost jednoho druhu výroby či sortimentu, tedy o specifický oborový existenční zájem. Tento přístup je ozvukem dřívějších záchranných kartelů jako „dětí nouze“, odůvodněných existenčními problémy v případě, že by kartel nebyl uzavřen (obdoba německých „Strukturkrisenkartelle“); s udržitelností, jak je implicitně chápána, má tento pojem společný jen módní (a nezřídka propagandisticky využívanou) „slupku“, která zvyšuje průchodnost a akceptovatelnost podobných ataků na soutěž.

[47] Srov. Např. Směrnici EP a Rady EU 2024/1760 z 13. června 2024 o náležité péči podniků v oblasti udržitelnosti a o změně směrnice EU 20149/1937 a nařízení EU 2023/2859. Rozbor podává JOSKOVÁ, L.: Povinnost náležité péče(*due diligence*) v oblasti udržitelnosti – podstata a vývoj ke směrnici CS3D. Obchodněprávní revue 2025, č. 2, str. 103 n.

Může to být spojeno s řadou nebezpečí;[48] korporace se mohou pod jejich záminkou soustředit na politiku využívající daňové zdroje a peníze spotřebitelů namísto sledování a prosazování politik při jejich zavádění. Mohou mít též vyšší náklady spojené se zjišťováním či odhadováním a koordinací různorodých cílů (*compliance*).

Soutěžní úřady mohou rozšiřováním své působnosti do politických sfér dávat v sázku svoji nezávislost. Tato kompetenční expanze může být i záminkou a výmluvou, proč vláda nejedná, přičemž právě její nečinnost je podnětem k plíživému rozšiřování působnosti soutěžních úřadů, které může vést k dysfunkcím v rozhodování o veřejných záležitostech, k rozmělnění odpovědnosti za určité kompetenční oblasti a k pozitivním i negativním kompetenčním sporům. Je arogantní předpokládat, že orgán pro hospodářskou soutěž rozumí určité specializované oblasti lépe než odvětvový regulátor, když se má orgán pro hospodářskou soutěž zabývat jinými než soutěžními záležitostmi a naopak.

Prosazování hospodářské soutěže může sloužit jako protilátka k sektorovým regulačním zásahům a může korigovat regulační zásahy, které jsou záměrně v rozporu s politikou hospodářské soutěže. To nebrání legitimní prvoplánové politické speciální regulaci, jež někdy může cíleně upřednostnit jiné společensky důležité hodnoty než účinnou hospodářskou soutěž.[49]

Hospodářská soutěž je agnostický princip,[50] který přímo či nepřímo slouží určité formě blahobytu spotřebitelů. Společnost jako celek a zákonodárce mohou mít samozřejmě zájem na různých výsledcích vznikajících v konkurenčním prostředí. Nikoli však prostřednictvím antimonopolních opatření, ale třeba prostřednictvím environmentální, pracovněprávní, sociální a jiné speciální regulace. Tedy prostřednictvím lineárních nástrojů, které sledují jiné normativní cíle než hospodářskou soutěž.

Hospodářská soutěž a regulace různých společenských činností a cílů jsou komplementárními nástroji, takže hlavní cíle práva hospodářské soutěže by neměly být opomenuty nebo ohroženy jejich záměnou se specifickými regulačními cíli. Naopak, měly by být řádně uplatňovány i s ohledem na jiné specifické regulační sociální cíle.[51] Ozývají se silné hlasy, že dnešní antimonopolní právo založené na moderním ekonomickém myšlení musí být posíleno a zpřísněno, aby mohlo čelit výzvám zvyšování tržní síly, a nemělo by být ohrožováno a oslabováno vágními politickými úvahami.[52]

Někdy jsou různé cíle práva hospodářské soutěže označovány jako „mimotržní“ či „alternativní".[53] To vede k dojmu, že jde o cíle jiné, náhradní nebo zástupné (což je pravý význam slova „alternativní"), zatímco jde nanejvýš o cíle další, doplňkové, doplňující nebo přidružené. Z teoretických úvah, z historie jeho vývoje a z rozhodovací praxe je zřejmé, že antitrust má cílů více a že mezi nimi neexistuje jasná hierarchie. Jsou proto předmětem hodnotového posuzování a hodnocení případ od případu v závislosti na aktuálních společensko-politických prioritách. Spíše než *hierarchizace* tak přichází v úvahu proporcionalizace a *vyvažování*. V tomto procesu žádné didaktické rozdělení cílů do různých skupin příliš nepomůže, protože je z hlediska hodnot a zájmů, které se na rozhodování podílejí, irelevantní.

Existence jiných důležitých a legitimních veřejných zájmů než hospodářské soutěže je nepochybná. Uplatňování těchto "alternativních" cílů ze strany orgánů pro hospodářskou soutěž předpokládá zahrnutí těchto „alternativních cílů" do širšího pojetí jakéhokoli blaha, nebo potlačení cílů práva hospodářské soutěže a stanovení priorit. To by znamenalo rozšiřující výklad tohoto ustanovení nad jeho čistě

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48 Tak TIROLE, J.: *Socially responsible agencies*. Competition Law&Policy Debate 2022, Vol. 7, No 4, s. 177.

49 DUNNE, N.*: The Role of Regulation in EU Competition Law Assessment*. LSE Working Papers 2021, No 09, s. 16 – 17.

50 THOMAS, S.: Normative Goals in Merger Control. Dostupno na https://awards.concurrences.com/IMG/pdf/thomas_ normative_goals_merger_control_-_awa_2021.pdf?67265/e788c31f6ad29ea61212ed99618d33c068dccd88, s. 14.

51 Praktické řešení protichůdných či vedlejších cílů soutěžního práva lze demonstrovat na příkladu silného postavení *BigTech* firem, které však nedosahují hranice dominance na relevantním trhu. Tradiční antitrust za těchto okolností nemůže působit a účinně zasahovat. V důsledku mocenské a informační asymetrie ve prospěch velkých digitálních hráčů však zjevně trpí hodnota spravedlnosti. To nicméně nelze "dohnat" rozšířením soutěžního práva, ale pomůže specifická regulace založená na politickém konsensu ve společnosti: jak ve prospěch ochrany férovosti, tak zákazníků (zákon o digitálním trhu) a spotřebitelů (zákon o digitálních službách).

52 BAKER, J.B.: *Competitive Edge. Washington Center for Equitable Growth*, 31 January 2019. Dostupno na https://equitablegrowth.org/revitalizing-u-s-antitrust-enforcement-is-not-simply-a-contest-between-brandeis-and-bork-look-first-to-thurman-arnold/, s. 4.

53 Tak KUPČÍK, J.: *Alternativní cíle soutěžního práva a prioritizace*. Antitrust 2018, č. 3, s. 73.

jazykový rámec, sklouznutí k teleologickému výkladu ve prospěch vágního a libovolně určitelného „veřejného zájmu".

Anonymní parametrický vliv hospodářské soutěže by neměl být zaměňován se sledováním jiných přímých normativních cílů. Hodnotící hlediska se pak vzájemně zaměňují a popírají, což vede k arbitrárnímu (a v konečném důsledku politickému) rozhodování. Orgány pro ochranu hospodářské soutěže jsou dostatečně zaměstnány ochranou hospodářské soutěže a je otázkou, zda vůbec mohou zasahovat (nejen formálně z hlediska působnosti, ale i věcně a svými odbornými pracovníky) např. do ochrany životního prostředí a dalších otázek obecného blaha.[54]

Paternalistická kontrola společenského blahobytu, i když sleduje záslužné cíle, proti nimž nelze nic namítat, nesmí zbavit spotřebitele možnosti s konečnou platností rozhodovat o výsledcích; a právě tuto schopnost zaručuje nedeformované antitrustové právo.[55] Soutěžní právo by se mělo držet svého poslání chránit autokorekční funkční soutěžní prostředí. Těžko nahraditelná role hospodářské soutěže jako procesu objevování by neměla být obětována ve prospěch svévolně nastavených politických zásluh a úspěchů. Neměla by tedy být za ně "směňována“ a instrumentalizována k dosažení mimokonkurenčních cílů. Ty lze lépe zajišťovat přímou regulací. Ochrana soutěže by neměla akceptovat různá vágní mainstreamová hesla, za nimiž se skrývají zájmy, které nejsou komplementární s ochranou hospodářské soutěže. Antitrustové právo není ani "sběrný koš", ani "beránek boží", který snímá hříchy světa. Přetváření antitrustu na jakýsi „univerzální lék“ na socioekonomické neduhy by se mohlo vymstít.[56]

ZÁVĚR

Žádné právní odvětví ani žádná část právní regulace se nevyhne přirozenému vývoji v reakci na měnící se společenské podmínky. Nesmí však ztratit svou podstatu a hlavní funkci a rozplynout se v operativním mikromanagementu aktuálních společensky podporovaných problémů. Společnost by neměla zbavovat funkčnosti hospodářskou soutěž jakožto nezbytný nástroj samoregulace, ani by neměla oslabovat její právní ochranu. Jinak by mohla snadno sklouznout k detailnímu centrálnímu řízení a ovlivňování čehokoli, což se v historii nejednou neosvědčilo.

V příspěvku jsem záměrně nezmínil řadu dalších konkrétních výzev, s nimiž se soutěžní právo potýká (namátkou tzv. Big Data, obří digitální platformy a jejich regulaci v DMA, rozvoj umělé inteligence, algoritmizace kartelů, zavádění tzv. nových soutěžních nástrojů apod. Vybrané okruhy se mohou ve srovnání s nimi zdát jako okrajové; ony jsou však sice vnějším, ale nikoliv snad proto méně nebezpečným ohrožením podstaty právní ochrany soutěže pod praporem líbivých a populárních hesel.

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[54] MAYER, CH.*: Der Beitrag des Kartellrechts zum Green Deal.* WuW 2021, Vol. 50, No 5 s. 259. Můžeme se např. setkat s velmi širokým ekologickým pojetím udržitelnosti, které je ještě obtížněji operacionalizovatelné. Např. progresivní nizozemský úřad pro hospodářskou soutěž mezi své cíle udržitelnosti zahrnuje kromě environmentálních otázek také biologickou rozmanitost, zdraví, dobré životní podmínky zvířat, spravedlivý obchod, spravedlivé pracovní podmínky včetně ochrany dětské práce a práva zakládat odbory a lidská práva. To je ovšem zjevně nepřiměřeně ambiciózní a nerealistický cíl. Srov. ACM. *Pokyny k dohodám o udržitelnosti*, 2021. Dostupné na https://www.acm.nl/en/ publications/ second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law. Kromě toho, že tento přístup "natahuje" pojem udržitelnosti tak, aby zahrnoval i dobré životní podmínky zvířat (co mají vlastně s udržitelností společného?), zavání sociálním inženýrstvím. Tvrdí se, že "dohoda mezi soutěžiteli, která je prospěšná pro životní prostředí, a tedy pro společnost jako celek, by mohla být povolena, i kdyby zákazníci společností na tom nakonec byli hůře" (citace M. SNOEP, in JEPHCOT, M.- SHAH D.-KINGSBURY, L.: *Climate change, sustainability, and competition law: where are we now*? E.C.L.R. 2022, Vol. 43, No 8, s. 369). U nás máme docela neblahé zkušenosti s nadřazováním tzv. celospolečenských zájmů nad zájmy spotřebitelů a s jeho důsledky.

[55] THOMAS, S., op, cit., s. 15, 23.

[56] Srov. LAMMI, G.: *Transformation Of Antitrust Law To All-Purpose Cure For Socioeconomic Ills Would Backfire,* Forbes (23 July 2019). Dostupno na https://www.forbes.com/sites/wlf/2019/07/23/transformation-of-antitrust-law-to-all-purpose-cure-for-socio-economic-ills-wouldbackfire/?sh=451392dc74a8.

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Third-Party Funding in Arbitration – An Instrument of Alternative Corporate Financing?[2]

Financovanie treťou stranou v arbitráži – nástroj alternatívneho firemného financovania?

Abstract

This paper examines third-party funding (TPF) in arbitration as a rising phenomenon in international dispute resolution. TPF enables parties with limited resources to claim their rights in arbitration and serves as an alternative source of external corporate financing. The main benefits are risk transfer, no need for initial capital, and expert support from funders. Limitations, on the other hand, include difficult access for SMEs, funder's share of compensation, and disclosure of sensitive information. In Slovakia, TPF in arbitration is a practically unknown concept. However, the absence of legal regulation is neither the decisive nor the sole reason for its limited use.
Keywords: *Third-party funding (TPF), Arbitration, Corporate financing, Alternative financing, Legal regulation.*

Abstrakt

Tento článok skúma financovanie sporov treťou stranou (third-party funding, TPF) v arbitráži ako narastajúci fenomén v medzinárodnom riešení sporov. TPF umožňuje stranám s obmedzenými zdrojmi uplatniť svoje práva v arbitráži a slúži ako alternatívny zdroj externého podnikového financovania. Hlavnými výhodami sú prenesenie rizika, absencia potreby počiatočného kapitálu a odborná podpora zo strany financovateľov. Obmedzenia na druhej strane zahŕňajú náročný prístup pre malé a stredné podniky, podiel financovateľa na získanej kompenzácii a zverejňovanie citlivých informácií. Na Slovensku je TPF v arbitráži prakticky neznámym konceptom. Absencia právnej úpravy však nie je ani rozhodujúcim, ani jediným dôvodom jeho obmedzeného využívania.
Kľúčové slová: *Financovanie treťou stranou (TPF), arbitráž, firemné financovanie, alternatívne financovanie, právna regulácia***.**

JEL Classification: K22

INTRODUCTION

The issue of third-party funding in arbitration proceedings s **(TPF)** is currently among the most topical subjects in the field of international commercial arbitration. Although the phenomenon itself is not entirely new, as it began to emerge at the end of the 1990s, its rapid expansion can be dated to around the global financial crisis in 2008,[3] and it has been growing sharply ever since. Although this instrument

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[3] ZABLOUDILOVÁ, K. *Nestrannost a nezávislost rozhodce v mezinárodní obchodní arbitráži – aktuální výzvy [rigorous thesis]*. 2019, p. 90. Avalilable at: https://is.muni.cz/th/hndnx/Kater_ina_Zabloudilova__RIGORO_ZNI__PRA_CE.pdf, [cited 2025-10-13].

was until recently predominantly the domain of countries with the Anglo-American legal system, today it is becoming a worldwide phenomenon and a global business sector.[4]

The fundamental purpose of TPF is to enable parties with limited financial resources to pursue their legitimate claims, thereby mitigating the imbalance of power in international arbitration. As a result, for example, a small or medium-sized enterprise **(SME)** can bring its claim against a multinational corporation and ensure that financial asymmetry between the parties does not determine the outcome of the dispute.[5]

This issue also partially overlaps with the topic of corporate financing, where alongside standard methods of credit financing, the significance of innovative or unconventional means of business financing is steadily increasing. These are often viewed as alternatives in relation to traditional forms of raising external capital (such as crowdfunding, venture capital, factoring and forfaiting, mezzanine financing).[6]

In this paper, we therefore analyze the mechanism of how the TPF institution functions in arbitration proceedings and formulate the hypothesis that this institution can be seen as a method of external corporate financing, which is, however, specific mainly due to its close link to the participation of a company in arbitration proceedings for the purpose of enforcing a financial claim. In this respect, we also attempt to identify the main advantages as well as disadvantages of this institution as a potential source of external corporate financing.

As already mentioned, the funding of arbitration disputes is, especially in common law countries (the United Kingdom, the USA, or Australia), but also in some continental European states (such as Germany and Switzerland), already a standard practice.[7] In Slovakia, however, this topic has so far not received significant attention in legal doctrine,[8] or legislation, and the practice regarding the provision of TPF is also virtually absent.

Within the second hypothesis, we will attempt to verify whether the cause of the limited (or absent) practice and availability of TPF in arbitration proceedings in Slovakia is the absence of legal regulation on this issue.

For the purpose of formulating theses for testing the hypotheses and subsequent synthesis, this paper primarily employs the dogmatic method, the analytical method, and the comparative method.

1. THE NATURE AND PURPOSE OF TPF IN ARBITRATION

The alternative method of dispute resolution through arbitration proceedings is traditionally associated with advantages that consist mainly of greater flexibility, a shorter duration of proceedings

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4 SASÍN, O. *Financování mezinárodní obchodní arbitráže třetí stranou. Nežádoucí jev, nebo běžná praxe? [rigorous thesis].* 2020, p. 67. Avalilable at: https://library.upol.cz/arl-upol/cs/csg/?repo=upolrepo&key=7507826489, [cited 2025-10-13]; Some authors even point out that, as recently as twenty years ago, TPF was illegal throughout the common law as a violation of the doctrines of maintenance and champerty, and virtually unknown in the civil law world. *See for example:* GARCIA, F. J. Third-party funding as exploitation of the investment treaty system. In Boston College Law Review. ISSN 0161-6587, vol. 59, 2018, no. 8, p. 2912.

5 OLÍK, M., ŠLEHOFER, J. *Nové pokyny na transparentnost a financování třetí stranou: Větší ochrana klientů v rozhodčím řízení [online]. 2025.* Avalilable at: https://rowan.legal/nove-pokyny-na-transparentnost-a-financovani-treti-stranou-v-rozhodcim-rizeni/, [cited 2025-10-13].

6 *See for example* BUHALA, O., SOKOL, M. Vybrané alternatívne spôsoby financovania obchodných spoločností. In HUSÁR, J., HUČKOVÁ, R. (eds.) Právo, obchod, ekonomika. Košice: University of P. J. Šafárik in Košice, 2024, p. 47 – 62.

7 Sasín, op. cit., p. 10.

8 In Slovak legal writing, the issue has not been addressed. In Czech literature, there is likewise no monographic treatment, but one can find texts that deal with the basic theoretical aspects of the issue, albeit only marginally (for example KUDRNA, J., ŠEVČÍKOVÁ, T. Nejrozsáhlejší změny pravidel rozhodčího řízení ICSID v jejich historii: evoluce, nebo revoluce? In Právník. ISSN 0231-6625, vol. 162, 2023, no. 2, p. 152 – 174.). Within Czech legal doctrine, this topic is addressed at a very high level in published rigorous theses (Zabloudilová, *op. cit.*; Sasik, *op. cit.*). The main sources of information on this issue are therefore foreign publications, some of which are also cited in the present paper.

(including single-instance proceedings), or greater confidentiality (due to its non-public nature).[9] Especially in international arbitration, however, the availability of these advantages nowadays is conditioned by the high financial cost of arbitration. It is important to realize that in standard court proceedings (litigation), part of the actual costs of proceedings are borne by the state, whereas in arbitration, all costs are borne privately, by the parties themselves. This results in international arbitration simply being an expensive method of dispute resolution, and there is no serious prospect for arbitration becoming any cheaper.[10]

From a certain perspective, this fact can be seen in a positive light, as it creates a strong incentive for parties to maximize their efforts to settle disputes out of court. However, if an out-of-court settlement is not reached and the parties are bound by an arbitration agreement, pursuing their claims through arbitration may confront them with the issue of deciding on the means of financing their lawsuit.[11]

As the main advantage, or argument in favor of the TPF institution in arbitration proceedings, literature almost unanimously cites the fact that without third-party funding, some businesses would not have sufficient resources to even access arbitration to enforce their claims.

The very essence of the TPF institution in arbitration proceedings lies in the fact that a third party **("funder")** finances the disputing party (usually the claimant) for the costs associated with its participation in the arbitration, in exchange for a share of the financial payout arising from the outcome of the dispute, if the claimant is successful in the arbitration.[12]

The funder may be any person or entity that is contributing funds to the defense of a case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration,[13] but is a person distinct from the participant in those arbitration proceedings. From the funder's perspective, the claim asserted by the business in arbitration represents an investment opportunity which, in the event of success in the dispute, can bring a multiple return.

It should be noted, however, that nowadays the entities providing such funding are highly specialized and devote themselves exclusively to financing (for example, in England and Wales they already have their own association and ethical code). Consequently, before financing is granted, the funder undertakes a thorough *due diligence* of information about the dispute, with the aim of assessing the degree or likelihood of success of the claim asserted by the company in the arbitration proceedings.

1.1. ATE insurance as part of a TPF contract

TPF is typically provided on a non-recourse basis meaning that if the claim is unsuccessful, the claimant is not liable to pay back the funder’s investment. If the claim fails, the funder receives no compensation and bears the fees of the claimant’s legal team as well as other adverse costs.[14] Especially in common law countries, as part of TPF, claimants can often further protect themselves by acquiring after the event (ATE) insurance, which covers the risk that the claimant will be ordered by the arbitral tribunal to pay the opposing party’s costs.[15]

This type of insurance reduces the funder's investment risk, because their obligation to pay the opposing party’s costs will not be threatened, or this risk will be minimized. Understandably, this increases the funder's motivation to finance the pursuit of the claim.

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9 *See for example* ROZEHNALOVÁ *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku.* Praha: Wolters Kluwer, 2013., p. 83 et seq.

10 BERTRAND, E. The Brave New World of Arbitration: Third-Party Funding. In ASA Bulletin. SSN: 1010-9153, vol. 29, 2011, no. 3, p. 607.

11 *Loc. cit.*

12 Kudrna, Ševčíková, *op. cit.*, p. 167.

13 ICCA. *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration [online]*. 2018. ISBN 978-94-92405-10-4, p. 67. Avalilable at: https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf, [cited 2025-10-13].

14 Garcia, *op. cit.*, p. 2915.

15 TOWNSEND, J. M. et al. *What is Third Party Funding? How Is It Used in International Arbitration? [online]. 2024.* Avalilable at: https://www.hugheshubbard.com/news/third-party-funding-in-international-arbitration, [cited 2025-10-13].

In Central Europe however, this type of insurance is only minimally developed and is entirely absent from the standard portfolio of Slovak insurance companies. From the author's point of view, this results from several objective factors. Firstly, court and arbitration costs are relatively low, which reduces the financial risk associated with litigation and thus lowers the demand for insurance that covers such risks. Secondly, there is no tradition of using specialized risk insurance for legal disputes. Both legal and business communities are less familiar with these products, and insurance companies have not developed offerings in this area. The local market is also small, with few or no cases where ATE insurance would be economically attractive for insurers. As a result, there is little incentive for insurance companies to offer such products, and awareness of the benefits – such as transferring litigation risk – is low among companies.

The closest equivalent available in Slovakia is legal protection insurance, which, however, is not typical *after the event* insurance but rather a *before the event* insurance, since it is taken out preventively before the dispute arises as a package of services for legal representation. Thus, it covers a different type of risk and usually only the policyholder's own legal costs and court fees, with the coverage of the opposing party's costs being limited and generally arising only in limited situations.

1.2. Legal framework

TPF in international arbitration is still a relatively new phenomenon, and many national legal systems do not regulate this institution in any way. In this context, there are also only a minimal number of arbitral awards and court decisions.[16] This assertion also applies to Slovakia, where the funding of arbitration proceedings by a third party is not regulated by the Arbitration Act (Act No. 244/2002 Coll.) nor by the primary procedural regulation, the Civil Dispute Code (Act No. 160/2015 Coll.).[17]

However, this situation is neither unique nor particularly surprising, especially in continental Europe. A similar situation currently still prevails in the regulation of the arbitration rules of various arbitral institutions (such as UNCITRAL, ICC, or ICSID), which do not regulate the TPF institution in arbitration at all, or they are only now adopting such regulation or have adopted it only recently. For instance, the ICC introduced rules concerning TPF only in 2021[18] and ICSID's rules were amended from 2022, while, for example, UNCITRAL is currently working on implementing similar rules (an Initial draft on the regulation of third-party funding has been published for comments).[19] We agree with the opinion that such institutions might become the locomotives, influencing the creation of more unified legislation for TPF.[20]

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16 Zabloudilová, *op. cit.*, p. 95, 104.

17 The only instance of such regulation can be found in connection with TPF in court proceedings, specifically regarding so-called class actions, which explicitly allow for the possibility of financing such a dispute by a third party while at the same time prohibiting the financing party from influencing the authorized entity (representing the interests of consumers) in a manner that would harm the collective interests of consumers affected by the claim; moreover, an action may not be brought against a defendant who is a competitor of the third party or against a defendant on whom the third party is dependent. According to Section 18(2) of Act No. 261/2023 Coll. on Actions for the Protection of Collective Interests of Consumers and on Amendments and Supplements to Certain Acts: *"The costs of proceedings for the issuance of a remedial measure may be borne by a third party. In this respect, the authorized entity must not be influenced by a third party in a manner that would harm the collective interests of the consumers concerned by the claim, and a claim may not be brought against a defendant who is a competitor of the third party or against a defendant on whom the third party is dependent."*

18 https://legalblogs.wolterskluwer.com/arbitration-blog/third-party-funding-finds-its-place-in-the-new-icc-rules/ BARNETT, J., MACEDO, L., HENZE, J. *Third-Party Funding Finds its Place in the New ICC Rules [online]. 2021.* Avalilable at: https://legalblogs.wolterskluwer.com/arbitration-blog/third-party-funding-finds-its-place-in-the-new-icc-rules/, [cited 2025-10-13].

19 UNCITRAL. *Initial draft on the regulation of third-party funding[online]. 2021.* Avalilable at: https://uncitral.un.org/en/thirdpartyfunding, [cited 2025-10-13].https://uncitral.un.org/en/thirdpartyfunding

20 HUBAI, A. *Coming out of the Closet: Third-Party Funding in International Arbitration [online]. 2018.* Avalilable at: https://blog.efila.org/2018/02/01/coming-out-of-the-closet-third-party-funding-in-international-arbitration/, [cited 2025-10-13].

Binding regulation is currently also absent at the level of the European Union. However, in September 2022, the European Parliament adopted a resolution requesting the Commission to present a directive (a legislative framework) for the regulation of commercial third-party funding (TPLF).[21] Following this initiative, the European Law Institute (ELI) issued a set of recommendations considered to be the "blueprint" for the forthcoming regulation of TPF in the EU.[22]

Substantively, all the above-mentioned regulations focus primarily on the transparency of funding for the purpose of identifying possible conflicts of interest, restricting undesirable influence by the funder on the funded party (company), and mitigating risks concerning the impartiality and independence of arbitrators.

The dynamic growth of practice[23] shows that, although the absence of any legal framework regulating TPF may represent a certain kind of uncertainty – which tends to work against funded companies and, on the contrary, may suit funders – as well as other risks regarding the quality and independence of the proceedings themselves, it appears that this fact does not constitute a major obstacle to the development of TPF in arbitration.

In general, in countries with the continental legal system, TPF – as it operates largely in Anglo-American systems – is not commonly found. The exceptions are mainly Germany and Switzerland.[24] Although Slovakia could hypothetically also become a seat of international arbitration, and although there is no express prohibition of TPF under Slovak law, the conditions are not yet present for the third-party funding industry to establish itself on the Slovak market.

The main reasons for this situation, therefore, include above all the fact that Slovakia does not have the status of a significant forum for (international) commercial arbitration with sufficiently economically attractive disputes, as well as other partial reasons such as, for example, the unavailability of ATE insurance, or the fact that it is still relatively cheap to initiate and pursue even high-value claims before Slovak courts, and also that court fees are capped and legal fees for domestic court cases tend to be low compared to other jurisdictions when calculated by reference to hourly rates.[25]

The analysis shows that the legal risks arising from the absence of regulation of TPF are in practice overwhelmed by two major benefits. One is the increased access to justice. The other is that TPF helps to align weak players who make infrequent use of arbitration with powerful funders who are repeat players in arbitration. Therefore, TPF may alter the bargaining dynamics between parties to the arbitration in favor of previously excluded companies. That, however, does not mean that litigation finance should be left unchecked.[26] Therefore, we believe that also the Slovak legislator should pay greater attention to the growing phenomenon of TPF in arbitration.

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[21] European Parliament. *Resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)) [online]. 2022.* Avalilable at: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0308_EN.pdf, [cited 2025-10-13]; *see in more detail e. g.* FAVRO, A. *European Parliament Resolution On Third-Party Funding: A Step Too Far? [online]. 2023.* Avalilable at: https://legalblogs.wolterskluwer.com/arbitration-blog/european-parliament-resolution-on-third-party-funding-a-step-too-far/, [cited 2025-10-13].

[22] European Law Institute. *Principles Governing the Third Party Funding of Litigation [online]. 2024.* ISBN: 978-3-9505495-1-5. Avalilable at: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_Governing_the_Third_Party_Funding_of_Litigation.pdf, [cited 2025-10-13].

[23] Some sources even refer to astronomical progression. Statistical data show an increase in investor interest of more than 500% only in the period from 2012 to 2018. *See for example* HUBAI, *op. cit*

[24] Sasín, *op. cit.*, p. 57.

[25] MAGÁL, M., RAMLJAKOVÁ, B. Slovakia – Country Report. In PITKOWITZ, N. (ed.) Handbook on Third-Party Funding in International Arbitration. Second Edition. New York: JurisNet, LLC, 2025. 1054 p. ISBN 978-1-944825-75-1. Available at: https://arbitrationlaw.com/library/slovakia-country-report-handbook-third-party-funding-international-arbitration-second, [cited 2025-10-13].

[26] STEINITZ, M. Whose Claim Is This Anyway? Third-Party Litigation Funding. In Minnesota Law Review. ISSN 0026-5535, vol. 95, 2011, no. 4, p. 1271, 1326.

2. TPF IN ARBITRATION PROCEEDINGS AS A FORM OF EXTERNAL CORPORATE FINANCING

The main purpose of financing companies with external resources is to ensure enough funds needed for development, day-to-day operations, investments, and for managing specific or crisis situations.

The choice of specific forms of financing depends on the needs, strategy, and unique situation of each company. Alongside traditional credit financing methods, the importance of alternative financing methods is increasingly growing, which may be preferred ways to obtain the necessary capital even for companies that lack sufficient creditworthiness or simply do not wish to burden their assets.

The question is whether the purpose of external financing also covers the funding of potential arbitration proceedings (disputes) by a third party. As we already suggested above, from the perspective of a party facing the question of enforcing its claim in arbitration, the situation of different businesses may vary. Some companies may have sufficient financial resources to cover these costs and thus may see them as ordinary business expenses. Other companies will approach the same question differently and may view such arbitration dispute essentially as an investment. From this perspective, it is logical that they might seek ways of external financing for such arbitration proceedings, as they would do with any other investment.[27]

One of the categories of funded entities therefore consists mainly of SMEs, which completely lack financial means related to the costs of arbitration proceedings. However, TPF can also serve entirely solvent companies that can afford to pay the costs of arbitration proceedings, but due to risks associated with capital outflow and possible failure in the dispute, hesitate to initiate arbitration.[28] These companies thus obtain resources to finance the dispute without jeopardizing their own cash flow and can continue to focus on their business activities without issue.[29] A claimant can keep the expense of an arbitration off the claimant's books and use its capital to grow its business rather than to finance an arbitration. In other words, this has the effect of transforming the legal department from a cost center to a revenue generator.[30]

In view of the above, we believe that TPF in arbitration proceedings represents a method of business financing in both respects, specifically linked to the particular situation of conducting a dispute for the purpose of enforcing a financial claim.

From the perspective of distinguishing between traditional and non-traditional (alternative) financing methods, we see this form of financing as alternative–in contrast to credit financing. The basic features of this type of financing, compared to credit financing (or a loan), are that the funder does not invest indirectly in the company with an enforceable monetary claim, but directly in that claim. Unlike a loan, the return on such financial support depends on the outcome of the dispute. In contrast to various insurance products, third-party funding in the narrower sense differs in that financial support is provided even if the affected party is successful in the dispute, so third-party funding does not have the character of compensation, and insurance payouts are usually lower.[31]

2.1. Advantages and disadvantages of TPF in arbitration proceedings

The main benefit of using TPF in arbitration proceedings is closely related to the fulfillment of the basic principles of arbitration (such as flexibility, efficiency, and confidentiality of proceedings). TPF supports the implementation of these principles by making arbitration truly accessible to parties with limited financial resources, thereby making this alternative dispute resolution method available regardless of the economic strength of the disputing parties. The nature of partial benefits can be perceived in both economic and procedural terms.

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27 Bertrand, *op.cit.,* p. 607.
28 *Loc. cit.*
29 Sasín, *op. cit.,* p. 9.
30 Townsend et. al., *op cit.*
31 Zabloudilová, *op. cit.,* p. 89.

Based on the previous analysis, the primary economic advantage of TPF as an alternative financing method is the transfer of financial risk in the event of failure in arbitration to the funder, so that the company does not bear the costs of an unsuccessful dispute – unlike traditional forms of credit financing.

Moreover, the company does not have to invest practically any capital in advance to obtain it (unlike, for example, a loan or factoring), because the funder's remuneration is due only in the event of a successful dispute. Unlike credit financing or leasing, TPF is also independent of creditworthiness and does not require collateral (such as guarantees or promissory notes).

In terms of procedural advantages, it is important to note that funders are usually highly specialized entities that, in connection with the provision of TPF, typically offer a certain degree of cooperation and partnership, which includes their expertise and professional support for the funded company – not only as part of the *due diligence* process, but also during the arbitration proceedings itself (non-binding strategic insights, etc.).[32]

This also leads to another indirect procedural advantage. The very fact that there is a third-party funding agreement in place generally means that the claim asserted by the claimant is genuine. Given that funders conduct their own due diligence on the merits of the case, it is arguable that the claims they fund are more likely than not to be genuine, with a high probability of success on the merits.[33] This potentially increases claimant's leverage in settlement negotiations because a funder's willingness to finance the claim may signal to the opposing party that an impartial third party (i.e., the funder) has performed its own evaluation of the case and found it sufficiently likely to succeed.[34]

Among the disadvantages of TPF are especially its more challenging accessibility, since for funders it only makes economic sense to finance complex corporate cases with high dispute value. Additionally, the funder's share in the event of success may be as high as 20% – 40% of the awarded amount, which is often more than loan interest or other transaction costs. SMEs therefore only rarely use TPF, mainly if they have a dispute of higher value that is economically attractive for the funder.

At the same time, the funder, by virtue of their influence and control over the conduct of the dispute, may intervene in its strategy or insist on a compromise solution, which may not always align with the interests or expectations of the funded company.

Finally, as part of due diligence, the company usually must provide the funder with a large amount of internal and often sensitive information before concluding the TPF contract.

CONCLUSION

Based on the analysis conducted, it can be concluded that TPF in arbitration proceedings may represent an effective tool for increasing access to justice and optimizing risk management for companies, especially in the international business context. Therefore, we consider the first hypothesis to be confirmed.

Within the above, we have identified and analyzed several features that distinguish TPF in arbitration proceedings from other alternative as well as traditional business financing methods. These features can also be considered the main advantages of TPF, which make it an effective financial tool, however, only with respect to its narrowly defined purpose–external financing of specific situations, namely disputes.

In addition, we have identified several problematic aspects and disadvantages that, on the commercial level, make this financing method relatively difficult to access – especially for SMEs – and on the legislative level are associated with particular legal risks.

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[32] *See for example* MASTRAGOSTINO, F. *Third-party funding in international arbitration: the funder's perspective – During the legal proceedings (Part II) [online]. 2024.* Avalilable at: https://www.clubdelarbitrage.com/post/third-party-funding-in-internationalarbitration-the-funder-s-perspective, [cited 2025-10-13].

[33] KIRTLEY, W., WIETRZYKOWSKI, K. Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding? In Journal of International Arbitration. ISSN 0255-8106, vol. 30, 2013, no. 1, p. 23.

[34] Townsend et. al., *op cit.*

However, we do not consider the absence of legal regulation of the TPF institution to be the sol, nor the decisive reason why this alternative financing method is not more developed (or practically at all) in Slovakia. Therefore, we consider the second hypothesis to be refuted.

Nevertheless, we believe that Slovak legislator should not ignore the global growth trend of TPF in arbitration but should regulate the legal issues and risks associated primarily with the transparency of financing, the undesirable influence of the funder, and the independence of arbitrators. Such a step can also be expected in view of ongoing legislative initiatives at the EU level.

The specific form of such legislation should be the subject of further research. However, we believe that its indirect effect could be that such legislation may also raise awareness of and demand for TPF in arbitration proceedings in Slovakia, as well as increase legal certainty, so that this institution becomes another available method of alternative financing for Slovak commercial companies and, possibly, also for domestic arbitration disputes. We think that this purpose could be further supported if such legislation takes the form of the explicit permission of TPF, thereby emphasizing that the use of this method of financing is legitimate.

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Judicial Intervention in the Restructuring Process under Slovak Law[2]

Súdny zásah do procesu reštrukturalizácie podľa slovenského práva

Abstract

This paper analyzes judicial intervention in the restructuring process under Slovak law, with a particular focus on the role of courts as guarantors of legality, fairness, and the protection of creditors' collective interests. Restructuring offers indebted but viable companies an opportunity to overcome financial distress while avoiding liquidation. However, restructuring is not merely a technical procedure—it requires substantive judicial oversight. The court intervenes in several critical phases: when granting permission to restructure, when examining creditor claims and voting rights, when assessing the legality of creditor meetings, and finally when approving or rejecting the restructuring plan. Judicial control is aimed at preventing abuse of restructuring by ensuring transparency, compliance with statutory requirements, and adherence to the principle of the common interest of creditors. The aim of this paper is to analyze the decisions of the Courts of the Slovak Republic concerning judicial intervention in the restructuring process.
Keywords: *restructuring, insolvency, juducial intervention.*

Abstrakt

Tento príspevok analyzuje ingerenciu súdu v procese reštrukturalizácie v rámci slovenského právneho poriadku so zvláštnym dôrazom na úlohu súdov ako garantov zákonnosti, spravodlivosti a ochrany spoločných záujmov veriteľov. Reštrukturalizácia poskytuje zadlženým, ale životaschopným podnikom príležitosť prekonať finančné ťažkosti a vyhnúť sa konkurzu. Zo strany súdu nejde len o technický postup, pretože reštrukturalizácia si vyžaduje dôsledný dohľad súdu. Súd ingeruje do viacerých kľúčových fáz konania: pri povoľovaní reštrukturalizácie, pri skúmaní pohľadávok veriteľov a ich hlasovacích práv, pri posudzovaní zákonnosti schôdzí veriteľov, a napokon pri schvaľovaní alebo odmietnutí reštrukturalizačného plánu. Účelom súdnej kontroly je zabrániť zneužívaniu reštrukturalizácie tým, že sa zabezpečí transparentnosť, dodržiavanie zákonných požiadaviek a rešpektovanie princípu spoločného záujmu veriteľov. Cieľom tohto príspevku je analyzovať rozhodnutia súdov Slovenskej republiky týkajúce sa súdnej intervencie v procese reštrukturalizácie.
Kľúčové slová: *reštrukturalizácia, insolvencia, ingerencia súdu.*

JEL Classification: K2

INTRODUCTION

In business practice, it is not uncommon for a company to encounter financial distress at some point. Such difficulties may stem from a variety of economic as well as non-economic factors, including economic crises, inflation, the COVID-19 pandemic[3], and similar circumstances. Financial distress may gradually escalate into a state of insolvency.

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[3] STEF N., Resolution of corporate insolvency during COVID-19 pandemic. Evidence from France. In: *International Review of Law and Economics*. 2022, p. 1-16.

One of the statutory tools available to a company in insolvency to address its financial difficulties is corporate restructuring, provided for under Slovak insolvency legislation. Restructuring involves the alteration of the debtor's capital and asset structure[4], enabling it to respond to current market conditions, deal with legacy debt, and continue its business operations[5]. It is, however, important to stress that restructuring should not be understood merely as a method of resolving insolvency, but rather as a consensual mechanism through which creditors and the debtor agree on how insolvency will be addressed[6]. Where insolvency exists and such an agreement is not reached, the process necessarily results in liquidation (bankruptcy proceedings).

In Slovakia, restructuring is governed by Act No. 7/2005 Coll. on Bankruptcy and Restructuring (hereinafter the "ZKR") and is subject to judicial supervision, with the court playing an indispensable role. In this context, the court acts not only as a public authority that decides on the opening and termination of restructuring, but also as an active participant whose duty is to safeguard the legality and fairness of the process in relation to all creditors[7]. The court's role is thus not limited to exercising formal oversight; rather, it entails substantive intervention to prevent distortions of the fundamental principles of insolvency proceedings.

Judicial involvement in restructuring can be observed at several stages of the process. At the outset, the court decides on the commencement and authorisation of restructuring, assessing whether the formal and substantive requirements for a debtor-in-possession restructuring have been met. Thereafter, the court plays a role in reviewing creditors' claims and the recognition of their voting rights, ensuring procedural fairness. An irreplaceable function of the court also lies in monitoring the legality of creditors' meetings, which serve as the equivalent of a creditors' committee in common law systems. Finally, one of the most significant aspects of judicial intervention is the court's power to confirm or reject the restructuring plan — including the possibility of a cram-down, whereby dissenting creditor classes may be bound by a plan if statutory conditions are satisfied.

This paper examines how the case law of the general courts and the Constitutional Court of the Slovak Republic has evolved and shifted in relation to the assessment of restructuring, particularly regarding the scope of judicial intervention, the interpretation of statutory conditions for permitting restructuring, and the application of the principle of the common interest of creditors.

1. COURT APPROVAL OF RESTRUCTURING

The authorisation of restructuring represents one of the key moments within insolvency proceedings. It is a procedural act of the court through which the debtor is granted the opportunity to address its financial difficulties by way of restructuring. The ZKR establishes the conditions that a debtor must meet when filing a petition for the authorisation of restructuring. The purpose of these requirements is to prevent the misuse of restructuring and to ensure that the procedure is used only in cases where the debtor is viable and there is a realistic prospect of rehabilitating its business.
The statutory conditions for the authorisation of restructuring are as follows:[8]

- the expert opinion (assessment) fulfils all statutory requirements;

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4 According to Article 2(1) of Directive (EU) 2019/1023 OF THE European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132, restructuring should be understood as:"measures aimed at restructuring the debtor's business, which include a change in the composition, conditions, or structure of the debtor's assets and liabilities, or any other part of the debtor's capital structure, such as the sale of assets or parts of the business, and, where provided for by national law, the sale of the business as a going concern, as well as all necessary operational changes, or a combination of these elements."

5 KOZÁK J., ŽIŽĽAVSKÝ M. in KOZÁK J. a kol. *Insolvenční zákon. Komentář*. Praha: Wolters Kluwer ČR. 2018. p. 1162.

6 WARREN E., WESTBROOK J. L. *The Law of Debtors and Creditors, Text, Cases, and Problems*. New York: Aspen Publishers, 2006. p. 405.

7 Decision of the Constitutional Court of the Slovak Republic of 19 November 2024, No. II. ÚS 272/2024.

8 Section 116 ZKR.

- the content of the assessment is clear and comprehensible;
- the assessment is prepared by an administrator registered in the list of insolvency practitioners with an office located within the jurisdiction of the competent regional court;
- at the time of filing the petition for restructuring, the assessment is not older than 30 days;
- the administrator entrusted with preparing the assessment has recommended restructuring, and the conclusions of the assessment demonstrate that the prerequisites for such a recommendation have been satisfied.

The judge must review the substantive accuracy of the assessment in order to conclude that it is clear and comprehensible, and that its conclusions demonstrate that the prerequisites for recommending restructuring are met[9]. However, according to the Constitutional Court of the Slovak Republic[10], the insolvency court is not bound by the conclusions of the restructuring assessment. If the assessment is unclear or incomprehensible, and there are doubts as to whether the debtor's financial statements provide a true and fair view of the facts relevant for accounting purposes and of the debtor's financial situation, it cannot be reasonably assumed that a substantial part of the debtor's business operations will be preserved or that creditors will be satisfied to a greater extent than in bankruptcy. In such a situation, the conditions for authorising restructuring are not fulfilled. On the one hand, the court must act actively in reviewing the above conditions; on the other, according to the Constitutional Court, it may not negate the administrator's recommendation of restructuring over liquidation without substantive and professional justification[11]. This means that the insolvency court is bound by the administrator's economic conclusions unless the contrary is proven during the proceedings.

The Constitutional Court has also identified the prerequisites that must be satisfied for the administrator to recommend restructuring in the assessment[12]. These are four tests, each of which must also be subject to the scrutiny of the insolvency court deciding on the authorisation of restructuring:

- **The business test**: the administrator must verify that the debtor genuinely carries on business activities.
- **The insolvency test**: the administrator must determine whether the debtor is insolvent, either due to over-indebtedness or illiquidity.
- **The going concern test**: the administrator must establish whether it can reasonably be assumed that a substantial part of the debtor's business operations may be preserved. In particular, it must be shown that the core operations of the business, subject to certain measures, can generate a positive operating result.
- **The comparison test**: the administrator must compare creditor recoveries in bankruptcy with those expected in restructuring. Restructuring must offer a higher level of creditor satisfaction than liquidation.

All four tests must be satisfied cumulatively. If even one of them is not met, the administrator may not recommend restructuring. Should the administrator recommend restructuring despite the absence of these prerequisites, the court must intervene and deny authorisation.

The law therefore places a demanding role on the court — it must strike a balance between respecting the professional judgment of the administrator and fulfilling its own duty to verify whether the recommendation of restructuring has a rational and legally acceptable basis. If the court concludes that the assessment is insufficient, incomprehensible, or that the administrator's recommendation does not follow from the established facts, it must reject the petition for restructuring.

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9 ĎURICA, M. *Zákon o konkurze a reštrukturalizácii. Komentár*. Bratislava: C.H.Beck, 2021, p. 927.

10 Decision of the Constitutional Court of the Slovak Republic of 3 February 2022, No. II. ÚS 54/2022.

11 Decision of the Constitutional Court of the Slovak Republic of 8 November 2017, No. I. ÚS 534/2017.

12 Decision of the Constitutional Court of the Slovak Republic of 4 March 2015, No. I. ÚS 109/2015-30.

It is precisely at this stage that the court's supervisory role manifests itself most clearly: preventing entry into restructuring in cases where there is no realistic prospect of rehabilitating the debtor's business. Authorisation of restructuring significantly affects the position of creditors — once granted, a moratorium comes into force, restricting individual enforcement of claims and altering the balance of power between the debtor and its creditors.

2. COURT APPROVAL OF THE RESTRUCTURING PLAN

The court plays an active role in approving the debtor's restructuring plan, which is preceded by its adoption by the creditors at the creditors' meeting[13]. At this stage, the decisive function of the court as a guarantor of fairness and legality of the entire process becomes most apparent. The court examines whether the plan respects the fundamental principles of insolvency law, whether it avoids unduly disadvantaging certain creditors, and whether it is realistic and economically feasible. If the court finds that the plan does not meet these requirements, it will refuse to confirm it. Conversely, if the court approves the restructuring plan, it becomes binding on all parties to the proceedings, enabling the debtor to continue business operations on a new, legally and economically more stable foundation. Judicial intervention at this stage is based on two key powers:

a) **Rejection of the plan** – The court may refuse to approve the restructuring plan even if it has been adopted by creditors at the creditors' meeting. This occurs where statutory grounds for rejection exist — for example, if the plan is not compliant with the law, if it was not adopted in the manner prescribed by law, or if its confirmation would unduly prejudice the rights of certain creditors.[14]

   The court must also reject the plan even if it has been accepted by both the creditors' meeting and the debtor (where the debtor's consent is required by law), provided that a statutory obstacle to confirmation is found. In particular, the court is obliged to reject the plan if:
   - the provisions of the Bankruptcy and Restructuring Act regarding the content of the plan, the procedure for preparing it, the voting process, or other statutory requirements have been materially breached, and this has had an adverse effect on any participant in the plan;
   - its adoption was achieved through fraudulent conduct or by granting special advantages to a particular participant;
   - the plan is materially inconsistent with the common interest of creditors.[15]

b) **Cram-down of dissenting creditor groups** – The court may confirm the debtor's restructuring plan even if one or more creditor groups voted against it. This is the so-called *cram-down* mechanism[16], which allows the court to override the opposition of minority or specific creditor classes, provided that statutory requirements are met (for instance, that the plan provides the dissenting group with at least as much satisfaction as it would receive in bankruptcy).[17]

3. THE COLLECTIVE INTEREST OF CREDITORS

One of the reasons for rejecting a restructuring plan, which the case law of Slovak courts frequently deals with, is the absence of the **common interest of creditors[18]**. It must be borne in mind that the effort

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13 PAYNE, J. The role of the court in debt restructuring. In: *Cambridge Law Journal.* 2018, N.1, p. 124-150.

14 Section 154 of ZKR.

15 ĎURICA, M. *Zákon o konkurze a reštrukturalizácii. Komentár*. Bratislava: C.H.Beck, 2021, p. 1089.

16 OLIVARES-CAMINAL R., GOGLIDZE N.. The Collective Will in Corporate Debt Restructuring. In: *Journal of Business Law*. 2024, n. 4, p. 351-374.

17 Section § 152 ZKR.

18 E.g. Decision of the Constitutional Court of the Slovak Republic of 23 January 2019, No. I US 300/2018-94, Decision of the Constitutional Court of the Slovak Republic of 7 Decemeber 2011, No. I. ÚS 200/2011, Decision of the Constitutional

to maximize the individual satisfaction of a single creditor may create conflicts among creditors, since no creditor is naturally inclined to share proportionally with other creditors, or to relinquish part of the satisfaction of his claim for the benefit of the debtor's other creditors[19]. The natural interest of each creditor who has filed a claim in the restructuring (whether secured or unsecured) is to achieve the highest possible level of satisfaction. Each creditor's claim has its legal basis, on which the creditor demands that the debtor fulfills the corresponding obligation, and the individual creditor typically does not see (or does not want to see) a reason why he should be deprived, even partially, of the satisfaction of his claim in favor of other creditors of the debtor.[20]

Such individual enforcement of one's own interests does not correspond to the sense and purpose of bankruptcy and restructuring proceedings, the essential feature of which is precisely to prevent individual satisfaction in favor of collective satisfaction.[21] The aim and purpose of restructuring is to prevent the individual exercise and enforcement of rights of individual creditors for the benefit of their collective satisfaction.[22] Therefore, even if a restructuring plan is approved by the formally required majority of creditors and the required majority of creditor groups, the court is obliged to examine also the substantive aspect of the plan, which relates precisely to the common interest of creditors.

The debtor must therefore take into account the interests of all creditors, not just selected (individual) ones, when drawing up the restructuring plan. Restructuring, as a special insolvency proceeding, elevates the common interest of creditors above the individual interest of a creditor. This is confirmed by the Constitutional Court in its decision, stating that if a regional court confirmed a district court's decision rejecting a plan due to its substantial conflict with the common interest of creditors, while in fact aligning itself with the individual interest of a majority creditor, it thereby violated the fundamental right of other creditors to (fair) judicial protection in connection with their fundamental right to equality of the parties in the (restructuring) proceedings. This means that even the position of a creditor as a majority creditor cannot undermine the court's duty to assess the interests of other creditors affected by the adoption of the restructuring plan.

The role of the court in reviewing the restructuring plan is to assess whether the **common interest of creditors** has been reflected in its specific provisions. This constitutes a special power of the court, enabling it to intervene in the restructuring process. As the Slovak Constitutional Court has stated, in restructuring proceedings, which are a complexly structured legal process, the competent general court is burdened with the duty to identify and uncover what lies beneath the content of the term "common interest of creditors" (and it cannot be excluded that this term may carry different content in different restructurings of different debtors, depending on the individual or group interests of specific creditors or creditor groups). The common interest of creditors, in the context of collective (typically gradual and incomplete) satisfaction of creditors in restructuring, prima facie does not correspond with the individual interests of specific creditors.[23]

If the court is to fairly assess whether the common interest of creditors is or is not fulfilled in the restructuring plan, it cannot entirely ignore the amount of the filed claim in terms of its significance for the individual creditor. Depending on the circumstances of the case, even the satisfaction of a relatively minor claim of a minority creditor may, for him personally (considering his legal or socio-economic status), mean as much or more than the satisfaction of the claim(s) of a majority creditor.[24]

Court of the Slovak Republic of 29 November 2016, No. III. ÚS 829/2016, Decision of the Constitutional Court of the Slovak Republic of 20 April 2016, No. I. US 367/2015, Decision of the Constitutional Court of the Slovak Republic of 16 December 2015, No. II US 273/2012.

19 PATAKYOVÁ M., DURAČINSKÁ J.. Konflikt záujmov veriteľov v reštrukturalizácii In: *Vybrané výzvy v právu soutěžním, v českém a slovenském právu obchodních korporací, v právu insolvenčním a v právu průmyslovém vlastnictví*. Olomouc: Iuridicum Olomoucense, 2018, p. 89.

20 Decision of the Constitutional Court of the Slovak Republic of 23 January 2019, No. I US 300/2018-94.

21 Decision of the Constitutional Court of the Slovak Republic of 20 April 2016, No. I. US 367/2015.

22 Decision of the Constitutional Court of the Slovak Republic of 7 Decemeber 2011, No. I. ÚS 200/2011.

23 Decision of the Constitutional Court of the Slovak Republic of 23 January 2019, No. I US 300/2018-94.

24 Decision of the Constitutional Court of the Slovak Republic of 29 November 2016, No. III. ÚS 829/2016.

The **common interest of creditors** should thus represent a projection of the individual interests of creditors, the achievement of which results in an acceptable satisfaction of all individual interests of the registered creditors.[25] The court's task will therefore be to thoroughly examine the substantive side of the restructuring plan, so that creditor satisfaction across different groups achieves the common interest of creditors. This is precisely where the corrective function of the court is manifested: its role is to prevent stronger creditor groups from imposing their interests at the expense of weaker ones. Otherwise, the court cannot approve such a restructuring plan and must declare bankruptcy over the company as the statutory consequence of a failed restructuring.

CONCLUSION

The court's intervention in the restructuring process under Slovak law represents a fundamental element of protecting the collective interests of creditors and ensuring the legality of insolvency proceedings. Through its decision-making competences, the court influences not only the very authorisation of restructuring, but also other key stages of the proceedings, including the assessment of the restructuring plan.

The purpose of this judicial oversight is not to replace the professional economic assessment carried out by the administrator, but rather to verify its legality, transparency, and compliance with the principle of the common interest of creditors. This material corrective enables the court to prevent stronger creditor groups from enforcing their particular interests at the expense of others, which would be in direct contradiction with the collective nature of insolvency proceedings.

The case law of the Constitutional Court of the Slovak Republic also confirms that the court's intervention must not be merely formal but rather active and corrective, with an emphasis on protecting the fundamental rights of participants and maintaining a balance between individual and collective satisfaction. Conceived in this way, the role of the court significantly contributes to legitimising restructuring as an institution which in practice often becomes the subject of tensions between the debtor and its creditors.

Thus, the court fulfils an irreplaceable function as a guarantor of fairness in restructuring. Without its active intervention, there would be a risk that restructuring would lose its rehabilitative character and become merely a tool for advancing the economic interests of selected creditor groups or of the debtor. Its ultimate purpose, however, remains not only the recovery of a viable entrepreneur but also the more effective and equitable satisfaction of creditors compared to bankruptcy.

The development of case law also demonstrates that the courts have gradually shifted from a predominantly formal examination of the statutory conditions for restructuring toward a materially oriented approach in which the economic reality of the debtor and the genuine protection of creditors play a decisive role. While earlier decisions tended to accept relatively general and schematic conclusions contained in restructuring assessments, later jurisprudence—shaped significantly by repeated interventions of the Constitutional Court of the Slovak Republic—emphasises the need for transparency, specificity, and verifiability of the administrator's and the debtor's assertions. This shift strengthens both the preventive and corrective functions of judicial oversight and reduces the risk that restructuring will become a tool for unjustified delay of bankruptcy or for the preferential treatment of particular creditor groups.

At the same time, the Constitutional Court has consistently stressed that general courts must not reduce the restructuring process to a formal exercise but must actively examine its material aspects—particularly the preservation of the common interest of creditors, the proportionality of the impact on minority creditors, and the credibility of the economic assumptions underlying the plan. These principles have subsequently been adopted by regional courts, which in recent years have displayed a stricter

[25] PATAKYOVÁ M., DURAČINSKÁ J., Individuálny vs. spoločný záujem veriteľov v reštrukturalizačnom konaní. In: *Právny obzor*. 2018, N. 5, p. 455 - 474.

approach in assessing the reliability of restructuring assessments, the realism of proposed measures, and the proportionality of their effects. This trend confirms that judicial practice is dynamically evolving toward greater protection of creditor plurality and a more rigorous application of the material rule of law within insolvency proceedings.

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3. OLIVARES-CAMINAL R., GOGLIDZE N.. The Collective Will in Corporate Debt Restructuring. In: *Journal of Business Law*. 2024, n. 4, p. 351-374.
4. PATAKYOVÁ M., DURAČINSKÁ J., Individuálny vs. spoločný záujem veriteľov v reštrukturalizačnom konaní. In: *Právny obzor*. 2018, N. 5, p. 455 - 474.
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7. WARREN E., WESTBROOK J. L. *The Law of Debtors and Creditors, Text, Cases, and Problems*. New York: Aspen Publishers, 2006. 1024 p. ISBN 9781454893516.
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11. Decision of the Constitutional Court of the Slovak Republic of 23 January 2019, No. I US 300/2018-94.
12. Decision of the Constitutional Court of the Slovak Republic of 29 November 2016, No. III. ÚS 829/2016.
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Zverenecký fond ako potenciálny nástroj ochrany majetku podnikateľa v procese reorganizácie[2]

Trust fund as a potential tool for protecting an entrepreneur's assets during reorganization

Abstrakt

Slovenská právna úprava v súčasnosti nepozná jednotnú systematickú úpravu správy cudzieho majetku, nakoľko jej prvky sú rozptýlené vo väčšom počte právnych predpisov, pričom absentuje komplexný civilnoprávny rámec na spôsob českej „správy cizího majetku" obsiahnutej v českom Občianskom zákonníku. Súčasne slovenská právna úprava nepozná inštitút zvereneckého fondu ako oddelenej majetkovej podstaty bez právnej subjektivity. Článok analyzuje potenciálnu využiteľnosť zvereneckého fondu (trust-like inštitútu) ako nástroja ochrany a stabilizácie majetku podnikateľa počas reorganizácie podnikateľa.
Kľúčové slová: *Zverenecký fond, Správa cudzieho majetku, Úpadok, Reorganizácia, Reštrukturalizácia, Insolvenčné právo.*

Abstract

Slovak law currently does not recognise a uniform, systematic legal regulation of the administration of another's assets, as its elements are scattered across numerous legal regulations, and there is no comprehensive civil law framework like the Czech " administration of another's assets" in the Czech Civil Code. At the same time, Slovak law does not recognise a trust fund as a separate asset base without legal personality. The article analyses the potential usefulness of a trust fund (a trust-like institution) as a tool for protecting and stabilising an entrepreneur's assets during the entrepreneur's reorganisation.
Keywords: *Trust fund, Administration of another's assets, Bankruptcy, Reorganization, Restructuring, Insolvency law.*

JEL Classification: K2

ÚVOD

Správa cudzieho majetku predstavuje tradičný, no dynamicky sa rozvíjajúci prvok súkromného práva, ktorého základným účelom je vyvážiť potrebu ochrany vlastníka alebo beneficienta s požiadavkou na flexibilné a odborné nakladanie s majetkom prostredníctvom tretej osoby.[3] Slovenský právny poriadok pozná viaceré inštitúty, ktoré túto funkciu čiastočne napĺňajú – od všeobecnej právnej úpravy správy cudzieho majetku, cez osobitné formy správy majetku v korporačnom, finančnom či verejnoprávnom prostredí, až po špecifické modely nadácií a fondov. Spoločným menovateľom týchto inštitútov je snaha zabezpečiť ochranu vlastníka alebo beneficienta pri zachovaní dostatočnej miery voľnosti správcu. Napriek tomu slovenský právny poriadok doteraz neponúka komplexný civilnoprávny

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[2] Príspevok bol spracovaný v rámci riešenia grantovej úlohy UGA-15-PDS-2025: *„Výzvy a perspektívy právnej úpravy správy cudzieho majetku (fiducie) v právnom poriadku Slovenskej republiky"* financovanej EÚ NextGenerationEU prostredníctvom Plánu obnovy a odolnosti SR v rámci projektu č. 09I03-03-V05-00009.

[3] JOSKOVÁ, L. – PĚSNA, L. Správa cizího majetku. Praha: Wolters Kluwer, 2017, s. 107.

rámec, ktorý by umožnil oddeliť majetok od osoby vlastníka a účelovo ho zveriť tretej osobe na správu. Tým by vznikla osobitná majetková podstata bez právnej subjektivity so samostatne upravenými vzťahmi medzi zakladateľom, správcom a beneficientom.

V komparatívnom kontexte sa takýto model vyvinul predovšetkým v anglosaskom prostredí vo forme trustu, ktorý sa stal jedným z najvýznamnejších inštitútov *common law* s vysokou mierou adaptability. Trust umožňuje zakladateľovi previesť majetok na správcu v prospech beneficientov, pričom vzniká oddelená majetková podstata, ktorá nie je súčasťou majetku žiadnej zo zúčastnených osôb. Tento model postupne inšpiroval aj kontinentálne právne poriadky, ktoré sa tradične hlásia k monistickej koncepcii vlastníckeho práva, avšak napriek tomu hľadajú spôsoby, ako vytvoriť obdobné mechanizmy. Česká republika prijala zverenecký fond, Francúzsko zaviedlo fiduciu, a ďalšie štáty ako Rakúsko či Nemecko uplatňujú hybridné zmluvné formy typu Treuhand. Tieto skúsenosti potvrdzujú, že aj v kontinentálnom prostredí je možné konštruovať oddelenú majetkovú podstatu bez právnej subjektivity, ktorá slúži na dosiahnutie konkrétneho ekonomického alebo právneho účelu.

Z pohľadu slovenského právneho poriadku nadobúda problematika správy cudzieho majetku osobitný význam v kontexte insolvenčného práva, predovšetkým pri reorganizácii podnikateľa. Reorganizáciu podnikateľa môžeme chápať v zmysle zachovania životaschopného jadra podniku podnikateľa a maximalizácie uspokojenia veriteľov prostredníctvom udržania prevádzky podniku dlžníka. Jednotlivé inštitúty formálnej reorganizácie podnikateľa sú upravené v zákone č. 7/2005 Z. z. o konkurze a reštrukturalizácii v znení neskorších predpisov (ďalej aj ako „Zákon o konkurze a reštrukturalizácii“), ako aj v zákone č. 111/2022 Z. z. o riešení hroziaceho úpadku v znení neskorších predpisov (ďalej aj ako „Zákon o riešení hroziaceho úpadku“). Na druhej strane je potrebné zdôrazniť, že podnikateľ môže vyvíjať svoje úsilie aj počas neformálnej reorganizácie, keď sa sám pokúša riešiť svoje záväzky tak, aby došlo k jeho ekonomickému ozdraveniu. Spoločným znakom týchto reorganizačných procesov je to, že úspech reorganizácie je determinovaný schopnosťou chrániť a stabilizovať kľúčové majetkové zložky podnikateľa, najmä pred ich odčerpávaním, znehodnotením alebo neefektívnym nakladaním. Práve v tomto priestore sa otvára otázka, či by zverenecký fond ako inštitút oddelenej majetkovej podstaty mohol slúžiť ako mechanizmus ochrany majetku podnikateľa počas reorganizačného procesu.

Zverenecký fond by mohol v teoretickej rovine plniť funkciu nástroja na dočasné oddelenie majetku, ktorý je kľúčový pre pokračovanie podnikateľskej činnosti, pričom by jeho správa bola zverená nezávislej osobe s povinnosťou konať v prospech účelu fondu a veriteľov. Tento model by mohol prispieť k posilneniu dôvery veriteľov, k zvýšeniu transparentnosti reorganizačných procesov a k efektívnejšej ochrane hodnoty majetku podnikateľa.

Problematika využitia trustových a *trust-like* inštitútov v kontexte insolvenčného práva nie je v zahraničnej právnej doktríne úplne nová. V zahraničnej odbornej literatúre sa už dlhodobo zdôrazňuje funkcia trustu ako nástroja stabilizácie hodnoty podniku a ochrany beneficientov pred agresívnymi veriteľskými zásahmi.[4] Súčasné komparatívne diskusie opätovne otvárajú aj otázku dualistického rozdelenia práv k majetku, ktoré umožňuje, aby majetok spravovaný v truste bol koncepčne a funkčne oddelený od majetku dlžníka aj správcu.[5] V českom právnom prostredí sa možnosti využitia zvereneckého fondu ako nástroja ochrany majetku podnikateľa diskutujú najmä v súvislosti s jeho flexibilitou pri správe rodinného a obchodného majetku.[6] Rovnako tak sa v rámci českej právnej doktríny zverenecký fond využíva aj na prípady založenia zvereneckého fondu pre prípad smrti *(mortis causa)*.[7] Francúzska právna doktrína vníma *fiducie-sûreté* pri reorganizácii a konsolidácii dlhov ako

[4] Napr. SCHWARCZ, L. S. Commercial Trusts as Business Organizations: An Invitation to Comparatists [online]. In *Duke Journal of Comparative & International Law*, 2003, roč. 13, Special Isue, s. 333-335. Dostupné na internete: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1147&context=djcil [cit. 2025-10-30].

[5] ZHANG, C. Re-exploring the nature of dual ownership in English trusts: a Scottish law perspective [online]. In *Trusts & Trustees*, 2023, roč. 29, č. 1, s. 62-65. Dostupné na internete: https://doi.org/10.1093/tandt/ttac113 [cit. 2025-10-30].

[6] JOSKOVÁ, L. – PĚSNA, L. *Správa cizího majetku*. Praha: Wolters Kluwer, 2017, s. 111-115.

[7] LEDERER, V. *Fiducie a svěřenský fond.* Praha: Wolters Kluwer, 2021, s. 70-103.

štandardný a súdmi akceptovaný nástroj, ktorý umožňuje previesť kľúčový majetok podnikateľa na správcu, pričom podnikateľ si zachováva možnosť majetok využívať v ďalšej prevádzke.[8]

V slovenskej doktríne zatiaľ neexistuje systematické spracovanie otázky využitia *trust-like* inštitútov v reorganizácii podnikateľa, resp. v rámci slovenského insolvenčného práva všeobecne. Existujúce texty sa zameriavajú na možnosť zavedenia zvereneckého fondu ako inštitútu civilného práva, nie však na jeho interakciu s insolvenciou a preventívnou reštrukturalizáciou.[9]

Cieľom predloženého článku je preto analyzovať potenciálne postavenie zvereneckého fondu ako nástroja ochrany majetku podnikateľa v procese reorganizácie, identifikovať jeho teoretické a praktické predpoklady, riziká a limity a zároveň načrtnúť úvahy *de lege ferenda* o jeho možnom zakotvení do slovenského právneho poriadku. Súčasne sa článok usiluje prepojiť doktrinálnu analýzu správy cudzieho majetku s požiadavkami Smernice Európskeho parlamentu a Rady (EÚ) 2019/1023 z 20. júna 2019 o rámcoch preventívnej reštrukturalizácie, o oddlžení a diskvalifikácii a o opatreniach na zvýšenie účinnosti reštrukturalizačných, konkurzných a oddlžovacích konaní a o zmene smernice (EÚ) 2017/1132 (ďalej aj ako „Smernica o reštrukturalizácii a insolvencii“), ktorá kladie dôraz na včasné zásahy, efektívne zachovanie hodnoty podniku a ochranu práv veriteľov.

Metodologicky príspevok vychádza z analytickej a komparatívnej metódy, prostredníctvom ktorých skúma právnu úpravu správy cudzieho majetku v slovenskom práve a porovnáva ju s vybranými zahraničnými modelmi (najmä českým, francúzskym, nemeckým a rakúskym). Závery sú následne rozvinuté metódou *de lege ferenda*, zameranou na formulovanie návrhov pre systematické zakotvenie zvereneckého fondu do slovenského právneho poriadku. Takto zvolený prístup umožňuje spojiť doktrinálnu analýzu s praktickými otázkami ochrany majetku podnikateľa v procese reorganizácie.

V zahraničnej doktríne aj praxi možno sledovať využívanie *trust-like* konštrukcií v situáciách podnikovej krízy. Vo francúzskom práve sa *fiducie-sûreté* používa ako nástroj stabilizácie majetku podnikateľa počas reštrukturalizácie, pričom dlžník si zachováva funkčné užívanie aktív. V Českej republike existujú prípady, v ktorých zverenecký fond slúžil ako nástroj na ochranu kľúčových aktív rodinných holdingov počas rokovaní s veriteľmi. V nemeckej praxi plní podobnú funkciu *Treuhand* pri vytváraní reštrukturalizačných zabezpečovacích fondov.

1. SPRÁVA CUDZIEHO MAJETKU V SLOVENSKOM PRÁVNOM PORIADKU

V teoretickej rovine možno fiduciárne inštitúty charakterizovať ako vzťahy založené na dôvere, pri ktorých dochádza k oddeleniu ekonomických záujmov od právneho titulu. Tento koncept sa stal kľúčovým najmä v common law, v ktorom dualistická koncepcia vlastníctva umožnila vznik trustu ako autonómneho inštitútu. V kontinentálnych právnych poriadkoch sa hľadali riešenia, ktoré síce rešpektujú zásadu jednotného vlastníctva, no napriek tomu umožňujú podobné funkcie prostredníctvom zmluvných alebo zákonných úprav.[10]

Myšlienka zverenia majetku do správy tretej osoby s cieľom zabezpečiť určité záujmy je známa už od rímskeho práva. Rímsky inštitút *fiducia* predstavoval prevod veci na základe dôvery (napríklad na účel zabezpečenia alebo správy), pričom vlastníctvo bolo navonok v osobe nadobúdateľa, avšak viazané dôverou voči pôvodnému vlastníkovi.[11] Podobne *fideicommissum* umožňovalo zabezpečiť dedičské usporiadanie prostredníctvom odkazu založeného na dôvere. Je možné uzavrieť, že rímska fiducia

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[8] BARRIÈRE, F. Francouzská zkušenost se svěřenstvím. In TICHÝ, L. – RONOVSKÁ, K. – KOCÍ, M. (eds.) *Trust a srovnatelné instituty v Evropě.* Praha: Centrum právní komparatistiky Právnické fakulty Univezity Karlovy v Praze, s. 89-90, ako aj BARRIÈRE, F. La fiducie-sûreté en droit français. In *McGill Law Journal*, roč. 53, 2013, č. 4, s. 870-904. Dostupné na internete: https://doi.org/10.7202/1019048ar [cit. 2025-10-30].

[9] Napr. JANČO, M. Trust, fiducia a slovenské právo (I. časť). In *Právny obzor*, roč. 95, 2012, č. 1, s. 44-56, alebo JANČO, M. Trust, fiducia a slovenské právo (II. časť). In *Právny obzor*, roč. 95, 2012, č. 1, s. 137-150, alebo CSACH, K. – SISÁK, Ľ. Svěřenský (zverenecký) fond podľa českého práva a jeho účinky na Slovensku. In *Súkromné právo*, 2022, roč. 8, č. 6, s. 201-208.

[10] JOSKOVÁ, L. – PĚSNA, L. *Správa cizího majetku*. Praha: Wolters Kluwer, 2017, s. 107.

[11] SALÁK, P. *Základy římského práva* [online]. Brno: Masarykova univerzita, 2024, s. 107. Dostupné na internete: https://science.law.muni.cz/knihy/monografie/salak-rimske-pravo-soukrome.pdf [cit. 2025-10-30].

(doslova dôvera, spoľahlivosť) predstavovala prevod kviritského vlastníctva veci formou symbolickej mancipácie *(nummo uno)* na dôverníka *(fiduciarius)*, ktorý sa osobitnou dohodou *(pactum fiduciae)* zaväzoval k spätnému prevodu po splnení účelu sledovaného stranami.[12] Tieto základy sa v neskoršom vývoji rozvíjali do rozličných foriem, ktoré sa odlišovali v závislosti od kultúrneho a právneho prostredia.[13]

Na území historického Uhorska sa objavovali fideikomisné úpravy a špecifické formy zvereneckých mechanizmov, ktoré slúžili na zachovanie rodového majetku alebo na plnenie určitých účelov. Československý právny poriadok po roku 1918 však neprijal trust ani obdobný inštitút, a to najmä z dôvodu jeho anglosaských koreňov a nezlučiteľnosti s monistickou koncepciou vlastníctva. Socialistické právo bolo orientované skôr na kolektívne formy vlastníctva a inštitúty založené na osobnej dôvere medzi súkromnými subjektmi ustúpili do úzadia.[14]

Právna úprava správy cudzieho majetku v Slovenskej republike je v súčasnosti fragmentárna a rozptýlená vo viacerých právnych predpisoch. Hoci ide o významný právny inštitút s častým praktickým uplatnením, slovenský právny poriadok nepozná jednotnú systematickú koncepciu správy cudzieho majetku ani všeobecný civilnoprávny rámec, ktorý by jasne definoval postavenie správcu, rozsah jeho oprávnení a vzťah k vlastníkovi alebo beneficientovi majetku.

V porovnaní s českým Občianskym zákonníkom (zákon č. 89/2012 Sb.), ktorý systematicky upravuje tzv. *„správu cizího majetku“* ako všeobecnú kategóriu právnych vzťahov, slovenská úprava zostáva nekomplexná a nedostatočne rozpracovaná. V praxi sa preto správa cudzieho majetku často opiera o analógiu alebo o osobitné zákony, ktoré upravujú špecifické formy správy (napr. nadácie, pozemkové spoločenstvá, správa bytových domov, správa štátneho majetku a pod.).

V slovenskom právnom poriadku pri rôznych formách správy cudzieho majetku upravených v právnom poriadku Slovenskej republiky možno identifikovať niekoľko spoločných čŕt, ktoré sú prítomné bez ohľadu na účel alebo právny základ správy.

Správa majetku spravidla vzniká na základe právneho titulu, či už ide o zmluvu (napr. mandátnu zmluvu podľa § 566 a nasl. zákona č. 513/1991 Zb. Obchodný zákonník v znení neskorších predpisov[15]), zákon (napr. zákon č. 278/1993 Z. z. o správe majetku štátu v znení neskorších predpisov) alebo rozhodnutie orgánu verejnej moci (napr. ustanovenie správcu v rámci insolvenčného konania podľa Zákona o konkurze a reštrukturalizácii).

Správca je pritom povinný konať s odbornou starostlivosťou, ktorá presahuje rámec bežnej starostlivosti, ako aj v osobitných právnych úpravách správy cudzieho majetku. V slovenskom práve je ďalej výrazne prítomný princíp oddelenia spravovaného majetku od majetku správcu. Tento princíp má však prevažne organizačný alebo účtovný charakter, ako to možno vidieť napríklad pri správe fondu prevádzky, údržby a opráv pri správe bytového domu podľa § 10 zákona č. 182/1993 Z. z. o vlastníctve bytov a nebytových priestorov v znení neskorších predpisov alebo pri správe majetku nadácie podľa § 3 ods. 1 zákona č. 34/2002 Z. z. o nadáciách v znení neskorších predpisov.

Správca zároveň nesie zodpovednosť za škodu spôsobenú porušením povinností pri správe cudzieho majetku. Správa majetku je napokon vždy preskúmateľná a kontrolovateľná subjektom, v prospech

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[12] MĹKVY, M. Trust v rekodifikovanom civilnom práve? [online]. In *Historia et theoria iuris*, 2021, roč. 13, č. 2, s. 50. Dostupné na internete: https://www.flaw.uniba.sk/fileadmin/praf/HTI_2021-II.pdf [cit. 2025-10-30].

[13] TUROŠÍK, M. Význam Rímskeho práva v moderných právnych poriadkoch. In: *Právny poriadok Slovenskej republiky po 25. rokoch : zborník príspevkov z medzinárodnej vedeckej konferencie "1. Banskobystrické dni práva" usporiadanej pri príležitosti 20. výročia založenia Právnickej fakulty Univerzity Mateja Bela v Banskej Bystrici, 11.-12. novembra 2015*. Banská Bystrica: Vydavateľstvo Univerzity Mateja Bela - Belianum, 2015, s. 580.

[14] ŠVECOVÁ, A. Fideikomis podľa zákonného a obyčajového uhorského práva až do jeho zániku v I. ČSR [online]. In *Acta Universitatis Tyrnaviensis - Iuridica VII : ročenka Právnickej fakulty Trnavskej univerzity v Trnave 2010*. Trnava: Typi Universitatis Tyrnaviensis, 2010, s. 217. Dostupné na internete: http://publikacie.iuridica.truni.sk/wp-content/uploads/2018/05/ACTA-UNIVERSITATIS-TYRNAVIENSIS-IURIDICA-VII-2010.pdf [cit. 2025-10-30].

[15] Bližšie pozri napr. KUBINEC, M. – UŠIAKOVÁ, L. – DZIMKO, J. Obstarávateľské zmluvy. In: ĎURICA, M. a kol. *Obchodné právo II. : Obchodné záväzky. Vysokoškolská učebnica.* Banská Bystrica : Vydavateľstvo Univerzity Mateja Bela v Banskej Bystrici - Belianum, 2025, s. 301-340. Dostupné na internete: https://doi.org/10.24040/2025.9788055722382 [cit. 2025-10-30].

ktorého sa správa vykonáva, prípadne osobitným orgánom dohľadu, čo zodpovedá európskemu trendu transparentnej fiduciárnej správy.[16]

Zásadným rozdielom oproti trustu a *trust-like* inštitútom však je, že slovenské právo nepozná samostatnú majetkovú podstatu bez právnej subjektivity, ktorá by bola oddelená od majetku zakladateľa, správcu aj beneficienta. Kým český právny poriadok tento model výslovne upravuje v podobe zvereneckého fondu, francúzske právo v podobe *fiducie* a nemecká či rakúska právna úprava využívajú *Treuhand* riešenia so zmluvne obmedzeným nakladaním s majetkom, slovenský právny poriadok ponecháva oddelenosť majetku len v rovine povinnosti správcu viesť ho oddelene, nie v rovine právneho „vypreparovania" majetku z majetkových súborov účastníkov tohto právneho vzťahu. Práve absencia tohto prvku — oddeleného majetku bez subjektivity — predstavuje kľúčovú prekážku pre systematické zavedenie *trust-like* inštitútu do slovenského práva.[17] Slovenské právo síce pozná dualizmus medzi vlastníkom a držiteľom, nie však trojstranný vzťah zakladateľ – správca – beneficient. V dôsledku toho nie je možné v slovenskom prostredí efektívne vytvoriť účelovo viazaný majetok, ktorý by bol právne oddelený od zakladateľa, no zároveň by nebol majetkom správcu.

Tento deficit má významné dôsledky nielen v oblasti súkromného práva, ale aj v insolvenčnom kontexte, keď absencia takéhoto mechanizmu sťažuje flexibilné riešenie situácií hroziaceho úpadku, resp. úpadku.

Na rozdiel od zvereneckého fondu, ktorý umožňuje jasne vymedziť účel, subjekty a spôsob správy oddeleného majetku, slovenský systém sa spolieha na zmluvnú autonómiu a čiastočné inštitúty. To vedie k vzniku situácií, ktoré môžu spôsobiť právnu neistotu, a to najmä pokiaľ ide o otázky vlastníctva, zodpovednosti správcu, nakladania s výnosmi, ochrany beneficientov a pod. Spoločné znaky správy cudzieho majetku v slovenskom práve tak vytvárajú základ pre fiduciárny model, chýba však rozhodujúci prvok – právne konštituovaná oddelená majetková podstata, ktorá je nevyhnutnou podmienkou *trust-like* inštitútov.

Pre analýzu uplatniteľnosti zvereneckého fondu v slovenskom prostredí je však nevyhnutné vyhodnotiť aj situáciu v iných európskych právnych poriadkoch.

2. TRUST A ZVERENECKÝ FOND V EURÓPSKOM KONTEXTE

Otázka správy cudzieho majetku, a najmä jej rozšírenej podoby – oddelenej majetkovej podstaty bez právnej subjektivity – je v európskom právnom priestore riešená rôznorodo. Právne poriadky členských štátov EÚ sa líšia v prístupe k *trust-like* inštitútom, ktoré sú výsledkom snahy o prispôsobenie tradičných kontinentálnych systémov anglosaskému modelu trustu. Tento vývoj je motivovaný predovšetkým potrebou právnej flexibility, ochrany majetku a efektívnej správy v komplexných ekonomických a insolvenčných situáciách.

Anglosaský trust predstavuje základný koncept, ktorý umožňuje zakladateľovi (*settlor*) previesť majetok na správcu (*trustee*), pričom správca spravuje tento majetok v prospech beneficientov alebo na dosiahnutie určitého účelu. Podstatou trustu je vznik dualizmu právnych vzťahov k majetku: správca nadobúda právny titul (*legal ownership*), zatiaľ čo beneficient získava ekonomické právo k majetku (*equitable ownership*). Tým vzniká oddelená majetková podstata, ktorá nie je súčasťou majetku ani zakladateľa, ani správcu, ani beneficienta. Táto konštrukcia umožňuje vysokú mieru flexibility – trust môže byť vytvorený za účelom ochrany rodinného majetku, kolektívneho investovania, zabezpečenia záväzkov, rovnako tak môže slúžiť aj na zachovanie hodnoty podniku v období ekonomickej nestability

[16] Porov. ZHANG, C. Re-exploring the nature of dual ownership in English trusts: a Scottish law perspective [online]. In *Trusts & Trustees*, 2023, roč. 29, č. 1, s. 62-78. Dostupné na internete: https://doi.org/10.1093/tandt/ttac113 [cit. 2025-10-30].

[17] HUSÁR, J. – CSACH, K. Národná správa za Slovenskú republiku. In TICHÝ, L. – RONOVSKÁ, K. – KOCÍ, M. (eds.) *Trust a srovnatelné instituty v Evropě.* Praha: Centrum právní komparatistiky Právnické fakulty Univezity Karlovy v Praze, s. 68.

podnikateľa a pod. Anglosaské právo pozná viacero typov trustov (discretionary, fixed, charitable), pričom všetky zdieľajú princíp fiduciárnej zodpovednosti správcu a transparentnej správy majetku.[18]

Česká republika bola prvým stredoeurópskym štátom, ktorý *trust-like* inštitút systematicky zakotvila do svojho právneho poriadku. Zverenecký fond bol zavedený zákonom č. 89/2012 Sb. Občanský zákonník v znení neskorších predpisov. Zverenecký fond nemá právnu subjektivitu, ale je samostatnou majetkovou podstatou oddelenou od majetku zakladateľa, správcu a aj beneficientov, pričom správca má vo vzťahu k spravovanému majetku fiduciárne povinnosti, najmä zodpovednosť za spravovaný majetok. Vznik fondu je podmienený písomným vyhlásením zakladateľa. Postavenie správcu je založené na fiduciárnej povinnosti konať s odbornou starostlivosťou a v súlade s účelom fondu. Na zabezpečenie transparentnosti sa zverenecké fondy zapisujú do verejného registra zvereneckých fondov vedeného Ministerstvom spravodlivosti ČR. Z praktického hľadiska zverenecký fond umožňuje efektívne oddelenie majetku podnikateľa a jeho využitie na špecifický účel – napríklad na správu rodinného a investičného majetku, ochranu aktív pred rizikami podnikania, ale aj ako nástroj stabilizácie majetku v situáciách ekonomickej neistoty podniku, napríklad pri rodinných holdingoch, kde jeho účelom bolo zabrániť rozpredaniu kľúčových aktív počas rokovaní s veriteľmi, pričom podnik mohol naďalej využívať majetok prostredníctvom zmluvy o užívaní alebo nájme a pod.[19]

Francúzsko prijalo inštitút *fiducie* v roku 2007, ktorý doplnil ustanovenia Code civil. *Fiducia* je definovaná ako právny vzťah, v rámci ktorého jedna alebo viac osôb (*constituants*) prevádza majetok, práva alebo záruky na inú osobu – správcu (*fiduciaire*), ktorá ich spravuje pre určitý účel v prospech jedného alebo viacerých beneficientov. *Fiducia* má zmluvný charakter, čím sa odlišuje od trustu, ktorý môže vzniknúť aj jednostranným úkonom. Jej základom je oddelenie majetku *fiducie* od majetku správcu a od majetku zakladateľa.[20] Rovnako tak *fiducia* môže mať význam aj v reorganizačných procesoch, kedy podnikateľ môže previesť majetok do *fiducie*, ktorá ho spravuje v prospech veriteľov, zatiaľ čo dlžník si zachováva jeho funkčné využívanie pre pokračovanie činnosti podniku. Francúzska doktrína tak opisuje *fiduciu* ako mechanizmus súbežnej ochrany veriteľov a zachovania hodnoty aktív podniku.[21]

V Nemecku a Rakúsku existuje tzv. Treuhand, ktorý predstavuje zmluvný fiduciárny vzťah založený na dôvere medzi zveriteľom (*Treugeber*) a správcom (*Treuhänder*). Hoci nejde o osobitnú majetkovú podstatu v právnom zmysle, právo uznáva určité oddelenie majetku prostredníctvom povinnosti správcu nakladať s vecou len v súlade s účelom Treuhandu. Tento model je flexibilný, ale jeho účinnosť závisí od zmluvnej presnosti a dôvery medzi stranami.[22]

Dôležitý impulz pre rozvoj *trust-like* inštitútov v Európe priniesla Haagska dohoda o práve rozhodnom pre trusty a o ich uznávaní (1985). Hoci Slovenská republika nie je jej zmluvnou stranou, Dohoda vytvára medzinárodnoprávne rámce pre uznávanie zahraničných trustov a podporuje kompatibilitu medzi *common law* a *civil law* systémami.[23]

Okrem toho možno vnímať určitý tlak zo strany komunitárnej legislatívy smerom k väčšej flexibilite majetkových režimov a ochrane majetku pred úpadkom. Smernica o reštrukturalizácii a insolvencii neustanovuje konkrétny majetkový inštitút, avšak vyžaduje, aby členské štáty umožnili ochranu aktív a pokračovanie podnikateľskej činnosti pri hroziacom alebo prebiehajúcom úpadku – čo je funkčne obdobný cieľ, aký sleduje trust alebo zverenecký fond.

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[18] ZHANG, C. Re-exploring the nature of dual ownership in English trusts: a Scottish law perspective [online]. In *Trusts & Trustees*, 2023, roč. 29, č. 1, s. 62-65. Dostupné na internete: https://doi.org/10.1093/tandt/ttac113 [cit. 2025-10-30].

[19] JOSKOVÁ, L. – PĚSNA, L. *Správa cizího majetku*. Praha: Wolters Kluwer, 2017, s. 109-110.

[20] BARRIÈRE, F. Francouzská zkušenost se svěřenstvím. In TICHÝ, L. – RONOVSKÁ, K. – KOCÍ, M. (eds.) *Trust a srovnatelné instituty v Evropě.* Praha: Centrum právní komparatistiky Právnické fakulty Univezity Karlovy v Praze, s. 81-90.

[21] BARRIÈRE, F. La fiducie-sûreté en droit français. In *McGill Law Journal*, roč. 53, 2013, č. 4, s. 870-904. Dostupné na internete: https://doi.org/10.7202/1019048ar [cit. 2025-10-30].

[22] KULMS, R.: Německo mezi trustem a treuhandem. In TICHÝ, L. – RONOVSKÁ, K. – KOCÍ, M. (eds.) *Trust a srovnatelné instituty v Evropě.* Praha: Centrum právní komparatistiky Právnické fakulty Univezity Karlovy v Praze, s. 9.

[23] CSACH, K. – SISÁK, Ľ. Svěřenský (zverenecký) fond podľa českého práva a jeho účinky na Slovensku. In *Súkromné právo*, 2022, roč. 8, č. 6, s. 203-204.

Všetky vyššie popísané modely potvrdzujú, že oddelenie majetku od osoby vlastníka možno dosiahnuť viacerými právnymi inštitútmi naprieč jednotlivými právnymi poriadkami, pričom spoločným znakom je fiduciárna povaha správy a transparentná zodpovednosť správcu. Z hľadiska možnej aplikácie v slovenskom prostredí sú transponovateľné najmä nasledujúce znaky: vytvorenie oddelenej majetkovej podstaty bez právnej subjektivity, jasné vymedzenie vzťahu zakladateľ – správca – beneficient, registrácia fondu a verejná kontrola, vylúčenie majetku fondu z konkurznej podstaty správcu, ako aj využitie fondu ako stabilizačného mechanizmu pri reorganizácii podnikateľa.

Z porovnania vyplýva, že *trust-like* inštitúty sú v európskom prostredí využiteľné aj pri reorganizácii. Vo Francúzsku je *fiducie-sûreté* etablovaným nástrojom konsolidácie záväzkov. V Českej republike sa zverenecký fond využíva ako nástroj stabilizácie majetku v holdingových a rodinných štruktúrach v čase ekonomickej krízy. Nemecký *Treuhand* slúži najmä na účel vytvorenia reorganizačných zabezpečovacích fondov. To je východiskom pre úvahy o jeho adaptácii aj v slovenskom právnom prostredí.

3. REORGANIZÁCIA PODNIKATEĽA V SLOVENSKOM PRÁVE

Ako už bolo naznačené, reorganizáciu podnikateľa je v súčasnosti možné docieliť neformálnymi, ako aj formálnymi postupmi. Medzi neformálne postupy je možné zaradiť rôzne postupy podnikateľa, ktoré smerujú k ozdraveniu jeho hospodárskej a ekonomickej situácie s cieľom udržania životaschopného podniku. Medzi formálne postupy je možné jednoznačne zaradiť reštrukturalizáciu ako insolvenčné konanie podľa Zákona o konkurze a reštrukturalizácii, ako aj preventívne reštrukturalizačné konanie podľa Zákona o riešení hroziaceho úpadku. Cieľom reštrukturalizácie je zachovanie podnikateľskej činnosti dlžníka, stabilizácia zamestnanosti a vyššia miera uspokojenia veriteľov než v prípade konkurzu.[24] Ide teda o právny rámec umožňujúci ozdravenie podnikateľa prostredníctvom reštrukturalizačného plánu, ktorý sa opiera o princíp *going concern value* a zachovanie hodnoty podniku ako živého celku.

Zákon č. 111/2022 Z. z. o riešení hroziaceho úpadku, účinný od 17. júla 2022, predstavuje preventívnu nadstavbu tradičnej reštrukturalizácie. Implementuje požiadavky Smernice o reštrukturalizácii a insolvencii. Samotná Smernica o reštrukturalizácii a insolvencii vníma preventívnu reštrukturalizáciu ako právny nástroj, ktorý má zabezpečiť predídenie úpadku obchodných spoločností, ktoré sa síce dostali do finančných ťažkostí, avšak majú potenciál životaschopnosti.[25] Týmto spôsobom slovenské právo rozšírilo spektrum foriem riešenia hroziaceho úpadku a umožnilo podnikateľovi zasiahnuť ešte pred vznikom úpadku podľa Zákona o konkurze a reštrukturalizácii.

Cieľom oboch právnych úprav je teda zachovanie ekonomicky životaschopného podniku a zabránenie jeho speňaženiu v konkurze prostredníctvom nástrojov reštrukturalizácie či preventívnej reštrukturalizácie. V tomto kontexte zohráva kľúčovú úlohu ochrana a stabilizácia majetku dlžníka.

V priebehu reštrukturalizačného konania podľa ZKR je majetok dlžníka chránený viacerými právnymi mechanizmami ako napr. ustanovením § 114 ZKR, ktoré zakotvuje tzv. moratórium, ktoré bráni veriteľom v individuálnych vymáhacích úkonoch (nemožno začať konanie o výkon rozhodnutia alebo exekučné konanie na majetok patriaci dlžníkovi; už začaté konania o výkon rozhodnutia alebo exekučné konania sa prerušujú, ako ani nemožno začať ani pokračovať vo výkone zabezpečovacieho práva na majetok patriaci dlžníkovi), čím sa vytvára priestor na prípravu a schválenie reštrukturalizačného plánu.[26]

Podobne zákon č. 111/2022 Z. z. o riešení hroziaceho úpadku pracuje s mechanizmom dočasnej ochrany podnikateľa, počas ktorej sa pozastavujú exekučné konania, výkony záložných práv a ďalšie úkony ohrozujúce majetok dlžníka. Cieľom dočasnej ochrany je umožniť dlžníkovi náležite pokračovať

[24] ĎURICA, M. *Zákon o konkurze a reštrukturalizácii.* 4. vydanie. Praha: C. H. Beck, 2021, s. 888.

[25] HAVEL, B. – ŽITŇANSKÁ, L. Hranice využitelnosti preventivní restrukturalizace a insolvency governance – český a slovenský pohled. In *Právní rozhledy*, 2022, roč. 30, č. 1, s. 1.

[26] ĎURICA, M. *Zákon o konkurze a reštrukturalizácii.* 4. vydanie. Praha: C. H. Beck, 2021, s. 918-920.

v podnikateľskej činnosti, zachovať si dobré vzťahy s dlhodobými zmluvnými partnermi, predísť poškodeniu dobrej povesti, pričom v konečnom dôsledku vzniká takto priestor pre vytvorenie prostredia pre rokovania s veriteľmi o ozdravnom pláne.[27]

V oboch konaniach však platí, že majetok dlžníka zostáva súčasťou jeho majetkovej podstaty, pričom právne úkony smerujúce k jeho ochrane alebo oddeleniu (napr. prevod v prospech tretej osoby a pod.) podliehajú prísnemu režimu preskúmania z hľadiska odporovateľnosti právnych úkonov a spravidla podlieha aj súhlasu správcu ustanoveného v insolvenčnom konaní. Moratórium teda poskytuje len procesnú ochranu (zákaz vedenia exekučného konania, zákaz výkonu záložného práva a pod.). Majetok však ostáva v majetkovej podstate dlžníka a dlžník s ním ďalej nakladá (aj keď s určitými zákonnými obmedzeniami). Naproti tomu zverenecký fond by predstavoval materiálne oddelenie majetku – majetok by bol vyňatý z dosahu dlžníka aj jednotlivých veriteľov a spravovaný nezávislou osobou na účel reorganizácie (a to najmä v prípade neformálnych reorganizačných procesov). Ide teda o rozdiel medzi dočasnou procesnou ochranou a trvalejšou stabilizačnou správou majetku. Kým moratórium chráni len pred individuálnym uplatňovaním práv (procesná ochrana), zverenecký fond vytvára stabilizačnú štruktúru, ktorá chráni majetok aj pred vnútorným rizikom znehodnotenia, predátorským správaním veriteľov alebo tunelovaním zo strany samotného dlžníka. Práve tu sa otvára priestor pre úvahu, či by bolo možné vytvoriť právny mechanizmus, ktorý by umožnil oddelenie časti majetku v prospech reorganizácie bez rizika zneužitia – napríklad prostredníctvom zvereneckého fondu.

V rámci reštrukturalizačného procesu zohráva kľúčovú úlohu správca. Spoločným znakom úpravy podľa Zákona o konkurze a reštrukturalizácii, ako aj Zákona o riešení hroziaceho úpadku je fakt, že správca vykonáva dohľad nad činnosťou dlžníka. Jeho postavenie sa vo viacerých aspektoch podobá postaveniu fiduciárneho správcu v rámci *trust-like* inštitútov – koná v prospech veriteľov a v súlade s účelom konania, pričom má zákonom stanovené povinnosti odbornosti a lojality.[28]

Napriek tomu správca nie je správcom cudzieho majetku v civilnoprávnom zmysle, pretože s majetkom dlžníka nenakladá na základe zverenia dlžníkom, ale z moci zverenej mu zákonom a súdom, ktorých ho ustanoví do funkcie správcu v rámci insolvenčného konania. Z pohľadu systematiky súkromného práva ide o inštitút verejnoprávneho dohľadu, nie zmluvného fiduciárneho vzťahu. To podčiarkuje rozdiel medzi reštrukturalizačným správcom a potenciálnym správcom zvereneckého fondu, ktorý by konal na základe súkromnoprávneho zverenia majetku.

Zaujímavá je však funkčná paralela: reštrukturalizačný správca, ako aj správca zvereneckého fondu plnia podobnú ochrannú a stabilizačnú úlohu, ktorá smeruje k zachovaniu hodnoty majetku a uspokojeniu oprávnených záujmov beneficientov či veriteľov.

Jedným z najcitlivejších problémov v praxi je otázka, ako ochrániť majetok podnikateľa počas procesu reorganizácie pred znehodnotením, únikom alebo predátorskými zásahmi veriteľov spočívajúcimi v tzv. tunelovaní podniku podnikateľa, resp. inými zásahmi, ktorých cieľom je zhoršiť možnosť uspokojenia pohľadávok určitej skupiny veriteľov a súčasne zlepšiť možnosť uspokojenia pohľadávok inej skupiny veriteľov. Tradičné nástroje – exekučné moratórium, zákaz výkonu záložného práva či dohľad správcu – sú síce účinné, ale časovo obmedzené a formálne náročné.

V tomto kontexte je možné konštatovať, že ak by slovenská legislatíva poznala inštitút zvereneckého fondu, resp. obdobný právny inštitút, mohol by tento plniť funkciu ochranného rámca majetku subjektu podstupujúceho proces reorganizácie. Teoreticky by bolo možné, aby podnikateľ – po zverení časti majetku do fondu – umožnil jeho správu nezávislou osobou (správcom fondu), ktorá by konala v prospech ako dlžníka aj jeho veriteľov. Takto oddelený majetok by nebol súčasťou konkurznej podstaty podnikateľa ani majetku správcu fondu, mohol by byť predmetom transparentného dohľadu veriteľov a súdu, umožnil by stabilizovať prevádzku počas reorganizácie (napr. financovanie prevádzky,

[27] HRABÁNKOVÁ, K. Verejná preventívna reštrukturalizácia ako sanačný proces podnikateľa v komparácii s českou právnou úpravou [online]. In *STUDIA IURIDICA Cassoviensia*, 2024, roč. 12, č. 2, s. 54. Dostupné na internete: http://sic.pravo.upjs.sk/ecasopis/122024-2/04_Hrabankova.pdf [cit. 2025-10-30].

[28] LEDERER, V. *Fiducie a svěřenský fond.* Praha: Wolters Kluwer, 2021, s. 177-178.

zachovanie výrobných aktív) a poskytoval by právny základ pre efektívnu ochranu majetku pred exekučnými zásahmi.[29]

Takýto model by bol v súlade s cieľmi Smernice o reštrukturalizácii a insolvencii, ktorá vyžaduje, aby členské štáty vytvorili právne rámce umožňujúce zachovanie hodnoty podniku počas preventívnej reštrukturalizácie.[30] Zavedenie zvereneckého fondu by preto mohlo predstavovať súkromnoprávnu inováciu v prospech insolvenčného systému, ktorá by doplnila existujúce verejnoprávne nástroje.

Slovenský systém reorganizácie je síce funkčný, no jeho úspešnosť závisí od schopnosti ochrániť a efektívne spravovať majetok podnikateľa počas ozdravného procesu. Súčasná právna úprava poskytuje rámec pre procesnú ochranu, nie však pre materiálne oddelenie majetku. Z komparatívneho pohľadu by preto bolo vhodné uvažovať o zavedení civilnoprávneho inštitútu oddelenej majetkovej podstaty, ktorý by umožnil efektívnejšiu a transparentnejšiu správu majetku počas reorganizácie.

4. ZVERENECKÝ FOND AKO POTENCIÁLNY NÁSTROJ OCHRANY MAJETKU PODNIKATEĽA

Zverenecký fond ako oddelená majetková podstata bez právnej subjektivity predstavuje inštitút, ktorý by mohol v slovenskom právnom prostredí plniť funkciu nástroja stabilizácie a ochrany majetku počas procesu reorganizácie podnikateľa. Jeho podstata spočíva v tom, že zakladateľ (typicky podnikateľský subjekt alebo obchodná spoločnosť) vyčlení časť svojho majetku zo svojho vlastníctva a zverí ju do správy tretej osobe – správcovi, ktorý ju spravuje v prospech určených beneficientov alebo na konkrétny účel (napr. zachovanie prevádzky podniku, uspokojenie veriteľov).[31] V tomto kontexte je potrebné rozlišovať osobu správcu ustanoveného súdom v insolvenčnom konaní a zvereneckým správcom. Zvereneckým správcom by v tomto prípade nemusela byť len osoba zapísaná v Zozname správcov vedenom Ministerstvom spravodlivosti SR, ale akákoľvek odborne spôsobilá osoba, ktorá by sa venovala výlučne správe majetku vyčleneného do zvereneckého fondu, pričom by bol odbremenený od veľkého množstva iných zákonných povinností, ktoré má správca ustanovený v insolvenčnom konaní.

V kontexte reorganizácie by zverenecký fond mohol predstavovať most medzi súkromnoprávnym a insolvenčným riešením. Na jednej strane by išlo o inštitút založený na autonómii vôle (zmluvné zverenie majetku), no na druhej strane by slúžil na naplnenie ochrany majetku a udržania ekonomickej hodnoty podniku. Rovnako tak imanentný význam je možné identifikovať najmä vo vzťahu k neformálnym reorganizačným procesom, ktoré vykonáva samostatne podnikateľ s cieľom sanovať svoju nepriaznivú ekonomickú situáciu pred aplikáciou formálnych postupov. Účelom zverenia majetku do zvereneckého fondu by bolo zachovanie tzv. jadra podniku (*core assets*), teda tých zložiek majetku, ktoré sú nevyhnutné na kontinuitu prevádzky a tvorbu pridanej hodnoty. Ide o princíp, ktorý je opakovane zdôrazňovaný ako rozhodujúci pre úspešný priebeh reštrukturalizácie, a to s cieľom zachovania podstatnej časti podniku.

Podnikateľ by v takomto prípade mohol zriadiť zverenecký fond, do ktorého by zveril majetok nevyhnutný na zachovanie základnej prevádzky (napr. výrobnú halu, know-how, ochranné známky). Tento majetok by bol oddelený od jeho ostatného majetku a nemohol by byť predmetom individuálneho vymáhania počas reorganizačného procesu, a to či už formálneho alebo neformálneho. Vzhľadom na povahu zásahu do majetkovej podstaty dlžníka by jeho zriadenie malo byť podmienené buď súhlasom

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[29] SCHWARCZ, L. S. Commercial Trusts as Business Organizations: An Invitation to Comparatists [online]. In *Duke Journal of Comparative & International Law*, 2003, roč. 13, Special Isue, s. 333-335. Dostupné na internete: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1147&context=djcil [cit. 2025-10-30].

[30] HRABÁNKOVÁ, K. Verejná preventívna reštrukturalizácia ako sanačný proces podnikateľa v komparácii s českou právnou úpravou [online]. In *STUDIA IURIDICA Cassoviensia*, 2024, roč. 12, č. 2, s. 62. Dostupné na internete: http://sic.pravo.upjs.sk/ecasopis/122024-2/04_Hrabankova.pdf [cit. 2025-10-30].

[31] KATKOVČIN, M. Perspectives of use of a trust fund as a form of investment under legal and economic conditions of the financial market in the Slovak Republic [online]. In *Bratislava law review,* 2018, roč. 2, č. 2, s. 146-147. Dostupné na internete: https://blr.flaw.uniba.sk/index.php/BLR/article/view/111 [cit. 2025-10-30].

väčšiny zabezpečených, ako aj nezabezpečených veriteľov, alebo schválením súdom v rámci reštrukturalizačného konania, obdobne ako sa vyžaduje súhlas veriteľov pri schvaľovaní reštrukturalizačného plánu. Správca fondu by ho spravoval výlučne v prospech veriteľov a na účely naplnenia reorganizácie ako sanačného procesu, počas ktorého dôjde k ozdraveniu podnikateľa z ekonomického hľadiska.

Rovnako tak by zverenecký fond mohol plniť funkciu zabezpečovacieho mechanizmu, keď by podnikateľ doň zveril časť majetku ako garanciu plnenia záväzkov pre veriteľov počas procesu reorganizácie. Veritelia by sa tak stali beneficientmi fondu, čím by sa posilnila ich dôvera a zvýšila pravdepodobnosť úspešnej reorganizácie podnikateľa.

Je potrebné zdôrazniť, že podnikateľ by síce vo vzťahu k majetku vyčlenenému do zvereneckého fondu stratil vlastnícke právo, avšak analogicky k francúzskej *fiducie-sûreté*, by si dlžník zachoval právo majetok užívať a využívať pre prevádzku podniku. Titulom užívania tohto majetku by bola odplatná alebo bezodplatná zmluva na základe ktorej by dlžník získal užívacie právo k majetku vyčlenenému do zvereneckého fondu. Z povahy veci je však logické, aby išlo o odplatnú zmluvu, a teda aby aj zverenecký fond získaval finančné prostriedky z užívania tohto majetku, čím by v konečnom dôsledku dochádzalo k zachovaniu hodnoty majetku v zvereneckom fonde a aj zvyšovania tejto hodnoty. Takto získané finančné prostriedky môžu byť použité jednak na správu majetku vyčleneného do zvereneckého fondu, ale aj na uspokojovanie pohľadávok veriteľov dlžníka. Zverenecký fond by tak, teoreticky, neviedol k prerušeniu činnosti dlžníka, ale naopak by umožnil jej pokračovanie pri súčasnom posilnení transparentnosti a dôvery veriteľov.

Trvanie existencie zvereneckého fondu by malo byť časovo obmedzené na dobu trvania reorganizačného procesu, prípadne na obdobie kontrolovaného uspokojovania záväzkov podľa reštrukuralizačného plánu, aby zverenie majetku neslúžilo na trvalú izoláciu majetku pred veriteľmi. Správa fondu by bola zverená nezávislému odbornému správcovi, ktorý by nebol totožný s reštrukturalizačným správcom ustanoveným súdom, keďže reštrukturalizačný správca vykonáva dohľad nad dlžníkom na základe verejnoprávneho splnomocnenia, zatiaľ čo správca fondu koná na základe fiduciárneho zverenia a zodpovedá za materiálnu ochranu a uchovanie hodnoty vyčleneného majetku. Na druhej strane je možné v tomto kontexte uvažovať aj nad širším potenciálnym využívaním zvereneckých fondov nielen v kontexte insolvenčného práva, ale aj riadenia a správy obchodných spoločností, ako aj obchodných záväzkových vzťahov, kedy by existencia a doba trvania zvereneckého fondu nebola determinovaná len na priebeh reorganizácie, resp. reštrukturalizácie.

Súčasne je potrebné opätovne zdôrazniť, že presun jadrových aktív podnikateľa do zvereneckého fondu preto nevylučuje ďalšie pokračovanie podnikateľskej činnosti dlžníka, pokiaľ fond poskytne dlžníkovi právo užívania majetku na základe súkromnoprávneho titulu, pričom správca fondu kontroluje, aby nakladanie s majetkom sledovalo účel reorganizácie a zachovanie prevádzkovej kontinuity.

Ako už bolo uvedené, Smernica o reštrukturalizácii a insolvencii vyžaduje, aby členské štáty podporovali včasné reštrukturalizácie a ochranu aktív podnikateľa. Zavedenie zvereneckého fondu do právneho poriadku Slovenskej republiky by v konečnom dôsledku bolo plne v súlade s touto európskou legislatívou, pretože by umožnilo vytvoriť mechanizmus predbežného zabezpečenia majetku, posilniť dôveru veriteľov v reorganizačný proces. Zároveň by zverenecký fond umožnil flexibilnú správu aktív mimo rigidného súdneho režimu. Zverenecký fond by tak mohol byť chápaný ako „preventívny nástroj pred úpadkom“, ktorý dopĺňa súčasný rámec preventívnej reštrukturalizácie o súkromnoprávny element.

Základnou prekážkou uplatnenia zvereneckého fondu v slovenskom právnom poriadku je absencia výslovnej právnej úpravy. Slovenský právny systém nepozná inštitút oddelenej majetkovej podstaty bez právnej subjektivity, ktorá by mohla existovať nezávisle od zakladateľa a správcu. Bez explicitného zákonného základu by zverenecký fond založený na súkromnoprávnej dohode mohol byť považovaný za neplatný právny úkon pre neurčitosť alebo pre rozpor s kogentnými ustanoveniami Občianskeho

zákonníka.[32] Takáto neexistencia legislatívneho rámca bráni nielen aplikačnej praxi, ale aj experimentálnym riešeniam – na rozdiel od Českej republiky, kde už samotná rekodifikácia Občianskeho zákonníka v roku 2012 vytvorila široký priestor pre využívanie zvereneckých fondov v rozličných právnych odvetviach.[33]

V konečnom dôsledku, pri aplikácii inštitútu v rámci formálnych reštrukturalizačných procesov, by bolo potrebné jednoznačne vymedziť vzájomný vzťah medzi správcom zvereneckého fondu a reštrukturalizačným správcom ustanoveným súdom. Obaja by totiž plnili fiduciárnu funkciu v prospech veriteľov, ale s odlišným právnym základom. Absencia koordinácie by mohla viesť ku konfliktom kompetencií (napr. kto rozhoduje o nakladaní s majetkom v tej-ktorej situácii a pod.).

Implementácia zvereneckých fondov do slovenského právneho poriadku by si tiež vyžadovala zavedenie mechanizmov na predchádzanie zneužívaniu zvereneckých fondov na zakrývanie skutočného vlastníctva, vyvádzanie majetku z obchodných spoločností, či na obchádzanie daňovej povinnosti alebo akékoľvek nekalé, resp. protiprávne konanie.

ZÁVER

Zverenecký fond ako inštitút oddelenej majetkovej podstaty bez právnej subjektivity predstavuje koncept, ktorý by mohol významne obohatiť slovenský právny poriadok, najmä v kontexte správy cudzieho majetku, čím by dokázal ovplyvniť široké spektrum právnych odvetví, osobitne vo vzťahu k súkromnému právu. Analýza preukázala, že slovenské právo dlhodobo trpí fragmentárnosťou právnej úpravy správy cudzieho majetku a absenciou uceleného mechanizmu, ktorý by umožnil efektívne oddelenie majetku od osoby vlastníka a jeho zverenie tretej osobe na účelovú správu.

Z komparatívneho hľadiska možno konštatovať, že kontinentálne právne systémy (najmä české, francúzske, rakúske a nemecké právo) dokázali úspešne implementovať *trust-like* inštitúty, ktoré zachovávajú princípy civilného práva, no zároveň využívajú flexibilitu anglosaského trustu. Tieto inštitúty – či už ide o český zverenecký fond, francúzsku *fiduciu* alebo nemecký *Treuhand* – potvrdzujú, že oddelenie majetku bez vzniku novej právnickej osoby je právne i ekonomicky realizovateľné a prakticky využiteľné aj v európskom prostredí.

Z pohľadu slovenského insolvenčného práva je ochrana majetku podnikateľa počas procesu reorganizácie jednou z kľúčových podmienok úspešného ozdravenia. Súčasný právny rámec – či už podľa Zákona o konkurze a reštrukturalizácii alebo Zákona o riešení hroziaceho úpadku – poskytuje procesné nástroje (moratórium, súdny dohľad, reštrukturalizačný plán), no chýba mu materiálny inštitút účelovej správy majetku, ktorý by umožnil dlhodobo a transparentne chrániť hodnotu aktív počas ozdravného procesu.

Na základe komparatívnej a funkčnej analýzy možno uzavrieť, že zverenecký fond by mohol túto medzeru vyplniť. Jeho využitie by bolo možné v troch rovinách: ochranná – oddelenie a zachovanie kľúčových aktív potrebných na prevádzku podniku; zabezpečovacia – vytvorenie garančnej štruktúry pre veriteľov v rámci reorganizačného plánu a prevádzková – správa finančných zdrojov určených na financovanie reorganizácie.

Takto koncipovaná právna úprava zvereneckého fondu by mohla posilniť dôveru veriteľov, zvýšiť transparentnosť reorganizačných procesov a prispieť k zachovaniu hospodárskej hodnoty podniku.

De lege lata však zverenecký fond nie je v slovenskom právnom prostredí aplikovateľný. Chýba mu legislatívne zakotvenie, definícia právnej povahy, jasné vymedzenie vzťahu k insolvenčným konaniam,

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[32] Bližšie pozri napr. GYÁRFÁŠ, J. § 39 [Neplatnosť právneho úkonu pre rozpor so zákonom alebo jeho obchádzanie alebo pre rozpor s dobrými mravmi]. In ŠTEVČEK, M. – DULAK, A. – BAJÁNKOVÁ, J. – FEČÍK, M. – SEDLAČKO, F. – TOMAŠOVIČ, M. a kol.: *Občiansky zákonník I. (§ 1 – 450) Komentár*. 2. vydanie Praha: C. H. Beck, 2019, s. 275-304.

[33] VITOUL, V. Svěřenský fond a jeho místo v českém právním prostředí [online]. In *Dny práva 2012. Část V. - Komplexní reforma soukromého práva.* Brno: Masarykova univerzita, 2013, s. 1248. Dostupné na internete: https://www.law.muni.cz/sborniky/dny_prava_2012/files/reforma/VitoulVlastimil.pdf [cit. 2025-10-30].

ako aj mechanizmy transparentnosti a dohľadu. Ak by bol zriadený len na základe zmluvy, mohol by byť vystavený riziku neplatnosti a odporovateľnosti, čím by stratil právnu funkciu ochrany majetku.

De lege ferenda preto možno odporúčať systematické zakotvenie zvereneckého fondu do Občianskeho zákonníka ako osobitnej formy správy cudzieho majetku, a to obzvlášť v súčasnom období, keď je v Slovenskej republike realizovaná rekodifikácia súkromného práva, ako aj zriadenie s tým súvisiaceho verejného registra zvereneckých fondov a jasne definované pravidlá dohľadu, prepojenie inštitútu s insolvenčným právom, a v neposlednom rade aj zavedenie mechanizmov transparentnosti a zodpovednosti správcu.

Zverenecký fond tak možno chápať ako most medzi civilným a insolvenčným právom, medzi autonómiou podnikateľa a ochranou veriteľov, medzi individuálnou iniciatívou a kolektívnym záujmom. Ak bude legislatívne správne nastavený, môže sa stať významným nástrojom predchádzania úpadku, stabilizácie majetku a posilnenia právnej kultúry podnikania v Slovenskej republike. Domnievam sa, že zavedenie zvereneckého fondu by preto neznamenalo oslabenie veriteľov, ale naopak by posilnilo ich postavenie tým, že by chránilo jadro podniku pred znehodnotením a súčasne by umožnilo kontrolované pokračovanie podnikateľskej činnosti dlžníka.

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Smart contracts and the Data ACT[2]

Smart kontrakty a akt o údajoch

Abstract

The paper examines the evolution from electronic to blockchain-based smart contracts and their recognition under the EU Data Act. Smart contracts automate agreement execution through code, enhancing efficiency but raising legal issues of consent, capacity, and enforceability. The Data Act defines smart contracts as computer programs for automated execution and imposes safeguards such as robustness, auditability, and safe termination. Although it is not a comprehensive regulation, it integrates smart contracts into EU law and ensures their compliance with consumer protection and contract principles. Smart contracts thus complement, rather than replace, traditional contract law.
Keywords: *Smart contracts; Blockchain; Data Act; Contract law; Self-executing agreements.*

Abstrakt

Článok skúma vývoj od elektronických k blockchainovým smart kontraktom a ich uznanie podľa nariadenia EÚ o dátach (EU Data Act). Smart kontrakty automatizujú plnenie dohôd prostredníctvom kódu, čím zvyšujú efektívnosť, no zároveň vyvolávajú právne otázky týkajúce sa súhlasu, spôsobilosti a vymáhateľnosti. Data Act definuje smart kontrakty ako počítačové programy na automatizované vykonávanie a ukladá povinnosti, ako sú robustnosť, auditovateľnosť a bezpečné ukončenie. Hoci nejde o komplexnú reguláciu, integruje smart kontrakty do práva EÚ a zabezpečuje ich súlad s ochranou spotrebiteľa a základnými zásadami zmluvného práva. Smart kontrakty tak dopĺňajú, a nie nahrádzajú, tradičné zmluvné právo.
Kľúčové slová: *Smart kontrakty; blockchain; Data Act; zmluvné právo; samovykonateľné dohody*.

JEL Classification: K290

INTRODUCTION

What is a contract and how it is concluded has been a concept in development. Oral, written, tacit – from a formal performance in Roman times to cryptography. It is safe to assume that what humanity considers to be a binding agreement and how a common consensus has been reached has been evolving with the advancement of technology.

For centuries it has been assumed that enforceable agreements require the backing of the legal system. Thomas Hobbes has concluded that *"bonds of words are too weak to bridle men's ambition, avarice, anger, and other passions, without the fear of some coercive power…. But in a civill estate, where there is a Power set up to constrain those that would otherwise violate their faith, that feare is no*

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more reasonable; and for that cause, hewhich by the Covenant is to perform first, is obliged so to do."[3]. Therefore, if society is to perform its basic functions binding agreements require a system to ensure that counterparties can trust one another. In this system there is no room for private enforcement because it is inherently inconsistent with justice – the only rule is the rule of the stronger.[4]

However, the advancement of blockchain technology that has been accompanied with the so called "smart contracts" have the potential to evolve the idea how a contract is concluded and enforced. According to Savelyev *"[s]mart contracts don't [need] a legal system to exist: they may operate without any overarching legal framework. De facto, they represent a technological alternative to the whole legal system."*[5] Even though the nature of smart contracts leaves no room of the possibility of their breach[6], they don't obliterate the need for a robust system of contract law. Irrespective of the differences between continental and common law, the common function of the contract law is to but to adjudicate the grievances that may arise ex post. Contract law is "*inherently ex post".*[7] In instances when the smart contract is burdened with legal defects (unconscionability, duress or illegality) or when the smart contract doesn't represent the will of the contracting parties, the adjudication of such dispute under the umbrella of the contract law will still provide an acceptable solution to all such disputes.

In this paper we will analyse the differences between electronic and smart contracts and how the European union has through Data Act[8] recognized smart contracts and incorporated them as part of the European contract law.

By utilising descriptive analysis, comparative legal analysis and normative evaluation, the author hypothesizes that smart contracts complement but do not supplant contract law, and that the EU Data Act represents the first formal legal step toward harmonizing smart contracts within EU law.

1. ELECTRONIC VS. SMART CONTRACTS

1.1. Electronic contracts

Electronic contracts can be described as a process of concluding contracts using technology. Electronic contracts are a modern variation of so-called wrap contracts (shrink-wrap, click-wrap, browse-wrap). What these contracts have in common is that the actual contract is "wrapped" – concluded by using a predefined process. Physical presence of the counterparty is not required, nor it's express will to conclude the contract with contracting party. Electronic contracts share a commonality with in that they are essentially manual contracting processes that have simply placed contractual terms on a different platform.[9]

The analogue predecessor of electronic contracts was the 'shrink-wrap' agreement. As the term suggests, it is a contract enclosed within a shrinkable material. This is an apt description for a contract that is concluded by unwrapping the packaging. This type of agreement was used with physical carriers of copyrighted works. The most common example of a shrink-wrap agreement was software distributed in packaging such as Blu-ray, DVD or CD. The essence of the shrink-wrap agreement was that by

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3 HOBBES, T.: *Thomas Hobbes, Leviathan (1909 ed),* page 91 [online] [Accessed 27.09.2025] Available at: http://files.libertyfund.org/files/869/Hobbes_0161_EBk_v6.0.pdf

4 RIPSTEIN, A.: *Private Order and Public Justice: Kant and Rawls,* Virginia Law Review, Vol. 92:1391, page 1418, [online] [Accessed 27.09.2025] Available at: https://www.virginialawreview.org/wp-content/uploads/2020/12/1391.pdf

5 SAVELYEV, A. Contract law 2.0: *'Smart' contracts as the beginning of the end of classic contract law.* In: Information & Communications Technology Law, page 21 [online]. 2017, Vol. 26, No. 2. [Accessed 27.09.2025] DOI: 10.1080/13600834.2017.1301036

6 CHRISTIDIS, K., DEVETSIKIOTIS, M.: *Blockchains and Smart Contracts for the Internet of Things.* In: *IEEE Access* page 2296 [online] 2016, Vol. 4. [Accessed 27.09.2025] DOI: 10.1109/ACCESS.2016.2566339

7 CORNELL, N.: *A complainant-oriented approach to unconscionability and contract law* In: University of Pennsylvania Law Review, page 1135 [online]. 2016, Vol. 164. [Accessed 27.09.2025] Available at: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=9524&context=penn_law_review

8 Regulation (EU) 2023/2854 of the European parliament and of the Council of 13 december 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act)

9 ECK, M. van, AGBEKO, F.D. The Recognition and Regulation of Smart Contracts in South Africa. In: *Potchefstroom Electronic Law Journal* [online]. 2024, Vol. 27. DOI: 10.17159/1727-3781/2024/v27i0a16383

breaking the foil—subsequently shrinking—around the package containing the physical medium a legal fiction of consent to enter into a licence agreement for the software was established.[10]

Although this method of software distribution is still possible, shrink-wrap agreements have largely been superseded by more modern dissemination of copyrighted works via the Internet. However, the concept of a 'wrap' remains. This is the fact that the electronic contract is 'wrapped' in a tangible form. The distinguishing feature of other 'wrap' agreements compared to shrink-wrap agreements is the transfer of this contract formation process into a fully digital form. In electronic contracts, instead of foil, the 'packaging' became data that identifies whether the user has expressed consent.

The essence of a click-wrap agreement is that the user agrees to the terms and conditions of use by clicking a button labelled 'I Agree', 'I Accept' or a similar expression of consent. The user must click the button to manifest their agreement. The contract terms are typically presented to the user in a visible format such as a hyperlink or the full text. Click-wrap agreements have been subject to judicial review both at the national and at the European level. The European Court of Justice (ECJ) in cases Majdoub v. CarsOnTheWeb., Deutschland GmbH[11] and Cobult UG v. TAP Air Portugal SA[12] dealt with the question of compliance of a click-wrap contract with the requirement of written form. In both cases the ECJ concluded that click-wrap contracts were valid even though one of the contracting parties was a consumer.

1.2. Automation of Electronic contracts

While shrink-wrap, click-wrap, browse-wrap contracts still require a manual input to be successfully concluded, the next step in the evolution of electronic contracts was their automation.

According to Van Eck and Agbeko the first step towards automation was the data-orientated contract[13]. In a data-orientated contract "*the parties have expressed one or more terms or conditions of their agreement in a manner designed to be processable by a computer system"*[14] Data-orientated contracts differentiate from their predecessors by representing contract terms in structed data instead of natural language.[15] Surden gives examples of a data-oriented contract by including terms such as: <Option_Expiration_Date: 01/18/2015> or <Exercise_Price:$400> within the structure of the contract.[16] Therefor a data-oriented contract is a formal, machine-readable agreement that defines the structure, quality, and semantic meaning of data, ensuring data reliability and consistent quality between data producers and consumers. Prime example of a data-orientated contracts are financial contracts primarily expressed as data. Another example is a fitness service's user data table, specifying that the email field must be a valid email format and the <customer_ID> must be non-empty to enforce these rules during data ingestion.

In Surden's electronic contracts typology the next step above data-orientated contracts was a "computable" contract. The difference a data-orientated contract and a computable contract is the level of automation. A computable contract is always a data-orientated contract which includes autonomous pre-defined conditions under which a computer can conclude or settle contracts. Surden's presents an example when a party attempts to execute an option on February 1, 2015, but the option expired earlier on January 18, 2015, a system might compute that this date has expired and react appropriately. This might include disallowing execution, or flagging erroneously executed contracts.[17]

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10 ADAMOVÁ, Z., HAZUCHA, B.: *Autorský zákon.* 1. vydanie. Bratislava: C. H. Beck, 2018, s. 482.

11 ECJ case C-322/14 Majdoub v. CarsOnTheWeb., Deutschland GmbH, ECLI: ECLI:EU:C:2015:334

12 ECJ case C-76/23 Cobult UG v. TAP Air Portugal SA., ECLI: ECLI:EU:C:2024:253

13 Op. cit. 8 page 3

14 SURDEN, H.*: Computable Contracts,* In: UC Davis Law Review, Vol. 46, No. 629, 2012, page 639 [online] [Accessed 27.09.2025] Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216866

15 Ibid., page 648

16 Ibid., page 649

17 Ibid., page 661

Van Eck and Agbeko point out that the inherent flaw of computable and data-orientated contracts is their limitation rooted in their pre-determined (or pre-programmed) scenarios set out in the computer code.[18] However, the removal of human factor in negotiating, forming, performing, and enforcing contracts in favour of automation by computers resulted in a dramatic reduction transaction costs[19]. It is no surprise that these contracts are widely used in finance and insurance.

In 1997 cryptographer Nick Szabo coined the term "smart contract" based on cryptography as self-executing and self-enforcing.[20] Smart contracts *"involve trusted third parties, exemplified by an intermediary, who is involved in the performance, and an adjudicator, who is invoked to resolve disputes arising out of performance (or lack thereof). Intermediaries can operate during search, negotiation, commitment, and/or performance. Hidden knowledge, or adverse selection, occurs ex-ante; hidden actions (moral hazards) occur ex-post*." Szabo founded the concept of smart contracts on the same principles as contemporary blockchain technology. With the rise of blockchain technology Szabo's hypothetical has become reality.

2. BLOCKCHAIN

2.1. Blockchain technology

Blockchain technology is based on a blockchain. A blockchain consists of blocks with a growing list of records that are linked using cryptography which prevents alteration of the stored data. Each block in the blockchain possesses a cryptographic hash value of the previous block, a fresh timestamp, and transaction data. Blocks in the blockchain are decentralised and distributed which ensures that chain of blocks cannot be modified retroactively without affecting all subsequent blocks.[21] Key features of blockchain technology are security, transparency, decentralization, immutability, and programmability.[22] The result of creating a decentralised network is that the organizations developing the blockchain's software have no power over the network.

Blockchain technology also uses nodes and clusters. A node in a blockchain is any device (computer, server, or smart device) that connects to the blockchain network. Nodes communicate with each other in a peer-to-peer (P2P) fashion, forming the backbone of the decentralized system. Each node can store, propagate, and sometimes validate transactions and blocks, helping to maintain the integrity and security of the blockchain.[23]

2.2. Ethereum and "Turing complete"

Ethereum can be characterized as a decentralized blockchain platform that creates a peer-to-peer network, which securely executes and verifies application code known as smart contracts.[24] Because it is build on the same principles, it competes with other blockchain technologies such as Bitcoin. That means that smart contracts can be executed on any blockchain technology, but Ethereum, due to its efficiency and popularity, has become the prime blockchain technology for smart contracts.

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18 Op. cit. 8 page 3

19 Op. cit. 13 page 689

20 SZABO, N.: *Formalizing and Securing Relationships on Public Networks.* In: First Monday [online]. 1997 [Accessed 27.09.2025] DOI: 10.5210/fm.v2i9.548

21 RAJASEKARAN, A.S., AZEES, M., AL-TURJMAN, F.: *A comprehensive survey on blockchain technology.* In: Sustainable Energy Technologies and Assessments [online]. 2022, Vol. 52. [Accessed 28.09.2025] DOI: 10.1016/j.seta.2022.102039

22 KUNDRÁT, M.: *Blockchain technológia ako dôkazný prostriedok,* Bulletin slovenskej advokácie 7-8/2021, str. 22-23

23 GUPTA, S., SADOGHI, M.: *Blockchain Transaction Processing*. 2019, page 3, [online] [Accessed 28.09.2025]. DOI: 10.1007/978-3-319-77525-8_333

24 *What is Ethereum?* https://aws.amazon.com/web3/what-is-ethereum/ [Accessed 28.09.2025]

Ethereum is also distinguished from Bitcoin by being 'Turing complete'. This means that any programme of any complexity can be processed by a computer. [25] In the context of smart contracts, Turing completeness refers to the ability of a contract's programming language to express any computation given sufficient resources.[26] This expressiveness has enabled decentralized finance, token standards, multi-party protocols, and experimental workloads that push on-chain computation boundaries. In real world applications Turing complete smart contracts have many use cases, such as financial services, digital identity management, supply chain management, health care industry.[27]

However, due to their complexity Turing-complete smart contracts come with higher risks than competing non-Turing-complete smart contracts. Tikhomirov points out that Ethereum smart contracts suffer from vulnerabilities caused by their complex programming language which must be constantly maintained and updated. Another risk factor is that *"Ethereum, guarantee integrity and availability, but provide little to no privacy"*.[28]

According to a study published in 2019 a far larger number of smart contracts do not need Turing complete languages for their formulation which will result in higher security.[29] The researchers propose a dual approach: one non-Turing complete language for smart contracts and a second programming language that enables the execution of Turing complete smart contracts. Their proposition reflects the dual approach to smart contracts between Ethereum and Bitcoin. Ethereum employs Turing complete programming while Bitcoin uses a non-Turing complete language.

3. SMART CONTRACTS

3.1. What is a smart contract

Szabo in 1996 defined a smart contract as *"a set of promises, specified in digital form, including protocols within which the parties perform on these promises"*[30] In 1996 Szabo's definition of a smart contract was just a hypothesis. This changed with the arrival of blockchain technology. Even tough Szabo's definition remains true even today, the definition of a smart contract has shifted. For example, Wang et alia define smart contracts as "*computer protocols that digitally facilitate, verify, and enforce the contracts made between two or more parties on blockchain."*[31] Sharma et alia defines a smart contract as *"a digital transaction that runs, executes, and records the dynamic operation on the ledger automatically."*[32] Finally, there is the legal definition of a smart contract. According to the Data Act smart contract means *"a computer program used for the automated execution of an agreement or part*

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[25] ANTONOPOULOS, A.M., PH.D, G.W. *Mastering Ethereum: Implementing Smart Contracts*. 2ND EDITION [s.l.]: O'Reilly Media, Inc., 2025, page 28

[26] TIKHOMIROV, S.: *Ethereum: State of Knowledge and Research Perspectives.* In: Imine, A., Fernandez, J., Marion, JY., Logrippo, L., Garcia-Alfaro, J. (eds) Foundations and Practice of Security. FPS 2017. Lecture Notes in Computer Science, vol 10723. Springer, Cham. [online] [Accessed 28.09.2025] https://doi.org/10.1007/978-3-319-75650-9_14

[27] KUSHWAHA, S.S. et al.: *Ethereum Smart Contract Analysis Tools: A Systematic Review.* In: IEEE Access [online]. 2022, Vol 10. [Accessed 28.09.2025] DOI: 10.1109/ACCESS.2022.3169902

[28] Op. cit. 25

[29] JANSEN, M., HDHILI, F., GOUIAA, R., QASEM, Z.: *Do Smart Contract Languages Need to Be Turing Complete?*. In: Prieto, J., Das, A., Ferretti, S., Pinto, A., Corchado, J. (eds) Blockchain and Applications. BLOCKCHAIN 2019. Advances in Intelligent Systems and Computing, Vol. 1010. Springer, Cham. [Accessed 28.09.2025] https://doi.org/10.1007/978-3-030-23813-1_3

[30] SZABO, N.: *Smart Contracts: Building Blocks for Digital Markets.* (1996) [online]. [Accessed 28.09.2025] https://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart_contracts_2.html

[31] WANG, S. et al.: *Blockchain-Enabled Smart Contracts: Architecture, Applications, and Future Trends*. In: IEEE Transactions on Systems, Man, and Cybernetics: Systems [online]. 2019, Vol. 49. [Accessed 28.09.2025] DOI: 10.1109/TSMC.2019.2895123

[32] SHARMA, P. et al.: *A review of smart contract-based platforms, applications, and challenges.* In: Cluster Computing [online]. 2022, Vol. 26. [Accessed 28.09.2025] DOI: 10.1007/s10586-021-03491-1

thereof, using a sequence of electronic data records and ensuring their integrity and the accuracy of their chronological ordering".[33]

The inclusion of smart contracts in the Data Act has resolved the debate regarding their classification as contracts for the purposes of contract law.[34] The common denominator of the above-mentioned definitions of smart contracts is their automated execution. From the perspective of contract law, automated execution means loss of agency of the contracting parties in favour of automated system based on programming code.

Werbach and Cornell emphasise four contentious areas of smart contracts from the perspective of contract law:

a) expression of the parties' mutual intent[35] - for example, if the smart contract refers to good delivered by a ship named Enterprise, but there are several ships of that name, standard contract law can hold the agreement unenforceable. The second problem is when the smart contract but does not represent the intent of the parties, for example, if a party enters into an agreement due to fraud or duress;
b) consideration[36]– as consideration distinguishes contracts from unenforceable gifts, Werbach and Cornell point out that for smart contracts there is no test for consideration.: *"there is nothing stopping someone from encoding a gift promise to the blockchain. Such a promise would execute irrevocably, in the same manner as any other smart contract"*;
c) legal capacity[37] – similarly as with consideration, a smart contract doesn't know whether the contract has been concluded with a person without legal capacity.
d) legality of smart contracts[38] - Werbach and Cornell raise the question whether smart contracts are legally binding and enforceable. To this objection we would like to point out that Werbach and Cornell published their article in 2017. Since then, this objection has been addressed by the Data Act. However, there are still jurisdictions where smart contracts are not explicitly recognised and are either treated in conjunction with other automated electronic contracts[39] or within the general framework of contract law.

3.2. Smart contracts from a technical perspective

From a technical perspective smart contract is a source code, a computer program built on the fulfilment of "if/when…then…" conditions. An example of a smart contract could be if John decides to buy something, he sets the following parameters for concluding the purchase: if you provide this contract with 5 units of X, the contract will return 1 unit of Y.

Smart contracts always produce the same result – they have a deterministic nature. A smart contract that would not be deterministic, meaning it could produce different outcomes, either cannot be deployed on blockchain technology at all, or the system will reject it.[40] Given that smart contracts are based on the fulfilment of predetermined conditions, they are self-executing as soon as those conditions are met.[41]

Because of their technical nature, smart contracts have certain advantages[42], such as:

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33 Article 2(39) of the Data Act
34 WERBACH, K., CORNELL, N.: *Contracts Ex Machina,* 67 *D*uke *Law Journal* (2017), page 338 [Accessed 28.09.2025] DOI: 10.5040/9781509937059.ch-001
35 Ibid., page 368
36 Ibid., page 370
37 Ibid., page 371
38 Ibid., page 372
39 Op. cit. 8, page 11
40 Op. cit. 5
41 *Ethereum's Smart Contracts Explained,* DELTEC BANK & TRUST LIMITED, https://www.deltecbank.com/news-and-insights/ethereums-smart-contracts-explained/ [online] [Accessed 30.09.2025]
42 Op. cit. 5

a) the contracting parties can review the code and identify its outcomes before deciding to conclude the contract,
b) the contracting parties have certainty of contract performance, since the smart contract code is already deployed on a network that neither party fully controls,
c) he trustworthiness of the entire process, as all interactions are electronically signed.

Despite these advantages, the deterministic nature and self-executing character of smart contracts could be considered their most significant challenges for which the tools of contract law may provide effective remedies. Consideration provided under a defective smart contract may be lost permanently.

3.3. The issues with self-execution

Werbach and Cornell note that there is no mechanism to prevent a smart contract from implementing an unconscionable term or one that incorporates liquidated damages amounting to a penalty. A courts decision finding contractual terms unenforceable may have no practical effect, because the contract will be performed regardless.[43] Contractual terms are encoded in a distrubuted blockchain without any authority's power to prevent the execution of the contract.

Van Eck and Agbeko argue that self-executing smart contracts provide no consumer protection. For instance, in the EU consumers have a right of withdrawal from a distance or off-premises contract without providing a reason or incurring any costs.[44] Unless an exception is provided, the self-executing nature of a smart contract used to provide goods or services precludes a consumer from withdrawing from the contract. Therefore, if a smart contract is intended to facilitate consumer contracts, the relevant consumer protection law must be adhered to. This can be addressed by hardcoding a 'kill-switch' to smart contracts which would grant consumers the right to a cooling-off period or the right to terminate the contract.[45] The "kill-switch" would have to be an ex post tool terminating the self-executed contracted to the moment of its self-execution. As we explain in the next chapter, the Data Act has a similar requirement for data sharing through smart contracts.

4. THE DATA ACT

4.1. What is the Data Act

The Data Act is not a comprehensive regulation on smart contracts. Its purpose is to regulate data transfers of data generated by businesses and consumers by *"laying down a harmonised framework specifying who is entitled to use product data or related service data, under which conditions and on what basis."*[46] To be more specific, the Data Act is the European Union's recognition of the vast volumes of data generated by digital services and connected electronics such as cars, smart televisions and industrial machinery.

Because this data is further processed and utilised for commercial purposes, the Data Act brings a unified set of rules which:

a) ensure connected devices on the EU market are designed to allow data sharing,
b) provide consumers with the ability to choose more services without relying on the manufacturer of the device,

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43 Op. cit. 33, page 373

44 Article 9 of the 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

45 Op. cit. 8, page 15

46 Recital 4 of the Data Act

c) grant business users in industries such as manufacturing or agriculture access to data about the performance of industrial equipment, thereby opening opportunities to enhance efficiency and optimise operations,
d) permit consumers to easily transfer data and switch between cloud providers,
e) prohibit unfair contracts that could prevent data sharing.[47]

The Data Act clearly states that users must consider other regulations including consumer law[48], national contract law, including rules on the formation, validity or effect of contracts, or the consequences of the termination of a contract.[49] In other words, smart contracts under The Data Act are not to replace contract law which continues to provide an ex post system of dispute resolution.

4.2. The Data Act and smart contracts

As previously mentioned, a smart contract is defined under the Data Act as a computer programme used for the automated execution of an agreement or part thereof. It employs a sequence of electronic data records to ensure their integrity and chronological accuracy.[50]

The Data Act imposes limitations and protections in data sharing that prevent a smart contract from being irreversibly executed. It should be considered another regulatory framework, alongside consumer law, that restricts the finality of self-executed transactions.

Under Article 36 of the Data Act smart contracts are required to:

a) guarantee robustness to avoid functional errors and withstand manipulation by third parties and access control to offer access control mechanisms,
b) allow safe termination and interruption to prevent continued execution of transactions and the ability to reset smart contracts.
c) provide data archiving and continuity so that when a smart contract is terminated or deactivated, there is a possibility to archive the transactional data. For this purpose, smart contracts must be auditable through their logic and code,
d) access control to ensure a smart contract is protected through rigorous access control mechanisms at the governance and smart contract layer,
e) be consistent. This requirement should provide consistency with the terms of the data sharing agreements.

Anyone wishing to deploy smart contracts must perform a conformity assessment in accordance with the above-mentioned requirements.[51] To facilitate the easier deployment of smart contracts under the Data Act, the EU Commission shall publish common specifications covering any or all of the essential requirements.[52]

As previously mentioned, the Data Act is not intended to be a comprehensive regulation of smart contracts. On the contrary, the Data Act represents partial regulation covering data exchange. Individuals whose trade, business or profession involves the deployment of smart contracts in data exchange must therefore always be aware of specific regulation, primarily consumer law, which is harmonised within the EU and grants specific rights to consumers. The requirement for safe termination and interruption

47 Data Act | Shaping Europe's digital future. [online] [Accessed 5.10.2025] https://digital-strategy.ec.europa.eu/en/policies/data-act
48 Recital 4 of the Data Act
49 Recital 9 of the Data Act
50 Article 2(39) of the Data Act
51 Article 36(2) of the Data Act
52 Article 36(6) of the Data Act

of smart contracts when implemented in tandem with EU consumer law should be able to satisfy consumer protections.

However, in instances where the Data Act is not applicable, for example when selling goods or services to consumers that are not 'connected products', harmonised standards for smart contracts published by the EU Commission under the Data Act could be a useful guide for any business wishing to deploy them.

CONCLUSION

Smart contracts, as analyzed in the article, represent an evolution how agreements are concluded and enforced, moving from manual or digitized processes toward autonomous execution via blockchain technology. However, despite their deterministic technical architecture and promise of increased efficiency, they do not supplant the necessity for robust contract law, which remains essential for resolving disputes and providing vital consumer and party protections.

This paper demonstrates that smart contracts can automate and secure contractual transactions, but their self-executing nature creates novel challenges from a legal perspective, especially regarding unconscionable terms, duress, illegality, and the possible loss of remedy for defective contracts. Importantly, the article underscores that core functions of contract law—such as adjudicating ex post grievances and discerning party intent—cannot be replaced entirely by code or trust in blockchain technology.

The European Union's Data Act is a crucial step toward integrating smart contracts within established contract law frameworks. It addresses risks posed by self-execution by imposing requirements for robustness, the ability to safely terminate contracts, access controls, and auditable logic—all designed to protect parties. However, the Data Act does not provide a comprehensive regulation for smart contracts. Those planning to deploy them must consider specific regulatory requirements including consumer law. When used outside data exchange of connected products the EU Commission's harmonised standards for smart contracts can serve as an inspiration.

In conclusion, smart contracts offer unprecedented opportunities for automating agreements and reducing transactional costs but must be viewed as a complement, not a substitute, to contract law—especially in light of their technical determinism and risks posed by self-execution. Legal frameworks like the Data Act provide necessary safeguards, ensuring that decentralized digital agreements remain just, auditable, and subject to ex post legal remedies. The future of automated contracting will depend on this dynamic balance between technological innovation and adaptive, robust legal regulation.

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Employer's civil liability towards third parties for damage caused by an employee in the light of Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work[2]

Občianskoprávna zodpovednosť zamestnávateľa voči tretím osobám za škodu spôsobenú zamestnancom v svetle smernice (EÚ) 2024/2831 Európskeho parlamentu a Rady zo 23. októbra 2024 o zlepšovaní pracovných podmienok v platformovej práci

Abstract

The article examines the significance of Directive (EU) 2024/2831 for the employer's civil liability for damage caused to a third party by an employee performing work through a digital platform with the involvement of automated monitoring and decision-making systems. Directive (EU) 2024/2831 itself is not dedicated to the employer's liability for damage caused to a third party. This Directive aims to improve working conditions and the protection of personal data in platform work. However, Directive (EU) 2024/2831 contains important provisions demonstrating the legislative direction adopted by the EU in respect of so-called automated decisions made using AI systems. Therefore, the legal solutions contained in Directive (EU) 2024/2831, considering their universal scope, are also relevant to the analysed employer's liability.
Keywords: *employer's civil liability, Directive (EU) 2024/2831, artificial intelligence, automated monitoring systems, automated decision-making systems, EU legislation.*

Abstrakt

Článok skúma význam smernice (EÚ) 2024/2831 pre občianskoprávnu zodpovednosť zamestnávateľa za škodu spôsobenú tretej osobe zamestnancom vykonávajúcim prácu prostredníctvom digitálnej platformy s využitím automatizovaných monitorovacích a rozhodovacích systémov. Smernica (EÚ) 2024/2831 sama osebe nie je zameraná na zodpovednosť zamestnávateľa za škodu spôsobenú tretej osobe. Jej cieľom je zlepšiť pracovné podmienky a ochranu osobných údajov pri platformovej práci. Smernica však obsahuje dôležité ustanovenia, ktoré naznačujú legislatívny smer EÚ vo vzťahu k tzv. automatizovaným rozhodnutiam prijímaným s využitím systémov umelej inteligencie. Preto sú právne riešenia obsiahnuté v smernici (EÚ) 2024/2831, vzhľadom na ich všeobecnú povahu, relevantné aj pre analyzovanú zodpovednosť zamestnávateľa.
Kľúčové slová: *občianskoprávna zodpovednosť zamestnávateľa, smernica (EÚ) 2024/2831, umelá inteligencia, automatizované monitorovacie systémy, systémy automatizovaného rozhodovania, legislatíva EÚ.*

JEL Classification: K31, K130

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INTRODUCTION

Technological progress, including development of widely understood algorithm-based artificial intelligence, has led to a dynamic development of a phenomenon unknown so far, that is work performed through so called digital platforms.[3] Importantly, this is a worldwide phenomenon and does not relate to highly developed countries only but also to developing countries, in which digital platforms have become an opportunity to earn money for persons previously excluded from the labour market. For example, in Sub-Saharan Africa, over the last 10 years the number of digital platforms has grown by approximately 150 on a yearly average.[4]

When making an attempt to define what digital platforms are, attention should de brawn to two aspects. First, digital (Internet) platforms, in technical sense, can be defined as advanced algorithm-based technological systems. Digital labour platforms (DLP), in turn, are a concept narrower than the term 'digital platforms' since, as the name suggests, they perform a function of intermediaries in the rendition of work.[5] On the other hand, widely understood digital platforms are used to provide different types of services, such as electronic payments (e.g., PayPal), remote communication (e.g., Skype, Zoom) or rentals/sharing, for example, Airbnb.[6] Second, in the economic sense, DLPs are understood as a business model consisting in the conduct of business activities by providing and coordinating human work through specialized technological tools.[7] Under the category of DLP itself, one can distinguish: 1. web based platforms – platforms offering orders executed on an entirely remote basis (e.g., programming, translations, solving specific business problems, design works), 2. location based platforms – platforms allowing to find physical labour in a specific location (e.g., transport, courier, nursing services, professional household services).[8] Such method of conducting business activities has, in a wide perspective, given rise to the emergence of a new economy segment, referred to as "gig economy."[9] According to the World Bank's data, in 2023, gig economy made up about 12% of the global labour market.[10]

This new area of human activity in the labour domain has so far eluded the existing legal framework. This was the case for various reasons, among which one can point to the cross-border status of operators

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3 The emergence of digital platforms dates back to the 90s of the XX century. However, a rapid growth in their number and significance has only taken place in the recent years due to technological progress (high-speed Internet, access to smartphones, cloud computing and the growing capacities to extract, utilize and track data). See: International Labour Organization. Report V(1): Realizing decent work in the platform economy. Geneva: International Labour Office, 2024, p. 11. Available at: https://www.ilo.org/resource/conference-paper/ilc/113/realizing-decent-work-platform-economy, [cited 2025-09-03]. Hereinafter: ILO Report V(1).

4 CIESIELSKI, M. Platformy cyfrowe kontra nowe przepisy UE. Co czeka Ubera, Glovo i Upwork? Jak Unia zmieni zasady pracy? Available online at: https://homodigital.pl/rosnie-znaczenie-platform-cyfrowych-na-rynku-pracy-co-to-jest-gig-economy/, [cited 2025-09-03].

5 See: the ILO Report V(1), p. 43–48.

6 TUSIŃSKA, M. The Business Model of Digital Labour Platforms and the Income of Platform Workers in Poland: Theory and Practice. In Krakow Review of Economics and Management / Zeszyty Naukowe Uniwersytetu Ekonomicznego w Krakowie. 2024, iss. 3(1005), p. 86. Available at: https://doi.org/10.15678/krem.9844, [cited 2025-09-03].

7 *Ibid*., p. 84–85.

8 CIESIELSKI, M., *op. cit.* Available at: https://homodigital.pl/rosnie-znaczenie-platform-cyfrowych-na-rynku-pracy-co-to-jest-gig-economy/, [cited 2025-09-03].

9 See: the ILO Report V(1), p. 11; COLLIER, R.B. *et al.* Labor Platforms and Gig Work: The Failure to Regulate. In IRLE Working Paper. 2017, no. 106-17, 1–23. Available at: https://doi.org/10.2139/ssrn.3039742, [cited 2025-09-03]; DE STEFANO, V., ALOISI, A. European Legal framework for digital labour platforms. European Commission. Luxembourg: Publications Office of the European Union, 2018, p. 5–54; HEALY, J. *et al.* Should we take the gig economy seriously? In Labour and Industry. Vol. 27, 2017, iss. 3, p. 232–248. Available at: https://doi.org/10.1080/10301763.2017.1377048, [cited 2025-09-03]; MYHILL, K. *et al.* Job Quality, Fair Work and Gig Work: The Lived Experience of Gig Workers. In The International Journal of Human Resource Management. Vol. 32, 2021, no. 19, p. 4110–4135. Available at: https://doi.org/10.1080/09585192.2020.1867612, [cited 2025-09-03]; VALLAS, S., SCHOR, J.B. What Do Platforms Do? Understanding the Gig Economy. In Annual Review of Sociology. Vol. 46, 2020, p. 273-288. Available at: https://doi.org/10.1146/annurev-soc-121919-054857, [cited 2025-09-03].

10 See: DATTA, N. *et. al.* Working Without Borders: The Promise and Peril of Online Gig Work. Washington, DC: The World Bank Group, 2023, p. 1–31. Available at: https://openknowledge.worldbank.org/handle/10986/40066, [cited 2025-09-03].

developing their business activities with the involvement of advanced technological tools (digital platforms), the structure of the adopted model of platform work, and flagrant disproportions – starting with economic and ending with technological – between the parties organizing platform work and profiting from such work, on the one hand, and natural persons performing the work, on the other. The new "platform" working environment, developing in the context of extreme inequivalence between the parties to legal relationships brought about a lack of adequate legal protection of the persons rendering work. Moreover, as far as persons performing work through digital platforms are concerned, their labour rights have not been expressly guaranteed under any directly dedicated piece of legislation. As a result of the above, there have been real difficulties when it came to invoking or enforcing such rights. The structure of the adopted model of platform work was also conducive to a blurring of the role of operators organising and profiting from platform work, who – in the circumstances of a specific case– often should have been attributed the status of employer. At the same time, problems were observed with identifying the legal relationship between the parties to a platform work arrangement as an employment relationship. It is estimated that in the European Union alone approximately 5.5 million of platform workers are potentially misclassified as self-employed persons.[11] The parties organising and profiting from platform work often define their relationships with the persons performing the work as cooperation with independent contractors. As a consequence of such model of operation, persons rendering platform work are left without the protection offered by the provisions of labour law, for example, in the form of minimum wage, paid annual leave, the right to rest periods or working time restrictions. On the other hand, however, as made clear in the case-law of national courts in the Member States of the EU, persons performing work through DLP, in many cases, meet the criteria of an employee. This is the case because such persons, when rendering work, are actually subject to supervision and control by the platforms, and specific rules are imposed on them as regards the use of applications or implementation of tasks for DLP customers.[12]

The phenomenon of performing work through digital platforms is related to so called algorithmic management. This term is defined as "the use of computer-programmed procedures for the coordination of labour input in an organization. (…) Algorithmic management is associated with many key digital technologies: big data analytics, machine learning, geolocation, connected mobile devices, wearables, etc. It should be understood as a specific way of combining and using those technologies to automate or at least support some of the functions previously carried out by human management for the coordination of work. In this sense, algorithmic management is a socio-technical process."[13] Algorithmic management involves automatic systems that simultaneously direct, evaluate, and discipline employees, reducing the role of human managers to appropriate responses to system requests for intervention.[14]

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11 TOMASZEWSKA, M. *Pracownicy platform internetowych – co zmieni się w ich statusie i pozycji w związku z nową unijną regulacją*. 2024. LEX/el. Available at: https://sip-1lex-1pl-15d274sqk11cf.han.bg.us.edu.pl/#/publication/47028 2378/tomaszewska-monika-pracownicy-platform-internetowych-co-zmieni-sie-w-ich-statusie-i-pozycji-w...?keyword= Pracownicy%20platform%20internetowych&cm=SFIRST, [cited 2025-09-03].

12 *Ibid*., TOMASZEWSKA, M. Available at: https://sip-1lex-1pl-15d274sqk11cf.han.bg.us.edu.pl/#/publication/470282378/ tomaszewska-monika-pracownicy-platform-internetowych-co-zmieni-sie-w-ich-statusie-i-pozycji-w...?keyword= Pracownicy%20platform%20internetowych&cm=SFIRST, [cited 2025-09-03].

13 BAIOCCO, S. *et al.* The Algorithmic Management of work and its implications in different contexts: Background Paper Series of the Joint EU-ILO Project "Building Partnerships on the Future of Work". Brussels: International Labour Organization, European Commission. 2022, p. 5, 8. Available at: https://www.ilo.org/sites/default/files/wcmsp5/groups/ public/%40ed_emp/documents/publication/wcms_849220.pdf, [cited 2025-09-03].

14 BARAŃSKI, M., GREDKA-LIGARSKA, I. Autonomous subordination and technological subordination as new concepts of subordinate work – in search of a new regulatory model. In Praca i Zabezpieczenie Społeczne / Labour and Social Security Journal. 2025, No. 3, p. 23. DOI 10.33226/0032-6186.2025.3.4; WOOD, A.J. Algorithmic Management: Consequences for Work Organisation and Working Conditions. Seville: European Commission, 2021, JRC124874, no. 7, p. 12. Available at: https://publications.jrc.ec.europa.eu/repository/handle/JRC124874, [cited 2025-09-03]. See also: WOOD, A.J. *et al.* Good Gig, Bad Gig: Autonomy and Algorithmic Control in the Global Gig Economy. In Work, Employment and Society. Vol. 33, 2019, iss. 1, p. 56–75. Available at: https://doi.org/10.1177/0950017018785616, [cited 2025-09-03]; TODOLI-SIGNES, A. The End of the Subordinate Worker? The On-Demand Economy, the Gig Economy, and the Need for Protection for Crowdworkers. In International Journal of Comparative Labour Law and Industrial

In the face of the growing problems and a specific legal loophole, the Union legislator decided to address the phenomenon of work on digital platforms by introducing provisions granting specific rights to persons who perform platform work and by imposing obligations on economic operators using this method of conducting business activity. Appropriate rules were laid down in Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work.[15] A deadline was imposed on the Member States of the EU to implement the Directive in their national jurisdictions within 2 December 2026.[16]

Under Directive (EU) 2024/2831, 'digital labour platform' was defined as: ″a natural or legal person providing a service which meets all of the following requirements: (i) it is provided, at least in part, at a distance by electronic means, such as by means of a website or a mobile application; (ii) it is provided at the request of a recipient of the service; (iii) it involves, as a necessary and essential component, the organisation of work performed by individuals in return for payment, irrespective of whether that work is performed online or in a certain location; (iv) it involves the use of automated monitoring systems or automated decision-making systems″. At the same time, in the Directive itself, a wide subjective scope of its application was adopted, so as to cover both 'persons performing platform work' and 'platform workers'. Person performing platform work means an individual performing platform work, irrespective of the nature of the contractual relationship or the designation of that relationship by the parties involved.[17] Platform worker, on the other hand, means any person performing platform work who has or is deemed to have an employment contract or an employment relationship as defined by the law, collective agreements or practice in force in the Member States with consideration to the case-law of the Court of Justice.[18]

The research purpose of this article is to present the legal consequences Directive (EU) 2024/2831 will have for parties organising platform work who, under the provisions of the Directive, will qualify as employers. Strictly speaking, this refers to consequences in the area of the employer's civil liability towards a third party for a damage caused to that third party by a platform worker. As a matter of fact, until the present day, digital platforms could avoid such liability. However, upon the entry into force of Directive (EU) 2024/2831, the question of civil liability of digital platforms will fundamentally change.

1. DIGITAL LABOUR PLATFORM AS EMPLOYER – LEGAL PRESUMPTION ESTABLISHED IN DIRECTIVE (EU) 2024/2831

A crucial legal instrument introduced under Directive (EU) 2024/2831 is a legal presumption that the contractual relationship between a digital labour platform and a person performing platform work through that platform is an employment relationship if facts are found pointing to the platform's direction and control, in accordance with national law, collective agreements or practice in force in the Member States and with consideration to the case-law of the Court of Justice.[19] The introduction by the Union legislator of the presumption of an employment relationship deserves special emphasis and recognition. First, this presumption means that, for the legal qualification of a given contractual relationship as labour relationship, the decisive factor will be the facts of a given case alone, such as performance of work by a natural person under the control and direction of a digital platform. As provided for under Art. 4(2) of Directive (EU) 2024/2831, "[t]he ascertainment of the existence of an employment relationship shall be guided primarily by the facts relating to the actual performance of

Relations. Vol. 33, 2017, iss. 2, p. 241 – 268; BĄBA, M. Employment With the Use of Artificial Intelligence: Opportunities and Risks. In Studia z Zakresu Prawa Pracy i Polityki Społecznej / Studies on Labour Law and Social Policy. Vol. 31, 2024, iss. 3, pp. 195–209. Available at: https://doi.org/10.4467/25444654SPP.24.013.19928, [cited 2025-09-03].

15 Regulation (EU) 2024/2831. Available at: https://eur-lex.europa.eu/eli/dir/2024/2831/oj, [cited 2025-09-03]. Hereinafter: Directive (EU) 2024/2831.

16 See Art. 29(1) of Directive (EU) 2024/2831.

17 Art. 2(1)(c) of Directive (EU) 2024/2831.

18 Art. 2(1)(d) of Directive (EU) 2024/2831.

19 See Art. 5(1) of Directive (EU) 2024/2831.

work, including the use of automated monitoring systems or automated decision-making systems in the organisation of platform work, irrespective of how the relationship is designated in any contractual arrangement that may have been agreed between the parties involved." Second, it is extremely important and practically consequential that the person performing platform work – being definitely the weaker party to the legal relationship – is relieved from the burden of proving the existence of a labour relationship. By introducing the presumption of employment relationship, the Union legislator shifted the burden of proof to digital labour platforms. This presumption is rebuttable. If the digital labour platform negates the fact of establishing a labour relationship with a person performing platform work and intends to rebut the legal presumption, the digital labour platform must prove that the given legal relationship is not an employment relationship as defined by the law, collective agreements or practice in force in the Member States, with consideration to the case-law of the Court of Justice.[20]

The purpose of the legal presumption under Art. 5 of Directive (EU) 2024/2831 is to enhance protection offered to platform workers and to prevent the phenomenon of improper classification of employment.[21] However, apart from implementing that key purpose, the presumption of an employment relationship between a digital labour platform and a natural person performing platform work will have yet another essential legal consequence. Namely, unless the discussed presumption is rebutted in a particular case, it will result in the qualification of a specific DLP as employer in relation to a specific natural person rendering platform work under a legal relationship concluded between the parties. This means, in turn, that in case of a damage caused to a third party by such employee in performance of platform work, the digital labour platform, classified as employer, will incur civil liability. This is an important reform of the legal framework since, due to the legal presumption of an employment relationship, legal protection will be enhanced not only in relation to persons performing platform work but also in relation to third parties that can suffer damage in the course of performance of such work. As far as the damage is concerned, one can point to a wide spectrum of potential detriments. This can be both personal injuries or damages to human property, or non-material damages. The type of damage that can be caused will depend on the character of platform work. In case of entirely virtual work (e.g., programming, designing, translating of text, solving business problems) both material damage and non-material damage can be caused, the latter, e.g., in relation to an infringement of the third party's personal interests. If, on the other hand, platform work is rendered in the physical environment (e.g., courier services, food supply, transport of persons), it inseparably involves a risk of the employee causing a personal injury or damage to human property.

The injured person can be a random third party unrelated to the DLP by any legal relationship, e.g., a random pedestrian in the street who was knocked over by a bicycle/electric scooter/car driven by a person providing services to the digital labour platform (employer). In such situations, vicarious liability will apply, which is a type of tortious liability.[22] This is the employer's liability for another person's act, i.e. for a damage caused to a third party by an employee in performance of employee duties. Bearing in mind that tortious law has not been harmonised on the EU level, we cannot talk about a uniform vicarious liability construction for all Member States of the Union.[23] However, in principle, when it comes to vicarious liability, the basis of the employer's liability is damage caused to a third party through an employee's fault.[24] The lack of the employee's fault exempts the employer from liability.

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[20] See Art. 5(1), second sentence, of Directive (EU) 2024/2831.

[21] TOMASZEWSKA, M., *op. cit.* Available at: https://sip-1lex-1pl-15d274sqk11cf.han.bg.us.edu.pl/#/publication/470282378/tomaszewska-monika-pracownicy-platform-internetowych-co-zmieni-sie-w-ich-statusie-i-pozycji-w...?keyword=Pracownicy%20platform%20internetowych&cm=SFIRST, [cited 2025-09-03].

[22] For more on vicarious liability, see: GREDKA-LIGARSKA, I. Employer's Vicarious Liability for Damage Caused by an AI Worker: Comparative Law Perspective. In Utrecht Law Review. Vol. 21, 2025, iss. 1, p. 36–48. Available at: https://utrechtlawreview.org/articles/10.36633/ulr.1063, [cited 2025-09-03].

[23] TJONG TJIN TAI, E. Liability for AI Decision-Making. In The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics. DiMatteo L.A. *et al.* (eds.). Cambridge: Cambridge University Press, 2022, p. 124.

[24] BECKERS, A., TEUBNER, G. Three Liability Regimes for Artificial Intelligence: Algorithmic Actants, Hybrids, Crowds. Oxford, London, New York, New Delhi, Sydney: Hart Publishing, 2021, p. 80.

The injured party can also be the addressee of services rendered by the platform worker, that is the customer of the digital platform. If the action performed by the platform worker that led to the occurrence of damage was a component of the digital platform's rendition under the obligational relationship between the platform and the platform's customer, contractual liability will come to the fore.[25] In the Member States of the EU, as a rule, we have to do with fault-based contractual liability.[26]

2. NEW LEGAL OBLIGATIONS FOR DIGITAL LABOUR PLATFORMS UNDER DIRECTIVE (EU) 2024/2831

The discussed Directive (EU) 2024/2831 imposes on digital labour platforms requirements that have a significance not only for the legal protection of persons performing platform work but also from the perspective of protecting the interests of third parties to whom the platform's employee caused damage in performance of his or her employee duties. The obligations that are relevant from the point of view of liability of a digital labour platform as employer for a damage caused to a third party by a platform worker were contained in Art. 10 of Directive (EU) 2024/2831. When reading the provisions of Art. 10 of Directive (EU) 2024/2831 and settling merely for the literal wording of the Article, one can reach a conclusion that its provisions relate only to the rights of persons performing work through platforms and have nothing to do with the liability of DLPs as employers for damages caused to a third party by a platform employee. In fact, Article 10 of Directive (EU) 2024/2831 imposes on digital labour platforms a requirement to exercise human oversight over automated monitoring systems and automated decision-making systems. This provision obligates the Member States to introduce national legal provisions to ensure that ″digital labour platforms oversee and, with the involvement of workers' representatives, regularly and in any event every two years, carry out an evaluation of the impact of individual decisions taken or supported by automated monitoring systems and automated decision-making systems on persons performing platform work, including, where applicable, on their working conditions and equal treatment at work."[27] At the same time, digital labour platforms should ″ensure sufficient human resources for the effective oversight and evaluation of the impact of individual decisions taken or supported by automated monitoring systems or automated decision-making systems. The persons charged by the digital labour platform with the function of oversight and evaluation shall have the competence, training and authority necessary to exercise that function, including for overriding automated decisions.″[28] In addition, when as a result of such oversight or evaluation: 1). a high risk is diagnosed of discrimination at work involving the use of automated monitoring systems or automated decision-making systems, or 2). it is ascertained that individual decisions made or supported by such systems violated the rights of a person performing work through the platform, then the digital labour platform is obliged to take necessary remedial measures. As provided for under Art. 10(3) of Directive (EU) 2024/2831, such remedial measure can be appropriate modification of the automated monitoring system or the automated decision-making system, and, where appropriate, even disengagement of those systems. Special attention should also be drawn to the fact that, under Art. 10(5) of Directive (EU) 2024/2831, the Union legislator introduced a prohibition of making certain decisions exclusively by algorithm-based systems and, accordingly, a requirement that certain decisions be made exclusively by a human. Namely, this refers to "[a]ny decision to restrict, suspend or terminate the contractual relationship or the account of a person performing platform work or any other decision of equivalent detriment (…)."

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[25] MACHNIKOWSKI, P. Odpowiedzialność za podwładnego. In Acta Universitatis Wratislaviensis. 2009, No. 3161, p. 362.

[26] See: JAGIELSKA, M. Odpowiedzialność za produkt. Warsaw: Oficyna Wolters Kluwer Business, 2009, p. 22. ISBN: 978-83-7601-772-3; DE CONCA, S. Bridging the Liability Gaps: Why AI Challenges the Existing Rules on Liability and How to Design Human-empowering Solutions. In Law and Artificial Intelligence: Regulating AI and Applying AI in Legal Practice. CUSTERS, B., FOSCH-VILLARONGA, E. (eds). The Hague: T.M.C. Asser Press 2022, p. 245.

[27] See Art. 10(1) of Directive (EU) 2024/2831.

[28] See Art. 10(2) of Directive (EU) 2024/2831.

At this point, it should also be explained how the Union legislator defines the terms ‘automated monitoring systems’ and ‘automated decision-making systems’. Namely, the term ‘automated monitoring systems’ "means systems which are used for or which support monitoring, supervising or evaluating, by electronic means, the work performance of persons performing platform work or the activities carried out within the work environment, including by collecting personal data."[29] On the other hand, the expression ‘automated decision-making systems’ "means systems which are used to take or support, by electronic means, decisions that significantly affect persons performing platform work, including the working conditions of platform workers, in particular decisions affecting their recruitment, their access to and the organisation of work assignments, their earnings, including the pricing of individual assignments, their safety and health, their working time, their access to training, their promotion or its equivalent, and their contractual status including the restriction, suspension or termination of their account.″[30] To sum up, this refers to advanced systems that are based on artificial intelligence and are not so much automatic as autonomous. This means that the advancement level of such systems is already high enough that they are designed to independently achieve the prescribed objectives, including to make autonomous decisions without involvement of a human. Such systems form a basis for algorithmic management of the labour process, as already mentioned in the introduction.

Bearing in mind the provisions of Art. 10 of Directive (EU) 2024/2831, as discussed above, and settling only for the linguistic layer of that Article, it would be difficult to search for a meaning of its provisions other than directly related to persons performing work through the platforms. However, a broader look at the legal norms under Art. 10 of Directive (EU) 2024/2831 leads to much more far-reaching conclusions, stepping beyond the regulatory sphere of obligations imposed on digital labour platforms vis-à-vis persons performing platform work (including employees). Namely, the requirement introduced in the discussed provision to exercise human oversight over automated monitoring systems and automated decision-making systems means that the Union legislator is opposed to autonomous decision-making in the labour process. This refers to decisions made by AI algorithms without human involvement and – very importantly – without human oversight. The provisions of Art. 10 of Directive (EU) 2024/2831 preclude a situation in which the labour process, even to a certain limited extent, is beyond human control. As a result, regardless of how advanced algorithmic systems used in the labour process are, one way or another, supervision over their operation must be exercised by a human. This means, in turn, that the liability for decisions made or supported by automated monitoring systems or automated decision-making systems is incurred by the employer (digital labour platform) alone, and that the employer cannot avoid that liability. In particular, the employer is not in a position to avoid liability by invoking the autonomy of processes taking place at work. The legal regime under Art. 10 of Directive (EU) 2024/2831 is extremely important from the point of view of vicarious liability that – as explained above – constitutes tortious liability of the employer for a damage caused to a third party by an employee in performance of his or her employee duties.[31] It must be highlighted at this point that although the legal regimes of vicarious liability in particular Member States of the EU differ from one another, the common core of the institution is the requirement of supervision exercised by the employer over the employee. If the employer organises, manages and controls the employee’s work, vicarious liability will apply in case of a damage caused to a third party.[32] Therefore, since Art. 10 of Directive (EU) 2024/2831 precludes the employer’s (digital labour platform’s) possibility to invoke automated monitoring of the employee’s work or automated decision-making and prescribes human oversight also over such

[29] Art. 2(1)(h) of Directive (EU) 2024/2831.

[30] Art. 2(1)(i) of Directive (EU) 2024/2831.

[31] The legal regime under Art. 10 of Directive (EU) 2024/2831 is extensive so as to secure the rights of any persons performing platform work, irrespective of their employment basis. Under Art. 10 of Directive (EU) 2024/2831, the Union legislator has not limited itself to employees only. However, for the sake of clarity, it must be stressed and made clear that the impact of the legal regime under Art. 10 of Directive (EU) 2024/2831, as discussed in this text, on the liability of digital labour platforms, as employers, relates only to civil liability for damages caused to a third party by a platform worker in performance of his or her employee duties.

[32] TJONG TJIN TAI, *op. cit.* p. 124.

processes that are carried out automatically by algorithms, the necessary conditions for applying vicarious liability are met. As a consequence, even automated processes, or, strictly speaking, processes carried out autonomously by AI, are, in the legal sense – in the light of Art. 10 of Directive (EU) 2024/2831 – treated as acts of the employer. This means, in turn, that the employer incurs full liability for such acts, both to the employee – as expressly provided under Art. 10 of Directive (EU) 2024/2831 – and to injured third parties if a platform worker causes a damage to the latter in performance of his or her employee duties. This is highly important as, due to the legal regime under Art. 10 of Directive (EU) 2024/2831, the institution of vicarious liability will still be effectively used also in relation to the most advanced technologies, including AI systems. Obviously, this refers to the liability of such digital labour platforms that, having met the conditions laid down in Directive (EU) 2024/2831, qualify as employers.

The Directive (EU) 2024/2831 does not introduce any new rules regarding an employer's liability for damage caused to a third party by an employee. However, what is groundbreaking in Directive (EU) 2024/2831 is the explicit determination that the digital labour platform, as an employer, shall also bear liability for those processes autonomously undertaken by monitoring systems and decision-making systems. Accordingly, in every Member State of the European Union, concerning digital labour platforms classified as employers, the principle of vicarious liability established under national law will continue to apply (due to the absence of harmonised tort law at the level of the European Union). Once Directive (EU) 2024/283 has been implemented into the national legal orders of all EU Member States, there will no longer be any doubt about who bears responsibility for damage caused to a third party by a platform-based worker. The entities bearing such liability will be digital labour platforms recognised as employers. This outcome will result from the provision contained in Article 10 of Directive (EU) 2024/2831. Without this legal regulation, the issue of civil liability towards third parties on the part of a digital labour platform, acting as an employer, would not be entirely clear. This stems from the fact that, as explained earlier, the existence of vicarious liability requires the employer to exercise genuine control over the employee. However, digital labour platforms (employers) delegate this control to algorithmic systems that monitor the work of platform workers and make automated decisions based on data collected about them. Such automation of the work process, even if only partially, has effectively resulted in excluding human oversight over platform workers. However, Directive (EU) 2024/2831 introduces an obligation of human supervision. This requirement applies to those processes which have already been automated by digital labour platforms and thereby effectively removed from the employer's (human) oversight and delegated to algorithms. As a rule, Directive (EU) 2024/2831 does not prohibit such processes, except in cases where infringements of workers' rights occur, necessitating corrective action. At the same time, Directive (EU) 2024/2831 clearly stipulates that human supervision of monitoring and decision-making systems is mandatory. That responsibility for any resulting infringements, including vicarious liability, rests with the employer.

It should also be clarified that this article does not discuss the specific legal regulations concerning the employer's vicarious liability in detail. Each Member State of the European Union has its own national legal framework governing this type of liability. The European Union has not yet opted for comprehensive harmonisation of tort law. As vicarious liability constitutes a tortious liability, it has likewise not been harmonised across the EU. An analysis of the national regulations concerning vicarious liability applicable in individual Member States would significantly exceed the scope of this article. Moreover, such analysis does not constitute its purpose. From the perspective of the adopted research objective, it is crucial to emphasise that, owing to Directive (EU) 2024/2831, the existing principles of an employer's vicarious liability in the national legal systems of the EU Member States will be effectively applied to digital labour platforms acting as employers.

CONCLUSION

The consequences of the legal regime under Directive (EU) 2024/2831 are extensive and cover not only natural persons performing platform work[33] and digital labour platforms[34] but also third parties to whom a platform worker caused damage in performance of his or her employee duties.[35] The introduction by the Union legislator of a legal presumption of an employment relationship significantly improves the situation of not only natural persons performing platform work but also third parties who suffered damage as a result of an act or omission of a platform worker. The reforms introduced in Directive (EU) 2024/2831 are far-reaching and positive since under the previous legislative framework, the standard of legal protection afforded to natural persons injured by performers of platform work was insufficient. This was the case as, in practice, in most situations the legal relationships between platform contractors and digital labour platforms were not qualified by DLP as employment and, as a result, DLPs – not having the status of employer – did not incur civil liability for damages caused to a third party by a person performing platform work. Platform contractors, treated by DLPs as independent service providers, and not as employees, incurred liability themselves vis-à-vis third parties for any damages that could occur in performance of platform work. This situation was very favourable to digital labour platforms that profited from platform work and, at the same time, would not assume any civil liability towards third parties for damages caused by platform contractors. At the same time, such state of the law was very unfavourable, or even unjust, both to injured third parties and persons performing platform work who caused the damage. First, because the financial position of persons performing platform work was often difficult and would not allow to compensate the damage caused. In fact, in such situations, the third party suffering damage was deprived of the compensation due. Second, the imposition on a platform work contractor of liability for a damage caused to a third party additionally worsened their already unfavourable legal and financial standing. Since, in fact, the person performing platform work has not been so far, in most cases, qualified by digital labour platforms as employee but as an independent contractor, that person could not take advantage of any employee rights. In such situation, the lack of legal protection as afforded to employees in combination with the need to incur full civil liability for damages caused to a third party gave rise to a flagrant disproportion between the legal position of persons performing platform work and the legal position of digital labour platforms. Attribution of the employer status to digital labour platforms, provided that the conditions are met as laid down in Directive (EU) 2024/2831, will definitely change the unfavourable legal situation discussed above. Platform work contractors will be granted employee rights and injured third parties will be in a position to seek damages from DLP (employers), that is parties in much better financial position, capable of paying due compensations in full.

The second, extremely important consequence of the legal regime under Directive (EU) 2024/2831 is an unambiguous determination by the Union legislator that digital labour platforms, acting as employers, cannot avoid liability towards their employees, but also towards third parties to whom a platform worker caused damage, even if the DLPs make use of artificial intelligence systems allowing to autonomously manage the labour process and to make decisions. Autonomy does not preclude liability, which, at the end of the day, will still be borne by the employer, that is digital labour platforms in the analysed situations. The legal provisions of Directive (EU) 2024/2831 are essential also inasmuch as they set a specific regulatory direction for the future. Presently, the EU legislator does not aspire to develop new legal constructions, differing from the existing ones, that would lead to granting so called digital personality to most advanced and autonomous AI systems and, at the same time, allow attribution to such systems of civil liability for the damage caused.

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33 Qualified as employees.

34 Qualified as employers.

35 This can be random natural persons unrelated to a DLP by any legal relationship or customers of the digital labour platform having a contractual relationship with the platform to whom a platform worker caused a damage in performance of his or her employee duties, or even other employees of the digital platform, or other persons rendering platform work, irrespective of their employment basis.

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The debtor's ordinary business activities as a mechanism for circumventing the *pari passu* principle[2]

Bežná podnikateľská činnosť dlžníka ako mechanizmus obchádzania zásady *pari passu*

Abstract

The upcoming amendment to insolvency rules has caused a discussion on the Slovak bankruptcy scene about the relationship between the pari passu principle and the performance of normal business activities by a debtor in bankruptcy. The amendment is intended to allow debtors to give priority to satisfying the claims of unrelated creditors without respecting the pari passu principle in the case of obligations necessary to maintain the operation of their business ("exception"). As the legislator did not specify in detail the category of claims that are key to maintaining the business, there is a risk that in practice this provision will cause legal uncertainty for entities that will be directly affected by the legal acts of the bankrupt debtor. In connection with the issue raised, the author aims to assess whether the pari passu principle takes precedence over the performance of the normal business activities of the debtor in bankruptcy and whether the category of claims necessary for the maintenance of the business is defined in such a way as to avoid doubts in practice. At the same time, the author focuses on the question of whether the amended provision works in favor of protecting the property interests of creditors or rather to their detriment. In conclusion, the author emphasizes that it is not possible to interpret the provisions of bankruptcy law in contradiction to the fundamental principles on which bankruptcy law is based.
Keywords: *pari passu principle, business activity, bankruptcy.*

Abstrakt

Pripravovaná novela pravidiel konkurzného konania vyvolala na slovenskej konkurznej scéne diskusiu o vzťahu medzi princípom pari passu a vykonávaním bežnej podnikateľskej činnosti dlžníka v konkurze. Novela má dlžníkom umožniť uprednostniť uspokojenie pohľadávok nespriaznených veriteľov bez rešpektovania princípu pari passu v prípade záväzkov nevyhnutných na udržanie prevádzky ich podniku („výnimka“). Keďže zákonodarca bližšie nešpecifikoval kategóriu pohľadávok, ktoré sú kľúčové pre udržanie podnikania, existuje riziko, že toto ustanovenie spôsobí v praxi právnu neistotu subjektom priamo dotknutým právnymi úkonmi úpadcu.

V nadväznosti na uvedený problém sa autor zameriava na posúdenie, či má princíp pari passu prednosť pred vykonávaním bežnej podnikateľskej činnosti dlžníka v konkurze a či je kategória pohľadávok nevyhnutných na udržanie prevádzky podniku definovaná tak, aby sa predišlo pochybnostiam v aplikačnej praxi. Zároveň sa autor venuje otázke, či novelizované ustanovenie pôsobí v prospech ochrany majetkových záujmov veriteľov alebo skôr v ich neprospech.

V závere autor zdôrazňuje, že ustanovenia konkurzného práva nie je možné vykladať v rozpore so základnými princípmi, na ktorých je konkurzné právo postavené.
Kľúčové slová*: zásada pari passu, podnikateľská činnosť, konkurz.*

JEL Classification: K20

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INTRODUCTION

Since the adoption of amendment No. 7/2005 Coll. to the Act on Bankruptcy and Restructuring and on Amendments to Certain Acts (hereinafter "the Bankruptcy Act"),[3] which came into effect on July 17, 2022, the Slovak bankruptcy area has been developing in a direction that weakens the principle of *pari passu* (the principle of proportional satisfaction of bankruptcy creditors) as a fundamental principle of bankruptcy law.

Currently, a government bill amending Act No. 7/2005 Coll. on Bankruptcy and Restructuring and on Amendments to Certain Acts, as amended, and amending certain acts (hereinafter "the Proposal") submitted by the Ministry of Justice of the Slovak Republic,[4] which shifts the "direction" of weakening the *pari passu* principle to a "trend." This shift is also reflected in the amended wording of Section 3(4) of the Bankruptcy Act ("the Amended Provision"), where the replacement of the conjunction "and" with the conjunction "or" will allow a debtor in bankruptcy to satisfy a creditor's claim necessary to maintain the operation of its business, even without undergoing a recovery process in the form of public preventive restructuring.[5]

The wording of the Amended Provision causes legal uncertainty, particularly from the perspective of creditors, in terms of the protection of their property interests by maintaining their right to proportional satisfaction, but also from the perspective of the trustee as an entity actively entitled to file an action to contest the validity of legal acts. Another area that may raise significant doubts in practice is the relationship between the Amended Provision and the contestability of legal acts of a debtor in bankruptcy, particularly in the context of the conflict between the *pari passu* principle and the limits of the so-called "normal business relations" in the form of the fulfilment of those claims that the legislator qualifies as necessary for the preservation of the operation of the enterprise.

In this paper, we focus on assessing whether the *pari passu* principle takes precedence over the normal business activities of a debtor in bankruptcy, and therefore whether it should be applied preferentially. At the same time, the aim of the author is to verify whether the Amended Provision is (or is not) capable of raising any doubts in its interpretation in practice. Through scientific research, we would also like to assess whether the Amended Provision works in favour of protecting the property interests of creditors or rather to their detriment.

Given the above, we set out to verify the following hypothesis: „It is not possible to interpret the amended provision (Section 3(4) of the Bankruptcy Act) in such a manner as to suppress the fundamental principle of *pari passu*.

In writing this paper, we used the methods of analysis, analogy, comparison, induction, and deduction. The individual scientific methods helped us to focus more closely on the question of the relationship between the Amendment and the *pari passu* principle, thereby verifying the defined hypothesis and fulfilling the scientific objective.

The paper builds on previous research in this area, which, however, focuses more on selected partial issues of the researched topic – for example, the contestability of legal acts. However, no attention has been paid to the conflict between the *pari passu* principle and the conduct of normal business activities, probably because the proposed legislation has not yet entered into force. For this reason, we consider the research topic to be of significant value to scientific research.

In closing, we note that the focus of this paper is an analysis of the Amended Provision, focusing primarily on the "exception" referred to in letter b), i.e., the exception to the application of the *pari passu*

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3 Act No. 7/2005 Coll. on Bankruptcy and Restructuring and on Amendments to Certain Acts.

4 The Proposal was discussed at the 39th session of the National Council of the Slovak Republic on 10 September 2025 and was forwarded to the editorial office.

5 For more information on public preventive restructuring – a comparison of selected institutions of Slovak and Czech legislation, see HRABÁNKOVÁ, K. Verejná preventívna reštrukturalizácia ako sanačný proces podnikateľa v komparácii s českou právnou úpravou. In STUDIA IURIDICA Cassoviensia [online], vol., 22, 2024, no. 2, pp. 51–68. Available at: doi:10.33542/SIC2024-2-04, [cited 2025-09-12].

principle in connection with the debtor's ordinary business activities in the form of payment of claims necessary to maintain the debtor's business operations.

1. THE *PARI PASSU* PRINCIPLE IN EFFECT EVEN BEFORE THE FORMAL DECLARATION ON BANKRUPTCY

Section 3(4) of the Bankruptcy Act contains a rule according to which proportional satisfaction of creditors should be applied at the time when the debtor learned/could have learned about their bankruptcy while exercising professional care. The debtor must therefore act in such a way that each of its creditors receives only what they would be entitled to in the event of bankruptcy[6] – the limit of the claim satisfaction. It is irrelevant whether bankruptcy has been formally declared on the debtor's assets – the application of the *pari pass*u principle is linked to the moment of bankruptcy.

In connection with the above, the importance of the duty of care of the statutory body becomes paramount. Acting with professional care in conjunction with acting in accordance with the interests of the company and its shareholders is one of the fundamental duties of the statutory body, which (among other things) includes making a decision only after obtaining and considering all available information relating to the subject matter of the decision, and not giving priority to their own interests, the interests of certain shareholders or third parties over the interests of the company, which is key for the purposes of performing a legal act consisting in satisfying the claim of a specific creditor. In defining professional care, Duračinská also applies the definition of the ZKR, concluding that "*professional care means acting with care appropriate to the function or position of the person acting, taking into account all available information that relates to or may affect their actions."*[7]

The judicial authorities also comment on the requirement of duty care. In a resolution of the Supreme Court of the Slovak Republic dated May 19, 2022, No. 4Obdo/106/2020, the court expressed the legal conclusion that a statutory body acts with professional care if it performs its function with the necessary knowledge and, when making a specific decision, makes appropriate efforts to use all reasonably available sources of information,[8] on the basis of which it considers its possible advantages and recognizable risks (with the aim of minimizing them). Others perceive acting with professional care as the duty of a statutory body to exercise its powers as a professional in the field of its administration and management. However, this does not mean that professionalism is understood as a duty of expertise in all aspects of a commercial company in which the company operates (e.g., law, accounting, economics, etc.).[9]

The debtor applies the above-mentioned obligation to satisfy creditors' claims in accordance with the *pari passu* principle from the moment it becomes insolvent and learns or could have learned of this fact, if duty care had been exercised. From an application perspective, bankruptcy[10] is most often demonstrated by the financial instability of a company, manifested in negative equity, which is a basic economic indicator and can be read from the financial statements. The second case is the debtor's

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6 The proportional satisfaction of creditors is justified primarily by the fair satisfaction of all creditors and not only of individually selected creditors. (DOLNÝ, J. Uspokojovanie pohľadávok spriaznených osôb v konkurznom konaní. In Justičná revue [online], vol. 72, 2020, no. 3, pp. 361–369. Available at: https://www.legalis.sk/clanky/1890/uspokojovanie-pohladavok-spriaznenych-osob-v-konkurznom-konani), [cited 2025-09-18]).

7 DURAČINSKÁ, J. Povinnosť starostlivosti riadneho hospodára alebo povinnosť odbornej starostlivosti z hľadiska právnej komparatistiky. In Dny práva 2012 - Days of law [online]. Brno: Masarykova univerzita, 2013, p. 1792. Available at: https://www.law.muni.cz/sborniky/dny_ prava_2012/files/Bermudskytrojuhelnik/Bermudskytrojuhelnik.pdf, [cited 2025-09-11].

8 RAKOVSKÝ, P. Daňový podvod a zneužitie práva v oblasti daní. Právne následky. Bratislava: C. H. Beck, 2021, pp. 43-54.

9 LUKÁČKA, P. § 135a [Zodpovednosť konateľa]. In LUKÁČKA, P., HUČKOVÁ, R., KUBINEC, M. a kol. Obchodný zákonník. Komentár. Praha: C. H. Beck, 2025, p. 657; BARKOCI, S., BLAHA, M., GRAMBLIČKOVÁ, B. § 135a [Zodpovednosť pri výkone funkcie]. In PATAKYOVÁ, M. a kol. Obchodný zákonník. Komentár. Bratislava: C. H. Beck, 2022, pp. 671–679.

10 Section 3(1) – (3) of the Bankruptcy Act.

inability to pay its debts after a maturity period of at least 90 days to more than one creditor, which is not a classic financial indicator, but more of a legal indicator, manifested by an insolvency test. [11] In both cases, these are indicators that primarily reflect the economic vitality[12] of the company, which the statutory body is required to monitor and evaluate in order to make specific decisions. In practice, this means that the statutory body is obliged, in accordance with its duty of care, to continuously evaluate indicators signalling the financial vitality of the company and its ability to meet its obligations.[13]

After assessing that a commercial company has gone bankrupt, there is an obligation, under threat of contestability, to satisfy creditors' claims only up to the amount that would have been satisfied in the event of hypothetical bankruptcy (limit on the extent of satisfaction of claims). In practice, this means that any performance in favour of creditors exceeding the specified limit is classified as a preferential legal act.[14]

In the Proposal, the legislator establishes one of two exceptions to this obligation, whereby the limit in question does not apply, namely the fulfilment of claims that are necessary to maintain the debtor's business operations, but only on condition that the creditor of the claim is an unrelated entity. The intention was to effectively ensure the continuity of the debtor's business activities, thereby enabling the debtor to continue to generate resources from which creditors can be satisfied. In all circumstances, however, it is necessary to take into account the performance itself, which should not result in a reduction of the debtor's assets greater than would have been the case if the performance had not been provided, or (in the best-case scenario) the debtor's assets are preserved or increased by the performance provided.[15]

We believe that such an extensively conceived exemption creates room for interpretation risks, particularly in connection with the concept of "claims necessary to maintain the debtor's business operations," the boundaries of which are not specified by the legislature. The lack of specification of this category of claims will most likely lead to subjective interpretation, which will vary depending on the interests pursued by the entity providing the interpretation (creditors, debtor, partners, bankruptcy trustee). However, differences in interpretation may also arise in the decision-making practice of courts, causing legal uncertainty for the debtor or bankruptcy trustee as entities bearing the risk of liability for incorrect decisions, or the creditors themselves who have entered a legal relationship with a commercial company experiencing economic difficulties.

However, we expect that the practical application will show that it will indeed be necessary to consider establishing a more precise framework for the category of claims necessarily related to the operation of the business. So far, we can imagine various categories of receivables under this term that could be classified as necessary for maintaining business operations, for example:

(i) receivables necessary to secure the company's infrastructure (receivables from energy suppliers, receivables related to the rental of real estate, telecommunications services, etc.);

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[11] For more details on testing for insolvency, see e.g. DOLNÝ, J. Testovanie úpadku a hroziaceho úpadku dlžníka z pohľadu slovenského právneho poriadku. In STUDIA IURIDICA Cassoviensia [online], vol. 11, 2023, no. 2, pp. 3-13. Available at: doi:10.33542/SIC2023-2-01, [cited 2025-09-15].

[12] See also HRABÁNKOVÁ, K. Verejná preventívna reštrukturalizácia ako sanačný proces podnikateľa v komparácii s českou právnou úpravou. In STUDIA IURIDICA Cassoviensia [online], vol., 22, 2024, no. 2, pp. 51–68. Available at: doi:10.33542/SIC2024-2-04, [cited 2025-09-12].

[13] „It is clear that executives are responsible for the state of accounting and prescribed records, regardless of whether they perform these activities personally or through other legal entities or individuals." (Supreme Court of the Slovak Republic: 3Obo/106/2007; District Court in Trnava: 6To/49/2023).

[14] In bankruptcy terminology, creditor preference relates to a violation of the rule of absolute priority, i.e., a situation in which, within the hierarchical structure of protected property interests of creditors, there is an improvement (preference) in the right of a creditor to be satisfied over other creditors with a comparable substantive legal position. (MALIAR, M. Odporovateľnosť dohodou o započítaní pohľadávok. In Súkromné právo [online], vol. 4, 2021. Available at: https://www.legalis.sk/clanky/2522/odporovatelnost-dohodou-o-zapocitani-pohladavok), [cited 2025-09-18].

[15] Explanatory memorandum to the Proposal.

(ii) receivables necessary to secure human capital (receivables from employees, receivables from health or social insurance, etc.);
(iii) receivables necessary to ensure the continuity of production or sale of goods and provision of services (e.g., receivables from suppliers);
(iv) receivables related to the fulfilment of obligations towards the state (e.g., tax receivables);
(v) claims necessary for the preservation and maintenance of the value of the debtor's assets (claims related to asset maintenance, claims related to physical protection of assets, claims against insurance companies); and
(vi) other.

Such an extensive definition of receivables necessarily related to the operation of the business would apparently circumvent the purpose of the Amended Provision. However, we do not believe it is appropriate to exhaustively define the exact calculation of receivables that fall into this category. It is understandable that the business environment offers entrepreneurs a wide range of activities that differ from one another. We believe that the legislator should define a basic framework for this category (consisting of the calculation of specific types of receivables), but at the same time should define the concept of "necessity," which is a key concept that is currently questionable and unspecified.

2. THE FUTURE OF THE *PARI PASSU* PRINCIPLE

The current wording of the Bankruptcy Act requires cumulative fulfilment of the following conditions for the application of the "exception" to the *pari passu* principle contained in Section 3(4):

(i) the debtor's bankruptcy;
(ii) the debtor's ongoing restructuring process; and
(iii) the fulfilment of a claim by an unrelated entity necessary to maintain the debtor's business operations.

Under the Amended Provision, it is sufficient to meet the condition set out in point (i) while cumulatively fulfilling the condition set out in point (ii) or, alternatively, the condition set out in point (iii).

For a more detailed explanation of the changes to the Amended Provision, Table 1 below provides an overview of the conditions that must be met for the debtor to circumvent the obligation to satisfy creditors proportionally.

Table 1 Comparison of Section 3(4) of the Bankruptcy Act in its current wording and in its amended wording

Legislative wording	Section 3(4) of the Bankruptcy Act, as currently amended: *"A debtor who has learned or could have learned about his bankruptcy while exercising duty care may not satisfy a due monetary claim to an extent greater than the amount that would be due to the creditor in the satisfaction of creditors in the event of bankruptcy; this shall not apply if the debtor's*	Section 3(4) according to the Proposal: *"A debtor who has learned or could have learned about his bankruptcy while exercising duty care may not satisfy a due monetary claim to an extent greater than the amount that would be due to the creditor in the satisfaction of creditors in the event of bankruptcy; this shall not apply if the debtor's insolvency occurred during*

	*insolvency occurred during public preventive restructuring **and** the claim is necessary to maintain the debtor's business operations against an unrelated party."*	*public preventive restructuring **or** the claim is necessary to maintain the debtor's business operations against an unrelated party."*	
Bankruptcy	✓	✓	✓
The course of the preventive restructuring process (public preventive restructuring)	✓	✓	⊗
Satisfaction of a claim of an unrelated entity necessary for maintaining the debtor's business operations	✓	⊗	✓

The Amended Provision was intended to clarify the conditions for property transactions by a company (transfer of assets from the company) during the interim period between the bankruptcy and its finding. The state of bankruptcy declared ex post by a court decision creates a situation in relation to the debtor's asset structure where the economic interests of creditors prevail over the debtor's assets. During this interim period, the debtor should restrict the disposal of assets, as its actions may result in unjustified preferential treatment of creditors, which may have consequences, including criminal ones.[16] At the moment of bankruptcy, the debtor is obliged to act in accordance with the *pari passu* principle, i.e. to minimize the risk of preferential payments, regardless of whether bankruptcy has been formally declared on their assets.[17]

In connection with the purpose pursued by the legislator in changing the Amended Provision, in our opinion it is desirable to recall the intention of the legislator in including Section 3(4) of the Bankruptcy Act as a novel provision. Section 3(4) of the Bankruptcy Act was included in the Bankruptcy Act because of the adoption of Act No. 111/2022 Coll. on the resolution of imminent insolvency and on amendments to certain acts (hereinafter referred to as the "Act on Imminent Insolvency").[18] The explanatory memorandum to the Act on Impending Insolvency states that a hierarchical structure of mutual relations between individual creditors arises for the debtor in relation to the debtor's assets at the moment of its insolvency – even before the insolvency was determined by the court by declaring bankruptcy. The existence of such quasi-contractual relationships between creditors prevents the debtor from freely deciding on the satisfaction of creditors' claims.[19] However, insolvency regulation should be precise regarding the possibility of certain claims being satisfied by the debtor itself and should reflect the existence of the rules of (absolute) priority and *pari passu* as two rules governing the existence of the debtor's hierarchical structure. The *pari passu* rule (horizontal rule) is a rule that is enforced in the satisfaction of unsecured obligations. The absolute priority rule (vertical rule) governs the satisfaction of secured creditors. If the debtor is bankrupt, it is reasonable to enforce that the debtor fulfils its debt as if the debtor's bankruptcy had already been determined by the court and bankruptcy proceedings had been declared on its assets, including the rules for satisfying related debt. The horizontal *pari passu* rule prevents the claims of persons (typically creditors) with comparable substantive legal status from being satisfied arbitrarily differently. The application of the vertical rule of absolute priority, on the other hand,

16 Explanatory memorandum to the Proposal.

17 Supreme Court of the Slovak Republic: 6Tdo/62/2011: „(...) if a company finds itself in a situation where, as a debtor, it does not have sufficient funds to pay all its due liabilities, it is obliged to satisfy all its creditors (...) proportionally and equally (...), it must adjust the management of the company so that it can fulfil all its obligations or, if necessary, terminate its business activities.“.

18 Act No. 111/2022 Coll. on the resolution of imminent insolvency and on amendments to certain acts.

19 Arbitrariness is also prevented by the formulation of certain criminal offenses (e.g., the offense of favouring a creditor within the meaning of Section 240 of Act No. 300/2005 Coll. Criminal Code).

ensures that creditors with different substantive legal positions are not satisfied arbitrarily equally or arbitrarily differently. The consequence of this rule is also that the claims of creditors with "better" priority must be satisfied in full before the satisfaction of claims with "worse" priority can begin.[20]

The purpose of adopting the provision of Section 3(4) of the Bankruptcy Act was therefore to ensure that a debtor in bankruptcy respects the *pari passu* principle and the principle of absolute priority when satisfying the claims of its creditors, and thus to prevent selective satisfaction of creditors, circumvention of the basic rules of bankruptcy proceedings, and damage to creditors.

The conjunctive arrangement of conditions in the Amended Provision, though, brings a whole new dimension to the actions of a debtor in bankruptcy. While Section 3(4) of the Bankruptcy Act, as currently worded, stipulates that a debtor in bankruptcy is entitled to satisfy creditors' claims that are key to the operation of the business without respecting the proportional satisfaction of creditors only if the debtor's bankruptcy occurred during an ongoing restructuring process (public preventive restructuring), i.e. when the debtor has actually taken steps to restore the economic vitality of the company and has an interest in eliminating unfavourable economic indicators, while continuing to operate in accordance with the restructuring plan (it would be virtually impossible for the company to operate without the payment of the claims necessary for its operation, and allowing them to be contested would be illogical), the Amended Provision allows a debtor in bankruptcy who, in addition to apparently violating the obligation to file a petition for bankruptcy in accordance with Section 11(2) of the Bankruptcy Act[21] and has not initiated any other process aimed at restoring the viability of the business, to satisfy selectively chosen unrelated creditors whose claims are necessary for the debtor's operation.

By enshrining this exception in other words, the legislator has established that the satisfaction of a claim of an unrelated creditor is not a contestable legal act if it concerns the performance of the debtor's ordinary business activities. However, as we mentioned above, the limits of the performance of ordinary business activities are not yet legally defined.

In our opinion, such a conclusion is also in direct conflict with Section 59(1) of the Bankruptcy Act,[22] according to which a preferential legal act is, inter alia, a legal act by which the debtor has otherwise unjustifiably favoured his creditor over other creditors. A preferential legal act consisting in the unjustified preferential treatment of a creditor over other creditors can undoubtedly also be subsumed under the satisfaction of the claim[23] of a selectively chosen creditor while simultaneously failing to satisfy the claims of other creditors in the same proportion. It is precisely because of the successful contestability of the debtor's legal acts, which reduce the debtor's assets or change their structure,[24] that

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20 Constitutional Court of the Slovak Republic: I. ÚS 417/2020.

21 Section 11(2) of the Bankruptcy Act: „A debtor who is a legal entity is obliged to file a petition for bankruptcy within 30 days of becoming aware or, with due professional care, could have become aware of its insolvency. This obligation on behalf of the debtor is also incumbent on the statutory body or member of the statutory body of the debtor, the liquidator of the debtor, and the legal representative of the debtor."; For further information on liability for failure to file a petition for bankruptcy in a timely manner, see MAJERNIČEK, O. Uplatňovanie zodpovednosti členov štatutárnych orgánov za nepodanie návrhu na vyhlásenie konkurzu včas. In Súkromné právo [online], vol. 6, 2020. Available at: https://www.legalis.sk/clanky/2224/uplatnovanie-zodpovednosti-clenov-statutarnych-organov-za-nepodanie-navrhu-na-vyhlasenie-konkurzu-vcas, [cited 2025-09-18] or LUKÁČKA, P. Perspektívy ochrany veriteľov v kontexte aktuálnych zmien Obchodného zákonníka. In BURDA, E., MIHÁLIK, S. (eds.) Právna ochrana veriteľov. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2017, p. 22.

22 Section 59(1) of the Bankruptcy Act: „(...) a preferential legal act is a legal act by which the debtor has fulfilled, in whole or in part, a monetary claim otherwise due only upon the declaration of bankruptcy, secured its obligation later than the obligation arose, agreed to modify or replace his obligation to his disadvantage, or otherwise unjustifiably favoured his creditor over his other creditors.".

23 By paying it, offsetting it, or by any other means whereby the claim of a selectively chosen creditor is extinguished.

24 Supreme Court of the Slovak Republic: 5Obdo/84/2020: „Although the transformation of the debtor's assets cannot in itself cause the creditor to be deprived of their rights, the change in the structure of the assets as a result of the set-off of claims is capable of depriving the creditor of their rights as a result of the actual non-acquisition of consideration from which the creditors of the bankrupt could subsequently be satisfied. If the set-off agreement had not been concluded, the purchase price that the defendant was obliged to pay to the bankrupt would belong to the bankruptcy estate, from which it would be possible to (partially) satisfy the claims of the other creditors of the bankrupt, while the defendant would be obliged to file his claim against the bankrupt in bankruptcy. (...) It is inadmissible for a debtor to give priority to the full satisfaction of

the performance provided to the favoured creditor should be returned to the bankruptcy estate and subsequently redistributed proportionally among the bankruptcy creditors in accordance with the *pari passu* principle.

The Amended Provision, though, gives the impression of suppressing the *pari passu* principle with the *vigilantibus iura scripta sun* principle. The result of the clash between these two fundamental principles is that a creditor who actively takes steps to enforce their claim and at the same time proves that their claim can be subsumed under the (currently) unlimited category of claims necessary to maintain the operation of the business has, let's say, certainty of success in any legal proceedings to determine the ineffectiveness of a legal act. We consider this approach to be untenable.

Not only the debtor's creditors who failed to take active steps to satisfy their claims in a timely manner find themselves in a state of legal uncertainty, but also the bankruptcy trustee himself as an entity actively entitled to file contestation actions. Pursuant to Section 3(2) of Act No. 8/2005 Coll. on trustees and on amendments and supplements to certain acts, the trustee is obliged to perform his activities with professional care, using his previous experience and acquired professional knowledge, which in practice is also reflected in the evaluation and subsequent contestation of the debtor's legal acts. The trustee's task is to effectively protect the bankruptcy estate and the interests of creditors, which means that we perceive contesting the debtor's legal acts not only as a right (optional possibility), but also as an obligation of the trustee.[25] On the other hand, the trustee should properly assess the likelihood of success of the claim, as each court proceeding prolongs the bankruptcy proceedings (time factor), which is also reflected in an increase in the expenses of the trustee related to the conduct of the bankruptcy proceedings (financial factor), which means an increase in claims against the estate.[26] We would like to express our conviction that, based on the wording of the Amended Provision, the trustee is unable to proceed objectively in order to avoid the risk of breaching the duty to act with professional care. [27] The reason lies in the fact that the legislator does not specify the category of claims that it designates as necessarily related to the operation of the business. In application practice, a scenario may arise where the administrator does not file an action to set aside, even though he could be successful at the end of the day, or, conversely, where the administrator initiates proceedings but, due to the inability to bear the burden of proof, only causes an unreasonable prolongation of the bankruptcy proceedings and an increase in the associated costs.

Leaving the Amended Provision without a further legislative definition gives a big role to the courts, which will have to consider the specific legal acts of the bankrupt debtor and decide whether a certain type of claim can be subsumed under the category of obligations related to the debtor's ordinary business activities. Although case law can be considered a quasi-source of bankruptcy law and the role of the courts in interpreting legal provisions is natural, in this case there is no clear legislative framework to guide their decision-making, which may lead to discrepancies in the interpretation of the Amended Provision, differing judicial interpretations, thereby contributing to legal uncertainty. Furthermore, we believe that leaving the scope of application of the provision in question to the individual discretion of the courts may create room for unpredictability in decisions and make it difficult to predict the legal consequences of the debtor's actions in bankruptcy.

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one creditor and not satisfy the other creditors at all. If the debtor proceeds in this manner, it will favour one creditor at the expense of the other creditors, who will be deprived by such action of the debtor. In this context, it is legally irrelevant that the debtor, who was unable to meet all his due obligations, fulfilled by his actions what the (favoured) creditor would have been legally entitled to, since it was the debtor's obligation to take into account the interests of all his creditors.“.

[25] Section 86(2) of the Bankruptcy Act; The contestability of the debtor's legal acts by the trustee in bankruptcy is intended to ensure that creditors' claims are satisfied in the manner and to the extent that would have been the case if the contestable legal act had not been performed. (ĎURICA, M. Zákon o konkurze a reštrukturalizácii. Komentár. 4th ed. Praha: C. H. Beck, 2021, pp. 509-526.)

[26] Section 87(2)(c) of the Bankruptcy Act.

[27] For more information on the responsibilities of the trustee in bankruptcy, see MORAVČÍKOVÁ, A. Zodpovednosť správcu konkurznej podstaty - právny režim nároku. In Súkromné právo [online], vol. 10-11, 2015. Available at: https://www.legalis.sk/clanky/135/zodpovednost-spravcu-konkurznej-podstaty-pravny-rezim-naroku, [cited 2025-09-18].

CONCLUSION

The satisfaction of selected creditors' claims before the commencement of bankruptcy proceedings in fact disadvantages the satisfaction of other creditors.[28] The main purpose of bankruptcy proceedings should be to preserve the *pari passu* principle in satisfying creditors, and for this reason, satisfying the claims of one or some preferential creditors in full effectively disadvantages other creditors whose satisfaction is threatened or even thwarted after the formal declaration of bankruptcy on the debtor's assets precisely as a result of the removal of assets from the commercial company.[29] Such preferential treatment should be excluded under the Amended Provision if the debtor performs a (preferential) legal act in the course of its ordinary business activities.

The absence of a definition of claims necessarily related to the continuation of business operations raises the question of the limits of ordinary business activities, which we perceive as a risk of subjective interpretation.

This is undoubtedly linked to the legal uncertainty that we perceive in two dimensions. Firstly, there is the legal uncertainty of those creditors whose claims have not been satisfied and who have therefore been deprived of their property interests. It is questionable whether the legislator will contribute to or harm the protection of creditors' property interests with the Amended Provision. The answer to this question depends on which side of the river the creditor stands. The protection of creditors' property interests is strengthened if the creditor's claim has been satisfied by the bankrupt debtor (it is irrelevant whether the creditor actively took steps to enforce its claim or whether the debtor did so voluntarily) and the creditor is able to argue that its claim was necessary to maintain the debtor's business operations. In such a case, the favoured creditor will not be obliged to return the performance received. However, this results in damage to the property interests of other creditors, as the satisfaction of selected creditors leads to a reduction in the debtor's assets, from which creditors will be satisfied after the formal declaration of bankruptcy. Secondly, there is legal uncertainty regarding the trustee in bankruptcy as an entity actively entitled to file an action to contest the validity of legal acts. The trustee in bankruptcy, while respecting the obligation to act with professional care, must effectively contribute to the protection of the property interests of creditors, and this obligation is reflected (among other things) in the initiation of litigation to determine the invalidity of the debtor's legal acts. However, the Amendment Provision is precisely the loophole in successful contestability.

Furthermore, the Amended Provision is in direct conflict with the purpose for which Section 3(4) of the Bankruptcy Act was adopted. The primary purpose was to establish a rule according to which a debtor in bankruptcy should respect the principles of absolute priority and *pari passu* when performing legal acts. However, the Amended Provision deviates from this purpose, as it approves legal acts of the debtor which, although carried out in the ordinary course of business, in fact unjustifiably favoured a selectively chosen creditor of an unfavourable claim.

We believe that, particularly in times of bankruptcy, the protection of creditors' property interests (the right to proportional satisfaction of claims) must take precedence over the debtor's ordinary business activities. If we were to allow the opposite interpretation, the contestability of legal acts would lose its

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[28] The prohibition of preferential treatment of creditors is also stated in Section 6 of the Bankruptcy Act, which states: „Creditors with equal rights have equal status in the resolution of the debtor's bankruptcy; preferential treatment of certain creditors is not permitted.“ (CSACH, K. Priame nároky tretích osôb voči členom orgánov alebo spoločníkom spoločnosti (deliktná ochrana veriteľa obchodnej spoločnosti). In HUSÁR, J., CSACH, K. Konflikty záujmov v práve obchodných spoločností. Bratislava: Wolters Kluwer, 2018, p. 124).

[29] DOLNÝ, J. Odporovateľnosť právnych úkonov v konkurznom práve. Bratislava: C. H. Beck, 2021, p. 34; Supreme Court of the Slovak Republic: 3Obdo/31/2020: „If a debtor who is unable to meet their due obligations does not have sufficient assets to satisfy them in full, they are obliged to satisfy their creditors proportionally. It is unacceptable for a debtor to give priority to the full satisfaction of one creditor and not satisfy the other creditors at all. If the debtor does so, they will favour one creditor at the expense of other creditors, who will be deprived by such action of the debtor. In this context, it is legally irrelevant that the debtor, who was unable to meet all their due obligations, fulfilled by their action what the - the (favoured) creditor had a legal claim, since the debtor's obligation was to take into account the interests of all its creditors, regardless of whether or not bankruptcy proceedings had been initiated against it.“.

meaning, as every debtor could claim that the satisfaction of claims was necessary, thereby circumventing the purpose of Section 57 in conjunction with Section 59 of the Bankruptcy Act. For this reason, too, it is necessary to uncritically accept the conclusion that even the payment of a liability arising from normal business relations can cause prejudice to other creditors. The mere fact that the debtor satisfied the claims of creditors during business cannot justify the selective satisfaction of selected creditors at the expense of others.

According to the Proposal, the interpretation of the amended Section 3(4) of the Bankruptcy Act cannot be applied in such a way that would place the amendment above the fundamental principles on which bankruptcy law is based. One of these principles is the *pari passu* principle, which is the fundamental pillar of satisfying creditors with comparable legal status in equal proportion. If the Amendment were allowed to take precedence over this principle, the very purpose of bankruptcy law would be undermined. The changes adopted as a result of the amendments to the Bankruptcy Act must therefore be interpreted in accordance with the fundamental principles on which bankruptcy law is based.

In conclusion, we would like to highlight Radbruch's formula:[30] *"The conflict between justice and legal certainty can only be resolved by giving priority to positive law, secured by regulations and power, even when its content is unjust and ineffective, except in cases where the conflict between positive law and justice reaches such an intolerable degree that the law as "inappropriate law" (unrichtiges Recht) must give way to justice."*[31] Per analogiam, an intolerable level of conflict between justice (in the form of the claim to uphold the *pari passu* principle) and positive law (the Amended Provision) means that the law must give way as inappropriate law in favour of justice.

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[30] See also RANGL, J. Povaha práva v teórii a praxi. In Právny obzor [online], vol. 103, 2020, no. 4, pp. 297–310. Available at: https://www.legalis.sk/clanky/2120/povaha-prava-v-teorii-a-praxi, [cited 2025-09-18] or PRUDOVIČ, M. Princíp bipolarity v prirodzenom práve v období staroveku a stredoveku. In Historia et theoria iuris [online], vol. 14, 2022, no. 2, pp. 130–138. Available at: https://www.flaw.uniba.sk/fileadmin/praf/HTI_2022-II_Prudovic.pdf, [cited 2025-09-18].

[31] RADBRUCH, G. O napětí mezi účely práva. Praha: Wolters Kluwer, 2012, p. 130.

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26. Supreme Court of the Slovak Republic: 3Obdo/31/2020.
27. Supreme Court of the Slovak Republic: 5Obdo/84/2020.

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Corporate mergers and demergers and the principle of actual coverage of share capital – insights from Polish law, in a comparative legal context

Zlúčenia a rozdelenia spoločností a zásada reálneho krytia základného imania – pohľad poľského práva v komparatívnom právnom kontexte

Abstract

One of the key events inherent to corporate mergers and demergers carried out "by acquisition" is – in typical cases – the increase in the share capital of the acquiring company. By contrast, when a merger or demerger is carried out through "the establishment of a new company", the key event is the formation of that company's share capital. In certain cases, when mergers or demergers involve over-leveraged businesses, the admissibility of increasing the share capital of the acquiring company or the issuing and covering the share capital of the newly established company, may be called into question. The crucial issue is whether – to provide creditors of the companies being reorganised with adequate protection – it is possible to apply general rules mandating the actual coverage of the share capital alongside the merger- and demerger-specific creditor protection measures.

This article aims to provide a cross-sectional and comparative overview of the approach to this issue in the legislation and doctrine of several European countries.

Keywords: *corporate mergers, demergers, principle of actual coverage of share capital.*

Abstrakt

Jednou z kľúčových udalostí typických pre zlúčenia a rozdelenia spoločností uskutočňované formou prevzatia je – vo všeobecných prípadoch – zvýšenie základného imania nástupníckej spoločnosti. Naopak, pri zlúčeniach alebo rozdeleniach uskutočňovaných založením novej spoločnosti je rozhodujúcou udalosťou vytvorenie základného imaniatejto novej spoločnosti. V niektorých prípadoch, keď sa zlúčenia alebo rozdelenia týkajú nadmerne zadlžených podnikov, môže byť spochybnená prípustnosť zvýšenia základného imania nástupníckej spoločnosti alebo vydania a splatenia základného imania novo založenej spoločnosti. Kľúčovou otázkou je, či – na zabezpečenie primeranej ochrany veriteľov reorganizovaných spoločností – je možné uplatniť všeobecné pravidlá vyžadujúce reálne krytie základného imania, a to popri osobitných opatreniach ochrany veriteľov pri zlúčeniach a rozdeleniach. Cieľom tohto článku je poskytnúť prierezový a komparatívny prehľad prístupu k tejto problematike v právnej úprave a právnej doktríne viacerých európskych krajín.

Kľúčové slová: *zlúčenia spoločností, rozdelenia spoločností, zásada reálneho krytia základného imania.*

JEL Classification: K220

INTRODUCTION

One of the key issues inherent to corporate mergers and demergers is how to ensure adequate protection to the creditors of companies undergoing reorganisation. Obviously, there are also other

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actors at play, such as shareholders or even stakeholders of the companies, since – as legal scholars are right to notice – the company structure involves a somewhat "built-in" conflict of interests between creditors and shareholders[2] (or, potentially, other stakeholders).

The key task for the legislator is to reconcile the conflicting interests of creditors and shareholders and to develop the most efficient corporate reorganisation model. The difficulty lies in the fact that the actual circumstances of companies involved in reorganisations, in particular their financial standing, may vary drastically. The creditor protection system developed by the legislator should, on the one hand, allow for flexible merger and demerger transactions when the risk of harm to creditors is low, and on the other hand, realistically protect creditors when they are truly at risk of being harmed.

The basic rules on the protection of creditors of companies involved in mergers and demergers have been outlined in UE law, with Directive 2017/1132 being particularly relevant[3]. Most notably, the EU legislator mandates that national legislators create "adequate" systems to protect creditors of companies involved in mergers and demergers, providing them, however, with a fairly extensive discretion as to what that system should look like (See Article 99 and Article 146 of the Directive)[4]. As a result, national law makers are opting for range of different solutions, and we see a variety of creditor protection models across different countries. As a rule, the protective mechanisms may be divided into two groups; those applicable *ex ante* or *ex post*[5]. A model is assigned into one of the those categories based on whether creditors can exercise their rights to safeguard their interests before or after the relevant merger or demerger has been registered. Additionally, *ex ante* models may be divided into those that enable the creditors to suspend the merger or division procedure and those which extend protection to creditors before a merger or demerger procedure is finalised without giving them the power to suspend it. Models from the first group (among those classified into *ex ante* category) can be found for example in Italian and British law, while the examples from the second group can be found in French and Belgian law. On the other hand, *ex post* models can be found in German and Swiss law[6]. A classic example of an *ex ante* mechanism is the right to object to a merger (Italian *l'opposizione* – see p. 4.4.4 below), while a classic example of an *ex post* mechanism is the right to request security for claims, triggered after a merger or demerger.

Regardless of the form of specific protection mechanisms adopted by national legislators in the laws governing corporate mergers and demergers, legal scholars increasingly often debate the possibility or need for additional application of more general provisions – not only the general company law rules governing the operation of particular types of commercial companies, but even broader rules of civil law.

It has been further suggested to distinguish between individual creditor protection measures, applicable to specific creditors and their claims existing during reorganisation, and the institutional protection measures protecting the interest of creditors as such (including future ones). The latter include in particular the provisions mandating that the share capital be actually covered, the main focus of this article. There are a number of doubts regarding the necessity, manner as well as the scope and effects of applying such measures to corporate mergers and demergers.

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2 See e.g. FLISZKIEWICZ, K. *Ochrona wierzycieli łączących się spółek kapitałowych*. Warszawa: C.H. Beck, 2016, p. 29 and KĘDZIERSKI, D. V., *Transakcje lewarowane a ochrona wierzycieli*. Warszawa: C.H. Beck, 2020, p. 118-121; more on the conflict of interests between creditors and shareholders see RADWAN A., *Sens i nonsens kapitału zakładowego – przyczynek do ekonomicznej analizy ustawowej ochrony wierzycieli spółek kapitałowych*. In CEJMER M., NAPIERAŁA J., SÓJKA T. (eds.), *Europejskie prawo spółek, t. II.* Kraków: Zakamycze, 2005, p. 27-43.

3 Directive of the European Parliament and of the Council (EU) 2017/1132 of 14.06.2017 relating to certain aspects of company law (EU OJ L 169 of 30.06.2017 p. 46 as amended).

4 To read more on this topic, see JERZMANOWSKI, J., *Creditor protection models in the context of corporate mergers and divisions – a comparative analysis of Polish, EU and Slovakian regulations*. In SUCHOŽA, J., HUSÁR, J., HUČKOVÁ, R. (eds.) *Právo, obchod, ekonomika IX*. Košice: Univerzita P. J. Šafárika v Košiciach, 2019, p. 164-165.

5 JERZMANOWSKI, J., *Creditor protection models in the context of corporate mergers and divisions – a comparative analysis of Polish, EU and Slovakian regulations*. In SUCHOŽA, J., HUSÁR, J., HUČKOVÁ, R. (eds.) *Právo, obchod, ekonomika IX*. Košice: Univerzita P. J. Šafárika v Košiciach, 2019, s. 165.

6 FLISZKIEWICZ, K. *Ochrona wierzycieli łączących się spółek kapitałowych*. Warszawa: C.H. Beck, 2016, p. 9-27.

Therefore, this article aims to provide a cross-sectional and comparative legal overview of such issues. First, it presents in more detail the difference between individual and institutional creditor protection measures applicable during merger and demerger processes. It explains why individual protection mechanisms are sometimes insufficient in those processes and why there is a need to resort to more general regulations concerning, in particular, the actual coverage of share capital and the protection of companies' assets. Subsequently, the article focuses on the former, i.e. the regulations concerning the actual coverage of share capital, and in particular the prohibition of the so-called *Unter-pari-Emission* and the scope of its application in merger and demerger processes. This issue is presented with a discussion of Polish, German, Austrian, Swiss and Italian law. The author pays particular attention to the effectiveness of these mechanisms in individual countries and the risk of creating companies (in merger and demerger processes) that do not have their share capitals fully covered. Finally, the author indicates the mechanisms that national legislators can use to strengthen the protection, currently appearing sometimes to be insufficient.

The research methodology selected for this paper relies mostly on the dogmatic law analysis and comparative law analysis.

1. INDIVIDUAL AND INSTITUTIONAL PROTECTION OF CREDITORS OF COMPANIES UNDER REORGANISATION

The distinction between individual and institutional creditor protection measures originates from German doctrine[7]. It can be said that both types of measures co-exist side by side[8]. In German doctrine, the former include instruments that enable creditors to request security for the claims (§22 and §125 UmwG)[9] and give them an option to pursue compensation for damages suffered during reorganisation (§25 et seq. UmwG)[10]. Their subject-specific nature arises from the fact that they require creditors to take specific action (demand security for their claim, submit a claim). As far as the latter group (institutional protection measures) is concerned, one could mention the rules regarding the actual coverage of share capital (DE: *Kapitalaufbringung*) and the protection of that capital (DE: *Kapitalerhaltung*). These measures are classified as institutional since, first of all, they do not require any activity on the part of individual creditors to be triggered, and, secondly, they provide protection during reorganisation not only to the existing creditors of companies being reorganised (in contrast to individual measures), but also to future ones. They simply create a certain institutional framework protecting current and future creditors of companies involved in reorganisation against insufficient satisfaction of their claims[11], while improving the trust of market participants in such reorganisations[12].

An analogous approach (and categorisation) should be applied to the analysis of other protection instruments available to creditors of companies being reorganised in other countries.

2. ACTUAL SHARE CAPITAL COVERAGE AND THE PROTECTION OF COMPANIES' ASSETS

De lege lata, share capital is one of the central constructs for the protection of assets, and thus also (but not only) for the protection of creditors of companies (especially in continental Europe)[13]. Its key

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7 SCHMIDT, K., *Gläubigerschutz bei Umstrukturierungen – Zum Referentenentwurf eines Umwandlungsgesetzes*. In Zeitschrift für Unternehmens- und Gesellschaftsrecht. 1993, no. 3, p. 367-383.

8 PETERSEN, J., *Der Gläubigerschutz im Umwandlungsrecht*. München: C.H. Beck, 2001, p. 315.

9 German act on conversions (*Umwandlungsgesetz*) of 28.10.1994 (BGBl I S. 3210, 1995 I S. 428 et seq. as amended).

10 GONTSCHAR, N., *Umwandlungsmaßnahmen im Insolvenzplanverfahren*. Baden-Baden: Nomos, 2017, p. 39-43; see also SCHMIDT, K., *Gläubigerschutz bei Umstrukturierungen – Zum Referentenentwurf eines Umwandlungsgesetzes*. In Zeitschrift für Unternehmens- und Gesellschaftsrecht, 1993, no. 3, p. 367.

11 PETERSEN, J., *Der Gläubigerschutz im Umwandlungsrecht*. Munich: C.H. Beck, 2001, p. 10-12, 17.

12 GONTSCHAR, N., *Umwandlungsmaßnahmen im Insolvenzplanverfahren*. Baden-Baden: Nomos, 2017, p. 38.

13 One should however, emphasize the gradual erosion of this system and the gradual loosening of capital requirements, especially for companies to which Directive 2017/1132 does not apply.

function is to limit the impact of losses incurred by companies on their capacity to satisfy their obligations. Though this view is being currently questioned, one may assume that it functions as a kind of a guarantee[14]. Although the contributions made to cover share capital are not an inviolable deposit (the company can use them), and the system based on share capital relies solely on balance sheet criteria without addressing the problem of liquidity, it nevertheless increases the solvency margin of companies[15]. This is primarily due to restrictions regarding the use of the company assets for the benefit of shareholders, which is of paramount importance in case of a crisis.

The guarantee function of the share capital relies on two types of legal rules. The first group includes rules aiming to ensure that the share capital becomes actually covered, while the second group focuses on maintaining such coverage[16]. This traditional division, emphasized in particular in German legal doctrine, reflects the aforementioned issue of capital coverage (*Kapitalaufbringung*) and its maintenance (*Kapitalerhaltung*).

The rules from the former group are to ensure that the actual economic value of assets contributed to the company to pay for the shares is at least equal to the amount of the declared share capital. This applies both to the establishment of a company and the potential share capital increase at a later date. The system of such rules is in itself quite extensive. It comprises, in particular, the rules on taking up shares, making contributions and the effects or sanctions for non-performance or improper performance of obligations to make contributions. Its crucial norms and the foundations for the rules on the actual coverage of share capital are provisions prohibiting taking up shares for less than their nominal value (for instance, in Poland, such rules are codified in the first sentence of Article 154(3) and Article 309(1) CCC[17]). They are supplemented by prohibitions on taking up own shares (in Poland: sentence 1 of Article 200(1) and sentence 1 of Article 366(1) CCC)[18].

The function of the rules protecting company assets is to prevent unjustified asset transfers that reduce solvency, which is crucial from creditors' perspective[19], and the investment potential of the companies, and thus their capacity to generate profits, which is of interest to shareholders. The system of provisions aimed at protection of company assets is no less extensive than the system of rules aimed at ensuring full coverage of share capital. It consists, in particular, of provisions defining the basic principles of protection of companies' assets, worded mostly as prohibitions, provisions on the distribution of profit or coverage of losses, regulations on the acquisition by companies of their own shares and their redemption, provisions creating mechanisms for the protection of creditors in connection with the reduction of share capital, and provisions on so-called financial assistance[20]. In Poland, crucial company asset protection rules include: in private limited liability companies – the ban on the return of contributions (article 189(1) CCC), while in joint-stock companies – the ban on reimbursement of payments made in exchange for shares (Article 344(1) CCC)[21]. The remaining company asset protection system provisions supplement these bans.

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14 OPALSKI, A., *Prawo zgrupowań spółek*. Warszawa: C.H. Beck, 2012, p. 384 and 386.

15 OPALSKI, A. In SOŁTYSIŃSKI S. (ed.), *System Prawa Prywatnego, vol. 17B, Prawo spółek kapitałowych.* Warszawa: C.H. Beck, 2016, p. 103, mn 3, p. 112, mn 10, p. 82, mn 3.

16 OPALSKI, A., *Prawo zgrupowań spółek*. Warszawa: C.H. Beck, 2012, p. 384-385.

17 Polish Code of Commercial Companies of 15.9.2000 (Journal of Laws of 2017, item 1577 as amended).

18 HERBET, A. In SOŁTYSIŃSKI S. (ed.), *System Prawa Prywatnego, vol. 17A, Prawo spółek kapitałowych*, Warszawa: C.H. Beck, 2015, p. 229-231, mn 21-24, OPALSKI, A. In SOŁTYSIŃSKI S. (ed.), *System Prawa Prywatnego, vol. 17B, Prawo spółek kapitałowych*. Warszawa: C.H. Beck, 2016, p. 125-127, mn 1-2.

19 OPALSKI, A. In SOŁTYSIŃSKI S. (ed.), *System Prawa Prywatnego, vol. 17B, Prawo spółek kapitałowych.* Warszawa: C.H. Beck, 2016, p. 167, mn 1.

20 See a collective classification of these mechanisms applicable to private limited liability companies and joint-stock companies in HERBET, A. In SOŁTYSIŃSKI S. (ed.), *System Prawa Prywatnego, vol. 17A, Prawo spółek kapitałowych*. Warszawa: C.H. Beck, 2015, p. 241, mn 36, OPALSKI, A. In SOŁTYSIŃSKI S. (ed.), *System Prawa Prywatnego, vol. 17B, Prawo spółek kapitałowych.* Warszawa: C.H. Beck, 2016, p. 167-168, mn 1.

21 OPALSKI, A., *Prawo zgrupowań spółek*. Warszawa: C.H. Beck, 2012, p. 388.

3. TOWARDS THE APPLICATION OF PROVISIONS ON ACTUAL COVERAGE AND PROTECTION COMPANIES' ASSETS IN MERGER AND DEMERGER PROCEDURES

The feasibility and necessity of applying provisions on the actual coverage of share capital and the protection of company's assets to merger and demerger procedures is not obvious at all. In fact, European legal scholars have been debating these matters for years. To a large extent, this is linked to the assessment of the actual effectiveness of the basic creditor protection mechanisms enshrined in the merger and demerger rules. The inadequacies of such protection directly support the view that one should rely on more general provisions on company law that could offer a broader institutional protection, including in particular the rules on share capital.

For instance, there has been a long-standing debate in foreign, mostly German and Austrian doctrine on whether the individual protection mechanisms ensure sufficiently high level of protection to creditors during reorganisation that would make it unnecessary to rely on the general rules governing the actual coverage and protection of share capital. Legal scholars and courts are divided on these issues. According to the prevailing (though not unanimous) view in the Austrian doctrine, individual creditor protection mechanisms (in particular §226 et seq. öAktG)[22] cannot be perceived as a sufficient and comprehensive regulation that would preclude the reliance on the general laws on the actual coverage and protection of share capital[23]. The Austrian Supreme Court also decisively agrees with this view. In Germany, the situation is more complex. It must be said that a large part of German doctrine takes the position that the protective mechanisms of the *Umwandlungsgesetz* (especially §22, §25 and §26 of the UmwG) are entirely sufficient, and finds an auxiliary reliance on the provisions on the actual coverage and protection of capital, in order to strengthen creditor protection, inadmissible[24]. German courts have expressed the same view a number of times[25].

In fact, this issue is part of a broader discussion on the effectiveness of *ex ante* and *ex post* creditor protection models. Foreign doctrine points out that in legal systems providing for *ex ante* protection, the level of creditor protection is higher than in systems based on *ex post* solutions. On the other hand, an important disadvantage of *ex ante* measures is that they extend the duration of reorganisation proceedings, which can be problematic, especially when the shareholders of the companies involved are unanimous as to the desirability of the reorganisation and want to proceed quickly[26]. In contrast, in systems relying on *ex post* solutions, creditor protection can sometimes be completely inadequate. In particular, as soon as the reorganisation is registered, the companies involved may take actions (dispose of assets, pay off the merged company's liabilities or incur new ones) rendering the subsequent use of *ex post* protection instruments (e.g., the right to demand security for claims) by creditors much less effective. The doctrine points out that, especially where individual creditor protection is based solely on *ex post* solutions, this protection must be boosted by solutions of institutional nature[27]. Attention is drawn to the need to ensure an appropriate balance between all solutions in question, i.e. *ex ante* and *ex post individual* protection and institutional protection measures. One should agree with this view.

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22 Austrian act on joint-stock companies (*Aktiengesetz*) of 31.3.1966 (BGBl No. 1965/98 as amended).

23 See a review of doctrinal positions in SZEP, CH. In JABORNEGG P., STRASSER R. (eds.), *Aktiengesetz. Kommentar, vol. 2*. Wien: Manz Verlag, 2010, §224, p. 922-924, mn 6-7.

24 In support of this view see e.g. RODEWALD J., *Vereinfachte „Kapitalherabsetzung" durch Verschmelzung von GmbH.* In GmbHRundschau. 1997, no. 1, p. 21, see also THALHEIMER J., *Kapitalerhaltung und Gläubigerschutz beim Down-Stream-Merger.* Hamburg: Verlag Dr. Kovač, 2011, p. 108-115; Contra e.g. KOPPENSTEINER, H.-G., *Zum Gläubigerschutz bei der Verschmelzung von Aktiengesellschaften*. In ADERHOLD, R., GRUNEWALD, B., KLINGBERG, D., PAEFGEN, W.A. (eds.), *Festschrift für Harm Peter Westermann zum 70. Geburtstag*. Köln: Dr. Otto Schmidt, 2008, s. 1160-1161, PETERSEN, J., *Der Gläubigerschutz im Umwandlungsrecht*. Munich: C.H. Beck, 2001, p. 195-196 and NARASCHEWSKI, A., *Gläubigerschutz bei der Verschmelzung von GmbH.* In GmbHRundschau.1998, no. 8, p. 358-359.

25 See e.g. OLG Stuttgart judgement of 4.10.2005, case No. 8 W 426/05, DStR 2006, 338.

26 KALSS, S., ECKERT, G., *Gläubigerverfahren bei Umgründungen von Kapitalgesellschaften: Überlegungen zur Zielrichtung und Wirkungsweise gläubigerschützender Vorschriften*. In Der Gesellschafter. 2008, no. 1, p. 90.

27 KALSS, S., ECKERT, G., *Gläubigerverfahren bei Umgründungen von Kapitalgesellschaften: Überlegungen zur Zielrichtung und Wirkungsweise gläubigerschützender Vorschriften*. In Der Gesellschafter. 2008, no. 1, p. 91.

The fact is that, under many legislations, individual protection afforded to creditors under merger and demerger regulations appears insufficient. This may apply not only to the aforementioned Austria or Germany, but to other countries as well. For example, the same conclusions can be drawn on the basis of Polish merger and demerger regulations, the weakness of which is most apparent at the interface with regulations governing the enforcement of claims and bankruptcy law[28]. Not only is there a clear lack of correlation between corporate law, enforcement and bankruptcy law, which primarily govern the order in which the claims of the creditors of the various companies involved in the reorganisation are satisfied, but, to make things worse, the bankruptcy of a company after the registration of a merger or demerger may completely nullify the protection of creditors under the reorganisation provisions of the Code of Commercial Companies.

This highlights the real need to rely on additional mechanisms in merger and demerger processes, in particular the provisions on real share capital coverage, as well as the protection of capital company assets.

4. CORPORATE MERGERS AND DEMERGERS AND THE PRINCIPLE OF ACTUAL COVERAGE OF SHARE CAPITAL

4.1. Preliminary remarks

Corporate mergers and divisions are peculiar procedures insofar as, in the course of their implementation, the need to apply provisions on the actual coverage of share capital and on the protection of corporate assets may be intertwined. In particular, in case of acquisitions of over-leveraged companies (in mergers) or over-leveraged parts of establishments (in demergers), we may be confronted with the question about the compliance of a specific procedure with the prohibition on taking up shares in the acquiring or newly established company below their nominal value by the shareholders of the merged or demerged company. On the other hand, a question may arise if the prohibition of returning contributions is not being breached. It is not possible to discuss both of these aspects within one short article. For this reason, further discussion focuses solely on the application of rules mandating actual share capital coverage to merger and demerger procedures.

4.2. Inadmissible *Unter-pari-Emission* – the case of Polish law: general remarks

The prohibition on taking up company shares below their nominal value (so-called *Unter-pari-Emission*) is expressly included in sentence 1 of Article 154(3) and Article 309(1) of Polish CCC. They are applicable both at the stage of establishing private limited liability and joint-stock companies and when their share capital is being increased (see Article 261 and Article 431(7) CCC). Generally speaking, the legislator requires that shares be taken up at least at their nominal value. Taking up shares below this value is not permitted. On the other hand, if the shares are taken up above this value (with the so-called share premium), the surplus is transferred to the supplementary fund (sentence 2 of Article 154(3) and Article 396(2) CCC).

The feasibility and necessity, as well as the correct manner of application of these provisions to merger and demerger processes raise many questions. References to the application of these provisions can be found in Article 497(1) and Article 532(1) CCC. In general, they require that the provisions on the establishment of acquiring or newly established companies be applied accordingly to mergers and

[28] See JERZMANOWSKI, J., *Creditor protection models in the context of corporate mergers and divisions – a comparative analysis of Polish, EU and Slovakian regulations*. In SUCHOŽA, J., HUSÁR, J., HUČKOVÁ, R. (eds.) *Právo, obchod, ekonomika IX*. Košice: Univerzita P. J. Šafárika v Košiciach, 2019, p. 169-170 and JERZMANOWSKI, J. *Finansowanie przez spółkę akcyjną nabycia lub objęcia emitowanych przez nią akcji w procesie wykupu menedżerskiego*. Warszawa: C.H. Beck, 2016, p. 138-140.

demergers, save for the provisions on in-kind contributions. These provisions are laid down in Articles 151-173 CCC (with regard to private limited liability companies) and Articles 301-327 CCC (governing joint-stock companies).

Though these provisions undoubtedly include sentence 1 of Article 154(3) and Article 309(1) CCC, this does not determine in itself that the assets acquired under merger or demerger must cover at least the value of shares allocated in exchange for them. This is because of the question whether in merger and demerger processes shares are "taken up" at all in the sense referred to in sentence 1 of Article 154(3) and Article 309(1) CCC. This is somewhat debatable since a shareholder of a company being acquired, a company merging by incorporation of a new company or a company being demerged does not transfer directly – to the acquiring or newly incorporated company – any assets (which, after all, pass to the beneficiary company under universal succession). What is more, the shareholder makes no additional declaration on taking up shares in the acquiring or newly established company, but rather becomes a shareholder of that company by operation of law, once the merger (or demerger) takes effect, in accordance with Article 494(4) and Article 531(5) CCC.

Nonetheless, the situation in question should be qualified as a "taking up" of shares within the meaning of sentence 1 of Article 154(3) or Article 309(1) CCC. The term "taking up shares" means, after all, simply the original acquisition of them. The fact that persons to whom new shares in acquiring or newly incorporated companies are allotted make no declarations is irrelevant. Consequently, also the very requirement to take up shares at least at their nominal value (arising from sentence 1 of Article 154(3) and Article 309(1) CCC) must be observed to the largest extent possible also in merger and demerger processes[29]. This applies both to mergers and demergers by establishing a new company and by acquisition.

4.3. Share coverage in the accounting and legal sense

The mere fact that regulations prohibiting the acquisition of shares below their nominal value apply to merger or demerger processes in itself explains very little. We should also study the implications of such applicability.

First of all, a distinction should be made between a situation where a merging company (acquired or merging by incorporation of a new company), or an organized part of an establishment transferred via demerger to an acquiring or newly incorporated company, has negative net assets, but can nevertheless have a positive valuation, and a situation in which both the net assets and the real value of that company or an organised part of an establishment are at or below zero[30]. In the former case, i.e. when the market value of the acquired assets is positive, the problem of adequate coverage of the newly created shares does not arise at all. In the latter case, the situation may be quite different.

At this point we must make a clear distinction between two issues, namely the coverage of newly issued shares from an accounting perspective and the coverage of share capital in the legal sense. In the first case, the issue is whether, after the share capital of the acquiring company is increased or the share capital of the newly incorporated company is issued and all required accounting operations are performed, the assets of the acquiring or newly incorporated company equal its liabilities (there will be a "balancing" of the two). When it comes to the second question, however, the issue is whether the acquiring or newly incorporated company would receive from the company being acquired, the company merging by the incorporation of a new company or the demerged company, a "contribution" with a value not less than the nominal value of the newly created shares[31].

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[29] In support of this view see RODZYNKIEWICZ, M. In OPALSKI, A. (ed.) *Kodeks spółek handlowych, vol. IV*. Warszawa: C.H. Beck, 2016, art. 497, mn 5 and art. 532, mn 3.

[30] In support of this view, e.g. in Italian doctrine, see e.g. GELOSA, G., INSALACO, M., *Fusioni e scissioni di società – profili civilistici e tributari*. Milano: Dott. A. Giuffrè Editore, 2002, p. 220-223, DINI, R., *Scissioni. Strutture, forme e funzioni*. Torino: G. Giappichelli, 2008, p. 374.

[31] REJMER, D., *Łączenie spółek kapitałowych. Regulacje prawnorachunkowe w Kodeksie spółek handlowych i innych ustawach*. Warszawa: Wolters Kluwer, 2023, p. 277-278.

Under Polish law, regardless of how the merger or demerger is settled from accounting perspective (with two methods being available: the so-called "acquisition method" and the so-called "pooling of interests method")[32], the newly created shares will be always covered from the balance sheet perspective. Without going into details, this is due to the possibility of recognising the so-called "goodwill" (positive or negative) in the balance sheet of the acquiring or newly incorporated company, or identifying the so-called "positive or negative capital from the merger" or demerger, which allow to compensate for balance sheet shortfalls. In both cases, we are dealing with self-balancing mechanisms[33].

The coverage of share capital in the legal sense is yet another matter. Although, unlike in German or Austrian law[34], Polish law assumes that the coverage or increase of share capital of a newly established or acquiring company in a merger or demerger process is not treated as a contribution in kind[35] and we are not dealing with "contributions" in a strict sense of the word, we should still speak of covering the share capital of the acquiring or newly established company with the property (net assets) or, potentially, the value of the establishment, establishments (or their parts) of the company being acquired, the companies merging by establishing a new company or the demerging company[36].

In some merger or demerger procedures, i.e. specifically when the market value of the assets transferred between companies is at or below zero, a merger or demerger – at least in certain specific configurations – may not be permissible. These are situations in which even the minimum share values – required by law – would not be covered[37].

4.4. Doctrinal positions in selected countries

Legal scholars in various countries have recognized the issue of the compatibility of merger and demerger procedures with regulations prohibiting so-called *Unter-pari-Emission*. In order to discuss the matter in the broadest terms, it is worth making a handful of comparative legal remarks. Of particular relevance are the comments on the legal regulations in Germany and Austria, where, traditionally, the issue of coverage and protection of share capital has been studied at great length. One should also include Switzerland and Italy, with extensive scholarship abounding in interesting studies.

4.4.1. Germany

First of all, according to the prevailing view in German doctrine, share capital in mergers or demergers is covered by a contribution in kind. The transfer of assets between companies involved in a reorganisation is seen as a contribution[38]. Additionally, in merger and demerger processes, scholars speak of the dogma of the obligation to allocate the shares (*Dogma der Anteilsgewährungspflicht*)[39] of the acquiring or newly established company to the shareholders of the company being acquired, the company merging by the establishment of a new company or the demerged company (or, potentially, allocating the shares to the demerged company itself – in the case of a demerger by spin-off – DE: *Ausgliederung*). A reorganization without the allocation of these shares is, in principle, invalid.

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[32] More on these methods in REJMER, D., *Łączenie spółek kapitałowych. Regulacje prawnorachunkowe w Kodeksie spółek handlowych i innych ustawach*. Warszawa: Wolters Kluwer, 2023, p. 191-233.

[33] REJMER, D., *Łączenie spółek kapitałowych. Regulacje prawnorachunkowe w Kodeksie spółek handlowych i innych ustawach*. Warszawa: Wolters Kluwer, 2023, p. 233-234, p. 278-279, p. 281-282 and p. 310.

[34] See further comments.

[35] Zob. np. RODZYNKIEWICZ, M. In OPALSKI, A. (ed.), *Kodeks spółek handlowych, vol. IV*. Warszawa: C.H. Beck, 2016, art. 497, mn 3 and art. 532, mn 4.

[36] REJMER, D., *Łączenie spółek kapitałowych. Regulacje prawnorachunkowe w Kodeksie spółek handlowych i innych ustawach*. Warszawa: Wolters Kluwer, 2023, p. 275-276.

[37] Cf. in German doctrine e.g. LIMMER, P. In LIMMER, P. (ed.), *Handbuch der Unternehmensumwandlung*. München: Carl Heymanns Verlag, 2019, p. 1174, mn 51; see also HECKSCHEN, H., *Umstrukturierung von Kapitalgesellschaften vor und während der Krise: Umwandlungsmaßnahmen vor dem Insolvenzeröffnungsantrag*. In Der Betrieb. 2005, no. 42, p. 2288.

[38] See e.g. HECKSCHEN, H., Die Entwicklung des Umwandlungsrechts aus Sicht der Rechtsprechung und Praxis. In Der Betrieb. 1998, no. 27-28, p. 1386 and LIMMER, P. In LIMMER, P. (ed.), *Handbuch der Unternehmensumwandlung*. München: Carl Heymanns Verlag, 2019, p. 1173, mn 51 and p. 1188, mn 84.

[39] OLMS, F., *Die Sanierungsverschmelzung der GmbH im Konzern*. Hamburg: Verlag Dr. Kovač, 2013, p. 2.

As the coverage of the share capital of the acquiring or newly established company is viewed as a contribution in kind, there is no doubt in German doctrine that the obligation to comply with the *Unter-pari-Emission* prohibition applies. Its violation, in the case of a reorganisation involving an over-leveraged company, can in principle only be avoided if it is preceded by additional remedies[40], or if it is carried out in an appropriate configuration. Specifically, this refers to mergers or demergers "by acquisition", carried out without an increase in the acquiring company's share capital. Such an increase, for example, is precluded in the case of a takeover of a wholly owned subsidiary by its parent company. What is more, German law contains a rule allowing a merger or demerger to proceed without an increase in the acquiring company's share capital if all shareholders of the acquired or demerged company waive their right to "receive" new shares in the acquiring company before a notary (see sentence 3 of §54 (1) and sentence 3 of §68(1) UmwG, also in conjunction with §125(1) UmwG)[41].

4.4.2. Austria

Austrian law governing mergers, i.e. *Aktiengesetz* and *Gesetz über Gesellschaften mit beschränkter Haftung* (referring to *Aktiengesetz*), does not provide directly that the assets of a company involved in a merger must have a positive value[42]. However, similarly to German doctrine, relevant restrictions are derived from the general provisions on the actual coverage and protection of capital (as well as e.g. from provisions on invalidity of legal transactions conflicting with good conduct)[43]. Of relevance here is the aforementioned view (decisively expressed by the Austrian Supreme Court) that §226 öAktG, which establishes the basic mechanism for the protection of creditors of merging companies, cannot be seen as a sufficient and comprehensive regulation that eliminates the need to resort to the provisions of the capital regulatory regime[44]. Unlike in Germany, Austrian scholars do not devote as much attention to the issue of actual coverage of the share capital of acquiring or newly established companies. However, taking up new shares below their nominal value (*Unter-pari-Emisssion*) is also deemed inadmissible. In this regard, as in German doctrine, it is generally accepted that the value of assets transferred in a merger must be positive if the merger is carried out with an increase in the share capital of the acquiring company, requiring relevant capital coverage[45]. Analogous comments are made with regard to demergers[46].

4.4.3. Switzerland

Swiss law offers ample material for many interesting conclusions. The Swiss situation is quite peculiar: given the specific regulation, i.e. Article 6 FusG[47] on mergers of companies disclosing capital

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[40] See e.g. LIMMER, P. In LIMMER, P. (ed.), *Handbuch der Unternehmensumwandlung*. München: Carl Heymanns Verlag, 2019, p. 1173, mn 51 and p. 1188, mn 84.

[41] See e.g. HECKSCHEN, H., Die Pflicht zur Anteilsgewährung im Umwandlungsrecht. In Der Betrieb. 2008, no. 25, p. 1365-1366, 1368, PRIESTER H.-J., *Anteilsgewährung und sonstige Leistungen bei Verschmelzung und Spaltung,* In Zeitschrift für Wirtschaftsrecht. 2013, no. 43, p. 2034, WICKE, H., *Der Grundsatz der Anteilsgewährung bei der Verschmelzung und seine Ausnahmen*. In Zeitschrift für Unternehmens- und Gesellschaftsrecht. 2017, no. 4, p. 527 et seq.

[42] BREISCH, M., *Upstream-Verschmelzung bei negativem Verkehrswert der übertragenden Gesellschaft?* In Der Gesellschafter. 2021, no. 3, p. 191; See also e.g. KALSS, S. In KALSS, S. (ed.), *Verschmelzung – Spaltung – Umwandlung. Kommentar*. Wien: Manzsche Verlags- und Universitätsbuchhandlung, 2021, §224 AktG, p. 206, mn 69.

[43] Cf. KALSS, S. In KALSS, S. (ed.), *Verschmelzung – Spaltung – Umwandlung. Kommentar*. Wien: Manzsche Verlags- und Universitätsbuchhandlung, 2021, §224 AktG, p. 209, mn 76 and p. 214-215, mn 92.

[44] SCHARL, N., *Die Zulässigkeit von Side-Stream-Verschmelzungen bei Vorliegen eines negativen Verkehrswerts – Exposé zum Dissertationsvorhaben*, Wien 2022, p. 3.

[45] See e.g. SCHARL, N., *Die Zulässigkeit von Side-Stream-Verschmelzungen bei Vorliegen eines negativen Verkehrswerts – Exposé zum Dissertationsvorhaben*, Wien 2022, p. 4, BREISCH, M., *Upstream-Verschmelzung bei negativem Verkehrswert der übertragenden Gesellschaft?* In Der Gesellschafter. 2021, no. 3, p. 192; importantly, some scholars claim that it refers to the positive value of property net of any potential synergy effects – see SZEP, CH. In JABORNEGG P., STRASSER R. (eds.), *Aktiengesetz. Kommentar, vol. 2*. Wien: Manz Verlag, 2010, §224, p. 924, mn 8.

[46] Cf. KALSS, S. In KALSS, S. (ed.), *Verschmelzung – Spaltung – Umwandlung. Kommentar*. Wien: Manzsche Verlags- und Universitätsbuchhandlung, 2021, §17 SpaltG, p. 1233, mn 132.

[47] Swiss Act on mergers (*Fusionsgesetz*) of 3.10.2003 (Systematische Sammlung des Bundesrechts 221.301, AS 2004 S. 2617 et seq. as amended).

loss or excessive debt, Swiss doctrine devotes far less space to analyses of the compliance of reorganisations with the rules on the actual coverage or protection of assets of companies. According to Article 6(1) FusG, a company whose net assets fail to cover at least a half of the share capital and non-distributable mandatory reserves, as well as a company that is over-leveraged, may, as a rule, merge with another company only when the latter has enough "free" equity to cover the shortfall in the former. Additionally, such merger is possible only when some of the creditors of the merging companies agree to give priority in satisfaction to others and their claims correspond at least to the shortfall identified in the merging company in poor financial standing (see Article 6(1) FusG).

Nevertheless, it should be noted that, just like the German and Austrian doctrine, Swiss legal scholarship recognises the problem of compatibility of mergers and demergers with the *Unter-pari-Emission* prohibition. Pursuant to Article 624 OR, new shares in the share capital of a company must be taken up at least at their nominal value (*zu pari*). Legal scholars note that, if new shares in the increased share capital of the acquiring company were not covered by the assets of the company being acquired, transferred to it, we could deal with an inadmissible *Unter-pari-Emission*[48]. The same applies to demergers. Also in this case it is assumed that the value of assets carved out from a company to be transferred to another one should, as a rule, be higher that the value of simultaneously transferred liabilities[49]. In principle, the shareholders of the company being acquired or a demerged company must receive new shares in the acquiring company. After all, the so-called principle of continuity of membership – *mitgliedschaftsliche Kontinuität* (Article 31 FusG) – applies, constituting the primary mechanism for protecting shareholders of companies involved in reorganisations. The new shares, as a rule, must be covered with assets with a value equivalent to at least their nominal value (with reservation that in determining the value of the transferred assets, the so-called goodwill may also be taken into account)[50].

The reorganisations where the share capital of the acquiring company is not increased at all form an exception. In such cases, one cannot speak of any *Unter-pari-Emission* in the acquiring company, since no new shares are issued.

4.4.4. Italy

The Italian doctrine represents a fundamentally different approach to protecting creditors of companies under reorganisation. This is due to a number of reasons, most notably the basic protective mechanism available under Italian law (the right of creditors to file a so-called "objection" – IT: *l'opposizione*), which is of *ex ante* rather than *ex post* nature. As a result, it is not necessary to extensively seek out other solutions, as it is the case e.g. in the Germanic law countries. In addition, Italy has introduced a special regulation for mergers carried out after a financed acquisition (IT: *la fusione a seguito di acquisizione con indebitamento*), which additionally strengthens creditor protection.

Unlike the doctrine of German-speaking countries, the Italian scholars dedicate far less attention to the issue of the compatibility of merger and demerger operations with the principle of full coverage of share capital and the provisions of the share capital protection system. Key analysis in this field focus on the general admissibility of the involvement of companies disclosing loss in mergers and demergers, as referred to in Article 2446 and 2447 c.c.[51].

Nevertheless, legal scholars also note that the acquisition of a company characterised by negative equity, or a portion of a demerging company with zero or below zero asset value, can be problematic from the point of view of the principle of full coverage of share capital. In this regard, in line with the

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48 VON DER CRONE, H.C., GERSBACH, A., KESSLER, F.J., VON DER CRONE, B., INGBER, K., *Das Fusionsgesetz*. Zürich – Basel – Genf: Schulthess Juristische Medien, 2017, p. 121, mn 257.

49 VON DER CRONE, H.C. et al. *Das Fusionsgesetz*. Zürich – Basel – Genf: Schulthess Juristische Medien, 2017, p. 479, mn 1058.

50 VON DER CRONE, H.C. et al. *Das Fusionsgesetz*. Zürich – Basel – Genf: Schulthess Juristische Medien, 2017, p. 479, mn 1058.

51 Codice Civile – Italian Civil Code – Il Codice Civile of 16.3.1942 (Gazzetta Ufficiale no 79 of 4.4.1942 r., Serie Generale as amended).

above reasoning, scholars emphasize the need to distinguish between a situation in which a company (or a specific, separable portion of its property) is characterized by negative net assets, but nevertheless can still be valued positively (e.g., due to high goodwill) and a situation in which both the net assets and the real value of the company or a portion of its property is worth zero or below zero. In the former case, it is simply possible to establish a share exchange ratio providing for shareholders of the acquired or demerged company to take up new shares of the acquiring company and cover the increased share capital of that company with the assets of the company being acquired or demerged[52]. In the latter, i.e., when the company being acquired or the demerged portion of property do not have any positive value, since the increased capital in the acquiring company could not be covered, the merger or demerger are *de facto* possible only when no such increase takes place at all[53]. This, of course, refers to cases similar to those already discussed, i.e. *upstream* or *sidestream* reorganisations in particular[54].

4.5. Mergers not in conflict with the principle of actual coverage of share capital and additional remedies

Not all merger or demerger procedures must be examined for compliance with the principle of actual coverage of share capital. Such examination is needed only when a new company with new share capital is formed (and hence whenever a merger by establishment of a new company takes place) or when the share capital of the acquiring company is increased in the process of merger by acquisition. If specific legal rules prevent the increase of the share capital of the acquiring company or allow for abstaining for such an increase, the problem of insufficient coverage of the share capital of the acquiring company with the assets of the company being acquired does not occur[55].

Typical cases where the allocation of the acquiring company's shares to the shareholders of the acquired or demerged company is not permitted include *upstream* operations, i.e. (1) the acquisition by the parent company of a wholly owned subsidiary, and (2) the acquisition by the parent company of a certain portion of assets of the demerged company being a wholly owned subsidiary. Under Polish law, these cases are covered by Articles 514(1) and 550(1) CCC. The general rule is that the acquiring company cannot simply take up its own shares in exchange for the shares it holds in the company being acquired or the demerged company. A similar situation may apply to so-called *sidestream* mergers – if the law of the country so provides. This is the case, for example, in Poland, where Article 515^1(1) CCC allows a merger to be carried out without allocating shares of the acquiring company to the shareholders of the company being acquired in a situation where one shareholder holds directly or indirectly all the shares in the merging companies, or the shareholders of the merging companies hold shares in the same proportion in all the merging companies.

From the point of view of the principle of actual coverage of share capital, the problem also does not arise if the shareholders of the company being acquired are granted already existing shares of the acquiring company held by the acquiring company (for example, in Polish law this is allowed by Article 515 CCC). Also in such a case, the share capital of the acquiring company is not increased, and hence there is no basis for applying the regulation mandating full coverage of the acquired shares.

Yet another case when a merger of companies does not conflict with the principle of actual coverage of share capital is the example, cited in the doctrine, when new shareholders of the acquiring company are allotted so-called nondenominational shares. Obviously, this applies to those countries where the

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[52] See e.g. GELOSA, G., INSALACO, M., *Fusioni e scissioni di società – profili civilistici e tributari*. Milano: Dott. A. Giuffrè Editore, 2002, p. 219-220, DINI, R., *Scissioni. Strutture, forme e funzioni*. Torino: G. Giappichelli, 2008, p. 374.

[53] GELOSA, G., INSALACO, M., *Fusioni e scissioni di società – profili civilistici e tributari*. Milano: Dott. A. Giuffrè Editore, 2002, p. 220, 222-223, DINI, R., *Scissioni. Strutture, forme e funzioni*. Torino: G. Giappichelli, 2008, p. 373.

[54] See e.g. DINI, R., *Scissioni. Strutture, forme e funzioni*. Torino: G. Giappichelli, 2008, p. 373-374, BUSANI, A., MONTINARI, CH., *La scissione con apporto di valore patrimoniale negative alla società beneficiaria*. In Le Società. 2011, no. 6, p. 653-654.

[55] See, in German doctrine, See e.g. LIMMER, P. In LIMMER, P. (ed.), *Handbuch der Unternehmensumwandlung*. München: Carl Heymans Verlag, 2019, p. 1173, mn 51 and p. 1177, mn 59.

law provides for such structures at all[56]. For example, under Polish law, pursuant to Article 300^2(3) CCC, such shares can be issued by so-called "simple joint stock companies" (PL: *prosta spółka akcyjna*). On the other hand, sentence 1 of Article 515(1) CCC provides that the acquiring company may allocate shares without nominal value to the shareholders of the company being acquired.

In fact, as demonstrated above, a number of mechanisms avoiding conflict with the rules on the actual coverage of share capital can be found across various legal systems. Since in all of the cases discussed above the share capital of the acquiring company is not increased and thus the provisions on the actual coverage of share capital need not be triggered, the use one of such options could be applied to reorganise (acquire or demerge) an over-leveraged company that would otherwise be impossible[57]. In practice, there have been cases where certain structures (e.g. parent – subsidiary) involving over-leveraged companies were first established, or certain conversions were carried out (e.g. into companies authorized to issue nondenominational shares) with the sole objective to be later used to reorganise over-leveraged businesses. Alternatively, other remedies allowed by national law may be used at the stages preceding mergers or demergers. They may involve, for instance, additional contributions to the over-leveraged company, already mentioned above, which are made by existing shareholders, "remedial" decrease of the share capital along with its appropriate increase, as well as other mechanisms, e.g. the submission of declarations by certain creditors (in particular shareholders) consenting to have their claims subordinated with respect to others.

4.6. The issue of effectiveness of protection

Since accounting mechanisms applied to settle mergers and demergers always ensure full coverage of newly issued shares from the perspective of balance sheet, incomplete coverage of these shares in the legal sense can sometimes go unnoticed. There is no denying that in mergers or demergers the acquiring or newly incorporated companies may not have their share capitals (in the legal sense) fully covered[58].

This problem can be illustrated using the example of Polish law. In practice, frequently the enforcement of any claims arising from a violation of Article 154(3) or Article 309(1) CCC in a reorganisation process *is de lege lata* very difficult, if not impossible. The mechanisms Polish law offers in this regard are very scarce. In particular, it should be noted that – unlike in some EU member states[59] – in Poland, the examination of a merger or demerger plan by an expert does not include the verification of the coverage of the share capital issued or increased in connection with the merger or demerger[60]. Save for some special cases provided for in Article 503^1(2) or 538^1(3) in conjunction with Article 312 CCC[61], merger and demerger procedures do not involve any verification of share capital coverage in the newly established company or its increase in the acquiring company.

Likewise, no such verification, and thus the confirmation (by way of relevant certificate) that the share capital of the acquiring or newly established company has been duly covered is required from the

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56 See, e.g. in the context of Polish law GRZEŚKÓW, M., *Połączenie odwrotne (downstream merger)*. Warszawa: C.H. Beck, 2023, p. 209; see also in the context of Italian law art. 2346(3) c.c. and MAGLIULO, F., *La scissione delle società*. Milano: Ipsoa, 2012, p. 617.

57 In doing so, one must also ensure compliance with all the remaining legal requirements.

58 REJMER, D., *Łączenie spółek kapitałowych. Regulacje prawnorachunkowe w Kodeksie spółek handlowych i innych ustawach*. Warszawa: Wolters Kluwer, 2023, p. 310.

59 See REJMER, D., *Łączenie spółek kapitałowych. Regulacje prawnorachunkowe w Kodeksie spółek handlowych i innych ustawach*. Warszawa: Wolters Kluwer, 2023, p. 150-153.

60 REJMER, D., *Łączenie spółek kapitałowych. Regulacje prawnorachunkowe w Kodeksie spółek handlowych i innych ustawach*. Warszawa: Wolters Kluwer, 2023, p. 150.

61 Pursuant to these provisions, in exceptional cases, i.e. primarily when the acquiring or newly established company is a joint-stock company and all the shareholders of companies involved in merger or demerger consented to abstain from having the merger plan examined by an expert and commissioning relevant expert opinion (as well as in other cases referred to in Article 538^1(2) and 538^1(3) CCC), the provisions of Articles 311-312^1 CCC apply accordingly (in particular with respect to the audit of contributions in kind).

members of management boards of such companies, which releases them from the standard liability referred to in Article 291 and 479 CCC[62].

It has been proposed in the Polish legal doctrine to oblige the management board members of the acquiring or newly established company to verify whether, following merger (demerger), the capital issued or increased in the reorganisation process has been covered by the value of the enterprise of the acquired or demerged company or the value of enterprises or companies merging by the establishment of a new company. The management board members would be required to confirm such coverage by a relevant certificate submitted to the registry court, being liable for relevant penalty for failing to do so. If the capital was found to be insufficiently covered, the registry court would enter a note in the business register disclosing the lack of full coverage.

Without a doubt, such a solution would be useful but it would not eliminate the problem of insufficient coverage of share capital of the acquiring or newly established company as a result of a merger or demerger. On top of this, a question would arise whether the shareholders of the company being acquired, a company merging by the establishment of a new company or a demerging company could be required to make up for the shortfall. Unfortunately, de lege lata one could hardly find such an option on the grounds of Polish law. This is because, unlike provisions on company formation, merger and demerger rules do not provide for any obligation of the shareholders of the acquired company, a company merging by the establishment of a new company or a demerging company to make any contributions. In consequence, *de lege lata* there are no grounds for the acquiring or the newly established company to raise such claims[63]. As a result, this aspect would also need to be addressed.

Polish law is not unique in terms of not ensuring adequate level of protection against the violation of the prohibition against taking up new shares below their nominal value in merger and demerger procedures. The situation is similar in many European states, especially if the courts are not tasked with verifying the actual coverage of share capital of the acquiring or newly established companies. In fact, many countries are facing the need of developing real defence mechanisms in this respect, appropriately correlated with their existing national creditor protection frameworks. Examples of changes may include, in particular, the increased role of auditors examining merger or demerger plans (by requiring them to verify the coverage of share capital in the acquiring or newly incorporated company), or expanding the responsibilities of managers leading the reorganisation. Some inspiration in this regard can be found, for example, in the regulations adopted in Spain, the Netherlands and Sweden[64]. Different approaches are possible in this area. Namely, an expert may be obliged, for example, to examine whether the sum of the equity of the companies participating in the merger covers at least the share capital of the acquiring or the newly established company (or whether the share capital of all companies existing after the division is fully covered). The expert may also be required to examine whether, in his or her opinion, the merger or division may jeopardise the ability of the companies participating in the reorganisation to settle their payable liabilities[65].

Important inspirations can be also provided by the earlier §69(11)(a) and §69(14) of the Slovak Commercial Code (Obchodný zakonnik). Those regulations stipulated that on the date of the merger or demerger, the value of the acquiring company's liabilities (except for subordinated liabilities) could not exceed the value of its assets, which required confirmation by an expert[66]. These provisions have not been directly transferred to the new law (Act No. 309/2023 Coll. on Transformations of Companies and

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62 REJMER, D., *Łączenie spółek kapitałowych. Regulacje prawnorachunkowe w Kodeksie spółek handlowych i innych ustawach*. Warszawa: Wolters Kluwer, 2023, p. 310 and p. 284.

63 REJMER, D., *Łączenie spółek kapitałowych. Regulacje prawnorachunkowe w Kodeksie spółek handlowych i innych ustawach*. Warszawa: Wolters Kluwer, 2023, p. 286.

64 REJMER, D., *Łączenie spółek kapitałowych. Regulacje prawnorachunkowe w Kodeksie spółek handlowych i innych ustawach*. Warszawa: Wolters Kluwer, 2023, p. 150-152.

65 See REJMER, D., *Łączenie spółek kapitałowych. Regulacje prawnorachunkowe w Kodeksie spółek handlowych i innych ustawach*. Warszawa: Wolters Kluwer, 2023, p. 150-152.

66 BARTOVÁ, Z. P. In PATAKYOVÁ, M. (et al.), *Commercial Code. Commentary*. Bratislava: C.H. Beck, 2022, p. 384-385.

Cooperatives[67]), but this may be treated as a legislative omission. In fact, it is still postulated that the expert should examine whether, as a result of the reorganization, the assets of the acquiring company will exceed its liabilities[68].

CONCLUSION

The analysis has demonstrated that the approach to the protection of creditors of companies involved in mergers or demergers varies greatly in legal doctrine from country to country, and often depends on whether the system in question is based primarily on *ex ante* or *ex post* mechanisms. Representatives of the doctrine (even those commenting on the regulations of the same countries) do not agree whether, in addition to the typical reorganization mechanisms of creditor protection, it is necessary to apply to mergers and divisions regulations of institutional nature, in particular provisions on the actual coverage of share capital. As it turns out, the views depend to the large extent on the assessed effectiveness of the protective mechanisms under mergers and demergers law.

Nevertheless, the analysis has revealed that, according to the prevailing view, general mechanisms of the system ensuring actual coverage of share capital in mergers and demergers need to be applied. This approach is correct. It means, in practice, that in order for the reorganisations to be effective, the increased share capital of the acquiring companies or the newly issued share capital of the newly established companies must be covered by the assets of the companies being acquired, merged by the establishment of a new company or the companies being demerged. Otherwise, we would be dealing with unauthorized *Unter-pari emissions.*

Naturally, the risk of violating the provisions on the actual coverage of share capital is not inherent to all transaction models. In particular, it does not exist in intra-corporate operations, such as *upstream* (or *sidestream*) transactions, among 100% parent and subsidiary companies, as well as in other cases where the share capital of the acquiring company is not increased or specific remedies have been put in place. However, where this risk does exists, unfortunately, the sanction mechanisms offered by the law do not provide creditors with sufficient protection against violations of the principle of actual coverage of share capital in the reorganisation process. This applies in particular to such countries where the verification of share capital coverage of acquiring or newly incorporated companies in a merger or demerger process falls beyond judicial control. This highlights the need for viable protection mechanisms in such countries, coordinated with their existing creditor protection models. They may include, in particular, the increased the role of auditors examining merger or demerger plans (by requiring them to verify the coverage of share capital in the acquiring or newly incorporated company), or, potentially, expanding the responsibilities of managers leading the reorganisation.

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[67] Act No. 309/2023 Coll. on Transformations of Companies and Cooperatives.

[68] ŽITŇANSKÁ, L. (et al.), *Zákon o premenách obchodných spoločností a družstiev. Komentár*. Bratislava: Wolters Kluwer, 2025, p. 74-78 and 118-120.

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Potenciál mimosúdneho riešenia sporov z obchodného tajomstva

The potential for out-of-court settlement of trade secret disputes

Abstrakt

Význam obchodného tajomstva v súčasnosti narastá. „Neviditeľnosť" obchodného tajomstva je dôvodom, prečo si ho podniky v hospodárskej súťaži cenia viac ako iné práva duševného vlastníctva. Logicky možno predpokladať, že spolu s nárastom využívania obchodného tajomstva na ochranu cenných a tajných informácií by mali priamo úmerne narastať aj spory z obchodného tajomstva. Autorka v tej súvislosti skúma skutočný počet súdnych sporov a, paradoxne, podľa prieskumu zisťuje relatívne nízky počet vedených súdnych sporov z obchodného tajomstva. Autorka uvádza kľúčové dôvody, prečo sa majitelia obchodných tajomstiev zdráhajú viesť spor súdnou cestou. Hľadajú sa preto alternatívne spôsoby riešenia sporov z obchodného tajomstva. V tej súvislosti autorka analyzuje najdôležitejšie výhody mimosúdneho riešenia sporov z obchodného tajomstva so zameraním na arbitráž (rozhodcovské konanie). Pokiaľ ide o spory s medzinárodným prvkom, vyzdvihuje sa využitie možnosti využitia Arbitrážneho a mediačného centra WIPO.

Kľúčové slová: *obchodné tajomstvo, porušenie obchodného tajomstva, súdna ochrana pri porušení obchodného tajomstva, mimosúdne riešenie sporov pri porušení obchodného tajomstva, arbitráž (rozhodcovské konanie), zachovanie dôvernosti.*

Abstract

The importance of trade secrets is currently increasing. The "invisibility" of trade secrets is the reason why businesses value them more than other intellectual property rights in the competitive environment. It can be logically assumed that as the use of trade secrets to protect valuable and confidential information increases, so should the number of trade secret infringement disputes. The author therefore examines the "real" volume of disputes regarding trade secret infringement. Paradoxically, the study finds a relatively low number of lawsuits from the causally competent court. The author presents the key reasons why trade secret owners are reluctant to pursue a dispute through court. Therefore, she is looking for alternative ways to resolve trade secret disputes. In this context, the author analyzes the most important advantages of out-of-court resolution of trade secret disputes with a focus on arbitration. As for disputes with an international element, the possibility of using the WIPO Arbitration and Mediation Center is highlighted.

Keywords: *trade secrets, unlawful acquisition, use and disclosure of trade secret, trade secret lawsuits, judicial protection of trade secret, out-of-court dispute resolution in trade secret matters, arbitration, confidentiality.*

JEL Classification: K220

ÚVOD

Obchodné tajomstvo patrí historicky medzi najvýznamnejšie súkromnoprávne inštitúty, ktorým sa chránia tajné a cenné informácie. Práve informácie sa v súčasnom modernom svete považujú za suroviny

[1] Odborná asistentka na Ústave súkromného práva Fakulty práva Paneurópskej vysokej školy v Bratislave so zameraním na právo duševného vlastníctva a obchodné právo.

novodobej ekonomiky. Tie informácie, ktoré sú tajné, mávajú pre ich majiteľa často nevyčísliteľnú hodnotu a môže od nich závisieť celá existencia podniku.[2] Obchodné tajomstvo ako významný *obchodnoprávny inštitút*[3], ktorý možno zaradiť zároveň do *systému práva duševného vlastníctva*[4], si vyžaduje inú ochranu než majú ostatné, v porovnaní s obchodným tajomstvom registrované, práva duševného vlastníctva, ako sú napríklad patenty, dizajny či ochranné známky. Ochrana obchodného tajomstva spočíva predovšetkým v jeho faktickom utajení. Vo všeobecnosti sa preto kladie dôraz najmä na prevenciu a zabezpečenie obchodných tajomstiev internými bezpečnostnými mechanizmami zo strany osôb, ktoré s týmito informáciami oprávnene nakladajú.[5]

Ak však napriek snahe a prijatiu adekvátnych krokov na utajenie obchodného tajomstva dôjde k jeho porušeniu alebo ohrozeniu, právna úprava umožňuje majiteľovi obchodného tajomstva domáhať sa právnej ochrany.[6] Podľa § 20 OBZ: „*Proti porušeniu alebo ohrozeniu práva na obchodné tajomstvo prislúcha majiteľovi obchodného tajomstva právna ochrana*.“ V praxi ide o určité opatrenia, postupy a prostriedky nápravy s cieľom zamedziť porušeniu a ohrozeniu obchodného tajomstva zo strany tretích osôb, a v prípade porušenia práva dosiahnuť určitú formu kompenzácie. Štandardnou možnosťou, ktorú majú majitelia obchodného tajomstva k dispozícii v prípade porušenia obchodného tajomstva vo forme jeho neoprávneného získania, využitia alebo sprístupnenia, je vedenie *súdneho sporu* na získanie právnych prostriedkov nápravy. Na riešenie potenciálnych sporov z obchodného tajomstva môžu strany okrem súdov využiť aj rôzne ďalšie metódy, vrátane vyjednávania, mediácie a arbitráže (rozhodcovské konanie). Tieto metódy, označované aj ako mimosúdne spôsoby riešenia sporov (ADR), ponúkajú *alternatívy* k súdnym sporom aj vo veciach obchodného tajomstva.

V predloženom príspevku poukazujeme na význam obchodného tajomstva v súčasnosti. V tej súvislosti skúmame čoraz častejšie využívanie obchodného tajomstva v podnikoch, s čím objektívne súvisí aj nárast sporov z obchodného tajomstva. **Jadrom** príspevku je analýza jednotlivých spôsobov právnej ochrany, ktoré má majiteľ obchodného tajomstva k dispozícii pri porušení obchodného tajomstva. Kriticky hodnotíme súdne riešenie sporov z obchodného tajomstva. Pomocou metódy výskumu zisťujeme, že súdne spory vo veciach obchodného tajomstva sú (nie len) na Slovensku

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[2] Obchodné tajomstvo sa nemusí vzťahovať bezprostredne na podnik a ani na podnikateľskú alebo inú zárobkovú činnosť. Potvrdzuje to dikcia Smernice Európskeho parlamentu a Rady (EÚ) 2016/943 z 8. júna 2016 o ochrane nesprístupneného know-how a obchodných informácií (obchodného tajomstva), ďalej len „smernica o obchodnom tajomstve“; pozri k tomu napr.: odôvodnenie č. 1, v ktorom prvej vete je uvedené: „*Podniky a neziskové výskumné inštitúcie (...)*“; (porovnaj: § 17 ods. 1 a ods. 2 OBZ).

[3] Základná právna úprava obchodného tajomstva na Slovensku je v súčasnosti obsiahnutá v Zákone č. 513/1991 Zb. Obchodný zákonník v znení neskorších predpisov (ďalej len „OBZ“). Obchodné tajomstvo medzi inštitúty obchodného práva zaraďuje aj odborná literatúra. Pozri k tomu napr.: VOJČÍK, P. a kol. Právo duševného vlastníctva. Plzeň: Aleš Čeněk, 2012, s. 411.

[4] Tento názor opierame o výklad práva EÚ: „*Hoci obchodné tajomstvo nie je chránené ako klasické právo duševného vlastníctva, napriek tomu je hlavným doplnkovým nástrojom pre požadované privlastnenie si duševného majetku, ktorý je hnacou silou znalostnej ekonomiky 21. storočia*.“ (Dôvodová správa k smernici o obchodnom tajomstve, bod 1); ako aj o výklad medzinárodného práva: ochrana „nezverejnených informácií“ (z angl. *undisclosed information*) je zakotvená v čl. 39 ods. 2 dohody TRIPS. Náš názor potvrdzuje aj výklad Ústavného súdu SR, podľa ktorého: „*Obchodné tajomstvo je jedno z práv, ktoré sa zaraďuje medzi práva k nehmotným statkom, (...)*.“ a ďalej: „*Právna úprava obchodného tajomstva obsiahnutá v § 17 Obch. zák. priradila obchodné tajomstvo k tzv. priemyslovým právam*.“ (Uznesenie Ústavného súdu SR z 18. septembra 2014, sp. zn. II. ÚS 559/2014-9). Pozri k tomu aj: KUBÍČEK, P., ŠKRINÁR, A., NEVOLNÁ, Z., KOPČOVÁ, R., ĎURICA, M. Obchodné právo. 4. vyd. Plzeň: Aleš Čeněk, 2025, s. 60.

[5] Takouto osobou je predovšetkým majiteľ obchodného tajomstva, ktorým je podľa § 17 ods. 2 OBZ „*fyzická osoba alebo právnická osoba, ktorá oprávnene nakladá s obchodným tajomstvom, ktoré sa vzťahuje na podnik prevádzkovaný touto osobou pri výkone podnikania*.“ Definičné vymedzenie subjektu „majiteľa obchodného tajomstva“ do samostatného ustanovenia zakotvila až novela zákona č. 264/2017 Z. z., ktorým sa mení a dopĺňa zákon č. 513/1991 Zb. Obchodný zákonník v znení neskorších predpisov a ktorým sa menia a dopĺňajú niektoré zákony („novela“) transpozíciou čl. 2 ods. 2 smernice o obchodnom tajomstve. Do prijatia novely samostatná legálna definícia osoby, ktorá oprávnene nakladá s obchodným tajomstvom, v slovenskom právnom poriadku absentovala.

[6] Zabezpečovanie tajných a cenných informácií „tomu zodpovedajúcim spôsobom“ predstavuje jeden zo základných zákonných predpokladov na ochranu obchodného tajomstva (pozri: § 17 ods. 1 OBZ). Pokiaľ tento predpoklad nebude naplnený, takéto informácie nemožno v zmysle § 20 OBZ chrániť, pretože ich nemožno za obchodné tajomstvo vôbec považovať.

ojedinelé. Hľadáme preto príčiny, prečo je tomu tak. Pomocou metódy komparácie upriamujeme pozornosť na nedávne legislatívne zmeny v nemeckom právnom systéme, pokiaľ ide o zachovanie utajenia informácií tvoriacich obchodné tajomstvo v civilnom procese, ktoré majú za cieľ zvýšiť záujem o súdnu ochranu pri porušení obchodného tajomstva. Poukazujeme pritom na potenciál mimosúdneho riešenia sporov z obchodného tajomstva, najmä pokiaľ ide o na arbitráž (rozhodcovské konanie), a uvádzame najdôležitejšie výhody rozhodcovského konania so špecifickým zámerom na podstatu ochrany cenných a tajných informácií tvoriacich obchodné tajomstvo, a to aj v kontexte medzinárodných sporov.

Vychádzame z nasledovnej **hypotézy**: „*Význam obchodného tajomstva v súčasnosti celosvetovo narastá, a rovnako tak narastá počet súdnych sporov týkajúcich sa porušenia obchodného tajomstva.*“

Za **cieľ** si kladieme zistiť, či narastá využívanie obchodného tajomstva na ochranu cenných a tajných informácií v podnikoch, a v tej súvislosti zistiť, či skutočne narastá aj počet súdnych sporov týkajúcich sa porušenia obchodného tajomstva za posledné roky tak, ako uvádza, najmä zahraničná, odborná literatúra. V tej súvislosti je cieľom analyzovať hlavné príčiny nezáujmu vedenia súdnych sporov z obchodného tajomstva, skúmať potenciál mimosúdneho riešenia týchto sporov, a to so zameraním na arbitráž (rozhodcovské konanie) a zhodnotiť jeho výhody oproti štandardnému, súdnemu, riešeniu sporov z obchodného tajomstva. Z dôvodu obmedzeného rozsahu príspevku nešpecifikujeme a neuvádzame zvlášť aj výhody litigácie a mediácie v sporoch z obchodného tajomstva.

Pri dosahovaní vytýčeného cieľa vychádzame najmä zo zahraničnej a slovenskej odbornej literatúry, vnútroštátnych právnych predpisov, predpisov práva EÚ a medzinárodného práva, komentárov k zákonom, pokiaľ ide o právnu reguláciu problematiky obchodného tajomstva, a zo súvisiacej slovenskej a zahraničnej judikatúry. Využívame najmä deskriptívnu metódu, metódu analýzy objemu súdnych sporov týkajúcich sa porušenia obchodného tajomstva, metódu komparácie, najmä pokiaľ ide o porovnanie súdneho a mimosúdneho riešenia sporov. Pre účely štatistiky objemu súdnych sporov vo veciach porušenia obchodného tajomstva sme oslovili Okresný súd v Banskej Bystrici, ako kauzálne príslušný súd na riešenie sporov vo veciach porušenia obchodného tajomstva. Nezávisle sme oslovili aj advokátske kancelárie, ktoré poskytujú právne poradenstvo vo veciach obchodného práva a práva duševného vlastníctva, s cieľom zistiť, či má počet prípadov porušenia obchodného tajomstva na Slovensku stúpajúcu tendenciu.

K. Linton vo svojom výskume dospela k záveru, že zo všetkých foriem duševného vlastníctva sa podniky v súčasnosti najviac zaujímajú o obchodné tajomstvo.[7] Na rastúci význam obchodného tajomstva reaguje aj právo EÚ: „*Obchodné tajomstvo zohráva dôležitú úlohu pri ochrane výmeny znalostí (...)“* a *„Obchodné tajomstvo je jednou z najčastejšie používaných foriem ochrany duševnej tvorby a inovačného know-how zo strany podnikov(...).*“[8] Podľa odbornej literatúry s nárastom záujmu o obchodné tajomstvo priamo úmerne narastajú aj spory vo veciach porušenia obchodného tajomstva: „*Nárast dôležitosti obchodného tajomstva spustil nebývalý boom v súdnych sporoch, v legislatíve a v pozornosti médií a akademikov*.“[9]; ďalej: „*Zaujímavý je aj neustály nárast sporov z obchodného tajomstva*.“[10] Významná americká právnická firma, Jones Day, v roku 2023 dospela k záveru, že „*všetko naznačuje, že rok 2024 prinesie väčšie spoliehanie sa na obchodné tajomstvo ako preferovanú formu ochrany duševného vlastníctva a rastúci počet sporov týkajúcich sa obchodného tajomstva.*“[11] Zo slovenských autorov sa tejto problematike zatiaľ nikto bližšie nevenoval.

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7 LINTON, K. The Importance of Trade Secrets: New Directions in International Trade Policy Making and Empirical Research. In: Journal of International Commerce and Economics. 2016. s. 1-17.

8 odôvodnenie č. 3 a 5 smernice o obchodnom tajomstve.

9 ALMELING, S. D. Seven Reasons Why Trade Secrets Are Increasingly Important. In: Berkeley Technology Law Journal, roč. 27, č. 2 (2012), s. 1091-1117.

10 VAN CAENEGEM, W., DESAUNETTES-BARBERO, L. Trade Secrets and Intellectual Property: Policy, Theory and Comparative Analysis, 2025, Holandsko: Wolters Kluwer. (ISBN 978-90-4118-671-3. 296 s.)

11 Ibid.

1. VÝZNAM OBCHODNÉHO TAJOMSTVA V SÚČASNOSTI

Všeobecná súkromnoprávna úprava obchodného tajomstva na Slovensku je obsiahnutá v Obchodnom zákonníku, v ktorom zákonodarca vymedzuje obchodné tajomstvo ako jeden z predmetov práv patriacich k podniku.[12] Podľa § 17 ods. 1 OBZ: „*Predmetom práv patriacich k podniku je aj obchodné tajomstvo. Obchodné tajomstvo tvoria všetky skutočnosti obchodnej, výrobnej alebo technickej povahy súvisiace s podnikom, ktoré majú skutočnú alebo aspoň potenciálnu materiálnu alebo nemateriálnu hodnotu, nie sú v príslušných obchodných kruhoch bežne dostupné, majú byť podľa vôle majiteľa obchodného tajomstva utajené a majiteľ obchodného tajomstva zodpovedajúcim spôsobom ich utajenie zabezpečuje*.“ Vo všeobecnosti možno obchodné tajomstvo definovať ako všetky skutočnosti (informácie), ktoré sú tajné, ktoré majú svoju ekonomickú (komerčnú) hodnotu, pretože sú tajné, ktoré ich držiteľ uchováva v tajnosti, a robí tak tomu zodpovedajúcim spôsobom.[13]

Pokiaľ ide o význam inštitútu obchodného tajomstva v súčasnej ére informačnej spoločnosti, Svetová organizácia duševného vlastníctva (WIPO) uvádza nasledovné: „*V dynamickom a čoraz viac prepojenom svete inovácií a obchodu zohráva ochrana duševného vlastníctva kľúčovú úlohu pri podpore hospodárskeho rastu, podpore hospodárskej súťaže a technologického pokroku. Spomedzi rôznych foriem ochrany duševného vlastníctva sa obchodné tajomstvo stalo kľúčovým nástrojom pre podniky na ochranu ich cenných dôverných informácií a udržanie si konkurenčnej výhody na čoraz globálnejšom trhu.*“[14] Podľa smernice o obchodnom tajomstve: „*Obchodné tajomstvo zohráva dôležitú úlohu pri ochrane výmeny znalostí (...)“* a *„Obchodné tajomstvo je jednou z najčastejšie používaných foriem ochrany duševnej tvorby a inovačného know-how zo strany podnikov,(...).*“[15] Na Sympóziu Svetovej organizácie duševného vlastníctva (WIPO) o obchodných tajomstve a inováciách, ktoré sa konalo v roku 2019 v Ženeve, podľa generálneho riaditeľa F. Gurryho: „*Obchodné tajomstvo je čoraz dôležitejšou oblasťou duševného vlastníctva, ale na medzinárodnej scéne je do istej miery zanedbávané*.“ [16] Zahraničná odborná literatúra sa vo všeobecnosti zhoduje v tom, že obchodné tajomstvo tvorí v súčasnosti kľúčovú rolu, pokiaľ ide o ochranu cenných informácií, ktoré majú v podniku zostať utajené.[17] „*Obchodné tajomstvá teraz tvoria kľúčovú súčasť obchodných stratégií a portfólií duševného vlastníctva mnohých spoločností*.“[18]; podľa S. Almelinga: „*Keďže technológie menia spôsob, akým žijeme a pracujeme, (...), obchodné tajomstvá sú dôležitejšie ako kedykoľvek predtým*.“, a tiež „*obchodné tajomstvá budú v nasledujúcich rokoch nadobúdať len väčší význam.*“[19] Skupina

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[12] K podniku patria veci, práva a iné majetkové hodnoty (§ 5 OBZ), pričom podľa zaužívaného právneho názoru sa obchodné tajomstvo zaraďuje medzi zložky nehmotnej povahy, ktoré tvoria práva a iné majetkové hodnoty. Pozri k tomu napr.: KOUKAL, P.: Obchodní tajemství v novém občanském zákoníku. In: Časopis pro právní vědu a praxi, Brno, č. 21 (2013), s. 467-475; OVEČKOVÁ, O. a kol.: Obchodný zákonník. Veľký komentár, II. zväzok, druhé vydanie. Bratislava: Wolters Kluwer, 2022, s. 234.

[13] Zovšeobecnenú definíciu opierame o výklad obchodného tajomstva podľa čl. 2 ods. 1 smernice o obchodnom tajomstve. Rovnako „len“ s troma pojmovými znakmi „nezverejnených informácií“ počíta aj medzinárodná právna úprava (čl. 39 dohody TRIPS).

[14] World Intellectual Property Organization: WIPO Guide to Trade Secrets and Innovation. Geneva: WIPO, 2024. DOI: 10.34667/tind.49735.

[15] Odôvodnenie č. 3 a 5 smernice o obchodnom tajomstve.

[16] Summary of discussion: WIPO SYMPOSIUM ON TRADE SECRETS AND INNOVATION organized by the World Intellectual Property Organization), 2020. International Bureau of WIPO: Ženeva (ďalej len „Summary WIPO Symposium“) bod 3.

[17] NIRWAN, P. Trade Secrets: The Hidden IP Right. WIPO: Magazine right, 2017 (online) https://www.wipo.int/wipo_magazine/en/2017/06/article_0006.html.

[18] VAN CAENEGEM, W., DESAUNETTES-BARBERO, L. Trade Secrets and Intellectual Property: Policy, Theory and Comparative Analysis, 2025, Holandsko: Wolters Kluwer. (ISBN 978-90-4118-671-3. 296 s.)

[19] ALMELING, S. D. Seven Reasons Why Trade Secrets Are Increasingly Important. In: Berkeley Technology Law Journal, roč. 27, č. 2 (2012), s. 1091-1117

zahraničných autorov ponúkla aj empirické dôkazy o súčasnom ekonomickom význame obchodného tajomstva.[20]

Potvrdzujeme tak prvú časť našej hypotézy a tvrdíme, že obchodné tajomstvá sú skutočne významné, a to najmä v súčasnej dobe, pre ktorú je príznačný technologický pokrok, digitalizácia a informatizácia. Na zvyšujúce sa riziko neoprávneného nadobúdania, využívania a zverejňovania nezverejneného know-how a obchodných informácií (obchodného tajomstva) prostredníctvom kybernetických útokov upozorňuje aj Európska Komisia: „*Keďže globálne hospodárstvo sa čoraz viac digitalizuje, riziko neoprávneného nadobúdania, využívania a zverejňovania nezverejneného know-how a obchodných informácií (obchodného tajomstva) prostredníctvom kybernetických útokov narástlo. Takéto kybernetické útoky zahŕňajú vykonávanie hospodárskej činnosti zameranej na získanie obchodných tajomstiev, ktoré by neskôr mohli byť oprávnené na ochranu duševného vlastníctva.*“[21]

Cenné a tajné informácie môžu mať veľký hospodársky význam pre podnik a jeho prosperitu. V niektorých prípadoch môžu byť obchodné tajomstvá pre podnik väčším prínosom ako patenty alebo iné práva duševného a priemyselného vlastníctva. Napríklad, pokiaľ ide o patenty, na získanie patentovej ochrany na vynález je potrebné, vo väčšine prípadov, značné úsilie spočívajúce v časovo a finančne náročných výskumných prácach, ktoré nemusia zaručenie viesť k nejakému cieľu. Obchodné tajomstvá a tiež know-how, tvoriace súbor praktických informácií a skúseností, ktoré môže tvoriť obchodné tajomstvo a ktoré nie je potrebné nikde registrovať, preto zohráva pre podniky dôležitú úlohu (napríklad v oblasti vedy a výskumu) a jeho význam v hospodárskej súťaži má v súčasnosti narastajúcu tendenciu. Prijatie zákonov upravujúcich právne vzťahy súvisiace so získaním, využívaním a ochranou obchodného tajomstva najsilnejšími ekonomikami sveta v posledných rokoch len akcentuje rastúci význam obchodného tajomstva v súčasnom modernom, najmä podnikateľskom, prostredí.[22]

2. ANALÝZA: SÚDNE RIEŠENIE SPOROV VO VECIACH OBCHODNÉHO TAJOMSTVA

V prípade neoprávneného zásahu do práva k obchodnému tajomstvu, pokiaľ nedôjde k dohode účastníkov sporu, resp. k inej náprave (napr. v rozhodcovskom konaní), na riešenie sporov vo veciach porušenia obchodného tajomstva, ako premetu priemyselného vlastníctva, je podľa § 25 ods. 1 CSP *kauzálne príslušný* Okresný súd Banská Bystrica, jeho územným obvodom je celé územie Slovenskej republiky. Odvolacím súdom je Krajský súd v Banskej Bystrici. Rovnaká príslušnosť súdu sa uplatní aj v prípade, ak má spor z priemyselného vlastníctva súčasne povahu sporu z nekalého súťažného konania alebo autorskoprávneho sporu.

Logicky možno predpokladať, že spolu s nárastom využívania obchodného tajomstva na ochranu cenných a tajných informácií v podnikoch by mali priamo úmerne narastať aj spory vo veciach porušenia obchodného tajomstva, čo bolo konštatované v predchádzajúcej kapitole.

Pre účely štatistiky objemu súdnych sporov vo veciach porušenia obchodného tajomstva sme preto oslovili kauzálne príslušný Okresný súd v Banskej Bystrici. Počet sporov, pokiaľ ide o porušenie obchodného tajomstva vo forme jeho neoprávneného získania, využitia a sprístupnenia inou osobou je podľa vyjadrenia súdu *veľmi nízky*, spravidla ide o maximálne 5 až 10 prípadov za kalendárny rok (pričom tomu bolo tak aj v roku 2024). Pokiaľ ide o žaloby vo veciach porušenia obchodného tajomstva, podľa vyjadrenia súdu, vo veľkej miere sa snaží využívať inštitút predbežného prejednania sporu.[23] Ako

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[20] APLIN, T., RADAUER, A., BADER, M.A. a kol. The Role of EU Trade Secrets Law in the Data Economy: An Empirical Analysis. In: International Review of Intellectual Property and Competition Law, č. 54, 2023, s. 826–858. https://doi.org/10.1007/s40319-023-01325-8.

[21] Odporúčanie Komisie (EÚ) 2024/915 z 19. marca 2024 týkajúce sa opatrení na boj proti falšovaniu a na posilnenie presadzovania práv duševného vlastníctva (odporúčanie EÚ 2024/915), odôvodnenie 39. Otázkou bezpečnosti obchodného tajomstva v digitálnom prostredí sa zaoberáme v samostatnom príspevku, preto ju bližšie v príspevku nebudeme skúmať.

[22] KOPČOVÁ, R: Trade secret: a significant legal institution in business and its legal regulation across selected European countries (including case law). In: Central and Eastern European Legal Studies. Atény: European Public Law Organization, č. 2 (2024), s. 241-277. ISSN 2310-2705.

[23] Predbežné prejednanie sporu (§ 168 až § 172 CSP) je fakultatívnym úkonom súdu a v prípade žiadneho druhu konania podľa CSP nie je zákonom uložená povinnosť spor predbežne prejednať. Ide o pomerne praktický inštitút, ktorý môže

súd ďalej uvádza, poväčšine sa strany dohodnú a prípad je ukončený spať vzatím žaloby, čím ani nedochádza k vytýčeniu samotného pojednávania. Podľa doterajšieho stavu má Okresný súd v Banskej Bystrici v pláne v roku 2025 riešiť 2 spory vo veciach porušenia obchodného tajomstva, pričom v oboch prípadoch ide zároveň o dopustenie sa nekalej súťaže.

Pre účely nášho výskumu sme oslovili tiež advokátske kancelárie[24], ktoré sa vyslovili, že podľa ich názoru počet prípadov týkajúcich sa porušenia obchodného tajomstva má v posledných rokoch *mierne stúpajúcu tendenciu*. Vo väčšine prípadov však klienti spravidla zvolia cestu internej dohody medzi majiteľom obchodného tajomstva a jeho rušiteľom. Pomerne značný počet prípadov sa týka len „domnelého" porušenia obchodného tajomstva, kedy informácie, ktoré boli neoprávnene získané, sprístupnené alebo zverejnené, nemožno považovať za obchodné tajomstvo. V tomto kontexte je potrebné upozorniť, že nie každé porušenie *dôverných informácií* možno zároveň klasifikovať ako porušenie obchodného tajomstva. Dôverné informácie sú také informácie, ktoré nie sú verejne dostupné, môžu, ale nemusia mať komerčnú hodnotu, sú medzi stranami komunikované dôverne a sú primerane chránené. Za dôverné si strany pri rokovaní o uzavretí zmluvy môžu označiť akékoľvek navzájom poskytnuté informácie, ktoré môžu ale nemusia byť obchodným tajomstvom (alebo inými slovami, dôverné informácie nemusia nevyhnutne napĺňať pojmové znaky obchodného tajomstva).[25] Len pokiaľ sú dôverné informácie zároveň obchodným tajomstvom (to znamená, kumulatívne napĺňajú zákonné predpoklady obchodného tajomstva)[26], je možné v prípade porušenia obchodného tajomstva uplatniť právne prostriedky ochrany obchodného tajomstva podľa príslušných súkromnoprávnych a verejnoprávnych predpisov. *„Najvyšší súd v tejto súvislosti zdôrazňuje, že dojednanie zmluvných strán o tom, že určité náležitosti zmluvy tvoria predmet obchodného tajomstva, nepostačuje na to, aby sa tieto skutočnosti stali obchodným tajomstvom, pokiaľ nenapĺňajú pojmové znaky vymedzené ustanovením § 17 Obchodného zákonníka."*[27]

Z vykonaného prieskumu konštatujeme, že v prípade porušenia obchodného tajomstva sa majitelia obchodných tajomstiev len zriedkavo obracajú na súd. Súdne spory vo veciach obchodného tajomstva sú podľa nás ojedinelé kvôli špecifickým právnym, dôkazným, a najmä strategickým dôvodom spojenými s predmetom ochrany, ktorými sú tajné a cenné informácie, ktoré majú ostať utajené. Konštatujeme v tej súvislosti nasledovné príčiny, prečo sa v sporoch z obchodného tajomstva majitelia len zriedka obracajú na súd:

a) Podniky často nemajú vedomosť o tom, čo tvorí ich obchodné tajomstvo, a preto si poväčšine ani nie sú vedomé toho, či skutočne došlo alebo nedošlo k jeho porušeniu alebo ohrozeniu. Ide podľa nás o celosvetový trend, ktorý sa netýka len Slovenskej republiky. Na nedostatočné pochopenie toho, čo predstavuje „obchodné tajomstvo" poukazujú aj viacerí autori v zahraničnej literatúre: „*Z údajov vyplýva jasný bod neistoty, ktorý sa týka významu pojmu „obchodné tajomstvo" a toho,*

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zásadným spôsobom zefektívniť a zjednodušiť procesný postup smerujúci k rozhodnutiu, ktorým sa konanie končí. Predbežné prejednanie sporu môže súd nariadiť a uskutočniť vždy iba pred prvým pojednávaním. Viac k procesnému inštitútu predbežného prejednania sporu pozri: FILOVÁ, A., SEDLAČKO, F., KOTRECOVÁ, A. Rekodifikácia civilného procesného práva: Predbežné prejednanie sporu a pojednávanie. In: Bulletin slovenskej advokácie, č. 9, 2016.

[24] Oslovili sme 6 advokátskych kancelárií, z ktorých štyri pôsobia v Bratislave a dve v Košiciach. Dve z oslovených advokátskych kancelárií zároveň pôsobí v Českej republike.

[25] Podľa slovenskej právnej úpravy dôverných informácií v obchodných záväzkových vzťahoch (§ 271 ods. 1 OBZ): „*Ak si strany pri rokovaní o uzavretí zmluvy navzájom poskytnú informácie označené ako dôverné, nesmie strana, ktorej sa tieto informácie poskytli, prezradiť ich tretej osobe a ani ich použiť v rozpore s ich účelom pre svoje potreby, a to bez ohľadu na to, či dôjde k uzavretiu zmluvy, alebo nie. Kto poruší túto povinnosť, je povinný na náhradu škody, obdobne podľa ustanovení § 373 a nasl."*

[26] Všeobecná legálna definícia obchodného tajomstva na Slovensku je zakotvená v § 17 ods. 1 OBZ. Podľa tohto ustanovenia: „*Predmetom práv patriacich k podniku je aj obchodné tajomstvo. Obchodné tajomstvo tvoria všetky skutočnosti obchodnej, výrobnej alebo technickej povahy súvisiace s podnikom, ktoré majú skutočnú alebo aspoň potenciálnu materiálnu alebo nemateriálnu hodnotu, nie sú v príslušných obchodných kruhoch bežne dostupné, majú byť podľa vôle majiteľa obchodného tajomstva utajené a majiteľ obchodného tajomstva zodpovedajúcim spôsobom ich utajenie zabezpečuje*."

[27] Rozsudok Najvyššieho súdu SR z 27. januára 2015, sp. zn. 5Sžo/41/2013.

čo by sa mohlo kvalifikovať ako „obchodné tajomstvo“.[28] Aj WIPO vo svojej správe konštatuje časté „*mylné predpoklady*“ podnikov, že „*informácie, ktoré vlastnia, sú obchodným tajomstvom*,“ a tak „*zbytočne vynakladajú svoje zdroje na zachovanie ich utajenia. “*[29] Kľúčové je preto v prvom rade pochopiť, ktoré informácie sú spôsobilé tvoriť obchodné tajomstvo, a ktoré informácie môžu byť ako obchodné tajomstvo aj právne chránené. Táto nevedomosť podnikov o možnostiach ochrany tajných a cenných informácií vedie následne k pochybnostiam, či sa v prípade ich neoprávneného získania môžu nejakej právnej ochrany vôbec domáhať. Racionálnou úvahou potom poväčšine majitelia, ktorých obchodné tajomstvo je porušené alebo ohrozené, inklinujú k tomu, že „zoberú veci do vlastných rúk“ alebo sa s rušiteľom dohodnú mimosúdne.

b) Zastávame názor, že majitelia obchodných tajomstiev majú obavu, že súdne konanie spôsobí ešte väčšie *riziko úniku informácií* než jeho samotné porušenie (napríklad obava, že počas súdneho konania môže dôjsť k zverejneniu obchodného tajomstva v rámci dokazovania alebo výpovedí svedkov, nahliadania do spisov a pod.). Naša úvaha je podporená aj stavom, ktorý bol prítomný v Nemecku pred prijatím samostatného zákona o ochrane obchodného tajomstva.[30] V tej súvislosti bolo uvedené: „*Spoločnosti sa zdráhali obrátiť sa na súd zo strachu, že stratia svoje obchodné tajomstvo, ale očakáva sa, že nový zákon na ochranu obchodného tajomstva v rámci nemeckého súdneho systému bude toto váhanie riešiť a povedie k nárastu súdnych sporov týkajúcich sa obchodného tajomstva v Nemecku*.“[31] Napriek prijatiu samostatného zákona o ochrane obchodného tajomstva v roku 2019 však boli v Nemecku aj naďalej súdne spory z porušenia obchodného tajomstva veľmi ojedinelé. Po piatich rokoch sa preto nemecký zákonodarca rozhodol v civilnom konaní posilniť zachovanie utajenia informácií, ktoré sú chránené ako obchodné tajomstvo. Od 1. apríla 2025 v Nemecku nadobudlo platnosť nové ustanovenie § 273a Občianskeho súdneho poriadku (z nem. Zivilprozessordnung, skr. „ZPO“), ktorým sa v súdnom konaní, vo všetkých inštanciách, posilňuje ochrana potenciálne tajných informácií na žiadosť sporovej strany (spravidla ide o majiteľa obchodného tajomstva). Medzi ochranné opatrenia patrí obmedzenie prístupu, vylúčenie verejnosti z pojednávaní a znemožnenie prístupu k informáciám pre tretie strany počas nahliadania do spisov.[32]

   Pokiaľ ide o slovenskú právnu úpravu, v CSP nie je explicitne zakotvené obdobné ustanovenie, ktoré by strane počas celého súdneho konania zaručovalo zachovanie utajenia informácií, ktoré sú obchodným tajomstvom.[33] Takéto zachovanie utajenia informácií nevyplýva ani z osobitných ustanovení k právnym prostriedkom ochrany obchodného tajomstva podľa Obchodného zákonníka.[34] Zastávame preto názor, že nedostatočné legálne zakotvenie zabezpečenia dôvernosti

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[28] APLIN, T., RADAUER, A., BADER, M.A. et al. The Role of EU Trade Secrets Law in the Data Economy: An Empirical Analysis. IIC 54, 826–858 (2023). https://doi.org/10.1007/s40319-023-01325-8.

[29] World Intellectual Property Organization: WIPO Guide to Trade Secrets and Innovation. Geneva: WIPO, 2024. DOI: 10.34667/tind.49735.

[30] V Nemecku v roku 2019 prijali samostatný zákon o ochrane obchodného tajomstva, ktorý bol výsledkom transpozície smernice o obchodnom tajomstve (Gesetz zum Schutz von Geschäftsgeheimnissen vom 18. April 2019, BGBl. I S. 466).

[31] Summary of discussion: WIPO SYMPOSIUM ON TRADE SECRETS AND INNOVATION organized by the World Intellectual Property Organization), 2020. International Bureau of WIPO: Ženeva (ďalej len „Summary WIPO Symposium“) bod č. 10.

[32] Podľa § 273a ZPO „Zachovanie dôvernosti“ (z nem. „Geheimhaltung“) strana musí „dôveryhodne“ preukázať, že informácie môžu byť obchodným tajomstvom. Ak súd žiadosti vyhovie, sporné informácie budú chránené komplexne počas celého konania a aj po jeho skončení.

[33] Porovnaj: Podľa § 176 CSP: „*Verejnosť možno na celé pojednávanie alebo na jeho časť vylúčiť, len ak by verejné prejednanie sporu ohrozilo ochranu utajovaných skutočností, citlivých informácií a skutočností chránených podľa osobitného predpisu (ďalej len "údaje chránené podľa osobitného predpisu") alebo dôležitý záujem strany alebo svedka. Vylúčenie verejnosti súd vhodným spôsobom oznámi*.“ Toto ustanovenie ohrozenie obchodného tajomstva ako dôvod na vylúčenie verejnosti na celé pojednávanie alebo na jeho časť explicitne nezakotvuje.

[34] Do určitej miery je zachovanie utajenia informácií, ktoré sú obchodným tajomstvom, zakotvené v § 55d OBZ, avšak len pokiaľ ide o zverejňovanie súdnych rozhodnutí. Podľa § 55d ods. 2 OBZ: „*Pri rozhodovaní o zverejnení rozhodnutia súd prihliada na hodnotu obchodného tajomstva, konanie rušiteľa obchodného tajomstva, vplyv porušenia obchodného tajomstva a pravdepodobnosť ďalšieho neoprávneného využitia alebo sprístupnenia obchodného tajomstva.*“, a podľa ods. 3 tohto ustanovenia: „*V rozhodnutí, ktoré má byť zverejnené, sa musia pred zverejnením údaje umožňujúce identifikáciu*

obchodného tajomstva v rámci civilného sporu môže byť jedným z dôvodov, prečo sa majiteľ v prípade neoprávneného získania, využitia a sprístupnenia jeho obchodného tajomstva inou osobou nebude spoliehať na súdnu ochranu.

c) Na mieste je tiež potrebné konštatovať *zložitosť a nákladnosť* celého súdneho konania, pretože konania vo veciach porušenia alebo ohrozenia obchodného tajomstva sú spravidla technicky a aj právne zložité (najmä pokiaľ ide o informácie, u ktorých je technicky alebo inak náročné preukázať, že napĺňajú všetky znaky obchodného tajomstva – napríklad postupy vývoja liekov, algoritmy, a i.).[35] V sporoch sa často vyžadujú znalecké posudky rôznych expertov podľa druhu obchodného tajomstva či kybernetická forenzná analýza, čo je samo osebe finančne nákladné, zdĺhavé a prináša pre majiteľa obchodného tajomstva len neistý pozitívny výsledok. Náš názor podporuje aj L. Lundstedt, podľa ktorej: „*Súdne spory o obchodné tajomstvo sú nákladné a neisté (...)*“, a ktorá ďalej argumentuje: „*dostupnosť veľkorysých nápravných opatrení na ochranu obchodného tajomstva môže viesť k neopodstatneným súdnym sporom a mať odrádzajúci vplyv (...).*“[36]

d) V súvislosti s možnými ďalšími zásahmi do obchodného tajomstva je pre majiteľa dôležitý aj samotný *čas do začatia súdneho konania*. Priemerný čas od podania žaloby po začatie súdneho konania je podľa vykonaného prieskumu približne rok, a tento pomerne dlhý priestor je potrebné, najmä s ohľadom na povahu obchodného tajomstva, ktorým sú tajné a cenné informácie, vnímať tiež ako nevýhodu súdneho riešenia týchto sporov. V období medzi samotným podaním žaloby a začatím súdneho konania sa zvyšuje riziko ďalšieho neoprávneného zásahu do obchodného tajomstva zo strany rušiteľa a tiež riziko jeho sprístupnenia ďalším osobám.

e) Za náročné považujeme aj *dokazovanie* vo sporoch z porušenia obchodného tajomstva. Dôkazné bremeno v spore spočíva plne na žalobcovi. Porušenie obchodného tajomstva je však „neviditeľné“, a tak získať dôkaz, že rušiteľ neoprávnene získal alebo použil tajné informácie chránené ako obchodné tajomstvo, môže byť v praxi veľmi zložité. Dokazovanie porušenia obchodného tajomstva sťažuje tiež obmedzený prístup k dôkazom a technická alebo abstraktná povaha obchodného tajomstva (napríklad výrobné postupy, zloženia liekov alebo algoritmy). V sporoch je tiež často náročné objektívne posúdiť hranicu medzi obchodným tajomstvom majiteľa (napríklad zamestnávateľa) a zručnosťami a skúsenosťami zamestnanca (know-how).

Na základe týchto objektívnych kritérií tvrdíme, že majitelia obchodného tajomstva racionálnou úvahou dospejú k tomu, aby zvážili použitie iných ako súdnych, menej riskantných, viac dôverných a prípadne aj rýchlejších, prostriedkov ochrany obchodného tajomstva. Súdna ochrana proti porušeniu obchodného tajomstva tak býva v praxi až akýmsi „posledným útočiskom“ pre poškodeného majiteľa a súdne spory vo veciach obchodného tajomstva sú veľmi zriedkavé. Nemyslíme si však, že v praxi k porušovaniu obchodného tajomstva nedochádza. Práve naopak, myslíme si, že tak ako narastá význam obchodného tajomstva a jeho využívanie v podnikoch, logicky sa musia zvyšovať aj spory súvisiace s jeho porušením alebo ohrozením. V tej súvislosti dokonca zastávame názor, že riziko „úniku“ informácií tvoriacich obchodné tajomstvo a prekračovanie právomocí z oprávnení na jeho využívanie sa oproti minulosti zvyšuje. Spôsobuje to súčasný trend digitalizácie informácií. Obchodné tajomstvá bývajú v súčasnosti ukladané a prenášané predovšetkým v digitálnej forme, čo kladie na ich ochranu nové nároky v porovnaní s minulosťou. V digitálnom veku predstavuje ochrana digitálneho obchodného

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osoby, ktorá je odlišná od rušiteľa obchodného tajomstva, anonymizovať.“ (Toto ustanovenie bolo prijaté ako transpozícia čl. 15 smernice o obchodnom tajomstve, podľa ktorého ods. 1: „*Členské štáty zabezpečia, aby v súdnych konaniach začatých vo veci neoprávneného získania, využitia alebo sprístupnenia obchodného tajomstva mohli príslušné súdne orgány na návrh navrhovateľa a na náklady porušovateľa nariadiť vhodné opatrenia na šírenie informácií týkajúcich sa rozhodnutia vrátane zverejnenia celého rozhodnutia alebo jeho časti*.“)

[35] Pozri k tomu: KOPČOVÁ, R. Obchodné tajomstvo ako najlepší spôsob právnej ochrany pre algoritmy v podnikaní? In: Košické dni súkromného práva V. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, (2024), s. 432 – 446.

[36] LUNDSTEDT, L. Cross-Border Trade Secret Disputes in the European Union Jurisdiction and Applicable Law. London: Edward Elgar Publishing Limited, 2023. s. 20.

tajomstva výzvy, najmä pokiaľ ide o zraniteľnosť voči kybernetickej krádeži, kybernetickým útokom a únikom údajov, a to nie len zo strany tretích osôb, ale aj z radu vlastných zamestnancov, obchodných partnerov, spoločníkov a ďalších osôb.[37]

3. POTENCIÁL MIMOSÚDNEHO RIEŠENIA SPOROV VO VECIACH PORUŠENIA OBCHODNÉHO TAJOMSTVA?

Tak, ako sme v predchádzajúcej kapitole poukázali jednak na *zvýšenú* mieru prípadov porušenia obchodného tajomstva a jednak na *nezáujem* majiteľov riešiť takéto spory súdnou cestou z uvedených objektívnych príčin, je namieste hľadať iné možnosti, ktoré majú poškodení majitelia k dispozícii v prípade porušenia alebo ohrozenia ich obchodného tajomstva. Na riešenie potenciálnych sporov z obchodného tajomstva môžu strany okrem súdov využiť rôzne metódy, vrátane vyjednávania, mediácie, a arbitráže (rozhodcovské konanie). Tieto metódy, označované aj ako mimosúdne spôsoby riešenia sporov (ADR), ponúkajú vo všeobecnosti *alternatívy* k súdnym sporom, ktoré spravidla bývajú pre obe zmluvné strany časovo a aj finančne náročnejšie.[38]

Zastávame názor, že pokiaľ dôjde k porušeniu obchodného tajomstva „vo vnútri" podniku (najmä pri neoprávnenom získaní obchodného tajomstva zo strany zamestnanca alebo spoločníka), majitelia obchodných tajomstiev v prvom rade prijímajú určité vnútorné opatrenia v rámci podniku, z dôvodu zachovania čo najväčšieho utajenia informácií (napríklad ukončenie pracovného pomeru, vylúčenie spoločníka a pod.). Avšak nie všetky prípady porušenia obchodného tajomstva je možné riešiť len vo forme vnútorných opatrení. Medzi najčastejšie prípady porušenia obchodného tajomstva patrí zneužitie informácií zdieľaných počas obchodných vzťahov, prekročenie rozsahu udelenej licencie na využívanie obchodného tajomstva zo strany nadobúdateľa licencie (či už z titulu licenčnej zmluvy na predmety priemyselného vlastníctva podľa § 508 až 515 OBZ, z titulu inej nepomenovanej zmluvy, napríklad vo franchisingu).[39] Práve v takýchto prípadoch vidíme *veľký potenciál mimosúdneho riešenia sporov* vo veciach obchodného tajomstva. Ako *alternatívu* k súdnemu sporu sa strany sporu môžu pokúsiť o ich zmierlivé riešenie, či už priamym rokovaním alebo môžu využiť zaužívané mechanizmy alternatívneho riešenia sporov (ADR), ako sú, už spomínané, rozhodcovské konanie alebo mediácia, v ktorých tretia strana pomáha pri riešení sporu alebo ho riadi.

Keďže na Slovensku neexistuje verejná, konzistentná štatistika, ktorá by dôveryhodne porovnala objem súdnych vs. mimosúdnych riešení sporov o obchodnom tajomstve, a celkovo sú štatistiky mimosúdnych vyrovnaní (nie len vo veciach porušenia obchodného tajomstva) spravidla neverejné, možno len predpokladať značný potenciál mimosúdneho riešenia sporov z obchodného tajomstva. V medzinárodnom meradle sa mediácia a arbitráž čoraz častejšie používajú ako úspešné metódy mimosúdneho riešenia sporov, a to v oblasti všetkých práv duševného vlastníctva. Rastúci záujem o mediáciu a arbitráž je podľa niektorých autorov tiež dôsledkom rastúceho počtu medzinárodných transakcií a sporov v oblasti duševného vlastníctva, vrátane obchodného tajomstva, ako aj potenciálnych rizík spojených so súdnymi spormi.[40] Za *najdôležitejší prínos* mimosúdneho riešenia sporov z obchodného tajomstva považujeme ich *výhodu zachovania „dôvernosti",* a to počas celého priebehu konania, vrátane výsledkov, ktoré toto riešenie sporov pre strany prinesie, a tiež vrátane zverejnenia

[37] Problematike bezpečnosti obchodného tajomstva v digitálom prostredí sa venujeme v samostatnom príspevku. K ďalším dôvodom súčasného zvyšujúceho rizika zásahom do práva k obchodnému tajomstvu pozri aj napr.: KORYCIŃSKA-RZĄDCA, P. Trade Secrets in the Digital Age: How Do the Measures Provided for in EU Law Face the Challenges of Protecting an Employer's Trade Secrets against Unauthorised Acquisition, Use and Disclosure by Its Employees? In: Białostockie Studia Prawnicze, roč. 29, č. 2 (2024), s. 163-176.

[38] K teoretickým a praktickým otázkam ADR, k výhodám ADR a k samotnému pojmu pozri napr.: RABAN, P. Alternativní řešení sporů, arbitráž a rozhodci v České a Slovenské republice a zahraničí. Praha: C. H. Beck, 2004, s. 42 a nasl.

[39] Pozri napr.: Rozsudok Krajského súdu v Banskej Bystrici z 24. apríla 2013, sp. zn. 43Cob/185/2012 (v tomto spore žalovaná porušila obchodné tajomstvo spôsobom, že po ukončení obchodného zastúpenia naďalej využívala databázu zastúpeného – žalobcu, ktorá tvorila jeho obchodné tajomstvo).

[40] Pozri k tomu: WOLLER, M., POHL, M. IP Arbitration on the Rise. In: Kluwer Arbitration Blog, 2019 (dostupné online: https://legalblogs.wolterskluwer.com/arbitration-blog/ip-arbitration-on-the-rise/).

informácie, že k samotnému sporu medzi stranami vôbec došlo. V praxi považujeme práve túto „dôvernosť“ ako kľúčový faktor v sporoch z obchodného tajomstva (prípadne aj v kombinácií s ďalšími inými právami duševné vlastníctvo), čo zároveň umožní stranám sústrediť sa na podstatu sporu bez obáv o verejný dopad sporu, bez obáv o ďalšie zverejnenie tajných a cenných informácií podniku, a bez obáv o ohrozenie jeho dobrej povesti. Táto vlastnosť je mimoriadne dôležitá najmä v kontexte sporov o obchodné tajomstvo, kde môže dochádzať k výmene obchodných tajomstiev, ako aj ďalších dôverných technických alebo obchodných informácií.

3.1. Arbitráž (rozhodcovské konanie) vo veciach obchodného tajomstva

Arbitráž (rozhodcovské konanie) je tradičným spôsobom riešenia obchodných sporov na území Slovenskej republiky. Podľa P. Kubíčka: „*O rozhodcovskom konaní hovoríme všade tam, kde súkromná vôľa strán zveruje spornú vec na prerokovanie a rozhodovanie určitým osobám alebo laickým inštitúciám a odníma ich takto štátnym súdom.“*[41] Základom rozhodcovského konania je tak dobrovoľný presun právomocí z dispozície štátnych súdov na rozhodcu (rozhodcov), ktorí sú oprávnení spor rozhodnúť bez toho, aby im bol zverený výkon verejnej moci. Pokiaľ ide o organizáciu rozhodovacieho subjektu, rozlišujeme dva základné typy arbitráže – stále rozhodcovské súdy a ad hoc arbitráž (súdy „ad hoc“).[42] Základným predpokladom arbitráže je, že sa strany sporu dohodnú, že zveria kompetenciu rozhodnúť ich spor rozhodcovskému súdu, resp. určenému rozhodcovi. Právnym titulom rozhodovania sporu z obchodného tajomstva pred rozhodcovským súdom je rozhodcovská zmluva alebo rozhodcovská doložka. Na rozdiel od mediácie, akonáhle sa strany platne dohodnú na predložení sporu na arbitráž, žiadna zo strán nemôže jednostranne odstúpiť od konania a konečné rozhodnutie rozhodcu (rozhodcov) je záväzné.[43]

Zamerajúc sa na výhody arbitráže (rozhodcovského konania) na riešenie sporov z obchodného tajomstva, jeho potenciál vnímame z dôvodu nasledovných skutočností[44]:

a) Rozhodcovské konanie je na rozdiel od súdneho konania *neverejné*, čím sa zabezpečuje diskrétnosť nie len celého konania, ale aj jeho výsledku. Zabraňuje sa tým prípadnému úniku dôverných informácií podniku, ktoré môžu byť chránené ako obchodné tajomstvo. Výhoda neverejnej povahy rozhodcovského konania spočíva aj v zabránení prípadnej nežiaducej medializácii daného prípadu po ukončení sporu. Spravidla majiteľ obchodného tajomstva nemá záujem sprístupňovať aj samotnú skutočnosť, že k takémuto porušeniu vôbec došlo, a to najmä zo strategických dôvodov (najmä z dôvodu ochrany jeho dobrého mena a dobrej povesti spájanej s existenciou obchodného tajomstva v podniku).
b) Rozhodcovské konanie je časovo *rýchlejšie*, lehoty na vydanie rozhodnutia sa počítajú v mesiacoch. Väčšina rozhodcovských rozhodnutí nadobudne právoplatnosť a vykonateľnosť do jedného roka od podania návrhu na začatie konania. Najmä pokiaľ ide o ochranu tajných a cenných informácií, je prítomná potreba rýchleho upravenia vzťahov. V súvislosti s možným ďalším zásahom do obchodného tajomstva je dôležité upozorniť nie len na rýchlosť samotného sporu ale aj na čas od podania návrhu do začatia konania.
c) Pokiaľ ide o uzatváranie licenčných, franchisingových alebo iných nepomenovaných zmlúv na využívanie obchodného tajomstva, je pomerne bežnou praxou, že zmluvné strany pochádzajú z

[41] Rozhodcovské konanie sa na Slovensku realizuje na základe zákona č. 244/2002 Z. z. rozhodcovskom konaní v znení neskorších predpisov (ďalej iba „ZRK“).

[42] KUBÍČEK, P. Stále rozhodcovské súdy a súdy „ad hoc“ v Slovenskej republike (quo vadis rozhodcovské konanie v SR). In: BĚLOHLÁVEK, A. J., KOVÁŘOVÁ, D. Stálé rozhodčí soudy versus rozhodčí řízení ad hoc. Praha: Stálá konference českého práva, 2017, s. 128-130.

[43] RABAN, P. Alternativní řešení sporů, arbitráž a rozhodci v České a Slovenské republice a zahraničí. Praha: C. H. Beck, 2004, s. 42.

[44] Všeobecne k výhodám rozhodcovského konania pozri napr.: KUBÍČEK, P., ŠKRINÁR, A., NEVOLNÁ, Z., KOPČOVÁ, R., ĎURICA, M. Obchodné právo. 4. vyd. Plzeň: Aleš Čeněk, 2025, s. 378.

rôznych krajín. V takýchto *zmluvách s cudzím prvkom,* ktorými sa udeľuje súhlas na využívanie obchodného tajomstva, považujeme za nanajvýš vhodné do zmluvy zakotviť dohodu, že prípadné spory z porušenia obchodného tajomstva (prípadne aj ďalších iných predmetov duševného vlastníctva) sa budú riešiť mimosúdne, pretože právna úprava obchodného tajomstva a jeho ochrany sa môže v jednotlivých krajinách výrazne odlišovať (najmä pokiaľ ide o krajiny mimo EÚ).[45] Z hľadiska *medzinárodných* arbitrážnych sporov je dôležité aj to, že v zahraničí je ľahšie dosiahnuť vykonateľnosť rozhodcovského rozhodnutia ako vykonateľnosť cudzieho súdneho rozsudku.[46]

d) Rozhodcovia sa často *špecializujú* v príslušnej oblasti práva, čo môže predstavovať ďalšiu výhodu pri rýchlom a spoľahlivom určení samotnej existencie obchodného tajomstva (najmä pokiaľ ide o určenie, či informácie sú alebo nie sú dostupné osobám v kruhoch, ktoré sa dotknutým druhom informácií bežne zaoberajú, napríklad pokiaľ ide o zložité algoritmy alebo informácie o vývoji lieku a pod.).
e) Rozhodcovské konanie je *menej formálne* ako súdne konanie a poskytuje stranám flexibilitu pri prispôsobovaní procesu riešenia sporov v rámci jedného a neutrálneho fóra. Na rozdiel od súdnych sporov je možné tieto alternatívne postupy riešenia sporov prispôsobiť špecifickým potrebám strán zapojených do daného prípadu.
f) Rozhodcovskému konaniu neodporuje, ak účastník konania pred začatím rozhodcovského konania, alebo po jeho začatí, ale pred ustanovením rozhodcu (rozhodcov) požaduje od súdu nariadenie neodkladného opatrenia (55b OBZ) a súd také opatrenie nariadi. Rovnako rozhodcovskému konaniu neodporuje, ak účastník požaduje od súdu nariadenie neodkladného opatrenia voči tretej osobe, ktorá nie je stranou rozhodcovskej zmluvy. Táto forma riešenia sporu preto *nebude v praxi vylučovať aj uplatnenie si súdnych prostriedkov ochrany obchodného tajomstva na súde*. V praxi môže ísť o predbežnú a preventívnu ochranu obchodného tajomstva vo forme neodkladného opatrenia, ktorá zohráva mimoriadne dôležitú úlohu pri ochrane obchodného tajomstva v takých situáciách, keď existuje reálna hrozba jeho bezprostredného neoprávneného získania, využitia alebo sprístupnenia zo strany tretej osoby).[47]

Na výhody arbitráže oproti klasickému súdnemu konaniu vo veciach práv duševného vlastníctva vo všeobecnosti poukazujú aj viacerí zahraniční autori. „*V porovnaní s typickým súdnym sporom ponúka arbitráž súkromnú, flexibilnú a možno aj rýchlejšiu metódu riešenia. Umožňuje stranám vybrať si rozhodcov, ktorí majú znalosti práva duševného vlastníctva a súvisiacich technických oblastí, čím zaručuje, že zložité spory budú rozhodovať kompetentní odborníci*.“[48] D. Lewis vo svojom výskume demonštruje, že teória a aj prax medzinárodnej arbitráže je „*zvlášť dobre pripravená riešiť niektoré*

[45] V rámci EÚ sa smernicou o obchodnom tajomstve harmonizovalo vnútroštátne právo a stanovili sa jednotné pravidlá ochrany pred neoprávneným získaním, využitím a sprístupnením obchodného tajomstva pre všetky členské štáty.

[46] Dohovor OSN o uznaní a výkone cudzích rozhodcovských rozhodnutí z roku 1958, známy ako „Newyorský dohovor“ (Vyhláška ministra zahraničných vecí 74/1959 Zb. zo 6. novembra 1959 o Dohovore o uznaní a výkone cudzích rozhodcovských rozhodnutí), zakotvuje uznávanie rozhodcovských rozhodnutí na rovnakej úrovni ako rozsudky vnútroštátnych súdov bez preskúmania vo veci samej. To výrazne uľahčuje výkon cezhraničných rozhodcovských rozhodnutí.

[47] Pozri: § 2 ods. 2 ZRK; Pokiaľ ide o nariadenie neodkladného opatrenia, vo všeobecnosti platí, aby žalobca v návrhu na nariadenie neodkladného opatrenia dostatočne osvedčil samotnú existenciu obchodného tajomstva. Pri nariaďovaní neodkladného opatrenia sa *zásadne nevykonáva dokazovanie*. Pozri k tomu napr.: Uznesenie Okresného súdu Košice I z dňa 11. októbra 2018, sp. zn. 29Cb/109/2018. V tejto súvislosti upozorňujeme, že v rámci transpozície smernice o obchodnom tajomstve sa špeciálna úprava neodkladných opatrení pri porušení obchodného tajomstva zakotvila do Obchodného zákonníka, konkrétne do časti upravujúcej osobitné ustanovenia k právnym prostriedkom ochrany obchodného tajomstva. Ide o ustanovenie 55b OBZ, ktoré nesie názov „Neodkladné opatrenia“, a ktoré od prijatia novely tvorí *samostatnú a komplexnú právnu úpravu neodkladných opatrení* pri porušení alebo ohrození obchodného tajomstva. Pri porušení alebo ohrození obchodného tajomstva sa preto použije úprava neodkladných opatrení podľa § 55b OBZ ako *lex specialis*, pričom všeobecnú úpravu neodkladných opatrení podľa civilného sporového poriadku (*lex generalis*) nebude nutné aplikovať.

[48] MANISHA, A. The Role of Arbitration in Intellectual Property Disputes (2024). http://dx.doi.org/10.2139/ssrn.4842346.

špecifické aspekty a požiadavky v sporoch oblasti duševného vlastníctva“ a podľa jeho názoru „*inherentné črty právneho prostredia medzinárodnej arbitráže naznačujú, že by sa mala považovať za preferovanú metódu ADR*“.[49]

V súvislosti s medzinárodnými spormi z obchodného tajomstva upriamujeme pozornosť aj na možnosť využitia *Arbitrážneho a mediačného centra WIPO*, ktoré ponúka časovo a nákladovo efektívne možnosti alternatívneho riešenia sporov, ako je mediácia, arbitráž, zrýchlená arbitráž a odborné posúdenie, ktoré umožňuje súkromným stranám urovnať ich domáce alebo cezhraničné obchodné spory.[50] WIPO výslovne uvádza aj možnosť takejto formy mimosúdneho riešenia sporov aj pre spory z obchodného tajomstva.[51] Podrobné a komplexné ustanovenia o ochrane obchodného tajomstva a iných dôverných informácií počas arbitráže sú explicitne zakotvené v pravidlách WIPO.[52] Podľa čl. 54 týchto pravidiel sa ochrana obchodných tajomstiev poskytuje počas celého priebehu arbitráže, taktiež pri zverejnení samotného rozhodcovského rozhodnutia, vrátane samotnej skutočnosti, že sa arbitráž v danej veci uskutočnila.[53] Pokiaľ ide o prax, I. De Castro a A. Gadkowski konštatujú: „*Pravidlá WIPO sa v tomto ohľade ukázali ako účinné, pretože obsahujú podrobné a komplexné ustanovenia zamerané na ochranu dôvernosti konania a aj v rámci neho*.“[54]

ZÁVER

Význam obchodného tajomstva v súčasnosti narastá. Jeho výhody oproti iným právam duševného vlastníctva si začínajú vo veľkej miere uvedomovať podnikatelia a ďalšie iné, najmä výskumné, inštitúcie naprieč medzinárodným spektrom. Prijatie noriem upravujúcich právne vzťahy súvisiace so získaním, využívaním a ochranou obchodného tajomstva v posledných rokoch len akcentuje jeho dôležitú úlohu (nie len) v podnikaní. Na rozdiel od iných práv priemyselného vlastníctva sa obchodné tajomstvá nikde neregistrujú, a tak ich skutočný objem v reálnom svete možno len hádať. Považujeme však za nanajvýš pravdepodobné, že obchodné tajomstvá tvoria v súčasnosti kľúčovú súčasť obchodných stratégií a portfólií duševného vlastníctva väčšiny podnikov po celom svete. Zastávame názor, že práve „neviditeľnosť“ obchodného tajomstva je dôvodom, prečo si ho podniky v hospodárskej súťaži cenia viac ako iné práva duševného vlastníctva.

Možno preto logicky predpokladať, že spolu so stúpajúcou tendenciou využívania obchodného tajomstva na ochranu cenných a tajných informácií v podnikoch by mali priamo úmerne stúpať aj počty sporov z obchodného tajomstva. V odbornej literatúre pozorujeme prevládajúci názor „neustáleho nárastu sporov v oblasti obchodného tajomstva“.[55] Autori však neponúkajú žiadne skutočné vysvetlenie tohto rastu a v odbornej literatúre nie je jednoznačne preukázané, či nárast takýchto sporov je jednoducho priamo úmerný aj s nárastom sporov pokiaľ ide o iné statky duševného vlastníctva, alebo či sa obchodné tajomstvá skutočne stali relatívne dôležitejšími. Je preto ťažké posúdiť, či tento údajný rast sporov v oblasti obchodného tajomstva súvisí s nárastom ich významu a praktického využitia alebo nie.

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[49] LEWIS, D. The Adoption of International Arbitration as the Preferred ADR Process in the Resolution of International Intellectual Property Disputes. In: Białostockie Studia Prawnicze, roč. 26 (2021), č. 5, s. 41-62.

[50] Webová stránka Arbitrážneho a mediačného centra WIPO poskytuje informácie o výhodách mechanizmov alternatívneho riešenia sporov. Sprístupňuje tiež vzorové zmluvné doložky a dohody o predkladaní návrhov vo viacerých jazykoch s cieľom uľahčiť postúpenie sporov týkajúcich sa duševného vlastníctva a technológií *vrátane obchodného tajomstva* postupom alternatívneho riešenia sporov WIPO (pozri: https://www.wipo.int/amc/en/clauses/arbitration/).

[51] World Intellectual Property Organization: WIPO Guide to Trade Secrets and Innovation. Geneva: WIPO, 2024. DOI: 10.34667/tind.49735.

[52] Pravidlá WIPO (z angl. „WIPO Arbitration Rules“) účinné od 1. júla 2021, dostupné online: https://www.wipo.int/amc/en/arbitration/rules/index.html.

[53] V čl. 54 pravidiel WIPO (z angl. „Disclosure of Trade Secrets and Other Confidential Information“) sa stanovujú konkrétne opatrenia na ochranu obchodného tajomstva a ďalších dôverných informácií, ktoré si strana želá zachovať utajené.

[54] DE CASTRO, I., GADKOWSKI, A. Confidentiality and Protection of Trade Secrets in Intellectual Property Mediation and Arbitration. In: Trade Secrets. Procedural and Substantive Issues, 2020. s. 79-90.

[55] Pozri k tomu najmä pozn. pod čiarou č. 7, 9, 10 a 19.

Na zistenie objemu súdnych sporov z obchodného tajomstva a ich narastajúcej tendencie na Slovensku sme oslovili kauzálne príslušný Okresný súd v Banskej Bystrici. Počet týchto sporov je podľa vyjadrenia súdu aj naďalej *veľmi nízky* (spravidla ide o maximálne 5 až 10 prípadov za kalendárny rok). Vo veľkej miere sa v týchto prípadoch využíva inštitút predbežného prejednania sporu, čím nie je nariadené ani prvé pojednávanie. Podľa prieskumu vybraných advokátskych kancelárií má počet prípadov týkajúcich sa porušenia obchodného tajomstva v posledných rokoch *mierne stúpajúcu tendenciu*, avšak v drvivej väčšine prípadov nemajú strany *žiadny záujem o využitie súdnej cesty* na riešenie ich sporu z obchodného tajomstva.

Analyzujeme nasledovné skutočnosti, ktoré považujeme za dôvody, prečo sa strany súdnym sporom z obchodného tajomstva vyhýbajú: (1) Podniky nemajú žiadnu alebo majú len slabú vedomosť o samotnej existencií obchodného tajomstva v ich podniku, a preto si často nie sú ani vedomé toho, či skutočne došlo alebo nedošlo k porušeniu obchodného tajomstva alebo nie. Táto nevedomosť podnikov súvisí aj s nevedomosťou o možnostiach právnej ochrany, a vedie k pochybnostiam, či sa v prípade neoprávneného získania, sprístupnenia alebo zverejnenia určitých tajných informácií môžu nejakej právnej ochrany vôbec domáhať. (2) Majitelia obchodných tajomstiev majú obavu, že súdne konanie spôsobí ešte väčšie riziko úniku informácií než jeho samotné porušenie. V tejto súvislosti poukazujeme na aktuálne zmeny v nemeckej právnej úprave civilného procesu – ide o prijatie nového ustanovenia § 273a o zachovaní dôvernosti (z nem. „Geheimhaltung“) do ZPO, ktoré výrazne posilňuje ochranu obchodného tajomstva v civilnom súdnom procese. Uvedená právna úprava môže slúžiť ako inšpirácia pre slovenského zákonodarcu. (3) Zložitosť a nákladnosť celého súdneho konania, pretože konania vo veciach porušenia alebo ohrozenia obchodného tajomstva sú spravidla technicky a aj právne zložité. (4) Zdĺhavosť súdneho konania, s poukázaním najmä na dlhý priemerný čas od momentu podania žaloby po začatie súdneho konania, vrátane neistoty, či súd vyhovie návrhu na nariadenie neodkladného opatrenia alebo nie. Najmä pokiaľ ide o zachovanie podstaty obchodného tajomstva – jeho utajenia, čas hrá veľmi významnú rolu v rozhodovacom procese majiteľa, či namiesto súdnej cesty zvolí rýchlejšie a istejšie, mimosúdne, spôsoby riešenia sporu. (5) Dokazovanie v sporoch z obchodného tajomstva je v praxi veľmi zložité. Dôkazné bremeno spočíva plne na žalobcovi. Porušenie obchodného tajomstva ako aj samotné obchodné tajomstvo je však „neviditeľné“, a tak môže byť pomerne náročné preukázať všetky zákonné predpoklady obchodného tajomstva, ako aj to, či rušiteľ tieto informácie získal skutočne neoprávnene.

Na základe uvedených skutočností tvrdíme, že majitelia obchodného tajomstva racionálnou úvahou dospejú k tomu, aby zvážili použitie iných ako súdnych, menej riskantných, viac dôverných a prípadne aj rýchlejších, prostriedkov ochrany obchodného tajomstva. Zastávame názor, že súdna ochrana proti porušeniu obchodného tajomstva býva v praxi až akýmsi „posledným útočiskom“ pre poškodeného majiteľa a súdne spory vo veciach obchodného tajomstva sú veľmi zriedkavé. Nemyslíme si však, že v praxi k porušovaniu obchodného tajomstva nedochádza. Práve naopak, podporujeme názor, že tak ako narastá význam obchodného tajomstva a jeho využívanie v podnikoch, logicky sa musia zvyšovať aj spory súvisiace s jeho porušením alebo ohrozením. V tej súvislosti dokonca zastávame názor, že riziko „úniku“ informácií tvoriacich obchodné tajomstvo a prekračovanie právomocí z oprávnení na jeho využívanie (napríklad z titulu licenčných a iných nepomenovaných zmlúv) sa oproti minulosti v súvislosti s vývojom technológií zvyšuje, a to najmä z dôvodu súčasného trendu „zdigitalizovania“ obchodných tajomstiev, ktoré môžu byť poľahky objektom kybernetickej krádeže alebo špionáže.

Preto skúmame aj iné alternatívy, ktoré majú majitelia obchodných tajomstiev k dispozícií na riešenie ich potenciálnych sporov. Zamerajúc sa len na výhody arbitráže (rozhodcovského konania) na riešenie sporov z obchodného tajomstva[56], jeho potenciál vnímame z nasledovných dôvodov: (1) Neverejnosť a zachovanie dôvernosti informácií počas celého priebehu konania, vrátane výsledkov, ktoré toto riešenie sporov pre strany prinesie, vrátane zverejnenia informácie, že k sporu medzi stranami

[56] Z dôvodu obmedzeného rozsahu príspevku nešpecifikujeme a neuvádzame zvlášť aj výhody litigácie a mediácie v sporoch z obchodného tajomstva, no zastávame názor, že aj tieto alternatívne metódy môžu v praxi slúžiť ako významný doplnok pri riešení sporov z obchodného tajomstva.

vôbec došlo. Majiteľ obchodného tajomstva spravidla nemá záujem o zverejnenie, že k porušeniu obchodného tajomstva v jeho podniku vôbec došlo, a to často zo strategických dôvodov (ochrana jeho dobrého mena a dobrej povesti spájanej s existenciou obchodného tajomstva v podniku, konkurenčná výhoda spojená s využívaním obchodného tajomstva a pod.). (2) Rozhodcovské konanie je časovo rýchlejšie, čo je dôležité pre čo najefektívnejšiu nápravu z porušenia obchodného tajomstva. (3) Právna úprava obchodného tajomstva a jeho ochrany sa v jednotlivých jurisdikciách výrazne odlišuje (pokiaľ ide o krajiny mimo EÚ) a pokiaľ ide o uzatváranie licenčných, franchisingových alebo iných nepomenovaných zmlúv na využívanie obchodného tajomstva, je pomerne bežnou praxou, že zmluvné strany pochádzajú z rôznych krajín. (4) Odbornosť konania, pretože rozhodcovia sa často špecializujú v príslušnej oblasti práva, čo môže predstavovať výhodu pri rýchlom a spoľahlivom určení samotnej existencie obchodného tajomstva (najmä pokiaľ ide o určenie, či informácie sú alebo nie sú dostupné osobám v kruhoch, ktoré sa dotknutým druhom informácií bežne zaoberajú). (5) Menšia formálnosť a flexibilnosť v procese riešenia sporov z obchodného tajomstva. (6) Rozhodcovskému konaniu neodporuje, ak účastník konania pred začatím rozhodcovského konania, alebo po jeho začatí, ale pred ustanovením rozhodcu (rozhodcov) požaduje od súdu nariadenie neodkladného opatrenia (55b OBZ) a súd také opatrenie nariadi.

Keďže na Slovensku neexistuje verejná, konzistentná štatistika, ktorá by dôveryhodne porovnala objem súdnych vs. mimosúdnych riešení sporov z obchodného tajomstva, možno len predpokladať značný potenciál mimosúdneho riešenia sporov z obchodného tajomstva (možno aj keď len do budúcnosti vzhľadom na nízke povedomie). V medzinárodnom meradle sa už mediácia a arbitráž čoraz častejšie používajú ako úspešné metódy mimosúdneho riešenia sporov, a to v oblasti všetkých práv duševného vlastníctva, vrátane obchodného tajomstva. V súvislosti s medzinárodnými spormi z obchodného tajomstva upriamujeme pozornosť aj na možnosť využitia Arbitrážneho a mediačného centra WIPO, ktoré uvádza možnosť takejto formy mimosúdneho riešenia sporov aj pre spory z obchodného tajomstva, pričom v procesných pravidlách (čl. 54) je ochrana obchodných tajomstiev výslovne zakotvená.

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Legal challenges of privacy protection in connection with the use of autonomous vehicles

Právne výzvy ochrany súkromia v súvislosti s používaním autonómnych vozidiel

Abstract

Road transportation is fundamental to the global economy, enabling trade, promoting economic development, and granting access to markets, employment, and essential services. It supports economic recovery initiatives, backed by stimulus funding. The development of autonomous vehicles (AVs) seeks to reduce accidents and traffic congestion. These vehicles process large data sets, including personal information, which raises legal issues regarding the balance between societal benefits and individual privacy rights. This paper examines privacy-related legal matters within the scope of EU and national legislation, assisting policymakers in balancing the advantages of AVs against privacy concerns. The research employs dogmatic, empirical, and comparative approaches.
Keywords: *autonomous vehicles, GDPR, principle of proportionality, rule of law, privacy, autonomy.*

Abstrakt

Cestná doprava je kľúčovým pilierom globálnej ekonomiky – umožňuje obchod, podporuje hospodársky rozvoj a zabezpečuje prístup na trhy, k zamestnaniu a k základným službám. Zároveň podporuje iniciatívy na hospodárske oživenie financované zo stimulačných balíkov. Vývoj autonómnych vozidiel (AV) smeruje k znižovaniu počtu nehôd a dopravných zápch. Tieto vozidlá spracúvajú rozsiahle súbory údajov, vrátane osobných údajov, čo vyvoláva právne otázky týkajúce sa rovnováhy medzi spoločenskými prínosmi a právom jednotlivca na súkromie. Tento článok skúma právne otázky súvisiace so súkromím v rámci práva EÚ a vnútroštátnej legislatívy a pomáha tvorcom politík hľadať rovnováhu medzi výhodami autonómnych vozidiel a ochranou súkromia. Výskum využíva dogmatické, empirické a komparatívne metódy.
Kľúčové slová: *autonómne vozidlá, GDPR, zásada proporcionality, právny štát, súkromie, autonómia.*

JEL Classification: K24

INTRODUCTION

'Autonomous vehicles (AVs)' are vehicles that manage all driving tasks in any environment via automated systems[2]. Countries like the USA, UK, Singapore, the Netherlands, and France are testing full automation on public roads[3]. AVs aim to address human driver shortcomings, responsible for about 90% of accidents[4]. Their benefits include lower costs, shared use, less dependence on private vehicles, multitasking, mobility for those unable to drive, family sharing, reduced parking needs, and less traffic

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congestion[5]. However, concerns about control, algorithm errors, hacking, regulation, privacy, ethics, environment, and safety remain[6]. The advanced control systems pose risks from flaws or cyberattacks[7].

Operating AVs necessitates managing vast amounts of data through onboard and external systems, which often includes personal and sensitive information of drivers and passengers. To promote sustainable development in AV technology, a significant legal challenge involves balancing societal values with individual privacy rights. This paper analyses the legal challenges associated with privacy protection, focusing on the legal basis within the framework of EU and national law. It considers how legislators can evaluate the common good derived from the expected benefits of AVs on public roads against the individual rights to privacy of road users. The research employs dogmatic, empirical, and comparative methodologies.

1. CONCEPTUALISATION OF AUTONOMOUS VEHICLES

The concept of computer-operated vehicles dates back to the 1950s[8]. Recently, governments and startups have fueled interest by claiming fully autonomous vehicles driven by AI are close. AVs are believed to improve safety, mobility, energy use, pollution, and save travel time[9]. They could also aid disabled travellers. The U.S. Department of Transportation defines AVS as vehicles where key controls like steering, acceleration, or braking operate without human input, either autonomously with sensors or connected via wireless systems[10].

Regulation (EU) 2019/2144 defines an ‘automated vehicle’ (Article 3(21)) as one capable of autonomous operation for some time but still requiring driver intervention, while a 'fully automated vehicle' (Article 3(22)) functions entirely without driver oversight.

The Society of Automotive Engineers[11] defines six levels of vehicle automation for the full dynamic driving task (DDT), with the Automated Driving System (ADS) taking control from level 3 onward. The ADS, a hardware and software module, manages the entire DDT, primarily impacting levels 3, 4, and 5.

Article 65k of the Polish Road Traffic Act (1997) defines an autonomous vehicle as one with systems controlling movement and operating without driver interference, who can still take control. This definition, however, lacks clarity for levels 3- 5, which involve conditional, high, and full automation.

For further consideration, an AV is characterised by: 1) a vehicle functioning as a mechanical communication device driven by natural forces; 2) equipped with an ADS that manages internal assistance systems; and 3) capable of autonomous driving functions internally and in interactions with other autonomous vehicles, like forming convoys[12].

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'Autonomy' in an information system means its ability to change its purpose without external control or supervision[13].

2. PRIVACY PROTECTION IN RELATION TO THE UTILISATION OF AUTONOMOUS VEHICLES

Privacy has long been a sensitive subject, defined as the desire to freely choose what to expose of oneself. Westin[14] states that privacy fulfils vital needs: personal autonomy, emotional release, self-evaluation, and selective communication. These needs are not only individual but also societal, requiring organisations to access privacy for decision-making. Social science shows observation restricts privacy and free activity by listening or watching, while forcing individuals to reveal personal memories can cause emotional crises when confronting hidden issues. Westin also identifies surveillance through recording as a threat to privacy without awareness.

Autonomous driving involves ongoing location tracking, destination monitoring, and data sharing with other users stored in the cloud, raising concerns about potential misuse of personal information. Consequently, the perceived privacy level is likely to positively affect users' willingness to adopt this technology[15]. The literature differentiates between personal data privacy (such as booking a service via an app) and vehicle data privacy (like in-vehicle video surveillance)[16]. The risk of government agencies accessing stored personal or vehicle data, particularly through continuous surveillance, raises significant privacy issues[17]. To prevent misuse by authorities, robust security measures and regulatory frameworks are crucial. Nonetheless, widespread AV adoption will inevitably lead to large data recordings-covering app registration, sensor data, location tracking, remote access logs, vehicle condition reports, and multimedia interactions[18]. While such extensive data collection is essential for AV operations and emergency services, it must be balanced with rigorous data privacy protections.

At the EU level, data protection is a fundamental right, separate from the right to private life. While both protect autonomy and dignity, data protection is proactive, ensuring safeguards during data processing with independent oversight. Article 8 of the EU Charter affirms this right, requiring fair processing and access to data. It covers all personal data and activities and can infringe on privacy without infringing private life. 'Private life' varies, covering sensitive information depending on circumstances. The GDPR, adopted in 2016, modernised EU law, maintaining core principles while adding rules like data protection by design, appointing Data Protection Officers, data portability, and accountability.

The GDPR outlines the rights and limitations related to the protection of personal data. According to the GDPR, the principles of data protection should apply to any information concerning an identified or identifiable natural person.

Since there is no specific regulation concerning the processing of personal data in connection with the use of AVs, this matter should be analysed based on the provisions of the GDPR. Considering the hierarchy of secondary legislation outlined in Article 288 of the TFEU, the GDPR possesses the following characteristics: a) it is a regulation with general application, meaning it is a general act that establishes specific rules of conduct applicable in an unspecified number of cases and to an indefinite

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13 ISO/IEC 22989:2022, Information technology, Artificial intelligence, Artificial intelligence concepts and terminology, https://www.iso.org/obp/ui/en/#iso:std:iso-iec:22989:ed-1:v1:en [cited 2025-09-25].

14 WESTIN, A.: The right to privacy, Athenaeum, New York, Atheneum 1967, p. 25.

15 GARIDIS, K., ULBRICHT, L., ROSSMANN, A., SCHMÄH, M.: (2020). Toward a user acceptance model of autonomous driving. In Proceedings of the 53rd Hawaii International Conference on System Sciences, January 2020, p. 1381.

16 STEPHANEDES, Y.J., GOLIAS, M., DEDES, G., DOULIGERIS, C., MISHRA, S.: Challenges, risks and opportunities for connected vehicle services in smart cities and communities, IFAC-PapersOnLine, Volume 51, Issue 34, 2019, pp. 139-140.

17 FAGNANT, D.J., KOCKELMAN, K.: Preparing a nation for autonomous vehicles: Opportunities, barriers and policy recommendations, Transportation Research Part A: Policy and Practice, 77 (2015), p. 167.

18 STEPHANEDES,Y.J., GOLIAS, M., DEDES, G., DOULIGERIS, C., MISHRA, S.: Challenges, risks and opportunities for connected vehicle services in smart cities and communities, IFAC-PapersOnLine, Volume 51, Issue 34, 2019, p. 140.

(open) category of persons; b) any entity governed by law, including states and individuals, may be an addressee of a regulation; c) regulations are binding in all their provisions, in their entirety; d) regulations are directly and fully binding, implying that they cannot be transformed. If an area is regulated by such a regulation, the competence of Member States to legislate on that area is extinguished unless the regulation enshrines an obligation to do so.

Identifying 'personal data', as defined in Article 4(1) of the GDPR, within the data processed in connection with AV requires clarifying the purposes and means of processing. An entity that determines the purposes and means of processing is regarded as a 'controller' under Article 4(7) of the GDPR.

Processing personal data must adhere to the principles outlined in Article 5(1)(2) of the GDPR, which are further detailed in the controller's obligations. Article 5 of the GDPR delineates the fundamental principles that underpin the protection of personal data: lawfulness, fairness, transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality, and accountability. Certain principles are elaborated further within other sections of the Regulation—for instance, transparency (Article 5(1)(a)) encompasses a duty to inform data subjects (Articles 12 and subsequent), while integrity and confidentiality (Article 5(1)(f)) are detailed in Articles 32 and thereafter. The principle of accountability (Article 5(2)) is elucidated in Articles 24 and 25, among others. The requirement that data processing be lawful necessitates compliance with all pertinent legal obligations, including professional secrecy where applicable. The heading of Article 6 GDPR has been amended to 'Lawfulness of Processing,' superseding the previous title under the Data Protection Directive, which was 'Criteria for Making Data Processing Legitimate,' and it establishes the principal conditions for lawful processing. Significantly, Article 6(1) GDPR stipulates that processing is lawful only if at least one of the specified conditions is met[19].

Recital (40) of the GDPR states that personal data processing is lawful only if based on the data subject's consent or other legitimate reasons in law, including compliance with legal obligations, performing a contract, or taking steps at the data subject's request before a contract. Such reasons don't necessarily require a law passed by parliament, as long as they align with the Member State's constitutional order. However, these legal bases must be clear, precise, and predictable, as per jurisprudence of the Court of Justice and the European Court of Human Rights.

Article 6(2) of the GDPR exemplifies a compromise between the objective of harmonising data protection legislation across the European Union—aimed at effectively eliminating any national laws in this domain—and the recognition that sector-specific regulations in certain areas of data protection are advantageous for legal entities and cannot be sufficiently achieved solely through Union law within a reasonable timeframe. Given the significance of harmonisation, particularly within the private sector, the legislative powers of Member States are confined to establishing regulations for the public sector (Article 6(1)(e)) and imposing specific legal obligations on controllers across both sectors (Article 6(1)(c)). Concerning data processing pursuant to Article 6(1)(f), which is vital for private sector operations, there exists no overarching provision permitting Member States to enact their own data protection laws. Only in the processing activities delineated in Chapter IX of the GDPR can Member States retain existing laws or introduce new ones. In all instances governed by Article 6(2), any national legislation that maintains or enacts more detailed data protection regulations must fully comply with the provisions of the GDPR.

In the absence of specific regulations concerning the processing of personal data related to the use of AVs within the European Union, it is essential to consider establishing a legal framework within national legislation for the processing of personal data in connection with the operation of such vehicles (i.e., a lex specialis to Article 6(1)(c) of the GDPR). The development of such regulations would enable the linkage of personal data processing with the fulfilment of particular obligations associated with the operation of AVs. Furthermore, the formulation of such regulations would necessitate that the legislator

[19] KUNER, C., BYGRAVE, L.A., DOCKSEY, C.: Commentary on the EU General Data Protection Regulation, Oxford University Press, 2020, p. 328.

undertake an initial assessment of the individual right to privacy in comparison to the societal benefits derived from the deployment of autonomous vehicles.

3. THE ROLE OF THE STATE IN THE FORMULATION OF LEGISLATION

The importance of law in society was key in Greek and Roman philosophy. In 'The Laws' (~360 B.C.), Plato suggested government should serve the law[20]. Aristotle, a student of Plato, identified three state authority divisions—the council, governing bodies, and courts—which defined Greek political structure[21].

Aristotle in 'The Politics' (~350 B.C.) contrasted rule of law and reason with rule by man and passion, arguing government should be bound by law to prevent arbitrary power. The history of constitutional law shows various classifications, but the most enduring distinguishes legislation, executive power, and jurisdiction as the main branches. Other classifications have fallen out of favour as insights into the state's true nature emerged, leading to the dominant perspective[22].

Both philosophers concur that laws are established for the common good. Aristotle, in 'Politics' (~350 B.C.), stated that good laws should be paramount, overseen by magistrates when laws are insufficient to address specific issues. The nature of good laws depends on the constitution of the state, suggesting that just laws originate from legitimate governments, while unjust laws arise from corrupt regimes[23].

Laws have been recognised since ancient times. During the Enlightenment, for example, German states systematically introduced new laws to surpass arbitrary power and create uniform principles. Most states adopted constitutions between 1810 and 1851, establishing parliamentary participation. This was built on the traditional estate-based legal system. In 1871, the Reichstag gained legislative power, working with the Bundesrat and the monarch. It passed the Civil, Commercial, and Criminal Codes, which still influence today[24].

Joseph Raz defines the rule of law in 'The Authority of Law"[25]. It includes principles like laws being prospective, open, clear, and publicly announced. Retroactive laws are usually absent but acceptable if foreknowledge exists. Laws should be stable, unambiguous, and not frequently changed to enable effective decision-making. Adherence varies; some laws are clearer and more stable, but violations differ in severity. The rule guides both laws and government actions, emphasising stability through broad regulations that define powers. Judicial independence is crucial; courts must interpret laws accurately for good governance. Principles like natural justice, review powers, accessibility, and limits on discretion are key to maintaining the rule of law.

Proponents of the substantive, or 'thick,' rule of law argue it should include justice and fairness, unlike formal theorists. Ronald Dworkin advocates for this view, calling it the 'rights conception,' which requires laws to recognise moral and political rights and allow their enforcement. A challenge is that 'moral rights' can be unclear and polarising, as seen in debates over same-sex unions or the death penalty[26].

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[20] BOBONICH, CH.: Plato's Politics, [in] FINE G. (ed.), The Oxford Handbook of Plato, 2nd edn., Oxford Handbooks (2019), p. 576.

[21] EDWARDS, J. G.: Confirmatio Cartarum and Baronial Grievances in 1297, The English Historical Review, Vol. 58, No. 230 (April, 1943), p. 150-151.

[22] JELLINEK, G.: Die Funktionen des Staates. In: Allgemeine Staatslehre. Springer, Berlin, Heidelberg, 1921, p. 595.

[23] VALCKE, A.: The Rule of Law: Its Origins and Meanings (A Short Guide for Practitioners) (March, 1 2012), available at SSRN, http://ssrn.com/abstract=2042336, [cited 2025-09-25].

[24] THRÄNHARDT, D.: Gesetzgebung [in] Andersen U., Bogumil J., Marschall S., Woyke W., Handwörterbuch des politischen Systems der Bundesrepublik Deutschland, Auflage 8, Springer Nature, 2021, pp. 352.

[25] RAZ, J.: The Rule of Law and its Virtue, The authority of law [in] Essays on law and morality, (Oxford, 1979; online edn, Oxford Academic, 22 Mar. 2012), pp. 215 -218.

[26] WACKS, R.: Dworkin: the moral integrity of law, Philosophy of Law [in] A Very Short Introduction, 2nd edn., (Oxford, 2014; online edn, Oxford Academic, 27 Feb. 2014), p. 49.

In his publication, 'On the Rule of Law, History, Politics, Theory', Brian Tamanaha[27] asserts that the rule of law is considered the foremost political ideal worldwide; however, its precise meaning remains ambiguous. He compares it to the concept of the good: 'everyone is for it', but no one maintains a clear understanding of its exact nature.

The formulation of law is linked to performing specific functions. The law, as expressed through legal norms, is used to make demands, gain support, justify actions, assign responsibility, and assess whether conduct is praiseworthy or blameworthy[28]. In the international system, they are also seen as 'providing solutions to coordination problems, reducing transaction costs, and establishing a shared language and framework for international relations'[29].

Multiple functions show norms serve both constitutive and constraining roles[30]. These roles form a norm's structure: problem, value, and behavior. Social constructivists like Wiener[31] argue that norms perform 'constitutive' functions: defining categories of actors and actions, shaping identities and interests.

Norms generate meaning by shaping shared understandings of what things are, whether tangible—like a reduced carbon footprint—or intangible, such as accountability or reconciliation. This meaning includes how items are valued, which is subjective but crucial, as these value-laden items define problems by relating material or social facts to societal values, determining if they are seen as good or bad[32]. A fact becomes problematic if it is interpreted as negatively affecting the achievement or ongoing practice of something society values, prompting corrective actions. Essentially, no principled action can occur unless actors identify and define 'underlying conditions in world affairs' as problems based on their values[33].

Hurrell et al.[34] define 'appropriate behavior' as involving constructing norms- combining their constitutive and constraint roles- and recognising that values shape responses. A norm has three parts: a problem needing a solution, a value giving moral importance, and a behavior to solve the problem and uphold the value. A problem blocks a value's realisation and calls for action.

As previously outlined, the motivations for legislation are diverse. One main reason is to address societal needs. As Plato and Aristotle noted, this remains relevant today. Laws are created to meet societal needs and improve systems, showing legislation's evolving nature. Laws also protect citizens' rights and liberties from abuse by others, organizations, or the government. They set standards for behavior and conduct, guiding citizens and upholding societal norms. Additionally, laws adapt over time to reflect changing values and needs, ensuring they stay relevant and effective.

4. BALANCING TECHNOLOGICAL ADVANCEMENT WITH PRIVACY SAFEGUARDS

Developing AVs within legal frameworks requires balancing innovation and privacy rights. Legal systems inherently need to reconcile safety, sustainability, and privacy, as personal data protection is constitutionally mandated.

The rule of law is embedded in the constitutions of EU member states. In Germany, it is part of the state's concept under Article 20(3) of the 1949 Constitution, governing the principle (ger. Das

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27 TAMANAHA, B.Z.: On the Rule of Law: History, Politics, Theory, Cambridge University Press 2004, p. 91.

28 WINSTON, C.: Norm structure, diffusion, and evolution: A conceptual approach, European Journal of International Relations 2018, Vol. 24(3), p. 640.

29 CORTELL,, A.P., DAVIS, J.W.: Understanding the domestic impact of international norms: A research agenda, International Studies Review, Vol. 2, No. 1 (Spring, 2000), p. 69.

30 CHECKEL, J.: (1997) International norms and domestic politics: Bridging the rationalist–constructivist divide. European Journal of International Relations 3(4), 1997, p. 47.

31 WIENER, A.: A Theory of Contestation. Berlin, Springer, 2014, p. 17-18.

32 WENDT, A.: Social Theory of International Politics. Cambridge: Cambridge University Press, 1999, pp. 1-3.

33 CARPENTER, R.C.: Setting the advocacy agenda: Setting the Advocacy Agenda: Theorizing Issue Emergence and Nonemergence in Transnational Advocacy Networks. International Studies Quarterly 51(1) 2007, p. 99.

34 HURRELL, A., MACDONALD, T.: Norms and ethics in international relations [in] SIMMONS B.A., CARLSNAES W., RISSE T. (eds.) Handbook of International Relations. London: Sage Publications 2007, pp. 57–58.

Rechtsstaatprinzip). In Poland, it's linked to democracy, per Article 7 of the 1997 Constitution. Constitutions set a legal order based on the highest normative act, reflecting the social contract. Legislators must follow this supreme law.

Article 20(3) of the German Constitution states that the constitutional order binds the legislature through the constitution's primacy[35]. This hierarchy requires lower acts to conform to the constitution, applying only to formal legislation, including state laws[36]. Other authorities are bound by the constitution and duty to uphold law and justice. Laws violating the Constitution are void from the start, i.e., ineffective.[37]

Since much of society's life is governed by law, a rational legislator's role is crucial for ensuring the state's proper and continuous functioning. It is essential to critically evaluate legislation, as it is unacceptable for laws to require corrective measures on a case-by-case basis, in accordance with democratic principles, the rule of law, legalism, and legal certainty (see Articles 2 and 7 of the Polish Constitution, 1997).

Duniewska[38] traces the principle of proportionality—related to moderation, commensuration, minimalism, and adequacy—back to ancient Roman law. A more accepted view is that it developed in the 1950s through German court decisions, spreading across Europe as a key part of modern democracies.

In Poland, the principle of proportionality is not explicitly stated in the current constitution (Polish Constitution, 1997), but it is rooted in Article 31(3), which allows restrictions on constitutional freedoms only when necessary for security, order, environment, health, morals, or others, without infringing core rights[39]. Initially, the Constitutional Court referenced both Articles 2 and 31(3), but over time, its reliance on Article 2 has lessened[40].

Individual freedoms and rights are outlined in Chapter II of the Polish Constitution. When considering rights—both human and civil—it is important to acknowledge their positive aspect, which requires the state to actively protect a certain good. Conversely, freedom is seen as a negative right; the state must not interfere with the domain protected by a specific freedom[41].

Within the current legal framework, the principles of necessity and non-excessive interference are inherent in Article 31(3) of the Polish Constitution (1997), which uses 'necessary' to outline the restriction's purposes. Excessive interference limits constitutional freedoms and rights, undermining their core. These criteria help determine violations or compliance with proportionality. Although the article doesn't explicitly mention 'usefulness,' it aligns with the rule of law, assessing whether legislation effectively achieves its goals[42].

The prohibition of excessive interference, or proportionality, requires balancing the restriction of constitutional rights with the regulation's purpose. This involves evaluating conflicting principles and deciding which prevails based on specific facts and legal circumstances. While protecting certain values is prioritised, one value must not be protected at the expense of completely eliminating or distorting another.

The principle of proportionality sets minimum requirements allowing interference with rights when met, ensuring legality and democracy. Conversely, reverse proportionality assesses failure in protecting human rights to evaluate if constitutional mandates are properly followed.

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35 JARASS, H.D., KMENT, M.:, Grundgesetz für die Bundesrepublik Deutschland, Berlin Beck, 18 Auflage, 2024, p. 546.

36 DREIER, H., SCHULZE-FIELITZ, H., BROSIUS-GERSDORF, F., MORLOK, M., BRITZ, G., WITTRECK, F., HERMES, G., WIELAND, J., BAUER, H., WOLLENSCHLÄGER, F., HEUN, W.: Grundgesetz: Kommentar. Artikel 20-82, Volume 2, Mohr Siebeck, 2015, p. 647.

37 JARASS H.D.: op.cit., p. 547.

38 DUNIEWSKA, Z.: Zasada proporcjonalności [in] KORZENIOWSKI P., STAHL M. (eds.), Prawo administracyjne. Pojęcia, instytucje, zasady w teorii i orzecznictwie, Warszawa, Wolters Kluwer 2024, p. 175.

39 TRZCIŃSKI, J.: Bezpośrednie stosowanie Konstytucji przez sądy administracyjne, Warszawa, Wolters Kluwer 2023, p. 78.

40 DUNIEWSKA, Z.: op.cit., p. 176.

41 GARLICKI, L.: Polskie prawo konstytucyjne, Warszawa, Wolters Kluwer 2023, p. 107.

42 TRZCIŃSKI, J.:, op.cit., p. 79.

The proportionality test examines if legislation achieves its goals, protects public interests, and if its consequences are proportionate to the burdens on citizens (see Judgement of the Constitutional Court: SK 22/97).

The proportionality principle covers both lawmaking and application when discretionary powers are involved[43]. While the Polish Constitution (1997) doesn't explicitly mention it, other statutes do. For example, Article 8 § 1 of the Polish Code of Administrative Procedure (1960) states that public administration proceedings are guided by proportionality, impartiality, and equal treatment to build trust.

When assessing a regulation against the principle of proportionality, it should be related to the constitutional freedoms it infringes. Regarding personal data processing with AVs, considerations include the right to privacy (see Article 47 of the Polish Constitution, 1997), communication confidentiality (see Article 49), and data protection (Articles 51(2-5)). Constitutional limits on rights include two main forms: the mechanism in Article 31(3) and explicit allowances within specific legal provisions[44].

Considering the origins of the regulation within European Union law, it becomes necessary to analyse the interactions between national legislation and EU legislation.

Although constitutional norms are directly applicable (see Article 8(2) of the Polish Constitution, 1997), they require specificity. The primary means of implementing constitutional norms is, therefore, statute, which must be consistent with the Polish Constitution (1997). Statutes that raise doubts about their legality yet remain in circulation should be subject to an interpretation that ensures their constitutionality.

Generally, ratified international agreements are subordinate to statutes in Poland's legal hierarchy, as per Article 87 of the Polish Constitution (1997). An exception is agreements ratified with prior consent, either through an act or referendum, which, under Article 91(2), supersede statutes when incompatible.

Although the Polish Constitution (1997) is a statute, treaty primacy does not inherently apply. All international agreements must align with it. The Constitutional Court case K 18/04 observed: ‘International agreements ratified under statutory authorization or referendum, including those on transferring competencies, do not have priority over the Constitution. The Constitution remains the 'supreme law' of Poland, including agreements on transfer of powers. Article 8, Section 1 of the Constitution grants it legal supremacy and primacy within Poland’s territory.’

This justifies safeguarding state sovereignty but doesn't mean reconciling different legal systems is impossible. The Constitution allows interpretation aligned with external frameworks. Difficulties arise if the interpretation can't be adapted, requiring amendments or terminating the agreement. The CJEU emphasises EU law's primacy, even over national constitutions (see Judgment of the CJEU, C-285/98).

The European Union legal system consists of primary legislation, namely treaties, which are directly applicable, and secondary legislation, which may necessitate implementation into national law. In accordance with Article 291(1) of the TFEU, Member States are obliged to undertake all necessary measures within their national legal frameworks to ensure the effective implementation of legally binding Union acts.

The principle of proportionality is well-established in the EU legal framework. It is explicitly mentioned in Article 5(1) of the TEU, which states that the Union's competences are defined by conferral. The exercise of these competences must follow the principles of subsidiarity and proportionality. Paragraph 4 states that, according to the principle of proportionality, Union actions should not exceed what is necessary to achieve Treaty objectives. This principle is applied alongside the Protocol on subsidiarity and proportionality (Protocol, 2009).

The Protocol requires EU institutions to uphold subsidiarity and proportionality, as outlined in Article 1. Article 5 mandates explanatory memorandums with draft legislation, including a statement on compliance. For directives, this statement must detail expected impacts on Member State regulations.

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[43] DUNIEWSKA, Z.: op.cit., p. 176.

[44] MIŁKOWSKI, T. M.: Czynności operacyjno-rozpoznawcze a prawa i wolności jednostki, Warszawa, Wolters Kluwer 2020, p. 104.

Article 69 TFEU requires national parliaments to verify that proposals under Chapters 4 and 5 follow subsidiarity. According to Article 295 TFEU, when the Treaties don't specify the legal act, institutions choose the appropriate type based on procedures and proportionality. The EU Charter, in Article 52(1), references proportionality, similar to Article 52 TFEU. Although primarily addressed to Union institutions (Article 51), Article 52(3) states the EU Charter can be implemented through legislative acts and by Member States when executing Union law.

The Code of Good Administrative Behavior[45] addresses proportionality. Adopted by the European Parliament on 6 September 2001, it guides EU institutions, their services, and officials in dealings with individuals. The Code reflects European administrative law principles from case law and national laws. Article 6 states that EU officials must ensure actions are proportionate to their objectives, avoiding disproportionate restrictions of citizens' rights or burdens. Its impact on national law is only indirect.

As the EU has acceded to the Convention for the Protection of Human Rights and Fundamental Freedoms, although the Convention itself does not address the issue of proportionality, it is necessary to consider not only the rulings of the CJEU but also those of the European Court of Human Rights. The ECtHR assesses whether measures taken at the national level are justified and proportionate, although it does not establish proportionality as a principle in its own right (see judgment of the EctHR in the case of Manoussakis and others vs. Greece).

The CJEU recognizes proportionality as a key principle of Community law, similar to national perspectives. It states that prohibitive measures must be appropriate and necessary to achieve legitimate aims. When multiple options are available, the least burdensome should be chosen, and the inconvenience must not outweigh the objectives (see Judgment of the CJEU, C-344/04).

5. ESTABLISHING THE CONTEXT FOR BALANCING THE RIGHT TO PRIVACY WITH THE RIGHT TO ROAD SAFETY

To facilitate the balancing process between the right to privacy and the right to road safety through the development of AVs, it is imperative to analyse the context to which this balancing operation pertains.

In the scholarly literature, both contextual integrity and responsible innovation have been advanced in relation to the development of a novel privacy framework that more accurately encapsulates the complexity of privacy challenges associated with AVs.

Nissenbaum's concept of contextual integrity (CI) is widely used in information communication technologies, online data, and privacy. Huang et al.[46] note that CI highlights how context defines personal information and its associated norms, such as transmission and disclosure. Appropriateness concerns reasonable information disclosure, while distribution covers the flow or restriction of info to others. Nissenbaum states violations of these norms breach privacy norms. The theory highlights that stakeholder relationships, regulations, institutions, and culture are key in understanding and managing privacy risks in ICT.

Nissenbaum[47] outlined five parameters for CI: recipient, sender, data subject, information type, and transmission principles. Unlike traditional privacy theories, CI assesses privacy based on appropriate information flow, which depends on following legitimate norms in social settings. Privacy is infringed when information transfer violates these norms in a specific context.

'Responsible Research and Innovation (RRI)' describes a transparent, interactive process where societal actors and innovators collaborate to ensure that innovations are ethical, sustainable, and socially

[45] Decision on the Code of Good Administrative Behaviour (OJ C 285, 29.9.2011, pp. 3–7).

[46] HUANG, G., HU, A., CHEN, W.: Privacy at risk? Understanding the perceived privacy protection of health code apps in China Big Data Soc., 9 (2) (2022), p. 1-2.

[47] NISSENBAUM, H.: Privacy as contextual integrity. Washington Law Review 79(1) 2004, p. 119.

desirable, facilitating the integration of science into society[48]. It views science and innovation as guided by socially acceptable objectives through a dynamic, inclusive process that encourages innovation and control before technology becomes entrenched. It also questions the ethical, inclusive, democratic, and fair selection of innovation goals. The concept assigns new responsibilities not only to scientists, universities, and businesses but also to policymakers[49]. As a result, scientific and technological paths are shaped by historical and social factors.

Stilgoe et al.[50] highlight the importance of institutional reflexivity in governance, which involves critically examining one's activities, acknowledging knowledge limits, and recognising that certain framings might not be universal. RRI serves as a significant framework for comprehending the societal challenges and limitations associated with new and emerging technologies, owing to its prudent approach. This is particularly pertinent to AVs[51], which encompass all road users, including non-vehicle operators such as pedestrians and cyclists, thereby raising concerns related to trust and safety.

Regarding AV privacy, RRI offers a mechanistic view of how societal norms and individual attitudes towards privacy evolve together. Reflexivity involves ongoing assessments of norms and their fit, supported by tools like codes of conduct, moratoriums, and standards that link external values with scientific practices[52].

When evaluating under the proportionality principle, it is essential to consider the value of individual privacy rights against the societal benefit of enhanced road safety through AV deployment. The implementation of AVs will significantly transform city design and how people travel and form communities[53]. Many studies, particularly from the RRI perspective, focus on the safety and public acceptance of AVs.

CONCLUSIONS

The principle of proportionality imposes restrictions on the interference of public authorities with individual rights and freedoms. It is principally aimed at the legislature. The essence of the principle of proportionality is expressed as the necessity for consistency and a balanced correlation between the objective of regulation or individual interference with personal rights and freedoms and the methods employed to attain these objectives.

The deployment of autonomous vehicles (AVs) on public roads necessitates the processing of substantial quantities of data. This requirement arises from the distinctive operations of these vehicles and their interactions with road infrastructure and other vehicles. According to Hind et al.[54], such vehicles establish connections not only with roadside systems such as traffic lights, toll booths, and congestion chargers but also with other vehicles. Although initially conceptualised as mobile sensing platforms, autonomous vehicles are increasingly reliant on various systems for their operation. Wilken et al.[55] emphasise that 'the importance of infrastructural support to autonomous vehicles, and

[48] VON SCHOMBERG, R.: Prospects for technology assessment in a framework of responsible research and innovation (in) DUSSELDORP, M., BEECROFT, R. (eds.), Technikfolgen Abschätzen Lehren: Bildungspotenziale Transdisziplinärer. Vs Verlag, Methoden, Wiesbaden, 2012, p. 39-40.

[49] OWEN, R., MACNAGHTEN, P., STILGOE, J.: Responsible research and innovation: From science in society to science for society, with society, Science and Public Policy, 39 (6) (2012), pp. 751-752.

[50] STILGOE, J., OWEN, R., MACNAGHTEN, P.: Developing a framework for responsible innovation, Res. Policy, 42 (9) (2013), p. 1568.

[51] COHEN, T., STILGOE, J., CAVOLI, C.: op.cit., p. 258.

[52] BUSCH, L.: Standards. Recipes for Reality. MIT Press, Cambridge, MA, 2011, p. 17.

[53] DICIANNO, B.E., SIVAKANTHAN, S., SUNDARAM, S.A., SATPUTE, S., KULICH, H., POWERS, E., DEEPAK, N., RUSSELL, R., COOPER, R., COOPER R.A.: Systematic review: Automated vehicles and services for people with disabilities, Neurosci. Lett., 761 (2021), p. 2.

[54] HIND, S., KANDERSKE, M., VAN DER VLIST, F.: Making the car "platform ready: How big tech is driving the platformization of automobility, Social Media + Society, 8 (2) (2022), p. 1-2.

[55] WILKEN, R., THOMAS, J.: Maps and the autonomous vehi cle as a communication platform. International Journal of Communication, 13, 2019,p. 2704.

communications between them, cannot be overemphasized'. These communications, vital for the coordination of vehicle-to-vehicle, vehicle fleet, and vehicle-to-infrastructure interactions, frequently depend on common standards. The level of automation, particularly at Level 3, involves complex interactions between the ADS and the (human) driver, necessitating the processing of personal data. Due to the volume and nature of this data, it can identify individuals, thereby qualifying as personal data under Article 4(1) of the GDPR. Considering the intricate relationship between infrastructure and AVs, data collection also extends to drivers, some of which qualify as personal data.

The legislator ought to contemplate the principle of proportionality and carefully weigh the individual's right to privacy against the societal interest in promoting road safety. AVs possess the potential to significantly diminish accidents by eliminating human error, while also continuously monitoring the environment to promptly identify and respond to potentially hazardous situations and driving conduct[56].

In the event that, pursuant to the application of the principle of proportionality, the legislator determines that prioritising the societal interest in enhancing road safety through the deployment of AVs justifies constraining the individual's right to privacy, such regulation could delineate the scope of data permitted to be processed by the data controller managing the AVs, as well as the purposes for which such data may be employed. Consequently, a specific domestic regulation would align with Article 6(1)(c) of the General Data Protection Regulation (GDPR), which stipulates that processing is lawful when necessary for compliance with a legal obligation to which the data controller is subject. This domestic regulation would also be consistent with the provisions of Article 6(2) of the GDPR.

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Specific Aspects of the Process of Excluding Assets from the Bankruptcy Estate Inventory in Personal Bankruptcy[2]

Špecifické aspekty procesu vylučovania majetku zo súpisu konkurznej podstaty pri osobnom konkurze

Abstract

The paper focuses on the specific features and application issues arising in the process of excluding assets from the bankruptcy estate inventory in personal bankruptcy proceedings, as well as on the related institution of the excindation action within the Slovak legal framework under Part Four of the Bankruptcy and Restructuring Act. It examines the preparation of the inventory, grounds for lodging an excindation objection, creditor requests to file an excindation action, and related procedural aspects, while highlighting shortcomings of the current regulation and proposing possible de lege ferenda solutions.
Keywords: *bankruptcy estate inventory, excindation objection, excindation action, debt relief, bankruptcy, incidental dispute.*

Abstrakt

Článok sa zameriava na osobitosti a aplikačné problémy, ktoré vznikajú v procese vylučovania majetku zo súpisu konkurznej podstaty v rámci osobného bankrotu, ako aj na súvisiacu inštitúciu vylučovacej žaloby v slovenskom právnom poriadku podľa štvrtej časti zákona o konkurze a reštrukturalizácii. Analyzuje prípravu súpisu, dôvody na podanie vylučovacej námietky, požiadavky veriteľov na podanie vylučovacej žaloby a súvisiace procesné aspekty. Súčasne poukazuje na nedostatky aktuálnej právnej úpravy a navrhuje možné riešenia de lege ferenda.
Kľúčové slová: *súpis konkurznej podstaty, vylučovacia námietka, vylučovacia žaloba, oddlženie, konkurz, incidenčný spor.*

JEL Classification: K35

INTRODUCTION

Debt relief is an important institution not only in the Slovak Republic but also in other European Union member states, for example. From a historical perspective, the institution of debt relief can be traced back to ancient times, but foreign legal doctrine[3] considers US bankruptcy law to be the first and model regime in modern societies.

Under the provisions of Part 4 of the Bankruptcy and Restructuring Act, the Slovak legal system allows a debtor to resolve insolvency either through personal bankruptcy proceedings or by means of a repayment schedule. The Slovak legal regulation of debt relief, contained primarily in Part 4 of Act No. 7/2005 Coll. on Bankruptcy and Restructuring and on Amendments and Supplements to Certain Acts

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3 WALTER, G., and KRENCHEL, J., V. 2021. *The Leniency of Personal Bankruptcy Regulations in the EU Countries*. Risks 9: 162. Available at: https://doi.org/10.3390/risks9090162.

(hereinafter referred to as the "*Bankruptcy and Restructuring Act*"), does not provide a statutory definition of debt relief.

In principle, it can be said that the institution of debt relief is intended to provide the debtor with an opportunity to be released from their debts and to once again exist and pursue their activities without the demotivating prospect of lifelong repayment. Debt relief should not have only an economic purpose for the debtor but also a social one.[4]

The Constitutional Court of the Slovak Republic[5] has stated that the purpose of debt relief under Part Four of the Bankruptcy and Restructuring Act is not to guarantee the full satisfaction of creditors' claims which, although duly filed and recognized, were only partially satisfied in bankruptcy proceedings. The objective of debt relief is to release the debtor, as a natural person, from their debts (§166(1) of the Bankruptcy and Restructuring Act) so that the unpaid liabilities do not burden them for the rest of their life, do not generate further insolvency, and enable them, from an economic standpoint, to regain financial stability and rebuild a sustainable livelihood.

The applicable legal regulation allows for two methods of debt relief for natural persons either through bankruptcy or by means of a repayment schedule. The choice of the form of debt relief lies solely within the debtor's discretion. The debtor does not file a general application for debt relief, in which the appropriate form would be determined by the court or the trustee; rather, the debtor exercises this choice by submitting the relevant petition to the bankruptcy court. Neither the court nor the trustee is authorized to alter the form of debt relief chosen by the debtor.[6]

Similarly to bankruptcy under Part Two of the Bankruptcy and Restructuring Act, in the case of personal bankruptcy the Act also imposes a number of duties on the trustee, which the trustee is obliged to fulfill in order to achieve the purpose of the personal bankruptcy proceedings.

From a general perspective, one of the essential duties of a trustee in bankruptcy proceedings is to draw up an inventory of the bankruptcy estate (hereinafter *"the inventory"*). Through this inventory, all assets forming part of the estate are identified, thereby determining the estate's overall composition. This understanding has also been confirmed by the Supreme Court of the Czech Republic[7], which in its ruling underscored that preparing the inventory represents a primary obligation of the bankruptcy trustee. The Court further clarified that the inventory forms the legal basis for the disposal of the estate's property, so that only assets properly recorded in it may be realized, while the trustee must act accordingly unless the law provides an exception. In our opinion, the conclusions of the Supreme Court of the Czech Republic stated in the cited decision remain valid, since even under the current legal regulation contained in Section 76(1) of the Bankruptcy and Restructuring Act, it is precisely the inclusion of assets in the inventory that is the legal fact that entitles the administrator to liquidate the included assets in bankruptcy proceedings. The conclusions of the cited decision form the basis for the current decision-making practice in all instances of the general court system of the Slovak Republic[8], which only confirms its relevance for the current legal regulation.

In practice, situations may arise where the trustee includes in the inventory not only the assets that belong to the debtor and may be realized in bankruptcy proceedings, but also property that should not have been included. To prevent the realization of assets that do not belong to the debtor or that cannot be realized in bankruptcy, the Bankruptcy and Restructuring Act provides affected persons (other than the debtor) with important legal remedies namely, an excindation objection and, upon fulfillment of the statutory requirements, also an excindation action. Through these instruments, persons with active legal

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4 UŠIAKOVÁ, L., DZIMKO, J.: *Právne postavenie zabezpečeného veriteľa v oddĺžení fyzickej osoby*; In: PRÁVNE ROZPRAVY ON-SCREEN II. – Sekcia súkromného práva, Available at: https://doi.org/10.24040/pros.13.11.2020. ssp.202-212.

5 Constitutional Court of the Slovak Republic: III. ÚS 570/2016.

6 DZIMKO, J., UŠIAKOVÁ, L., BARANCOVÁ, A.: *Smrť dlžníka v procese oddĺženia fyzickej osoby*; In: Košické Dni Súkromného Práva IV. Available at: https://doi.org/10.33542/KDS22-0098-1-18.

7 R (ČR) 52/1998.

8 See, for example, Regional Court in Banská Bystrica: 41CoKR/50/2024, Supreme Court of the Slovak Republic: 1Obdo/99/2018, or District Court Trnava: 32C/40/2018.

standing may seek the exclusion of disputed property from the inventory, thereby avoiding the adverse consequences that could result from its realization.

In our opinion, the process of excluding assets from bankruptcy proceedings and the related application of the excindation objection is not given sufficient attention in the legal doctrine of the Slovak Republic, with the exception of the commentary by Prof. Ďurica[9] and the monograph by Dzimko[10] (which only deals with this process marginally), which we consider to be a significant shortcoming, as the outcome of this process may significantly affect the rights (especially property rights) and legally protected interests of the persons concerned.

With regard to the above, the aim of this paper is to highlight the specific features and application problems that arise in connection with the inclusion of disputed assets in the schedule of assets, as well as the reasons for the disputed nature of such entries. The paper focuses on the active legal standing for raising an excindation objection and, where applicable, an excindation action, while pointing out specific situations in which a given person may assert such an objection.

The primary objective of this contribution is to examine the relevant provisions of the Bankruptcy and Restructuring Act related to the process of excluding assets from the schedule of assets in discharge bankruptcy, with the aim of answering the question of whether the legal regulation of this process and the related institutions of the process of excluding assets from the bankruptcy estate inventory in personal bankruptcy, as provided mainly in the Bankruptcy and Restructuring Act affords sufficient legal protection to affected persons.

The working hypothesis underlying this paper is that although *„the current legal framework of the process of excluding assets from the bankruptcy estate inventory in personal bankruptcy generally affords sufficient legal protection to affected persons.“*

To achieve the stated objectives, the paper will employ a combination of several scientific methods. The analytical method will be used to examine legal regulations, case law, and scholarly literature relevant to the examined issue. The empirical method will serve to collect and analyze data concerning practical and application related challenges within the studied area. In addition to the above, the paper will also make substantial use of various methods of legal interpretation. Furthermore, the paper also addresses the practical application of the excindation objection and the subsequent procedure, pointing out shortcomings of the legal framework contained mainly in Part 4 of the Bankruptcy and Restructuring Act, and at the same time offering possible solutions to selected issues in the form of de lege ferenda proposals.

1. PREPARATION OF THE INVENTORY

As stated at the beginning of this paper, one of the trustee's most essential duties is the preparation of the inventory. According to Section 76(1) of the Bankruptcy and Restructuring Act which, pursuant to Section 167j(3), applies analogously to the inventory in personal bankruptcy the inventory is defined as a document authorizing the trustee to realize the assets listed therein.

The legal regulation concerning the preparation of the inventory contained in Part Four of the Bankruptcy and Restructuring Act is relatively concise. Pursuant to Section 167j(1) of the Act, the trustee is required to prepare the inventory within 60 days from the date of the declaration of bankruptcy.

In order to accurately determine the assets subject to personal bankruptcy proceedings, the trustee is required to conduct independent investigations, ensuring that such inquiries are both time-efficient and economically proportionate.[11] Given the debtor's obligation under Section 167(2)(c) to provide a list of their current assets and a record of higher-value assets owned during the preceding three years, it is clear that, in preparing the inventory, the trustee will primarily base the inventory on the asset list submitted by the debtor.

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9 ĎURICA, M. *Zákon o konkurze a reštrukturalizácii*. Komentár. 4. vydanie. Praha: C. H. Beck, 2021, s. 1200.

10 DZIMKO, J. *Oddlženie fyzickej osoby*. 1. vydanie. Bratislava: C. H. Beck, 2024, s. 81.

11 DZIMKO, J. *Oddlženie fyzickej osoby*. 1. vydanie. Bratislava: C. H. Beck, 2024, s. 81.

Naturally, the list of assets submitted by the debtor may not be complete or accurate; therefore, the trustee has a duty to conduct independent investigations in order to obtain a comprehensive and reliable determination of the debtor's assets subject to bankruptcy. If the trustee becomes aware of newly discovered or previously concealed assets of the debtor, he or she is subsequently obliged to supplement the inventory with the newly identified assets without undue delay.

The analogous application of Sections 76 and 77 of the Bankruptcy and Restructuring Act is also significant in relation to the essential elements of the inventory. According to Section 77(1) of the Bankruptcy and Restructuring Act, the inventory shall include the assets subject to bankruptcy. This provision further establishes that every legally distinct object, right, or other asset value shall be entered in the inventory as a separate item of property, except for those of only negligible value. Another mandatory element that the inventory must contain is the date and reason for the inclusion of an asset, and, where applicable, the date and reason for its exclusion from the inventory. In this regard, Section 77(3) of the Bankruptcy and Restructuring Act is of particular importance, as it requires the trustee to indicate, for each asset component, the value entered in the inventory according to the trustee's own estimate, expressed in euros.

The trustee lists the debtor's assets in such a way that it is obvious which items make up the debtor's estate. It is recommended that each asset be described as precisely as possible to make later verification easier. The description should allow clear distinction of the property from other assets recorded in the debtor's accounts. Because of this, assets should be grouped and described consistently with accounting principles, so that every listed item can be properly identified in both accounting and physical form. If this precision is lacking, it can hinder or even prevent the administrator from effectively managing or selling the assets. Once any obstacle preventing proper identification disappears, the administrator can proceed further. In practice, it may also be necessary to clarify who actually holds the property if that is not immediately apparent. If a collective item belongs to the debtor's estate, it is entered in the inventory as a single entry. However, the record must make it clear what the group or set specifically consists of and what is included in it as of the date of entry. This prevents any uncertainty or later disputes about what exactly forms part of the estate. The aim is to ensure that the description of grouped assets is transparent enough to eliminate possible confusion in the future.[12]

When preparing the list of assets, the trustee is required to record any object, receivable, entitlement, or asset value that is presumed to be part of the debtor's estate, regardless of whether ownership is contested.[13]

In this regard, reference may be made to a ruling of the Supreme Court of the Slovak Republic[14], which emphasized that the inclusion of property in the bankruptcy estate does not in itself alter the ownership of that property regardless of whether the owner is the debtor or another person. The Constitutional Court has similarly affirmed that the mere entry of a third party's asset into the bankruptcy inventory does not deprive that person of the legal standing to assert or defend their ownership rights against unlawful interference (Constitutional Court Judgment No. III. ÚS 321/2018). According to the Supreme Court, this principle applies equally to both tangible and intangible property, including claims or other asset values belonging to third parties that have been recorded in the debtor's bankruptcy estate.

The inclusion of assets in the bankruptcy inventory plays a crucial role in determining who has standing to bring an excindation action. In our view, it is precisely the act of recording a particular asset in the inventory that constitutes the legal fact giving rise to the claimant's active legal standing to initiate such proceedings.

This interpretation is also supported by the Constitutional Court of the Slovak Republic[15], which held that the entry of disputed property into the bankruptcy inventory constitutes the legal act giving rise to

[12] MORAVEC, T. In: MORAVEC, T., KOTOUČOVÁ, J. a kol. *Insolvenční zákon*. Komentář. 4. vydání. Praha: C. H. Beck, 2021, s. 801.

[13] R (ČR) 52/2008.

[14] Supreme Court of the Slovak Republic: 9Cdo/40/2023.

[15] Constitutional Court of the Slovak Republic: I. ÚS 95/2019.

a third party's right to bring an excindation action. If the disputed asset has not been entered into the inventory, such non-existent property cannot be the subject of exclusion proceedings.

In this context, it should be noted that Section 167j(1) of the Bankruptcy and Restructuring Act requires the trustee to publish in the Insolvency Register only amendments or modifications to the inventory, but not the inventory itself. Such an interpretation, however, would lack any logical foundation. Considering the analogous application of Sections 76 and 77 of the Bankruptcy and Restructuring Act, it can be inferred that the trustee is also obliged to publish the inventory itself in the Insolvency Register, as it represents the document authorizing the trustee to realize the debtor's assets included in the bankruptcy estate.

2. EXCINDATION OBJECTION AND THE PROCEDURE FOLLOWING ITS APPLICATION

When preparing the inventory, situations may arise in which the trustee includes in it assets of the debtor that are not subject to bankruptcy, or assets that do not belong to the debtor.

As noted above, the trustee is obliged to publish the completed inventory (as well as any subsequent amendments) in the Insolvency Register. In such situations, the Bankruptcy and Restructuring Act provides persons who claim that certain assets have been improperly included in the inventory with legal means to avert the adverse consequences of realizing such assets in bankruptcy. This protection takes the form of an objection (hereinafter referred to as the "*excindation objection*"), which the concerned person may submit directly to the trustee. Section 167j(2) of the Bankruptcy and Restructuring Act does not, however, provide any further specification as to what should be the subject matter of an excindation objection, nor does it define its substantive requirements. The Bankruptcy and Restructuring Act likewise does not establish any time limit within which such a person must file the objection. Furthermore, the Bankruptcy and Restructuring Act does not specify, even in an illustrative manner, the grounds on which the inclusion of assets in the inventory may be considered disputed.

Although the Bankruptcy and Restructuring Act does not prescribe any formal or substantive requirements for the submission of an excindation objection, we take the view that the most appropriate form of such an objection is the written form.

Submitting the objection in writing is considered the most suitable approach, primarily to ensure the legal certainty of the person lodging the excindation objection. In the absence of a written form, a third party submitting the objection could, in any subsequent incidental dispute, find themselves in an evidentiary disadvantage and potentially fail to meet the burden of proof in proceedings concerning the exclusion of assets from the inventory.[16]

Bankruptcy proceedings, restructuring proceedings and debt relief proceedings represent specific types of civil proceedings.[17] With reference to Section 196 of the Bankruptcy and Restructuring Act, which, inter alia, establishes the subsidiary application of Act No. 160/2015 Coll. – the Code of Civil Contentious Procedure (hereinafter referred to as "CSP") also in relation to debt relief, it is our view that the objection should contain the general requirements of a submission as laid down in Section 127(1) CSP. According to this provision, if the law does not require special particulars for a submission, it shall include the following:

a) the authority to which it is addressed (in this case, the trustee),
b) the person making the submission,
c) the subject matter of the submission,
d) the purpose pursued by the submission, and
e) the signature.

[16] ĎURICA, M. *Zákon o konkurze a reštrukturalizácii*. Komentár. 4. vydanie. Praha: C. H. Beck, 2021, s. 1200.
[17] ĎURICA, M. *Zákon o konkurze a reštrukturalizácii*. Komentár. 4. vydanie. Praha: C. H. Beck, 2021, s. 1369.

We are also of the view that, in accordance with Section 127(2) of the CSP, the person lodging the objection should indicate the file reference number of the respective personal bankruptcy case.

We consider it a shortcoming of the legal regulation contained in Section 167j(2) of the Bankruptcy and Restructuring Act that it does not specify any time limit within which an actively legitimized person must submit an excindation objection to the trustee. In our view, in order to make the application of the excindation objection in personal bankruptcy proceedings more effective and to strengthen the legal certainty of creditors, the Act should explicitly establish such a time limit.

In this regard, we believe it would be appropriate to at least determine the point in time until which an actively legitimized person may submit the excindation objection. In our opinion, it would be suitable to apply by analogy Section 78(3) of the Bankruptcy and Restructuring Act, according to which a person whose property has been included in the inventory with a note in favor of another person, or with no note at all, may assert to the trustee that the property should not have been included in the inventory, but no later than until the distribution of the proceeds from the realization of the affected property, or the termination of the bankruptcy due to insufficient assets.

The wording of Section 167j(2) of the Bankruptcy and Restructuring Act likewise does not make it clear who should be regarded as the actively legitimized person entitled to submit an excindation objection to the trustee. We take the view that, in most cases, this will be the owner of the disputed asset, or a person claiming ownership of the asset that has been included in the inventory by the trustee. Naturally, it cannot be ruled out that an excindation objection may also be submitted by a person other than the owner of the disputed asset, or by someone merely asserting ownership thereof.

We also take the view that persons affiliated with the debtor may likewise be regarded as actively legitimized to submit an excindation objection. Pursuant to Section 9(2) of the Bankruptcy and Restructuring Act, a related person of a natural person is considered to be a close person of that natural person (for example, a relative in the direct line, a sibling, or a spouse), as well as a legal person in which the natural person or their close person holds a qualified participation[18].

The Bankruptcy and Restructuring Act does not, within its provisions, explicitly grant active legal standing directly to the debtor. However, we are of the opinion that, in the context of personal bankruptcy proceedings, situations may arise in which it would be appropriate for the debtor to have the right to lodge an excindation objection or, where necessary, an excindation action.

The Bankruptcy and Restructuring Act likewise does not provide, even by way of example, any guidance as to when an asset entered into the inventory should be regarded as disputed.

In general terms, the concept of a disputed asset may be understood as an object, right, or other asset value in respect of which circumstances exist suggesting that it might form part of the bankruptcy estate, although this has not yet been sufficiently established.[19]

From a practical perspective, the inclusion of property belonging to a person other than the debtor represents the most typical reason why an asset becomes disputed in the inventory.

For instance, this may occur in a situation where the trustee (for example, relying on the debtor's own statement of assets) includes in the inventory a motor vehicle, while a third party claims to have acquired the vehicle under a purchase agreement dated 28 June 2024.

Another actively legitimized person to submit an excindation objection, in our opinion, is a person affiliated with the debtor. This category may cover, for example, the debtor's spouse and close relatives in the direct line, or other persons who, being in a family or analogous relationship, are regarded as close persons to one another if the harm suffered by one of them would reasonably be perceived by the other as harm to themselves. From this it follows that a person affiliated with the debtor may, for example, also be the debtor's former spouse. This was confirmed, for instance, in a ruling delivered by the

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[18] According to Section 9(3) of the Bankruptcy and Restructuring Act: *"For the purposes of this Act, a qualified participation shall mean a direct or indirect share representing at least 5% of the registered capital of a legal person or of the voting rights in a legal person, or the ability to exercise influence over the management of a legal person comparable to the influence corresponding to such a share. For the purposes of this Act, an indirect share shall mean a share held indirectly through legal persons in which the holder of the indirect share has a qualified participation."*

[19] ĎURICA, M. *Konkurzné právo na Slovensku a v Európskej Únii*. Bratislava: Eurokódex, 2012. s. 572.

Regional Court in Nitra[20], which held that former spouses those whose marriage has been dissolved by divorce may be considered close persons only if they are in a relationship analogous to a family relationship and if the harm suffered by one of them would reasonably be perceived by the other as their own harm.

Under Section 167i(1) of the Bankruptcy and Restructuring Act, the debtor's community property of spouses ceases to exist upon the declaration of bankruptcy. Property forming part of the debtor's community property (hereinafter the *"joint property of spouses"*) shall be incorporated into the bankruptcy estate, provided that such property has not been settled prior to the declaration.

In our view, the debtor's spouse should be entitled to file an excindation objection with the trustee, particularly where the joint property of spouses was settled prior to the declaration of personal bankruptcy but the trustee nonetheless includes, in the inventory, property which following the settlement, became the exclusive ownership of the other spouse. In this circumstance, the other spouse may raise an excindation objection, claiming that the relevant property should not form part of the inventory, as it had already become his or her exclusive property prior to the declaration of bankruptcy.

Another situation may arise where the joint property of spouses has not been settled before the declaration of bankruptcy. In such a case, Section 167i(1) of the Bankruptcy and Restructuring Act states that all assets forming part of the debtor's joint property of spouses are to be regarded as belonging to the bankruptcy estate. However, the trustee may mistakenly enter in the inventory an item that in reality constitutes the exclusive ownership of the other spouse, for example, property received as a gift from his or her parents. Under Section 143(1) of Act No. 40/1964 Coll., the Civil Code, the joint property of spouses generally covers all assets that may be subject to ownership and that either spouse acquires during marriage. This rule, however, is subject to certain exceptions, since assets obtained, for instance, through inheritance or by way of a gift are excluded from the joint property of spouses.

This can be illustrated by a model example in which the trustee, drawing on the asset list provided by the debtor, includes in the inventory hand-made garden furniture valued at EUR 4,000. However, this furniture was acquired by the other spouse into his or her exclusive ownership under a donation agreement concluded with his or her parents. In such a case, the other spouse would have legal standing to file an excindation objection with the trustee, since the garden furniture in question ought not to have been recorded in the inventory, given that it was not part of the debtor's joint property of spouses.

A different situation could be considered where the parents of the other spouse gifted that spouse monetary funds amounting to EUR 10,000, which the spouses later used together, for instance, to purchase a motor vehicle. If bankruptcy were later declared on the debtor's assets and the trustee included the motor vehicle in the inventory, in our opinion the other spouse would not be entitled to seek the exclusion of the motor vehicle from the inventory through an excindation objection and subsequently through an excindation action. As follows from established case law[21], if an item was acquired during the existence of the joint property of spouses and was partly financed from the exclusive funds of one spouse, such an asset is, pursuant to Section 143 of the Civil Code, regarded as forming part of the joint property of spouses. When the joint property is later settled, the spouse from whose separate funds the expenditure was made is entitled only to claim reimbursement from the joint property for the amount so expended.

It follows from the foregoing that, in such circumstances, the other spouse would not be entitled to seek the exclusion of the motor vehicle from the inventory. Nevertheless, pursuant to Section 150 of the Civil Code, the other spouse would be entitled to receive, from the proceeds of the sale of the motor vehicle, reimbursement in the amount of EUR 10,000 representing the sum taken from his or her exclusive funds (donated by the parents) and used for the acquisition of an asset included in the joint property of spouses.[22]

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[20] Regional Court in Nitra: 5Co/145/2013.

[21] See, for example, R 42/1972.

[22] See, for example, District Court Košice I: 30Cbi/1/2019.

We take the view that, under certain circumstances, the debtor themself may also be an actively legitimised person entitled to lodge an excindation objection in discharge bankruptcy proceedings. Section 167j(2) of the Bankruptcy and Restructuring Act does not precisely define the persons actively legitimised to submit an excindation objection to the trustee; it merely provides that "anyone who claims that the property should not have been included in the schedule has the right to raise an objection with the trustee…". Applying a grammatical interpretation of this provision leads to the conclusion that, within discharge bankruptcy proceedings, an objection and subsequently an excindation action may, in principle, be filed by anyone.

The question of the debtor's active legal standing is disputed in both academic literature and judicial practice. An opposing view is expressed, for example, by Ďurica[23], who states that the amendment specifically regulates the rights of third parties in connection with the exclusion of assets. As with the contestation of claims, the exclusion of assets from the schedule depends on the initiative of creditors. Anyone who claims that certain property should not have been included in the schedule is entitled to raise an objection with the trustee, who is then obliged to publish this objection in the Commercial Bulletin (Author's note: currently the Insolvency Register.). The amendment does not explicitly require the objection to be made in writing. A third party who fails to raise the objection with the trustee in writing will, in the event of a dispute, find themself in a difficult evidentiary position. If any creditor insists on the inclusion of the property in the schedule, that creditor must, within 60 days of the publication of the objection in the Commercial Bulletin, request the trustee to invite the person who raised the objection to file an action against the creditor — who insists on including the property in the schedule — for the exclusion of the property from the schedule. A similar view has also been taken, for example, by the District Court of Trenčín[24], which in its decision stated that a grammatical interpretation of Section 167j(2) of the Bankruptcy and Restructuring Act does not clearly determine who may successfully seek the exclusion of recorded property from the schedule by way of an action. However, according to the established case law concerning excindation actions (both within bankruptcy law and enforcement law), the party actively legitimised to bring such an action is, in principle, a person other than the debtor, who must demonstrate that the property whose exclusion is sought should not have been included in the schedule, and that the right excluding such inclusion currently belongs to that person.

We do not share this view and maintain that the debtor themself may, in certain circumstances, have the possibility to prevent the liquidation of property within discharge bankruptcy proceedings.

We are of the opinion that, to remove any ambiguity, the Bankruptcy and Restructuring Act should expressly include a provision granting the debtor the right to lodge an excindation objection or, where appropriate, an excindation action, with respect to assets, rights, or other values that, under Section 167h(4) of the Bankruptcy and Restructuring Act, are exempt from enforcement. Pursuant to Section 115(2) of Act No. 233/1995 Coll. on Judicial Executors and Execution Activities (Execution Code) and on Amendments and Supplements to Certain Acts, items excluded from enforcement include, for example, basic personal clothing, bedding and footwear, as well as household essentials such as the beds of the debtor and family members, a dining table with corresponding chairs, a refrigerator, a cooker, a heating appliance, and similar necessary items.

If the trustee were to record in the inventory assets that, under Section 167h(4) of the Bankruptcy and Restructuring Act, are excluded from the scope of bankruptcy, the debtor should have the right to prevent their realization. In our view, the most suitable instrument for the debtor's protection in such a situation would be the excindation objection and, where appropriate, the subsequent excindation action.

We also consider that the debtor should have the right to lodge an excindation objection and, if necessary, an excindation action in situations where the trustee records in the inventory assets acquired by the debtor only after the declaration of personal bankruptcy. This conclusion is supported by Section 167h(1) of the Bankruptcy and Restructuring Act, which stipulates that the bankruptcy applies to

[23] ĎURICA, M. Zákon o konkurze a reštrukturalizácii. Komentár. 4. vydanie. Praha: C. H. Beck, 2021, s. 1200.

[24] See, for example, District Court Trenčín: 22Cbi/3/2019.

property belonging to the debtor at the time of the declaration of bankruptcy, provided that the requirements under Sections 167h(1) and (2) of the same Act are not met.

In this paper, we would also like to draw attention to a situation in which the trustee includes in the inventory property that can be subsumed under the categories of land specified in Section 166d(1) of the Bankruptcy and Restructuring Act.

The concept of the exempt value of the debtor's dwelling serves, in the context of bankruptcy proceedings, to secure for the debtor, for a certain time, the financial means needed to cover housing expenses lost as a consequence of the realization of property used for housing. It refers to a portion of the value of a single dwelling unit, including its accessories and any adjoining or built-up land, which the debtor has identified in the list of assets as his or her residence providing accommodation.[25]

According to legal doctrine[26], for the purposes of Section 151o(3) of the Civil Code, an adjacent plot of land is defined as a plot through which the owner of a building must gain access to a public road, or to another plot from which he or she is entitled to reach a public road, or to another plot from which access to a public road is lawfully possible.

For the purposes of Section 166d(1) of the Bankruptcy and Restructuring Act, however, it may be concluded that an adjacent plot of land does not necessarily include every plot located near the debtor's dwelling, but only such a plot as the owner of the building necessarily requires to ensure access to a public road.[27] From this, it follows that, for the purposes of Section 166d(1) of the Bankruptcy and Restructuring Act, land situated behind the family house (for example, a garden) will not be considered part of the debtor's dwelling.

This distinction is significant in relation to the possibility or impossibility of realizing a particular plot of land within personal bankruptcy proceedings. In view of the foregoing, we take the view that if the trustee includes in the inventory a plot of land that can be subsumed under the categories of land referred to in Section 166d(1) of the Bankruptcy and Restructuring Act, the debtor (and, pursuant to Section 167j(2) of the Bankruptcy and Restructuring Act, not only the debtor but also any other person) could prevent its realization by submitting an excindation objection to the trustee, or subsequently by filing an excindation action.

This is also confirmed by the Regional Court in Košice[28], which stated that an excindation action under Section 167j(2) of the Bankruptcy and Restructuring Act filed by the debtor is admissible, provided that the debtor's dwelling has been included in the schedule in violation of the law. Such an action constitutes a means that fulfils the purpose and intent of the legislator in discharge bankruptcy proceedings under Part Four of the of the Bankruptcy and Restructuring Ac, as opposed to liquidation bankruptcies under Part Two of the of the Bankruptcy and Restructuring Ac, thereby taking into account the specific nature of personal debt relief proceedings (personal bankruptcies).

Pursuant to Section 167j(2), second sentence, of the Bankruptcy and Restructuring Act, if any creditor with a registered claim insists on the inclusion of the property in the inventory, such creditor may, within 60 days from the publication of the objection in the Insolvency Register, request the trustee to invite the person who filed the objection to bring an excindation action against the creditor who insists on the inclusion of the property. If no creditor with a registered claim makes such a request, the trustee shall exclude the property from the inventory.

The Bankruptcy and Restructuring Act does not stipulate any formal requirements for such a request; however, we are of the opinion that, in this case as well, the written form of the request is the most appropriate.

Another deficiency of the legal regulation contained in the Bankruptcy and Restructuring Act is that Section 167j(2) in no way specifies the time limit for filing an excindation action in cases where a creditor requests the trustee to invite the person who submitted the excindation objection to bring an

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25 ĎURICA, M. *Zákon o konkurze a reštrukturalizácii*. Komentár. 4. vydanie. Praha: C. H. Beck, 2021, s. 1148.

26 BARICOVÁ, Jana. § 151o [Vznik vecného bremena]. In: ŠTEVČEK, M., DULAK, A., BAJÁNKOVÁ, J., FEČÍK, Marián, SEDLAČKO, F., TOMAŠOVIČ, M. a kol. Občiansky zákonník I. 2. vydání. Praha: C. H. Beck, 2019, s. 1394, marg. č. 11.

27 BALLA, F*., Oddlženie prostredníctvom konkurzu*. Bratislava: C. H. Beck, 2025, s. 52.

28 Regional Court in Košice: 2CoKR/13/2024.

excindation action. We believe that this legislative gap may lead to an unreasonable prolongation of bankruptcy proceedings, thereby delaying the satisfaction of creditors who have duly and timely registered their claims in the bankruptcy. The Bankruptcy and Restructuring Act also does not grant either the trustee or the bankruptcy court the authority to impose a time limit of a preclusive nature for filing an excindation action.

CONCLUSION

The institution of the excindation objection represents an important means of protection through which, within personal bankruptcy proceedings, any person claiming that certain property should not have been included in the inventory may prevent the realization of such property.

The working hypothesis has been confirmed the analysis shows that the current legal regulation of the process of excluding assets from the bankruptcy estate inventory in personal bankruptcy primarily contained in Section 167j(2) of the Bankruptcy and Restructuring Act provides adequate protection to affected persons, with the exception of the deficiencies highlighted and discussed above.

In our view, the legal framework established in Section 167j of the Bankruptcy and Restructuring Act should at least determine the time limit within which an actively legitimized person may submit an excindation objection. In this respect, it would, in our opinion, be appropriate to apply by analogy Section 78(3) of the Bankruptcy and Restructuring Act, according to which a person whose property has been entered into the inventory with a note in favor of another person, or with no note at all, may assert to the trustee that the property ought not to have been recorded in the inventory, and in any event no later than before the distribution of the proceeds derived from the realization of the relevant property.

In our opinion, another deficiency of the current legal framework is that Section 167j(2) of the Bankruptcy and Restructuring Act fails to explicitly provide that the debtor may also submit an excindation objection or, where applicable, an excindation action, which may give rise to various interpretative and procedural issues. In our opinion, to remove any ambiguity, the Bankruptcy and Restructuring Act should expressly include a provision entitling the debtor to submit an excindation objection or an excindation action, for instance, with respect to objects, rights, or other asset values that, pursuant to Section 167h(4) of the Bankruptcy and Restructuring Act, cannot be subject to enforcement. The debtor should also be entitled, in our opinion, to submit an excindation objection or an excindation action in cases where the trustee includes in the inventory property that the debtor acquired only after the declaration of personal bankruptcy.

Another deficiency of the legal regulation contained in the Bankruptcy and Restructuring Act is that Section 167j(2) in no way specifies the time limit for filing an excindation action in situations where a creditor requests the trustee to invite the person who submitted the excindation objection to bring such an action. The absence of such a time limit may lead to an unreasonable or even intentional prolongation of the bankruptcy proceedings. For this reason, we believe that the Bankruptcy and Restructuring Act should establish a preclusive time limit for filing an excindation action in order to prevent unnecessary delays in bankruptcy proceedings. Alternatively, the Act should include a provision empowering the trustee or the bankruptcy court to impose such a preclusive time limit.

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Accessibility of Preventive Restructuring in the EU: National Approaches to Entry Conditions. A Comparative Review[2]

Dostupnosť preventívnej reštrukturalizácie v EÚ: Národné prístupy k vstupným podmienkam. Komparatívna analýza

Abstract

In recent years, preventive restructuring has been introduced across EU Member States as a new legal mechanism designed to enable debtors to address their financial difficulties at an early stage, with the primary aim of avoiding insolvency proceedings and preserving the continuity of economically viable enterprises. This article undertakes a comparative legal analysis of the economic, procedural, and formal entry conditions governing access to preventive restructuring frameworks under Slovak law. These national requirements are then compared with those adopted in selected neighbouring EU Member States. Authors assess whether certain statutory entry conditions, such as the definition and threshold for the likelihood of insolvency, viability testing, or eligibility limitations, may constitute legal or practical impediments to timely and effective access to preventive restructuring framework by debtors.

Keywords: *Preventive Restructuring Directive, Accessibility of Preventive Restructuring, Likelihood of Insolvency, Viability test, Financial Distress, Thresholds for Preventive Restructuring.*

Abstrakt

V posledných rokoch bola v členských štátoch EÚ zavedená preventívna reštrukturalizácia ako nový právny mechanizmus, ktorého cieľom je umožniť dlžníkom riešiť ich finančné ťažkosti v počiatočnom štádiu, a to s hlavným zámerom predísť insolvenčnému konaniu a zachovať kontinuitu ekonomicky životaschopných podnikov. Tento článok vykonáva komparatívnu právnu analýzu ekonomických, procesných a formálnych podmienok vstupu, ktoré upravujú prístup do rámcov preventívnej reštrukturalizácie podľa slovenského práva. Tieto vnútroštátne požiadavky sa následne porovnávajú s úpravou prijatou vo vybraných susedných členských štátoch EÚ. Autori posudzujú, či určité zákonné podmienky vstupu – ako definícia a prah pravdepodobného úpadku, test životaschopnosti či obmedzenia oprávnených subjektov – môžu predstavovať právne alebo praktické prekážky včasného a efektívneho prístupu dlžníkov k preventívnej reštrukturalizácii.

Kľúčové slová: *smernica o preventívnej reštrukturalizácii, dostupnosť preventívnej reštrukturalizácie, pravdepodobnosť úpadku, test životaschopnosti, finančné ťažkosti, prahové podmienky pre preventívnu reštrukturalizáciu.*

JEL Classification: K22

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INTRODUCTION

More than three years have passed since the implementation of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (hereinafter referred to as the „*Preventive Restructuring Directive*" or „*PRD*") into the national legal systems of the EU Member States.[3]

In the Slovak republic a concrete manifestation of this is the Act on the Resolution of Imminent Insolvency (hereinafter also referred to as the "*ARII*")[4] which, as of July 17, 2022, has introduced two forms of preventive restructuring for certain entrepreneurs, namely public and non-public preventive restructuring. These represent new legal instruments designed to address financial distress.

Although their primary aim is to assist entrepreneurs in avoiding insolvency and to preserve economically viable businesses, practical application has not yet indicated a high frequency of their use.[5] The exact number of non-public preventive restructurings carried out thus far cannot be determined, as their initiation and course are not made public. However, the single publicly available court decision approving a public preventive restructuring clearly indicates that, even three years after the Act on the Resolution of Imminent Insolvency entered into force, this instrument has not become a widely used tool for business rescue within the Slovak legal environment. [6] Consequently, the question of which factors may significantly influence a debtor's motivation to pursue one of the available forms of preventive restructuring in resolving financial distress remains highly relevant, even following the implementation of the Preventive Restructuring Directive.

Both domestic and international academic literature have identified a considerable number of diverse practical obstacles that impact a debtor's motivation to pursue preventive restructuring. For instance, *Dolný* particularly calls for amendments to income tax regulations concerning debt write-offs on the part of the debtor, as well as to the treatment of value-added tax (VAT) and its application following the conclusion of preventive proceedings. In the absence of such changes, he considers the current legal framework for preventive restructuring to be largely impractical in practice. Other authors consider as crucial the appropriate determination of the level of financial distress that preventive restructuring frameworks are intended to address, the imposition of proportionate procedural and formal requirements on debtors seeking to enter into preventive restructuring, [7] the possibility for the debtor to obtain temporary protection from individual enforcement actions by creditors,[8] the preservation of the debtor's

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[3] In the vast majority of EU Member States, the PRD was implemented only within the extended transposition period, i.e., by 17 July 2022. Only a very small number of EU Member States managed to implement the PRD within the original deadline, i.e., by 17 July 2021 (for example, Germany and the Netherlands). In *CERIL Report 2024-1 on the Transposition of the EU Preventive Restructuring Directive 2019/1023.* [online] [cit. 28.7.2025]. Available at: https://congressus-ceril.s3-eu-west-1.amazonaws.com/files/5e7ab372836d41cb8903d687bfef9625.pdf?Signature=Xs0FaZuYkVlcwr6%2FxwcUEE9pC2E%3D&Expires=1753737597&AWSAccessKeyId=AKIAIUTTQ23AZYZKILZQ&response-content-disposition=inline%3Bfilename%3 DCERIL_Report_2024-1.pdf.

[4] Act No. 111/2022 Coll. on the Resolution of Imminent Insolvency and on Amendments and Supplements to Certain Acts, as amended.

[5] The level of practical applicability of non-public preventive restructuring cannot be precisely determined, as its initiation or course is not published in the Commercial Bulletin.

[6] Since the entry into force of the Act on the Resolution of Imminent Insolvency, only one court notice on the approval of a public preventive restructuring has been published in the Commercial Bulletin under the section on preventive restructurings. [online] [cit. 28.7.2025]. Available at: https://obchodnyvestnik.justice.gov.sk/ObchodnyVestnik/Web/Detail.aspx?IdOVod=3565&csrt=15884338895689989782.

[7] GARRIDO, J. et al. *Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive*. In: IMF Working Papier, no. 152, 2021. Available at: https://www.elibrary.imf.org/view/journals/001/2021/152/001.2021.issue-152-en.xml.

[8] GANT, J. L. et al. *The EU Preventive Restructuring Framework: in Extra Time?* (October 8, 2021). (2021). p. 5. Available at: https://ssrn.com/abstract=3938867, DURAČINSKÁ, J., MAŠUROVÁ, A. *Preventívne formy riešenia hroziaceho úpadku (transpozícia smernice (EÚ) 2019/1023 o reštrukturalizácii a insolvencii z komparatívneho pohľadu).* Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2023, 64 s. alebo GURREA-MARTINEZ, A. *The Myth of Debtor-*

control over the business during the restructuring process, and the conditions required to secure creditor consensus on the proposed restructuring plan across the creditor structure.[9] In our opinion, the ability, or inability to achieve cross-border effects of preventive restructuring may, in certain cases, also call into question the overall effectiveness of the instrument in the debtor's efforts to save their business.

In the spectrum of various factors that could practically act as obstacles to the debtor's access to the frameworks of preventive restructuring, this paper aims to provide an overview of the conditions by which the Act on the Resolution of Imminent Insolvency has conditioned the debtor's possibility to enter public preventive restructuring. Substantively, the paper distinguishes between economic, procedural, and formal conditions for access to preventive restructuring. Not all of them necessarily originate from the Preventive Restructuring Directive. Therefore, the paper first identifies and explains the access conditions implemented into the Act on the Resolution of Imminent Insolvency in the context of the European legislator's harmonization efforts.

However, it is necessary to recognize that the Preventive Restructuring Directive adopted a highly flexible approach to access preventive restructuring and sets only a minimal standard of conditions under which the preventive resolution of a debtor's financial difficulties should occur within the European legal environment. Therefore, it is unsurprising that national regulations across EU Member States may ultimately differ in terms of the debtor's access to preventive restructuring frameworks.

Considering that, over a period of three years, only one debtor in Slovakia has opted to use public preventive restructuring to address their financial difficulties, it is worth asking what conditions had to be met to utilize this tool and how these compare to the requirements established by the legal systems of other EU Member States. In this regard, special attention will be given to the national regulations of the Czech Republic, Austria, and Hungary.

In addressing this topic, it is possible to build on the research findings of several authors from both domestic[10] and international[11] environments. While the doctrine on preventive restructuring is well-supported by academic sources, the availability of Slovak court decisions is notably limited due to the low frequency of public preventive restructuring being used in practice. Consequently, instead of relying on case law, this analysis will focus on the relevant legal provisions and compare them with selected foreign legal frameworks.

Building on this foundation, the aim is to assess the degree of discretion granted to EU Member States by the Preventive Restructuring Directive in shaping the legal rules regarding debtor's access to preventive restructuring, examine how the Slovak legislator has exercised this discretion, and identify the conditions it has established. The aim is to identify those conditions that may serve as barriers to debtor's access within the Slovak jurisdiction and thereby contribute to the broader discussion on factors that could discourage debtors from utilizing this procedure.

The insights drawn from this comparative analysis will be employed in the conclusion of this paper to inductively formulate findings concerning debtor's access to public preventive restructuring.

Friendly or Creditor-Friendly Insolvency Systems: Evidence from a New Global Insolvency Index. Singapore Management University Yong Pung How School of Law Research Paper 4/2023. Available at: https://ssrn.com/abstract=4557414.

9 GANT, J. L. et al. *The EU Preventive Restructuring Framework: in Extra Time?* (October 8, 2021). (2021). p. 5. Available at: https://ssrn.com/abstract=3938867.

10 DURAČINSKÁ, J., MAŠUROVÁ, A. P*reventívne formy riešenia hroziaceho úpadku (transpozícia smernice (EÚ) 2019/1023 o reštrukturalizácii a insolvencii z komparatívneho pohľadu)*. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2023, DOLNÝ, J. Dopady novej insolvenčnej regulácie na postavenie veriteľov pri verejnej preventívnej reštrukturalizácií. In *Zásahy verejnej moci do podnikania a obchodovania: Pocta profesorovi Jánovi Husárovi*. Košice: Univerzita P.J. Šafárika v Košiciach, 2022, HRABÁNKOVÁ, K. Verejná preventívna reštrukturalizácia ako sanačný proces podnikateľa v komparácií s českou právnou úpravou. In *STUDIA IURIDICA Cassoviensia*. 2024, Vol. 12, no. 2, CUKEROVÁ, D. O ingerencii verejnej moci pri preventívnej reštrukturalizácii. In *Zásahy verejnej moci do podnikania a obchodovania: Pocta profesorovi Jánovi Husárovi*. Košice: Univerzita P.J. Šafárika v Košiciach, 2022.

11 PAULUS, G. CH., DAMMANN, R. *European Preventive Restructuring. Directive (EU) 2019/1023. Article-by-Article Commentary*. München: C. H. Beck, 2021, SCHÖNFELD, J. a kol. *Preventivní restrukturalizace. Revoluce v oblasti sanací podnikatelských subjektů.* Praha: C. H. Beck. 2021, SIKMUND, A., BROŽ, J., KAČEROVÁ, L. a kol. *Zákon o preventivní restrukturalizaci. Praktický komentář.* Praha: C. H. Beck, 2023, and others.

1. ACCESSIBILITY OF PREVENTIVE RESTRUCTURING UNDER PRD: MANDATORY AND OPTIONAL ELEMENTS IN DESIGNING

Each EU Member State is required to ensure that debtors facing the risk of insolvency have access to preventive restructuring frameworks within their jurisdiction.[12] Although the Preventive Restructuring Directive uniformly imposes this obligation on all Member States, its minimalist approach to specifying the conditions under which these frameworks should be accessible may, in practice, undermine their actual availability at the national level.

The following table provides an overview of the different types of conditions that the Preventive Restructuring Directive has formulated in relation to debtor access to preventive restructuring. For clarity, these conditions are categorized substantively into economic, procedural, and formal.

Table: Access Conditions for Preventive Restructuring under PRD

Access Conditions	Recital or Article in PRD	Feature in designing
Economic Threshold Conditions		
Application of preventive restructuring for cases of likelihood of insolvency	**Rec. 24, Art. 1(1) (a), 4(1)**	**Mandatory**
Application of preventive restructuring also for cases of non-financial difficulties	Rec. 28	Optional
Viability test	Art. 4(3)	Optional
Procedural Access Conditions		
Conditional access for debtor sentenced for serious breaches of accounting or bookkeeping obligations	Art. 4(2)	Optional
Limit on repeated access within a specified period	Art. 4 (4)	Optional
Application by creditors or employee's representatives with the debtor's consent	Art. 4(8)	Optional
Formal/Personal Access Conditions		
Application of preventive restructuring to legal persons	**Art. 1(4)**	**Mandatory**
Application of preventive restructuring only to legal persons	Rec. 20, Art. 1(4)	Optional
Application of preventive restructuring to natural persons and groups of companies	Rec. 24, Art. 1(4)	Optional

Source: Authors

The overview above confirms that the PRD sets only a minimal level of harmonization regarding debtor's access to preventive restructuring frameworks. It prescribes just two mandatory conditions: an economic condition related to the threshold of financial distress that the debtor may address through the preventive restructuring framework, and a formal condition that, within the European legal context,

[12] Article 4(1) PRD.

limits access to this rescue mechanism exclusively to legal entities. As a result, during the PRD's implementation, each national legislator retained significant discretion to impose additional conditions, thereby either broadening or restricting debtor's access to the rescue mechanism and influencing its practical usability.

The following sections of this paper will briefly explain the individual access conditions, but only to the extent necessary to assess their potential to act as practical obstacles to the debtor's access to preventive restructuring frameworks. A detailed explanation of their nature has already been provided by other authors, to whom we will simply refer here.[13]

1.1. Economic Threshold Conditions: Financial difficulties, Likelihood of Insolvency and Viability

Preventive restructuring frameworks are primarily intended to address a debtor's financial difficulties. However, not every level of financial distress qualifies a debtor for access to such a framework. According to Article 4(1) of the PRD, this rescue mechanism should be available only to debtors experiencing financial difficulties that reach the threshold of **likelihood of insolvency**. This indicates that, under EU law, preventive restructuring is harmonized only as a tool for addressing a specific threshold of financial distress.

Nonetheless, Member States are not precluded from introducing or maintaining other preventive mechanisms within their national legal systems, alongside the European concept of preventive restructuring, even if these frameworks do not meet the standards set by the PRD.[14]

1.1.1. Likelihood of insolvency

It may appear that the requirement of likelihood of insolvency, established as a uniform starting point for access to preventive restructuring, creates a common threshold across EU Member States from which these frameworks become available to debtors. However, the PRD does not explicitly define when a debtor is considered to be in a state of likelihood of insolvency. According to Article 2(2)(b) of the PRD, the definition of likelihood of insolvency is left entirely to the national laws of the Member States. As a result, the precise level of financial distress that entitles a debtor to access preventive restructuring must be determined in accordance with each Member State's legal framework. This means that a debtor experiencing a certain degree of financial difficulty may be eligible for preventive restructuring in one Member State, while a debtor facing the same difficulties in another Member State may not have that option available.

The discussion surrounding the consequences of an inappropriate definition of likelihood of insolvency is well established.[15] There is general agreement that setting the threshold of financial distress too low may lead to abuse of the preventive restructuring framework by debtors, particularly in relation to the effects of the moratorium and the restructuring plan.[16] Conversely, if the threshold is set too high,

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[13] See in particular PAULUS, G. CH., DAMMANN, R. *European Preventive Restructuring. Directive (EU) 2019/1023. Article-by-Article Commentary*. München: C. H. Beck, 2021.

[14] See Recital 16 of the Preamble.

[15] For example, PAULUS, G. CH., DAMMANN, R. *European Preventive Restructuring. Directive (EU) 2019/1023. Article-by-Article Commentary*. München: C. H. Beck, 2021, p. 90 or GARRIDO, J. et al.. *Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive.* In: IMF Working Papier, no. 152, 2021, p. 10. Available at: https://www.elibrary.imf.org/view/journals/001/2021/152/001.2021.issue-152-en.xml.

[16] GARRIDO, J. et al. *Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive.* In: IMF Working Papier, no. 152, 2021. Available at: https://www.elibrary.imf.org/view/journals/001/2021/152/001.2021.issue-152-en.
xml or SIKMUND, A., BROŽ, J., KAČEROVÁ, L. et al.. *Zákon o preventivní restrukturalizaci. Praktický komentář.* Praha: C. H. Beck, 2023, p. 3 a 18.

it can significantly impair the functionality and overall effectiveness of the mechanism.[17] This highlights a critical link between the level of financial distress that national preventive restructuring frameworks are designed to address, and their potential to function as a practical barrier to debtor's access.

1.1.2. Non – financial difficulties

A debtor's solvency may be threatened not only by financial difficulties. Non-financial distress may arise in situations such as the loss of key business partners, the threat of litigation for damages, ongoing armed conflict, or pandemics. [18] While preventive restructuring frameworks are primarily designed to address a certain level of financial distress, Recital 28 of the PRD permits Member States to extend their applicability to cases involving non-financial difficulties as well, provided that such difficulties are of such severity that they genuinely and seriously endanger the debtor's solvency.

1.1.3. Viability test

The Preventive Restructuring Directive allows Member States to condition debtor's access to preventive restructuring frameworks through a so-called viability test. While the Directive does not provide detailed guidelines or a precise methodology for this test, it outlines a straightforward concept of its intended purpose. The viability test is not meant to deliver a comprehensive economic forecast of the debtor's future performance. Rather, its primary function is to quickly filter out debtors who clearly lack prospects for continued viability from those who satisfy this requirement. Its simplicity is reflected in the expectation that the test should involve only minimal associated costs.[19]

The precise scope of the viability test may naturally differ among Member States; whereas one member State might require debtors to meet higher standards confirming their viability, another Member State may set these standards significantly lower. The test's potential to become a practical obstacle to debtor's access to preventive restructuring typically arises when the criteria used to assess the debtor's business viability are inappropriately set.

1.2. Frequency of availability

The Directive also allows Member States to limit debtor's access to preventive restructuring frameworks in terms of the frequency of their use within a certain time period. It is solely at the discretion of each Member State to decide whether, and for how long, a debtor may be excluded from the possibility of restructuring through preventive measures.[20] While the appropriateness of implementing such restrictions in national legislation may be subject to debate,[21] there is no doubt that setting an excessively long exclusion period could create an unjustified barrier to debtor's access to preventive restructuring frameworks.

At the national level, an additional barrier to debtor's access may arise from the systemic delineation of the "European" preventive restructuring framework in relation to other debtor rescue mechanisms. As noted above, the Preventive Restructuring Directive does not prevent Member States from introducing or maintaining other purely national preventive mechanisms that do not comply with the Directive's standards. As a result, a debtor may attempt to rescue their business through multiple types of preventive procedures within a certain period. The Directive does not regulate the relationship between the European and national forms of preventive procedures. However, since it allows Member

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17 To increase the chances of a successful restructuring, it should be possible to commence it in an early stage. See VEDER, M., MENNENS, A. *Capital Markets Union in Europe*, Oxford Legal Research Library, 2018, p. 564.

18 *Ibid.*, p. 10.

19 See Recital 26 PRD.

20 Article 4(4) PRD.

21 PAULUS, G. CH., DAMMANN, R. *European Preventive Restructuring. Directive (EU) 2019/1023. Article-by-Article Commentary*. München: C. H. Beck, 2021, p. 93 – 94.

States to limit the frequency of using the European preventive restructuring framework, it logically follows that similar restrictions could be imposed on national rescue mechanisms as well.

1.3. Other conditions in accessing the preventive restructuring

The use of preventive restructuring frameworks to address financial difficulties primarily depends on the debtor's initiative. However, Member States may extend the circle of parties authorized to initiate preventive restructuring to include creditors and employee representatives, provided they have the debtor's consent.[22] Diversity in accessibility is also evident in another respect. While the Preventive Restructuring Directive guarantees access to preventive restructuring frameworks only for legal entities, Member States retain the freedom to make these frameworks available to natural persons as well.

To enhance creditor protection, the Preventive Restructuring Directive allows Member States to restrict access to preventive restructuring for debtors who have been convicted of serious violations of accounting or reporting obligations under national law. As a condition for accessing preventive restructuring, Member States may require such debtors to implement appropriate remedial measures aimed at addressing the deficiencies that led to their conviction.[23]

2. CRITERIA TO ENTER THE PREVENTIVE RESTRUCTURING: REPORT FROM SLOVAKIA

As noted above, the transposition of the Preventive Restructuring into Slovak law was carried out through the adoption of the Act on the Resolution of Imminent Insolvency, which entered into force on 17 July 2022. This legislation introduced substantial reforms not only in the area of pre-insolvency proceedings but also within the broader framework of insolvency law. In addition to establishing new mechanisms for public[24]and non-public[25] preventive restructuring, it also amended the legal regulation of insolvency restructuring under Act No. 7/2005 Coll. on Bankruptcy and Restructuring. While insolvency restructuring was originally designed as a tool to address both severe forms of financial distress, insolvency and imminent insolvency, it is now available exclusively to debtors who are already insolvent. Since preventive restructuring and insolvency restructuring are intended to address different levels of financial distress, they are not interchangeable options from which a debtor may freely choose. Nevertheless, the availability of these formal mechanisms does not exclude the possibility of resolving a debtor's adverse financial situation through informal restructuring, using contractual and corporate tools outside the supervision or involvement of the courts.

If a debtor intends to resolve imminent insolvency through public preventive restructuring, they must submit an application using an electronic form, along with a draft restructuring plan and other required annexes, via the electronic portal of the competent court. This court is responsible for deciding on whether to grant permission for the debtor's restructuring. According to Section 10(1) of the Act on the Resolution of Imminent Insolvency, the court shall approve public preventive restructuring if the debtor is in a state of imminent insolvency and no other legal obstacle prevents the initiation of the proceedings.

2.1. Likelihood of insolvency

The use of public preventive restructuring frameworks is primarily conditioned on the debtor reaching a specific level of financial distress. Although the Preventive Restructuring Directive does not prioritize either of the two traditional solvency tests for assessing a business's solvency, thus allowing Member States to rely on both, the balance sheet test and the cash-flow test, to determine the threat of

[22] Article 4(8) PRD.
[23] Article 4(4) 2 PRD and Section 10(1) ARII.
[24] Section 7 et seq. ARII.
[25] Section 51 to Section 54 ARII.

insolvency, the Slovak legislator has restricted access to preventive restructuring exclusively to cases of **imminent illiquidity.**[26]

From the wording of Section 4(1) of Act No. 7/2005 Coll. on Bankruptcy and Restructuring, it can be inferred that imminent illiquidity constitutes only one possible manifestation of financial distress falling under the broader concept of an imminent insolvency.[27] Accordingly, the Slovak framework for preventive restructuring is accessible only for a narrower range of financial difficulties. In practice, this means that if a debtor is over-indebted, faces the imminent over-indebtedness, or is experiencing other, less severe and legally undefined financial difficulties, the use of the restructuring mechanism is not permitted.

Understanding the distinction between imminent insolvency in the form of imminent over-indebtedness and imminent illiquidity is critically important for the debtor, as even in cases of likelihood of insolvency due to anticipated over-indebtedness, the debtor, or more precisely, their statutory body, is subject to specific obligations.[28] Fulfilling these obligations is intended to support the timely resolution of the debtor's adverse financial situation and to help prevent actual insolvency.

According to Section 4(2) of the Act on Bankruptcy and Restructuring a debtor is considered to be in a state of imminent illiquidity if, considering all circumstances, it can be reasonably assumed that the debtor will become insolvent within the next 12 calendar months. The statutory defined timeframe for identifying imminent illiquidity is considered optimal for predicting the risk of bankruptcy.[29]

The economic assessment of imminent illiquidity uses the concept of the coverage gap. The projection of the monthly development of the coverage gap is prepared for the next 12 months, based on projected interim financial statements, calculations, or cash flow statements.[30]

Since preparing such a projection may be technically demanding for smaller businesses, the Ministry of Justice of the Slovak Republic has published a simplified form for projecting the monthly development of the coverage gap.[31] This form contains basic accounting items that allow the debtor to independently plan a short-term liquidity plan and test whether insolvency is imminent.[32]

A deterioration in the debtor's financial condition after initiating public preventive restructuring does not automatically result in the termination of the process. If during the ongoing preventive restructuring the financial difficulties reach the level of insolvency, the recovery process may continue without the need to convert the procedure into formal insolvency restructuring.[33] This conclusion applies provided that the debtor is able to properly and timely fulfil all new obligations and the court confirms the restructuring plan, or the insolvency is averted by other means.[34]

The assessment of the debtor's financial difficulties prior to submitting the application for public preventive restructuring is carried out by the debtor or by an advisor whom the debtor is generally required to engage - except in specified exceptions, when preparing the materials for the recovery process.

2.2. Viability test

The Act on Resolving Imminent Insolvency does not explicitly define economic criteria for assessing the viability of a debtor's business. Instead, the Slovak legislator takes a negative approach by specifying

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[26] Section 1(1) ARII and Section 10(1) ARII.

[27] Section 4(1) of the Act on Bankruptcy and Restructuring „ *A debtor is deemed to be in imminent insolvency, particularly, if they face imminent illiquidity.* (*Dlžník je v hroziacom úpadku, najmä ak mu hrozí platobná neschopnosť.)"*

[28] See Section 4a ARII.

[29] DOLNÝ, J. Testovanie úpadku a hroziaceho úpadku dlžníka z pohľadu slovenského právneho poriadku. In *STUDIA IURIDICA Cassoviensia.* Vol. 11, No. 2, 2023, p. 11.

[30] Section 3(2) third sentence of the Act on Bankruptcy and Restructuring.

[31] The simplified form is available at: Zjednoduseny-formular-projekcie-mesacneho-vyvoja-medzery-krytia.xlsx

[32] Available at: Komenar-k-vyplnaniu-zjednoduseneho-formulara.pdf. Currently, however, the available version of the simplified coverage gap projection form contains calculation errors that are inconsistent with Decree No. 197/2022 Coll.

[33] Section 12(2) ARII.

[34] Section 1(1) ARII and Section 12 ARII.

situations where business viability cannot be presumed. If any of these conditions are met, the court will refuse to approve public preventive restructuring. According to Section 10(2) of the Act on Resolving Imminent Insolvency, these situations primarily include:

- existence of grounds for the debtor's dissolution,
- the debtor has been dissolved or is undergoing liquidation,
- bankruptcy has been declared or formal restructuring proceedings have been initiated against the debtor,
- enforcement or similar recovery proceedings are ongoing against the debtor to collect a monetary claim,
- enforcement of a security interest has been initiated against the debtor,
- the debtor fails to maintain proper accounting records or has not filed the financial statements in the official registry, or
- the debtor has taken other actions that jeopardize financial stability and has not remedied their consequences.

The circumstances described indicate that the rescue of the debtor is not realistically achievable. Although some of these situations such as accounting errors or formal deficiencies justifying the dissolution of the debtor may seem strict, they are usually remediable shortcomings that the debtor can rectify during the preparation for initiating preventive restructuring.

Since the law provides only a demonstrative list of reasons, it is not excluded that other circumstances on the debtor's part may also lead to the conclusion that the debtor's business is not viable. In our opinion, it is therefore not possible to automatically infer the viability of the debtor's business in all cases by applying an argument *a contrario*.

It is also important to note that the debtor is required to submit a viability analysis along with the application for permission to commence preventive restructuring. This analysis serves as the basis for assessing whether one of the fundamental conditions for allowing the restructuring process has been met.[35]

2.3. Frequency of availability

From the perspective of the possibility to reuse the preventive restructuring frameworks, the Slovak legislator distinguishes two situations:

- If the court has approved a public preventive restructuring, the debtor may submit a new application no earlier than two years after its conclusion. In practice, this mainly applies to cases where the ongoing proceeding was terminated based on a qualified motion under Section 13 of the Act on Resolving Imminent Insolvency.
- If the court confirmed the public (preventive restructuring) plan, the right to submit a new proposal arises only after two years have passed since the fulfilment of the public plan.

The Slovak legal framework does not explicitly address the situation where a debtor who was previously insolvent and underwent an insolvency restructuring process failed to fulfil the obligations arising from the confirmed restructuring plan and subsequently again finds themselves in financial difficulties, specifically in the form of imminent illiquidity. Unlike the blocking period set for repeated preventive restructuring or repeated insolvency restructuring,[36] the law imposes no similar time restriction for cases where the debtor falls into imminent insolvency after the conclusion of insolvency

[35] Section 8 and Section 36(6) lett. j) ARII.
[36] Section 109(3) lett. e) Act on Bankruptcy and Restructuring.

restructuring. Therefore, public preventive restructuring remains available without limitation to such debtors.

From a practical standpoint, this approach confirms the purpose of preventive proceedings and their importance for debtors with a "failed" restructuring, fulfilling the goal of preventing further deepening of financial difficulties up to the level of insolvency and the necessity to resolve them exclusively through bankruptcy proceedings before the statutory two-year blocking period elapses.

Notably, the first (and so far, only) authorization of public preventive restructuring by a Slovak court involved a debtor who submitted an application around the two-year period after the conclusion of a prior insolvency restructuring, without fulfilling the confirmed restructuring measures.

2.4. Other restrictions on access to the preventive restructuring

An application to initiate preventive proceedings may be submitted exclusively by a debtor who is a legal entity[37] operating a business.[38] Certain entities, such as financial institutions, regional government bodies, or the state itself, are explicitly excluded by law from submitting such applications.[39]

Another legal requirement for accessing preventive restructuring is the disclosure of the debtor's ultimate beneficial owner. Therefore, at the time of submitting the proposal for authorization of preventive restructuring, the debtor must already be registered in the Register of Public Sector Partners maintained in accordance with Act No. 315/2016 Coll. on the Register of Public Sector Partners.

3. A COMPARATIVE REVIEW: INSPIRATION FROM THE CZECH REPUBLIC, AUSTRIA AND HUNGARY

Similarly, in other EU Member States, it is possible to observe how national legislators approached the implementation of the Directive into their national laws between 2021 and 2023. The minimum level of harmonization regarding the debtor's access to preventive restructuring already suggests a variety of solutions. Using the differences in the national regulations of the Czech Republic, Austria, and Hungary as examples, we will attempt in the following sections of this paper to identify which trend in shaping the conditions of access ultimately prevailed - whether the trend is to broaden or narrow the availability of preventive restructuring frameworks. The choice of these countries is due to their geographical proximity and strong potential to compete with each other in the market of pre-insolvency legal regimes.

3.1. Likelihood of insolvency

Czech Republic

The innovative mechanism of preventive restructuring was introduced into the Czech legal system by Act No. 284/2023 Coll. on Preventive Restructuring (hereinafter referred to as "Preventive Restructuring Act"), which entered into force on 23 September 2023. Like Slovak legislation, the Czech Act distinguishes between public[40] and general (non-public) forms of preventive restructuring.

The criterion of likelihood of insolvency is defined as a state of the debtor's financial distress, in which, taking into account all relevant circumstances, it can be reasonably assumed that the debtor would become insolvent if the proposed restructuring measures were not implemented. To determine whether the debtor's financial difficulties are sufficiently serious to justify access to the preventive restructuring framework, one may rely on the statutory presumption set out in Section 4(3) of the Preventive Restructuring Act. According to this provision, the criterion is deemed to be met if the operation of the business does not generate sufficient income to cover monetary debts incurred during

[37] Section 7(1) ARII.
[38] Section 10(2) ARII.
[39] Section 1(2) ARII.
[40] Section 104 et seq. of the Preventive Restructuring Act.

the past year within their due dates.[41] Preventive restructuring is not accessible if the debtor is already in a state of insolvency in the form of illiquidity.

Unlike the Slovak legal framework, neither imminent over-indebtedness nor over-indebtedness constitutes an obstacle to initiating preventive restructuring. This clearly demonstrates that, in terms of financial difficulty thresholds, the Czech legislative framework provides access to preventive restructuring for a broader range of debtors.

To facilitate the accurate identification of financial difficulties, the Ministry of Justice of the Czech Republic has established a publicly accessible online portal called Financial Health ("*Finančí zdraví*"). This tool is designed to help entrepreneurs recognize financial issues early and take appropriate measures to avert adverse economic outcomes.[42] Compared to the Slovak counterpart, this online application is considerably more advanced.

Austria

The new Corporate Restructuring Act (*Bundesgesetz über die Restrukturierung von Unternehmen*),[43] abbreviated as ReO was enacted as part of the implementation of the Preventive Restructuring Directive and came into effect on July 17, 2021. It introduced three new tools to address imminent insolvency: ordinary restructuring proceedings (*ordentliches Restrukturierungsverfahren*), European restructuring proceedings (*europäisches Restrukturierungsverfahren)* and simplified restructuring proceedings (*ereinfachtes Restrukturierungsverfahren*).

The debtor's state of likelihood of insolvency is defined very flexibly in Section 6(2) ReO as a condition where the viability of the debtor's business would be threatened without restructuring, especially if illiquidity is imminent. Imminent insolvency is also presumed if the equity ratio falls below 8% and the fictitious debt repayment period exceeds 15 years.[44]

This shows that access to preventive restructuring is not necessarily limited to imminent illiquidity alone. A debtor may also initiate preventive restructuring in a state of imminent over-indebtedness or even over-indebtedness. The only barrier to commencing preventive restructuring is a level of financial difficulty equivalent to illiquidity.[45] However, some authors argue that, due to minimal *ex ante* judicial scrutiny, this barrier poses only a limited practical obstacle.[46]

Compared to the Slovak approach, the Austrian framework offers a considerably wider range of financial difficulties that debtors can address through preventive restructuring.

Hungary

The Hungarian legislator fulfilled the obligation to implement the Preventive Restructuring Directive by adopting Act No. LXIV/2021 on Restructuring and on Amendments to Certain Laws (hereinafter referred to as the "Restructuring Act"),[47] which, effective from July 1, 2022, introduced preventive restructuring for debtors conceived as uncontested court proceedings that may take place exclusively before the Metropolitan Court of Budapest.

Depending on the effects of the moratorium, Hungary distinguishes between two forms of preventive restructuring. Where a general moratorium with effects for all creditors has been imposed, it is

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41 Section 4(3) Preventive Restructuring Act.

42 Available at: https://eformulare.justice.cz/msp-financni-zdravi/form/uvod.

43 BGBl. I Nr. 147/2021 (*Restrukturierungsordnung*).

44 Translation by the authors of the original text „*Wahrscheinliche Insolvenz liegt vor, wenn der Bestand des Unternehmens des Schuldners ohne Restrukturierung gefährdet wäre, insbesondere bei drohender Zahlungsunfähigkeit; sie wird vermutet, wenn die Eigenmittelquote 8% unterschreitet und die fiktive Schuldentilgungsdauer 15 Jahre übersteigt*."

45 See Section 7(3) ReO.

46 For instance, DURAČINSKÁ, J., MAŠUROVÁ, A. *Preventívne formy riešenia hroziaceho úpadku (transpozícia smernice (EÚ) 2019/1023 o reštrukturalizácii a insolvencii z komparatívneho pohľadu).* Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2023, p. 36 or BOON, J. M. G. J., KOSTER, H., VRIESENDORP, R. D. *Implementation of the EU Preventive Restructuring Directive*, Part I, BLRN No 1, 2023, p. 14.

47 2021. évi LXIV. törvény a szerkezetátalakításról és egyes törvények jogharmonizációs célú módosításáról. Available at: https://njt.hu/jogszabaly/2021-64-K0-00.

considered public preventive restructuring.[48] In other cases, the preventive restructuring is non-public. As a rescue mechanism, it is intended to address the debtor's financial difficulties corresponding to the so-called imminent illiquidity (*fizetésképtelenné válás valószínűsége*). This is defined in Section 3(1)(8) of the Restructuring Act as a situation where it can reasonably be assumed that, without further measures, the debtor will be unable to meet its monetary obligations when they fall due. Although the relevant timeframe for assessing the debtor's financial difficulties is not precisely defined, conceptually, the Hungarian solution closely aligns with the economic threshold for entering preventive restructuring as regulated by the Slovak Act on Resolving Imminent Insolvency.

3.2. Viability test

Czech Republic

Access to preventive restructuring in the Czech Republic is conditional upon meeting the so-called test of operational continuity (*provozuschopnosť podniku*), which is based on the debtor's belief that, through the proposed restructuring measures, they will be able to preserve or restore the operational functionality of their business.[49] The wording of the law suggests that preventive restructuring may be permitted even in cases where the debtor's business is not currently operational, provided there is a realistic potential for recovery.

Although the legislator does not explicitly set out indicators of operational continuity or discontinuity,[50] as is the case under Slovak law for the viability test, some provisions may, in our opinion, be interpreted as pointing to such criteria. For example, under Section 5(4) of the Preventive Restructuring Act, preventive restructuring is not permitted if the debtor is in liquidation.

In the initial phase, the fulfilment of the operational viability condition depends on the debtor's good-faith assessment and the positive response of the selected creditors. It is therefore not the role of a public authority to assess operational continuity, but rather that of the market and the selected creditors, who bear the risk of the debtor's potential failure.[51] If, given the specific circumstances of the case, it can be reasonably presumed that the proposed measures set out in the restructuring plan are unlikely to gain approval, this may serve as an indication that the debtor is not acting in good faith.

Austria

In the Austrian ReO, the viability test is not designed as a separate condition for the debtor's access to preventive restructuring. Nevertheless, the law refers to the viability of the business in several places as one of the requirements that the fulfilment of the restructuring plan[52] or its preparation according to the restructuring concept[53] must guarantee. Thus, the debtor cannot avoid some form of viability testing of their business when entering preventive restructuring. However, it is not expected that the debtor will provide clear evidence that the proposed restructuring measures will guarantee the viability of their business. The court may reject the proposal to initiate preventive restructuring only if the restructuring plan or restructuring concept is clearly unsuitable to ensure the debtor's viability.[54]

Hungary

Although the viability test is not explicitly defined as such in the Hungarian Restructuring Act, some authors interpret it through provisions that require the debtor to submit, long with the application,

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48 See 15. Section 1 Restructuring Act.
49 Section 4(1) Preventive Restructuring Act.
50 ZEZULKA, O. In SPRINZ, P., JIRMÁSEK, T., ZOUBEK, H. et al. Zákon o prevetívní restrukturalizaci. Komentář. 1. vyd. Praha: C. H. Beck, 2025, p. 27.
51 Explanatory Memorandum of the Preventive Restructuring Act, p. 55.
52 Section 7(1) n. 1 ReO.
53 Section 7(2) ReO.
54 Section 7(3) ReO.

documents demonstrating the status of their assets and financial condition indicative of imminent illiquidity as well as the absence of obstacles preventing the initiation of preventive restructuring.[55]

These provisions closely resemble what the Slovak legislator explicitly regulates as a prerequisite for the viability of the debtor's business in Section 10(2) of the Slovak Act on Resolving Imminent Insolvency. According to Section 7 of the Hungarian Restructuring Act, preventive restructuring is not permissible if the debtor is in liquidation, bankruptcy, restructuring, if enforcement proceedings are ongoing against them, if they have failed to comply with accounting obligations, or if they have undisputed or acknowledged debts overdue by at least 30 days and exceeding 10% of all claims against them, among other restrictions.[56]

3.3. Frequency of availability

Czech Republic

The Czech legislator has also restricted the use of the preventive restructuring framework from a time-based perspective. Preventive restructuring is not accessible if, within the last five years, a court has legally confirmed the debtor's insolvency in insolvency proceedings. This restriction mainly applies to debtors who underwent a formal insolvency restructuring process under Section 316 et seq. of the Insolvency Act during that period.

A debtor may undergo preventive restructuring repeatedly for relevant financial difficulties. An exception applies if, within the five years prior to reinitiating the process, a previous preventive restructuring was terminated due to a finding of inadmissibility based on the debtor's dishonest intent.[57] Such a determination can be made not only within the previous court proceedings but also when assessing the debtor's dishonesty in a subsequently initiated preventive restructuring.[58]

Austria

The availability of preventive restructuring for debtors in Austria is time-limited. According to Section 6(3) of the ReO, preventive restructuring shall not commence if a restructuring plan under the ReO or a reorganization plan under the Insolvency Code was confirmed in relation to the same debtor less than seven years ago.[59] This shows that the Austrian legislator has restricted the availability of preventive restructuring not only in cases of its repeated use but also in combination with the insolvency reorganization process.

Hungary

The Hungarian legislator has restricted the frequency of using preventive restructuring to a three-year period. However, this limitation applies only under certain conditions. According to Section 7(2) letter e) of the Restructuring Act, preventive restructuring is inadmissible only if the debtor obtained a moratorium during a previous preventive or insolvency restructuring and less than three years have passed since its commencement.

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55 KANIZSAI, K. Pre-insolvency procedures implemented in Hungarian Law. IOTA Paper, 2023, p. 4. Available at: https://www.iota-tax.org/ngsite/content/download/1354/28566.

56 See 7. Restructuring Act.

57 See Section 5(4) lett. c) Preventive Restructuring Act.

58 CHYTIL, P., SPRINZ, P. In SPRINZ, P., JIRMÁSEK, T., ZOUBEK, H. et al. *Zákon o preventivní restrukturalizaci. Komentář*. 1. vyd. Praha: C. H. Beck, 2025, p. 69.

59 Insolvenzordnung RGBI 337/1914.

3.4. Other restrictions in accessing the preventive restructuring

Czech Republic

An entity authorized to initiate preventive restructuring is exclusively a legal person, specifically a business corporation (*obchodní korporace*).[60] According to Section 1(1) of Act No. 90/2012 Coll., on Companies and Cooperatives, this term includes not only the four types of companies but also cooperatives. Certain legal entities are explicitly excluded from the scope of this legislation, such as credit institutions and banks, collective investment undertakings, health insurance companies, and financial institutions. Similarly to the Slovak legal framework, the Czech regulation does not apply to natural persons conducting business.

A specific barrier to the initiation of preventive restructuring is the existence of a *dishonest intent* on the part of the entrepreneur. Section 5(2) of the Czech Preventive Restructuring Act contains a relatively broad, non-exhaustive list of reasons or circumstances under which the debtor's dishonest intent may be presumed. Certain elements of dishonest intent may arise already in the initial phase of the process, while others may become evident only at a later stage of the restructuring procedure.

In the context of eligibility criteria for initiating preventive restructuring, a dishonest intent must be assumed particularly where the debtor initiated the process despite knowing, or reasonably having to know, that they were not entitled to do so, or where the debtor knowingly provided false or incomplete information in relation to the invitation to initiate preventive restructuring or the restructuring plan.

The reason for the inadmissibility of preventive restructuring due to the debtor's dishonest intent, under Section 4(3)(k) of the Czech Preventive Restructuring Act, is the existence of a final court decision by which the debtor was convicted of an intentional criminal offence related to their business activity or the subject of their business. This impediment does not apply if the conviction has been expunged in accordance with the relevant criminal law provisions.

Similarly to the Slovak legislator, the Czech legislator places emphasis on transparency in the debtor's ownership structure and the identification of the ultimate beneficial owner within often complex and opaque corporate structures. However, the approach differs: while under Slovak law, the debtor must be registered in a dedicated public register, the Czech framework merely requires disclosure of the beneficial owner in the restructuring plan.[61]

Austria

Just like in Slovakia, only the debtor is entitled to file a petition for the commencement of preventive restructuring.[62] However, unlike the Slovak approach, access to this procedure is not limited solely to legal entities, instead, it is also available to natural persons. A special requirement applies to any debtor or member of their governing body who has been lawfully convicted under Section 163a of the Criminal Code (*Strafgesetzbuch*)[63] within the three years prior to filing the petition. In such cases, the debtor must not only meet the general conditions but also prove that they have taken adequate measures to address the underlying issues that led to their conviction.

Hungary

Similarly to Slovakia, the application to initiate preventive restructuring can be submitted exclusively by a debtor who is a legal entity conducting economic activity or an entity which, while not a legal entity, has legal personality under civil law.[64] The Hungarian legislator, like the Slovak one, thus did not take the opportunity to extend the availability of preventive restructuring to individual entrepreneurs (natural persons).

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60 Section 3(1) Preventive Restructuring Act.
61 Section 9(1) lett. c) Preventive Restructuring Act
62 Section 7(1) ReO.
63 Strafgesetzbuch BGBl. Nr. 60/1974.
64 See 3. Section 1(1) Restructuring Act.

CONCLUSION

The presented analysis has primarily demonstrated that the Preventive Restructuring Directive affords Member States a broad degree of autonomy in designing national rules governing a debtor's access to preventive restructuring frameworks. The Directive opted for only a minimum level of harmonization, establishing just two mandatory conditions: the level of financial distress and the accessibility of the restructuring framework at least to legal persons. This minimalist approach provided Member States with significant discretion in defining the entry conditions for preventive restructuring. It is therefore not surprising that the comparative review of Slovak law and the legal frameworks of the Czech Republic, Austria, and Hungary reveals divergent rules and notable differences.

From the perspective of financial distress thresholds, Slovakia has adopted a more restrictive approach by limiting access to public preventive restructuring exclusively to debtors facing imminent illiquidity. This entry threshold narrows the pool of eligible debtors compared to jurisdictions such as the Czech Republic or Austria, where access is permitted even in cases of other forms of imminent insolvency, including over-indebtedness.

Regarding the viability requirement, the Slovak model relies on a negative list of exclusion criteria that exclude access to preventive restructuring. While this approach may seem rigid, many of the listed grounds are temporary and can be remedied by the debtor prior to initiating the process. As such, they should not be viewed as systemic shortcomings or significant disincentives.

Since only one case of public preventive restructuring has been recorded in Slovakia so far, it is not currently possible to assess frequency-related conditions as a practical barrier for debtors. On the contrary, unlike the stricter time restrictions found in countries such as the Czech Republic, the absence of a time limitation on the use of preventive restructuring following the unsuccessful implementation of insolvency restructuring measures may have a positive motivational effect on debtors.

A further noteworthy observation is that not only Slovakia, but also the other examined jurisdictions have retained the debtor's exclusive right to initiate preventive restructuring proceedings. None of these countries have opted to extend standing to employee representatives or creditors, and, with the exception of Austria, have not extended access to natural persons either.

Based on the results of the comparative analysis, the approach taken by the Slovak legislator in defining the entry conditions for public preventive restructuring can be characterized as predominantly conservative and, in several respects, restrictive. The combination of a strictly voluntary regime, the absence of a broader standing base, and the strong societal stigma in Slovakia that continues to associate financial distress with personal failure, alongside the fact that an unsuccessful public preventive restructuring excludes access to "traditional" insolvency restructuring[65] for a period of two years, may significantly undermine debtors' motivation to opt for this recovery mechanism.

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[65] Section 109(3) lett. e) Act on the Bankruptcy and Insolvency.

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Digital evidence in legal proceedings[2]

Digitálne dôkazy v súdnom konaní

Abstract

The digital revolution has fundamentally transformed the way evidence is collected and assessed in legal proceedings. Electronic evidence has become an integral part of judicial processes, yet its use remains fraught with challenges – ranging from data manipulation and the lack of uniform standards to inconsistent judicial evaluation across jurisdictions. In this paper we analyse the legal status of electronic evidence in Slovak law, comparing it with selected foreign legal systems. We seek to answer whether electronic evidence is treated equally to traditional forms of evidence across all types of proceedings in Slovakia and what limitations apply to its use. In research, we employ normative legal and doctrinal methods, comparative analysis, and qualitative examination of secondary legal sources. Findings indicate that while electronic evidence is generally admissible in Slovak law, its probative value depends on meeting specific legal requirements concerning authenticity, integrity, and lawful acquisition. We conclude by recommending the development of standardized legal frameworks and enhanced professional training in digital forensics to ensure the effective and consistent use of electronic evidence in judicial practice.
Keywords: *digital evidence, legal proceedings, admissibility, authenticity.*

Abstrakt

Digitálna revolúcia zásadným spôsobom zmenila spôsob získavania a hodnotenia dôkazov v právnych konaniach. Elektronické dôkazy sa stali neoddeliteľnou súčasťou súdnych procesov, ich využívanie však stále sprevádzajú viaceré výzvy – od manipulácie s údajmi a absencie jednotných štandardov až po nekonzistentné hodnotenie zo strany súdov v rôznych jurisdikciách. V tomto článku analyzujeme právne postavenie elektronických dôkazov v slovenskom práve a porovnávame ho s vybranými zahraničnými právnymi systémami. Usilujeme sa zodpovedať otázku, či sa elektronické dôkazy na Slovensku posudzujú rovnocenne s tradičnými dôkaznými prostriedkami vo všetkých typoch konaní a aké obmedzenia sa na ich použitie vzťahujú. Vo výskume využívame normatívnu právnu a doktrinálnu metódu, komparatívnu analýzu a kvalitatívne skúmanie sekundárnych právnych zdrojov. Zistenia naznačujú, že hoci sú elektronické dôkazy v slovenskom práve vo všeobecnosti prípustné, ich dôkazná sila závisí od splnenia špecifických právnych požiadaviek týkajúcich sa autenticity, integrity a zákonného spôsobu nadobudnutia. V závere odporúčame vytvorenie štandardizovaných právnych rámcov a posilnenie odborného vzdelávania v oblasti digitálnej forenziky, aby sa zabezpečilo efektívne a konzistentné využívanie elektronických dôkazov v súdnej praxi.
Kľúčové slová: *digitálne dôkazy, súdne konanie, prípustnosť, autenticita.*

JEL Classification: K40

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INTRODUCTION

Ongoing technological advancements continuously transform various facets of human existence and the process of evidence collection. The digital era has unveiled numerous possibilities for acquiring and presenting evidence, which has resulted in the rise of electronic evidence. Electronic devices frequently function as repositories of both public and private data, serving as crucial information sources for law enforcement bodies. Despite their extensive utilization, there remain notable challenges such as data manipulation, detecting and tracking alterations in electronic data, and the lack of definitive standards for securing and assessing digital information. This scenario often results in inconsistent legal judgments and subjective methodologies.[3]

The primary objective of this paper is to study the prospects for improving the handling of electronic evidence in legal processes. This involves analysing the role of electronic evidence in judicial outcomes and providing a comparative legal analysis of different national approaches. For the purposes of this paper, we have formed a research question as follows:

"Is electronic evidence in the Slovak legal system equivalent to traditional evidence in all types of legal proceedings and what are the limits of its use?"

Based on this research question, we set out one hypothesis:

"Electronic evidence is generally accepted in all types of proceedings under Slovak law, but its admissibility and probative value depend on compliance with specific legal requirements for authenticity, integrity, and legality of evidence collection."

1. METHODOLOGY

Given the legal and comparative nature of the research, in this paper we primarily applied the normative legal method, which focuses on identifying and interpreting legal rules, principles, and doctrines relevant to the admissibility and evaluation of electronic evidence. Complementarily, we used doctrinal legal research to systematise and clarify the law through the analysis of authoritative legal texts. A key methodological pillar was the comparative legal method, which enables the examination of different national approaches to electronic evidence, including those of the United States, United Kingdom, Germany, France, India, Indonesia, and Slovakia. Theoretical analysis and synthesis were employed to define the conceptual framework and process legal norms and definitions from both domestic and international sources. Formalization, along with deductive and inductive reasoning, supported the formulation of theoretical generalizations and the identification of priorities for improving legal practice. Data collection was conducted through literature study, focusing on secondary sources such as legislative texts, legal scholarship, and case law. The data were processed using qualitative analysis, involving the classification and synthesis of legal materials and literature. Although the study is primarily theoretical, descriptive analysis may be applied in future research to incorporate empirical findings and assess the real-world impact of electronic evidence on judicial outcomes.

2. OVERVIEW OF PUBLISHED WORKS IN THE RESEARCH AREA

The academic discourse regarding electronic evidence predominantly emphasizes the technical, forensic, and procedural dimensions of digital evidence, particularly in the realm of criminal trials (see e.g., Dawas, Jafarzadeh & Saranghi; Moussa; Golovin et al.; Rodchenko et al.; Varenia et al.). These scholarly works explore topics such as data authenticity, integrity, as well as methods for data collection and preservation, addressing the challenges of evidence manipulation and the necessity for dependable

[3] DAWAS, R. A., JAFARZADEH, S., & SARANGHI, R. N. *The Role and Significance of Electronic Evidence in Criminal Case Prosecution*. In: African Journal of Biomedical Research, Vol. 27, No. 4s (2024) DOI: 10.53555/AJBR.v27i4S.5488.

forensic techniques. Even though electronic evidence is increasingly utilized in both criminal and civil litigation, there remains a significant gap in comprehensive research focused on its legal handling in civil proceedings and its practical evaluation by the judiciary. Various studies (e.g., Moussa; Malik; Sheikh, Afroj & Iqbal) underline the significance of legal standards for admissibility. However, these studies tend to remain theoretical and lack empirical data on how digital evidence is evaluated and weighted in judicial practice. Additionally, the literature underscores the lack of consistent standards, leading to discrepancies in judicial decision-making both within and among jurisdictions. There is an evident need for more practice-driven and interdisciplinary research, including empirical investigations that would assess the real-world effects of digital technologies and electronic evidence on judicial outcomes and legal certainty.

3. THEORETICAL FOUNDATIONS, DEFINITIONS, AND CHARACTERISTICS

Electronic evidence is defined as any evidence derived from data contained in or produced by any device whose operation depends on software or data stored or transmitted through a computer system or network.[4] Digital evidence is defined as information of a probative value that is stored or transmitted in binary form.[5] Forms include text documents, graphics, plans, photographs, video and audio recordings, metadata, databases,[6] but also e-mails, text messages, and social media activity.[7]

Digital and electronic evidence is characterized by its intangibility, as it resides in a non-physical space and does not share the properties of conventional evidence. Another characteristic is its dependency, since this type of evidence cannot be directly perceived by human senses and must be converted into a human-readable format using suitable technical methods and software. This form of evidence is not confined to a specific medium; when information is distributed across multiple electronic storage devices, each copy is regarded as an original electronic document. The primary criteria for assessing the admissibility of digital evidence in legal contexts are largely consistent internationally. Typically, the acceptance of electronic evidence hinges on satisfying legal requirements, particularly those related to authenticity and integrity. Integrity guarantees that the evidence has remained unaltered since its creation or retrieval. Digital forensics plays a crucial role in ensuring that electronic documents meet the necessary material criteria of accuracy and integrity. Hash functions are essential for verifying data integrity and detecting alterations. The ISO/IEC 27037:2012 standard outlines the best practices for the collection, identification, and preservation of electronic evidence. [8]

4. COMPARATIVE ANALYSIS OF ELECTRONIC EVIDENCE IN SELECTED JURISDICTIONS

4.1. Anglo-Saxon systema (USA and UK)

In the United States, electronic evidence is traditionally regarded as a form of written evidence and is not categorized as a distinct type. This classification streamlines the determination process for evidence admissibility, thereby supporting the protection of citizens' rights. The Federal Rules of Evidence, established in 1975, serve as the primary framework for evidence-related procedures in the US, dictating the admissibility of digital evidence. The recognition and implementation of electronic

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4 MOUSSA, A. F. *Electronic evidence and its authenticity in forensic evidence*. In: Egyptian Journal of Forensic Sciences, Vol. 11 (2021) DOI: 10.1186/s41935-021-00234-6.

5 Scientific Working Groups on Digital Evidence and Imaging Technology, Best Practices for Digital Evidence Laboratory Programs Glossary (https://www.swgde.org/glossary/)

6 GOLOVIN, D. et al. *Electronic Evidence in Proving Crimes of Drugs and Psychotropic Substances Turnover*. In: Access to Justice in Eastern Europe, No. 2 (14) (2022) DOI: 10.33327/AJEE-18-5.2-n000217.w

7 RODCHENKO, L. et al. *Judicial Decisions in the Era of Information Technology Review of Electronic Evidence and Its Role in Forensic Psychiatry Expertise*. In: Journal of Lifestyle and SDGs Review, Vol. 5, No. 3 (2025) DOI: 10.47172/2965-730X.SDGsReview.v5.n03.pe05404.

8 VARENIA, N. et al. *Enhancing the Handling of Digital Evidence in Ukraine's Criminal Justice System*. In: Journal of Lifestyle and SDGs Review, Vol. 5, No. 2 (2024) DOI: 10.47172/2965-730X.SDGsReview.v5.n02.pe03390.

evidence reliability and admissibility are largely based on judicial precedents. The US legal system typically applies conventional evidentiary standards to digital evidence, avoiding additional specific requirements. This approach accommodates technological advancements while upholding rigorous admissibility standards. Under the Federal Rules of Evidence, the principal requirements for digital evidence include its relevance to the case and its authenticity, which requires proof that the evidence is as claimed. Provisions like Rule 902(11) permit certain electronic evidence to be self-authenticating if verified by the records custodian. [9]

In the United Kingdom, digital evidence, such as electronic documents, is typically subject to the same legal standards as traditional documentary evidence. Anglo-Saxon evidentiary law does not differentiate between evidence types; instead, it focuses on shared legal issues like authenticity and reliability.[10] According to English common law, it is assumed that mechanical devices, including computers, operated correctly at the time in question unless proven otherwise.[11] The Police and Criminal Evidence Act 1984 (PACE) is the main statute overseeing electronic evidence in criminal cases, outlining procedures for handling and admitting computer-produced outputs.[12] Section 19 of PACE permits law enforcement to procure electronic information pertinent to a crime to prevent its concealment, loss, falsification, or destruction.[13] For evidence to be admissible, it must be demonstrated to have been accurately produced by a computer.[14] In civil cases, the approach has changed over time. The Civil Evidence Act 1968 initially permitted the use of computer-generated documents under certain conditions to safeguard legal interests.[15] Per Section 5 of this Act, a document with a computer-generated statement was admissible if specific criteria were met.[16] Before the Civil Evidence Act 1995, the admissibility of digital evidence was constrained by rules like the best evidence rule and hearsay limitations. The 1995 Act provided clearer guidelines, notably Section 69, allowing the admission of computer-generated evidence if it was created during normal operations and based on reliable data input. This legislation also introduced a rebuttable presumption of accuracy.[17] Subsequent legal changes, including the repeal of relevant sections of the Civil Evidence Act 1995 and the Criminal Evidence Act 1999, have shifted the emphasis from strict admissibility criteria to the broader principle of evidentiary relevance.[18]

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9 SHEIKH, T., AFROJ, S., & IQBAL, F. *Admissibility of Digital Evidence in Court: In Light of Changes in Bangladesh Evidence Law*. In: International Journal of Research and Scientific Innovation, Vol. 11, No. 8 (2024) DOI: 10.51244/IJRSI.2024.1108124.

10 NIKOLENKO, L. M. *The use of electronic evidence in the criminal process of foreign countries*. In: Analytical and Comparative Jurisprudence (2024) DOI: 10.24144/2788-6018.2024.05.125.

11 MALIK, N. *Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings as per Bhartiya Sakshya Adhiniyam*, 2023. In: SHODH SAGAR® Universal Research Reports, Vol. 11, No. 4 (2024) DOI: 10.36676/urr.v11.i4.1311.

12 MOUSSA, A. F. *Electronic evidence and its authenticity in forensic evidence*. In: Egyptian Journal of Forensic Sciences, Vol. 11 (2021) DOI: 10.1186/s41935-021-00234-6.

13 NIKOLENKO, L. M. *The use of electronic evidence in the criminal process of foreign countries*. In: Analytical and Comparative Jurisprudence (2024) DOI: 10.24144/2788-6018.2024.05.125.

14 MOUSSA, A. F. *Electronic evidence and its authenticity in forensic evidence*. In: Egyptian Journal of Forensic Sciences, Vol. 11 (2021) DOI: 10.1186/s41935-021-00234-6.

15 PASHA, A. et al.. *The use of electronic evidence in court: a comparative legal analysis in the world practice*. In: Cuestiones Políticas, Vol. 40, No. 72 (2022) DOI: 10.46398/cuestpol.4072.21.

16 OKPARA, J. O. et al. *Admissibility of electronic evidence in criminal trials in Nigeria and the challenges of new crimes*. In: AGORA International Journal of Juridical Sciences, No. 1 (2023) DOI: 10.15837/aijjs.v17i1.5745.

17 SHEIKH, T., AFROJ, S., & IQBAL, F. *Admissibility of Digital Evidence in Court: In Light of Changes in Bangladesh Evidence Law*. In: International Journal of Research and Scientific Innovation, Vol. 11, No. 8 (2024) DOI: 10.51244/IJRSI.2024.1108124.

18 MALIK, N. *Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings as per Bhartiya Sakshya Adhiniyam*, 2023. In: SHODH SAGAR® Universal Research Reports, Vol. 11, No. 4 (2024) DOI: 10.36676/urr.v11.i4.1311.

4.2. Continental European systems (Germany and France)

Within the German procedural framework outlined in the Code of Civil Procedure, the notion of electronic evidence is not explicitly defined; however, the term "electronic document" is described. An electronic document refers to any data or information stored electronically that can be repeatedly accessed and read through written characters. A crucial criterion for its legal recognition is its reliability, which is assured when the document bears a qualified electronic signature. German legal principles differentiate between public and private electronic documents, as well as those transmitted via e-mail using a "De Mail" account.[19] Moreover, German judges possess the discretion to admit electronic evidence and evaluate its validity.[20] In criminal cases, Germany has instituted regulations for the technical acquisition of encrypted communications, which permit the deployment of technical methods, such as installing spyware "Staatstrojaner", to retrieve information from a person's system when traditional telecommunications surveillance is impeded by encryption. Such intrusive measures are governed by the principle of proportionality.[21]

The French legal system (similar to Germany) is governed by the principle of freedom of proof, which allows the judge a wide margin of discretion. According to the French Civil Code, written evidence is defined as a sequence of symbols, letters, or other characters with a specific meaning, regardless of the method of their fixation or transmission. The critical point is that in France, electronic documents have the same legal force as paper documents. Signed electronic documents do not have to be specifically linked to specific technological means.[22] When it comes to verifying authenticity, courts in France commonly accept methods such as testimony (which must contain evidentiary information), and this approach is applicable to all types of electronic evidence. If the court has doubts about the authenticity of the evidence submitted (e.g., a screenshot from a website), it may request additional confirmation, but in practice it is often sufficient for the plaintiff to provide a link to the page and the judge will verify the information himself. Thanks to this approach, there is no significant distinction between paper and electronic documents, which would otherwise contribute to unnecessary delays in court cases.[23]

4.3. Asia/South-East Asia (India and Indonesia)

The legal framework for recognizing electronic evidence in India has seen substantial reforms. The Bharatiya Sakshya Adhiniyam, 2023 (BSA) now categorizes electronic records as documentary evidence. These records are explicitly included in the definitions of "evidence" (Section 3(a)) and "document" under the BSA.[24] The term "electronic records" includes data, images, sounds, and other content stored, received, or transmitted electronically, such as microfilm and computer-generated microfiche.[25] The Information Technology Act of 2000 initially introduced electronic evidence into the Indian Evidence Act (IEA) of 1872. Its admissibility is determined by cumulative conditions set forth in Section 65B(2) of the IEA, which is now part of the BSA 2023. Section 65A, which was added following the IT Act, details the procedures for verifying electronic documents in accordance with

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19 PASHA, A. et al.. *The use of electronic evidence in court: a comparative legal analysis in the world practice*. In: Cuestiones Políticas, Vol. 40, No. 72 (2022) DOI: 10.46398/cuestpol.4072.21.

20 MOUSSA, A. F. *Electronic evidence and its authenticity in forensic evidence*. In: Egyptian Journal of Forensic Sciences, Vol. 11 (2021) DOI: 10.1186/s41935-021-00234-6.

21 MAIOROVA, L. *Improving electronic evidence legal regulation in criminal proceedings*. In: SHS Web of Conferences (EURO-ASIAN LAW CONGRESS 2021) (2021).

22 PASHA, A. et al.. *The use of electronic evidence in court: a comparative legal analysis in the world practice*. In: Cuestiones Políticas, Vol. 40, No. 72 (2022) DOI: 10.46398/cuestpol.4072.21.

23 Ibidem.

24 MALIK, N. *Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings as per Bhartiya Sakshya Adhiniyam*, 2023. In: SHODH SAGAR® Universal Research Reports, Vol. 11, No. 4 (2024)

25 SHANKER, N. R. *The Role of Digital Evidence in Legal Proceedings*: The Indian Perspective. In: International Journal of Research Publication and Reviews, Vol. 5, No. 5 (2024) DOI: 10.55248/gengpi.5.0524.1321.

Section 65B.[26] Key requirements include the record's creation during regular computer use, proper functioning of the computer, and derivation of information from routine input.[27] A certificate of authenticity, signed by a responsible individual, is needed to verify the record and must describe the record and its creation method.[28] The Supreme Court has ruled that this certificate is essential under Section 65B(4) unless the original device is provided as primary evidence under Section 62 IEA.[29] Recognizing the susceptibility of digital data to manipulation, the Home Affairs Standing Committee in 2023 emphasized the importance of ensuring the authenticity and reliability of digital documents.[30]

In Indonesia, electronic information and documents have been formally acknowledged as legitimate legal evidence, complementing the conventional evidentiary framework established by procedural law.[31] This acknowledgment was enacted through Law No. 11/2008 concerning Information and Electronic Transactions (ITE) Law, which has undergone subsequent amendments.[32] The ITE Law sanctioned electronic information and documents, along with their printouts, as legitimate legal evidence, thereby broadening the scope of the five traditional evidence types recognized under the Indonesian Criminal Procedure Code (KUHAP).[33] Within civil procedure, regulated by the H.I.R/R.Bg. system,[34] electronic documents are classified as a novel form of evidence with an expansive characteristic.[35] Traditionally, civil law identifies only two categories of written evidence —deeds and non-deeds.[36] Electronic documents and their printouts are deemed admissible provided they adhere to procedural stipulations.[37] Nevertheless, exclusions apply: electronic documents are inadmissible for legal actions that necessitate execution in written form or as notarial deeds.[38] For validation, electronic documents must satisfy both formal and material criteria, encompassing accessibility, visibility, integrity, and accountability.[39] The evidence must derive from electronic systems that are reliable and secure.[40] Despite the ITE Law's enhancement of the legal standing of electronic evidence, challenges persist, especially concerning the authenticity and integrity of the data submitted.[41]

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26 Ibidem.

27 RAO, R. V., SHARMA, P. *Demystifying Constitutional and Legal Concerns in Admissibility of Electronic Evidence in Court of Law* (2022). DOI: http://dx.doi.org/10.2139/ssrn.4224278

28 Ibidem.

29 MALIK, N. *Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings as per Bhartiya Sakshya Adhiniyam*, 2023. In: SHODH SAGAR® Universal Research Reports, Vol. 11, No. 4 (2024)

30 Ibidem.

31 WARDANI, D. E. K. et al. *Electronic Evidence in Criminal Procedural Law*. In: Journal of Law, Policy and Globalization, Vol. 104 (2020) DOI: 10.7176/jlpg/104-01.

32 Ibidem.

33 MANURUNG, K. H., HAREFA, B. *The Validity of Electronic Evidence and Its Relation to Personal Data Protection*. In: Jurnal Daulat Hukum, Vol. 7, No. 4 (2024).

34 H.I.R. stands for "Herzien Indonesisch Reglement" – this is a historical Indonesian civil procedure code that was adopted from Dutch law during the colonial period.
R.Bg. stands for "Rechtsreglement voor de Buitengewesten" – a similar procedural regulation applicable to the so-called "outer regions" of Indonesia.

35 ADHAN S., S., YUNIATI, A., MUHADZ, M. L. *Electronic Certificate Perspective in Civil Law Evidence*. In: Advances in Social Science, Education and Humanities Research, Vol. 628 (2022), Universitas Lampung International Conference on Social Sciences (2021). DOI: https://doi.org/10.2991/assehr.k.220102.042.

36 Ibidem.

37 SUMILATA, R. R. I., GINTING, G. *Legal Study of the Existence of Electronic Evidence in Corruption Crimes*. In: Gema Wiralodra, Vol. 14, No. 2 (2023).

38 ADHAN S., S., YUNIATI, A., MUHADZ, M. L. *Electronic Certificate Perspective in Civil Law Evidence*. In: Advances in Social Science, Education and Humanities Research, Vol. 628 (2022), Universitas Lampung International Conference on Social Sciences (2021). DOI: https://doi.org/10.2991/assehr.k.220102.042.

39 Ibidem.

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41 VEDWAL, A. *Admissibility of digital evidence for cyber crime investigation*. In: Seminar Course (BBA LLB (CYBER LAW)), School of Law, University of Petroleum & Energy Studies (2023

5. DIGITAL EVIDENCE IN SLOVAK REPUBLIC

5.1. Legal regulation under act No. 160/2015 Coll. of the Civil procedure code – Civil proceedings

According to the provisions of § 187(1) and (2) of Act No. 160/2015 Coll. Civil Procedure Code,[42] electronic or digital evidence is admissible if it has been obtained by lawful means. This also follows from the word "in particular" in the second paragraph of the cited provision, which indicates that the list is illustrative, not exhaustive. The court may also admit illegally obtained evidence, but only if it passes the so-called proportionality test. If a party to the proceedings proposes to use evidence obtained by illegal means, a conflict of two interests arises. The first is the interest in accurately establishing the facts of the case, which is necessary for a correct decision in the matter. In civil proceedings, this gives effect to the party's right to a fair trial, guaranteed by Article 46(1) of the Constitution of the Slovak Republic. In some cases, the party's obligation to bear the burden of proof may depend on the use of such unlawfully obtained evidence. The second interest is compliance with the law in obtaining evidence, in particular non-interference with personal rights and compliance with contractual obligations. This interest is in accordance with the principle of legality set out in Article 2(2) of the Constitution of the Slovak Republic. This gives rise to a conflict of two interests. Evidence, i.e. all means of ascertaining the facts, serves to clarify them, while judicial protection safeguards legality, which any party may claim, including those who allege that their rights have been infringed by the evidence.[43]

The need to carry out a proportionality test in such cases is also mentioned in the explanatory memorandum to Article 16 of the Civil Procedure Code. An example is given of a situation where a court takes into account electronic communications or image and sound recordings obtained without the consent of the person concerned. The court must justify that the protection of the personality of the data subject is weaker in the specific case than the constitutional right whose violation is to be proven by the evidence thus obtained (for example, in cases of racial, gender, or other discrimination). Although the new procedural codes allow the use of illegally obtained evidence, the court is required to perform a strict proportionality test, on the basis of which it will decide on its admissibility.[44] The example given in the explanatory memorandum to Act No. 160/2015 Coll. on Civil Procedure also shows that electronic or digital evidence is admissible if it is lawful, or even unlawful if it passes the proportionality test.

5.2. Legal regulation under act No. 301/2005 Coll. of the Criminal procedure code – Criminal proceedings

Pursuant to the provisions of § 2(12) of Act No. 301/2005 Coll. of the Criminal Procedure Code,[45] in conjunction with provisions of § 119(3) and (5) of Act No. 301/2005 Coll. of the Criminal Procedure Code,[46] it can be inferred that the principle is essentially the same, but, for example, the illustrative

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42 *"(1) Anything that may contribute to the proper clarification of the matter and that has been obtained by lawful means from evidence may serve as evidence.*
(2) Means of evidence include, in particular, the examination of a party, the examination of a witness, a document, an expert opinion, expert evidence, and an inspection. If the manner of taking evidence is not prescribed, it shall be determined by the court."

43 GEŠKOVÁ, K. § 187 [Dôkazné prostriedky]. In: ŠTEVČEK, Marek, FICOVÁ, Svetlana, BARICOVÁ, Jana, MESIARKINOVÁ, Soňa, BAJÁNKOVÁ, Jana, TOMAŠOVIČ, Marek a kol. Civilný sporový poriadok. 2. vydanie. Praha: C. H. Beck, (2022)

44 Ibidem.

45 *"(12) Law enforcement authorities and courts shall evaluate evidence obtained by lawful means, as well as evidence admissible under Section 119(5), according to their inner conviction based on careful consideration of all circumstances of the case, individually and in their entirety, regardless of whether it was obtained by the court, law enforcement authorities or any of the parties."*

46 *"(3) Anything that can contribute to the proper clarification of the matter and that has been obtained from evidence in accordance with this Act or a special Act may serve as evidence. Evidence includes, in particular, the examination of the accused, witnesses, experts, expert opinions and expert statements, on-site verification of testimony, reconnaissance, reconstruction, investigative experiments, inspections, items and documents relevant to criminal proceedings, reports, information obtained through the use of information technology or operational and investigative activities.*

calculation is expanded and adapted to the needs of criminal proceedings. Electronic evidence is admissible if obtained by lawful means. Special provisions also apply, for example, to confessions obtained by coercion and the like.

5.3. Legal regulation under act No. 71/1967 Coll. of Administrative procedure – Administrative proceedings

According to the provisions of § 32(1), (2) and (3) and § 34(1) and (2) of Act No. 71/1967 Coll. of the Administrative Procedure Code,[47] it can be established that the principle is roughly the same, but the illustrative calculation in § 34 is relatively brief. It is supplemented by § 32, where the basis for the decision is relatively extensive. Electronic or digital evidence is not excluded in this type of proceeding either.

5.4. Legal regulation pursuant to Act No. 244/2002 Coll. on Arbitration proceedings

The provisions of § 27(1) and (2) of Act No. 244/2002 Coll. on arbitration proceedings[48] do not imply a requirement of legality, only a requirement of relevance to the clarification of the matter. We consider electronic and digital evidence to be admissible.

From the analysed legal regulations of various types of legal proceedings, it can be concluded that electronic and digital evidence is admissible under certain conditions. The main characteristics of admissibility are legality of acquisition – e.g., consent of the participant or legal procedure. Another characteristic is relevance – the evidence must be related to the case under consideration and contribute to clarifying the fact situation.

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(5) Evidence obtained by unlawful coercion or threat of such coercion, or by providing an unlawful benefit or promise of an unlawful benefit to a cooperating person, or a benefit that the prosecutor has not reported to the court in violation of this Act, may not be used in proceedings except in cases it is used as evidence against the person who used such coercion or threat of coercion or provided or promised such a benefit to a cooperating person."

47 *„(1) The administrative authority is obliged to ascertain the actual state of affairs accurately and completely and, for this purpose, to obtain the necessary documentation for its decision. In doing so, it is not bound solely by the proposals of the parties to the proceedings.*
(2) The basis for the decision shall be, in particular, the submissions, proposals, and statements of the parties to the proceedings, evidence, affidavits, as well as facts generally known or known to the administrative authority from its official activities. The scope and manner of obtaining the basis for the decision shall be determined by the administrative authority. Data from public administration information systems and extracts therefrom, with the exception of data and extracts from the criminal register, shall be considered generally known facts and shall be usable for legal purposes. The party to the proceedings and the person involved are not required to prove this data to the administrative authority with documents. Documents issued by the administrative authority and the content of the administrative authority's own records are considered facts known to the administrative authority from its official activities, which the party to the proceedings and the person involved are not required to prove to the administrative authority.
(3) At the request of the administrative authority, state authorities, local government authorities, natural persons, and legal entities are obliged to report facts that are relevant to the proceedings and decision.
(1) All means that can be used to ascertain and clarify the actual state of affairs and that are in accordance with the law may be used as evidence.
(2) Evidence includes, in particular, the examination of witnesses, expert opinions, documents, and inspections."

48 *"(1) The arbitral tribunal shall only examine evidence proposed by the parties to the arbitration proceedings. The arbitral tribunal shall consider the selection and manner of examination of evidence according to its potential contribution to the clarification of the dispute.*
(2) Evidence shall be taken in such a way as to preserve the obligation of confidentiality regarding classified information protected under special laws and other obligations of confidentiality established by law or recognized by the state. In such cases, questioning may only be conducted if the person being questioned has been released from the duty of confidentiality by the competent authority or by the person in whose interest this duty exists. This shall apply mutatis mutandis where evidence is taken other than by questioning."

CONCLUSION

Electronic evidence is globally recognized, but jurisdictions differ in how they integrate it, either treating it as a type of documentary evidence (USA, UK, France) or distinguishing it as a separate category (India, Indonesia). The core challenge remains ensuring authenticity and integrity. In Slovakia, electronic documents are admissible and hold the full probative force of a written document, provided they meet legal requirements concerning lawful acquisition and relevance. We find it necessary to develop comprehensive and standardized guidelines for handling electronic evidence and their submission, especially in view of the growing influence of AI, deepfake videos and photos, and so forth. In this regard, we believe that electronic evidence must also be examined from the perspective of its credibility. We find that it is vital to increase the basic knowledge of judges and implement enhanced measures for cybersecurity. Specialized training programs in digital forensics would help raise the competence of law enforcement personnel.

The research conducted in the framework of this paper led us to address the research question: ***"Is electronic evidence in the Slovak legal system equivalent to traditional evidence in all types of legal proceedings and what are the limits of its use?"***

Electronic evidence in the Slovak legal system is, in principle, treated as equivalent to traditional evidence across all types of legal proceedings. The relevant procedural codes all allow for the use of electronic or digital evidence, provided it is relevant and obtained lawfully. The law does not distinguish between traditional and electronic evidence in terms of admissibility; both are subject to the same general evidentiary rules. However, the limits of its use are defined by several key requirements:

- **Lawful acquisition:** Evidence must be obtained in accordance with the law. Unlawfully obtained evidence may only be admitted if it passes a proportionality test, balancing the right to a fair trial with the protection of other fundamental rights.
- **Relevance:** The evidence must contribute to clarifying the facts of the case.

These requirements are reflected in the main procedural codes and are further supported by judicial practice and legal scholarship. We consider the approach to digital and electronic evidence in the Slovak legal system to be satisfactory; we did not identify any practical shortcomings in the course of our examination. Based on our analysis, we conclude that electronic and digital evidence is formally equivalent to traditional evidence in the Slovak legal system and that its use in proceedings does not involve excessive difficulties compared to other types of evidence. However, we believe that it would be appropriate to strengthen the methodology for evaluating electronic evidence and to increase the professional readiness of the parties to the proceedings. In the future, we find it necessary to respond to new technological challenges, particularly in the field of artificial intelligence and digital manipulation of evidence. Based on empirical knowledge from legal practice, we note that courts in the Slovak Republic accept electronic evidence such as email communication, mobile phone screenshots, social media posts, and the like. Courts generally do not distinguish electronic evidence from other types of evidence. Of course, in civil proceedings, the principle of free evaluation of evidence applies, and the court does not examine the authenticity of the evidence submitted ex officio. For this reason, we believe that it is possible to submit electronic evidence to the proceedings that is fabricated and not authentic. On the other hand, the above statement also applies to other evidence. In such a case, it applies to both electronic and traditional evidence that the disputing party should be active in the proceedings. It is up to the disputing party to question and challenge the authenticity of the evidence submitted by the other party and, for example, to propose that expert evidence be obtained in relation to the authenticity of the evidence submitted.

EVALUATION OF THE HYPOTHESIS

"Electronic evidence is generally accepted in all types of proceedings under Slovak law, but its admissibility and probative value depend on compliance with specific legal requirements for authenticity, integrity, and legality of evidence collection."

The hypothesis is **confirmed** by the findings which we have identified in the course of processing of this paper. The Civil Procedure Code explicitly states that anything that may contribute to clarifying the matter and has been obtained lawfully may serve as evidence. The list of evidence is illustrative, not exhaustive, and includes electronic evidence. The Criminal Procedure Code and Administrative Procedure Code contain similar provisions, allowing for electronic evidence as long as it is relevant and lawfully obtained. The Arbitration Act does not exclude electronic evidence and focuses on the relevance and contribution to clarifying the dispute. If evidence is obtained unlawfully, it may still be admitted if a proportionality test shows that its use is justified by a stronger constitutional right (e.g., proving discrimination).

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Legal Aspects of Artificial Intelligence and Cybersecurity: Personal Data Protection and Liability in the Era of Cyber Threats[2]

Právne aspekty umelej inteligencie a kyberbezpečnosti: ochrana osobných údajov a zodpovednosť v ére kybernetických hrozieb

Abstract

In the era of increasing cyberattacks, which are increasingly carried out with the use of artificial intelligence (AI) tools, the protection of personal data represents one of the greatest legal and societal challenges. AI can be misused for sophisticated forms of phishing, deepfake techniques, or automated attacks, thereby raising the risk of unauthorized processing and misuse of sensitive data. The paper focuses on the legal aspects of this issue, particularly on questions of liability for damages caused by autonomous systems, the international dimension of regulation, and the need for a harmonized approach within the EU. It also highlights the importance of ethical principles and transparency as prerequisites for trust and effective protection of individual rights in the digital environment.
Keywords: *cyberattacks, artificial intelligence, personal data, regulation, protection.*

Abstrakt

V ére narastajúcich kybernetických útokov, ktoré sú čoraz častejšie realizované s využitím nástrojov umelej inteligencie (AI), predstavuje ochrana osobných údajov jednu z najväčších právnych a spoločenských výziev. AI môže byť zneužitá na sofistikované formy phishingu, deepfake techniky či automatizované útoky, čím sa zvyšuje riziko neoprávneného spracúvania a zneužitia citlivých údajov. Článok sa zameriava na právne aspekty tejto problematiky, najmä na otázky zodpovednosti za škodu spôsobenú autonómnymi systémami, medzinárodný rozmer regulácie a potrebu harmonizovaného prístupu v rámci EÚ. Zároveň zdôrazňuje význam etických princípov a transparentnosti ako predpokladov dôvery a efektívnej ochrany práv jednotlivca v digitálnom prostredí.
Kľúčové slová: *kybernetické útoky, umelá inteligencia, osobné údaje, regulácia, ochrana.*

JEL Classification: K240

INTRODUCTION

Imagine an ordinary internet user browsing news on social media, checking email, and sharing documents through a cloud service. Within seconds, their personal data ranging from login credentials and financial details to biometric identifiers may become the target of a sophisticated cyberattack. The attacker, empowered by artificial intelligence (AI), can generate a false identity, create a convincing deepfake video, or deploy an automated phishing email capable of bypassing traditional security mechanisms. This is not a distant scenario of speculative fiction but a reflection of the present digital reality, where the protection of personal data has become one of the most pressing legal and societal challenges of the 21st century.

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Artificial intelligence is reshaping not only technological progress but also the very nature of cybersecurity threats. By enabling automation, personalization, and large-scale data exploitation, AI amplifies the potential impact of cyberattacks. At the same time, it challenges the adequacy of existing legal frameworks designed to ensure privacy, data integrity, and accountability in digital environments.

Recent scholarly research confirms that the intersection of artificial intelligence and cybersecurity has become a rapidly evolving and interdisciplinary field. Studies have identified persistent regulatory gaps, particularly concerning the robustness and security of high-risk AI systems and the need for harmonized standards across jurisdictions.[3] The question of liability and accountability for AI-driven incidents remains unresolved, with scholars debating whether responsibility should fall on developers, operators, or users.[4]

The main aim of this paper is to analyse the legal aspects of personal data protection in the context of AI-based cybersecurity threats. Particular attention is devoted to questions of liability, regulatory frameworks, and the need for harmonized international cooperation. The research focuses on the European Union's triad of key legal instruments: the General Data Protection Regulation (GDPR), the NIS2 Directive, and the Artificial Intelligence Act (AI Act), each addressing different layers of digital protection data integrity, systemic resilience, and algorithmic transparency.

The central hypothesis tested in this paper is that current legal frameworks do not provide sufficient protection against the risks arising from the use of AI in cyberattacks and therefore require adaptation and harmonization at both the European and global levels.

To achieve this objective and verify the hypothesis, the study employs a combination of research methods. Primarily, it relies on doctrinal analysis of national and European legal instruments, complemented by comparative and analytical approaches examining the intersection of law, technology, and cybersecurity. This interdisciplinary perspective allows for a deeper understanding of how the European Union seeks to balance innovation with the protection of fundamental rights in an increasingly AI-driven digital society.

1. ARTIFICIAL INTELLIGENCE AS A CATALYST FOR CYBERATTACKS

In the past decade, the development of AI tools has fundamentally transformed the nature of cyberattacks. AI enables their automation, increases their efficiency, and simultaneously broadens the range of potential forms of misuse. It has become a means of generating and disseminating disinformation, creating false identities, and producing so-called deepfake materials that undermine trust in digital content. This paper focuses particularly on two types of attacks: phishing and deepfake technologies which represent the most significant and, at the same time, the most dangerous threats in terms of the misuse of personal data through AI-driven cyberattacks.

1.1. Phishing Attacks in the Era of Artificial Intelligence

You are spending an ordinary day at the office. Your colleague from the finance department receives an email that at first glance appears to be an urgent notification from the bank: "A recent transaction has been blocked. Please verify your identity immediately." The message contains the company's logo, the correct employee signature, and a link leading to a website that looks almost identical to the bank's login page. Under the pressure of deadlines, your colleague clicks the link, enters her credentials, and a few hours later reports an attack on the company's account followed by unauthorized transfers. It is later

[3] HAMON, Ronan; JUNKLEWITZ, H.; JOSEP SOLER GARRIDO a SÁNCHEZ, Ignacio. Three Challenges to Secure AI Systems in the Context of AI Regulations. Online. IEEE Access. 2024, vol. 12, s. 61022-61035. ISSN 2169-3536. Available at: https://doi.org/10.1109/access.2024.3391021. [cit. 2025-10-27].

[4] JALAHUSSEIN, Alkayid; MOHAMMAD, Alsalamat; FADELMANSOUR, Aljuneidi a BQOOUR KARIMEH JALAL. Legal Liability Arising from Artificial Intelligence Activities. Online. Journal of Ecohumanism. 2024, vol. 3, no. 6, s. 338-346. ISSN 2752-6798. Available at: https://doi.org/10.62754/joe.v3i6.4006. [cit. 2025-10-27].

revealed that the email was generated by an automated tool that used publicly available information from the internet and a machine learning model that adapted the message to the recipient's writing style a textbook example of modern, AI-powered phishing.

Definitions of phishing and its forms vary across the literature. One available definition state that phishing represents a form of cyberattack in which the attacker uses electronic communication to send manipulative messages. Their goal is to persuade the user to perform certain actions, such as providing sensitive information or clicking on a malicious link, thereby unknowingly acting in favor of the attacker.[5] Put simply, phishing involves impersonating a trusted entity with the aim of obtaining sensitive information from the victim (e.g., usernames, passwords, or financial data). Whereas traditional phishing was often mass-mailed and relatively generic, modern attacks are increasingly personalized and multi-channel. Phishing is no longer confined to email: attackers exploit instant messaging, social networks, and counterfeit websites using a so-called *"scattered approach,"* thereby increasing the probability of a successful compromise. This distributed strategy combines automated collection of victim data with generative models that produce highly fluent and convincing texts, which in turn undermines traditional detection mechanisms.[6]
In summary, AI tools are specifically leveraged in phishing campaigns to:

- **Use of generative AI for email creation**: Attackers employ generative AI particularly large language models to automate the production of unique, realistic phishing emails tailored to individual targets. Such messages are highly persuasive and stylistically varied, which significantly impairs detection by traditional spam filters. Each email can be customized to the specific recipient, thereby removing the predictability typical of mass phishing campaigns.[7]
- **Automated website cloning:** AI tools can rapidly generate fake websites that closely mimic legitimate ones, thereby facilitating the deception of users and the exfiltration of their sensitive information.[8]
- **Manipulative techniques in cyberspace:** AI can analyse publicly available information and use it to personalise phishing messages, thereby increasing the likelihood that recipients will trust and respond to them.[9]

1.2. Deepfakes

Following the previous scenario, imagine that after your colleague entered her login credentials on a fake website, another incident occurs the next day. A call comes through on the company phone, and the voice on the line sounds exactly like that of the company's CEO. The caller urgently instructs her to approve a payment to a supplier. Although she hesitates, the familiar voice of the CEO convinces her, and she authorizes the transfer. It is later revealed that the voice resembling the CEO's was synthetically generated a typical example of the use of deepfake technology.

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5 KHONJI, Mahmoud; IRAQI, Youssef a JONES, Andrew. Phishing Detection: A Literature Survey. Online. *IEEE Communications Surveys & Tutorials*. 2013, vol. 15, no. 4, s. 2091-2121. ISSN 1553-877X. Available at: https://doi.org/10.1109/surv.2013.032213.00009. [cit. 2025-10-12].

6 ÖKDEM, Selçuk a OKDEM, Sema. Artificial Intelligence in Cybersecurity: A Review and a Case Study. Online. Applied Sciences. 2024, vol. 14, no. 22, s. 10487-10487. ISSN 2076-3417. Available at: https://doi.org/10.3390/app142210487. [cit. 2025-10-12].

7 CHIBUIKE SAMUEL EZE a SHAMIR, Lior. Analysis and Prevention of AI-Based Phishing Email Attacks. Online. Electronics. 2024, vol. 13, no. 10, s. 1839-1839. ISSN 2079-9292. Available at: https://doi.org/10.3390/electronics13101839. [cit. 2025-10-13].

8 BASIT, Abdul; ZAFAR, Maham; LIU, Xuan; ABDUL REHMAN JAVED; JALIL, Zunera et al. A comprehensive survey of AI-enabled phishing attacks detection techniques. Online. Telecommunication Systems. 2020, vol. 76, no. 1, s. 139-154. ISSN 1018-4864. Available at: https://doi.org/10.1007/s11235-020-00733-2. [cit. 2025-10-13].

9 KUMAR, Shreyas; ALAN SILVA DE MENEZES; GIRI, Sushil a KOTIKELA, Srujan. What The Phish! Effects of AI on Phishing Attacks and Defense. Online. Proceedings of the International Conference on AI Research. 2024, vol. 4, no. 1, s. 218-226. ISSN 3049-5857. Available at: https://doi.org/10.34190/icair.4.1.3224. [cit. 2025-10-13].

As the term itself suggests, "deepfake" originates from the combination of the words *"deep"* (referring to deep learning) and *"fake"* (meaning falsified or inauthentic). The term is generally used to describe the manipulation of existing media content (image, video, or audio) or the generation of entirely new synthetic content using deep learning techniques. The most commonly discussed forms of deepfake content include fabricated facial images, falsified voice recordings, and videos that combine both, producing manipulated visuals and sound simultaneously. Although the word "fake" implies deception or artificiality, deepfake technology also has numerous harmless or even beneficial applications, for instance, in the entertainment industry and creative arts.[10]

Methods for creating deepfake content typically require large amounts of video and image data to train models that generate realistic videos. For this reason, common targets of deepfake attacks are individuals for whom plentiful visual material is available online for example, celebrities, politicians, or other public figures. Deepfake technology often involves swapping or synthetically generating the faces of these persons and embedding them in compromising or malicious videos.[11]

The creation of deepfake content relies on deep neural networks that extract input features and use them to generate synthetic, fabricated, yet highly realistic material.[12] The main challenge lies in the detection of deepfakes, which is far more complex than identifying traditional forms of digital manipulation, as the difference between authentic and falsified data is minimal and often nearly imperceptible.[13]

1.2.1. When Deepfakes Enter the Courtroom

The development of AI has brought not only new forms of cyberattacks but also fundamental changes in the field of evidence and legal certainty. One of the most serious challenges is the possibility that AI-generated content may become part of judicial proceedings, not as an object of examination but as falsified evidence. The phenomenon of deepfakes has therefore ceased to be merely an issue of cybersecurity or privacy protection and now directly affects the very core of justice and trust in the legal system.

This threat was confirmed in practice for the first time this year. The Superior Court of California, County of Alameda, in the case of Mendones v. Cushman & Wakefield, Inc. (decision of September 9, 2025), found that the plaintiffs had submitted falsified evidence created using generative AI, including deepfake videos, altered photographs, and manipulated messages. The purpose of these materials was to artificially support the claims made in the motion for summary judgment. Upon discovering that the submitted evidence was synthetically generated and deliberately misleading, the court imposed a terminating sanction, namely the dismissal of the lawsuit with prejudice.

In its reasoning, the court emphasized that the integrity of the judicial process had been fundamentally compromised and that "the presentation of AI-generated deepfake evidence constitutes a direct attack on the credibility of justice." The decision is groundbreaking as it represents the first case in the history of American civil justice in which deepfake technology was explicitly identified and sanctioned. The court thus sent a clear signal of zero tolerance toward synthetic evidence and

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[10] ALTUNCU, Enes; VIRGINIA N. L. FRANQUEIRA a LI, Shujun. Deepfake: definitions, performance metrics and standards, datasets, and a meta-review. Online. Frontiers in Big Data. 2024, vol. 7. ISSN 2624-909X. Available at: https://doi.org/10.3389/fdata.2024.1400024. [cit. 2025-10-13].

[11] ABBAS, Fakhar a TAEIHAGH, Araz. Unmasking deepfakes: A systematic review of deepfake detection and generation techniques using artificial intelligence. Online. Expert Systems with Applications. 2024, vol. 252, s. 124260-124260. ISSN 0957-4174. Available at: https://doi.org/10.1016/j.eswa.2024.124260. [cit. 2025-10-13].

[12] KOLAGATI, Santosh; T. CHINDRELLA PRIYADHARSHINI a V. MARY ANITA RAJAM. Exposing deepfakes using a deep multilayer perceptron – convolutional neural network model. Online. International Journal of Information Management Data Insights. 2021, vol. 2, no. 1, s. 100054-100054. ISSN 2667-0968. Available at: https://doi.org/10.1016/j.jjimei.2021.100054. [cit. 2025-10-13].

[13] DEVASTHALE, Aditya a SURAL, Shamik. Adversarially Robust Deepfake Video Detection. Online. In: 2021 IEEE Symposium Series on Computational Intelligence (SSCI). 2022, s. 396-403. Available at: https://doi.org/10.1109/ssci51031.2022.10022079. [cit. 2025-10-13].

simultaneously called for the introduction of stricter mechanisms for the authentication of digital evidence in the era of generative AI.[14]

In the long term, it is evident that deepfakes affect not only the protection of privacy and reputation but also the very essence of legal certainty and justice. If visual or audio evidence can be falsified to the extent that it becomes indistinguishable from reality, the fundamental pillars of the legal order are at risk. The California case therefore serves as an important warning that without reliable mechanisms for verifying digital evidence, trust in the justice system itself may be undermined.

1.3. Summary

The first chapter focused on the interconnection between artificial intelligence and cybercrime, demonstrating that modern cyberattacks can no longer be viewed merely as a technical issue but rather as a complex social phenomenon. Artificial intelligence has evolved from a tool of technological progress into a catalyst for cyber threats, enabling their automation, personalization, and mass dissemination on a scale that was until recently unimaginable.

We have analysed two types of attacks that most critically endanger personal data protection and trust in the digital environment: phishing and deepfakes. The first example illustrated how AI can generate convincing manipulative messages targeting user psychology, while the second demonstrated the ability of AI to create synthetic visual and audio content that blurs the line between reality and fabrication.

These topics were chosen because phishing and deepfakes uniquely combine technical sophistication with profound social and legal implications. Phishing leads to the misuse of personal and financial data, while deepfakes undermine the authenticity of digital content, disrupt privacy and credibility, and weaken legal certainty in the online environment. The common denominator of both phenomena is the ability of AI to manipulate reality textual, visual, and psychological thereby generating new forms of cyber threats that traditional legal frameworks cannot fully capture.

These threats represent a new type of challenge for law and regulation. Technological development advances exponentially, while legal adaptation occurs gradually. The following chapter therefore focuses on how European law responds to these emerging digital risks through instruments such as the GDPR, NIS2 Directive, and the AI Act.

The next section of this paper examines how law intervenes in a space where technology, ethics, and responsibility converge, and how the European Union seeks to strike a balance between fostering innovation and safeguarding the fundamental rights of citizens in an era of AI-driven cyberattacks.

2. CYBERSPACE UNDER THE SUPERVISION OF LAW

The rise of AI has brought not only technological progress but also a new generation of risks that go beyond national borders. The European Union has responded to these challenges by striving to create a comprehensive and coherent legal framework that simultaneously promotes innovation and protects the fundamental rights of individuals. While the first chapter demonstrated how AI has transformed the nature of cyberattacks, this section focuses on how EU law has approached the regulation and prevention of these emerging threats.

2.1. GDPR

In an environment where personal data has become one of the most valuable commodities of the digital age, protection against its misuse in cyberspace represents one of the key legal challenges. The

[14] VOLOKH, E. Court throws out case after finding plaintiffs submitted deepfake videos and altered images. In Reason.com [online]. 2025. Available at: <https://reason.com/volokh/2025/09/25/court-throws-out-case-after-finding-plaintiffs-submitted-deepfake-videos-and-altered-images/?nab=0>. [cit. 2025-10-15].

General Data Protection Regulation (GDPR)[15] represents the fundamental legal instrument within the European Union that governs the processing of personal data while simultaneously establishing mechanisms for the prevention and mitigation of incidents caused by cyberattacks.[16]

A fundamental principle of the GDPR is the requirement of integrity and confidentiality in data processing, enshrined in Article 5(1)(f), which also addresses the risks of cyberattacks aimed at unauthorized access, loss, or damage to data. This principle is further developed in Article 32(1) of the GDPR, which explicitly stipulates that controllers and processors must implement appropriate technical and organizational measures, including pseudonymization, encryption, and the safeguarding of system integrity and availability, in order to ensure a level of security appropriate to the risks that data processing poses to the rights and freedoms of individuals.[17]

The cited Article 32(1) of the GDPR emphasizes that securing communication channels through which data are transmitted is an essential prerequisite for the effective protection of personal data. In practice, this means that organizations must implement advanced methods of encryption, authentication, and data transmission monitoring to prevent interception or modification during transfer.

If a security breach occurs despite these safeguards, Articles 33 and 34 of the GDPR set out clear procedures. The controller is obliged to report the incident to the supervisory authority within 72 hours of its discovery and, in cases where the breach poses a high risk to the rights and freedoms of individuals, must also inform the affected persons.[18]

In the Slovak context, individuals who suspect that their personal data have been misused or that a controller has violated the GDPR can file a complaint with the Office for Personal Data Protection of the Slovak Republic. The authority is responsible for supervising compliance with data-protection legislation, investigating complaints, and imposing corrective measures or fines. Its role is crucial in bridging the European legal framework with national enforcement practice.[19]

Modern cyberattacks employ AI to collect and analyze personal data, automate attacks, and create convincing phishing campaigns. The GDPR addresses these challenges through the principle of "data protection by design and by default" (Article 25), which requires that data protection be integrated from the earliest stages of system development, including in AI models.

Controllers processing large volumes of data or using AI for profiling or automated decision-making are, under Article 35, required to conduct a Data Protection Impact Assessment (DPIA). This process identifies risks associated with potential attacks and mandates the implementation of measures to mitigate them. In cases of AI-driven attacks that, for example, exploit deepfake technology or misuse biometric data, the GDPR provides a legal basis for applying the principle of lawfulness of processing and for protecting special categories of data under Article 9 of the GDPR.

A major strength of the GDPR lies in its technological neutrality. This means that legal rules apply equally to all technologies as long as they pursue the same objective of protection. Such legislation does not discriminate between different types of technologies, whether traditional or emerging, and does not mandate the use of any specific technology if equivalent alternatives exist. The aim is to prevent the law from hindering innovation or creating inequality among technical solutions. Within the framework of the GDPR, the principle of technological neutrality ensures that the protection of individuals must not

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[15] 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).

[16] ECABERT, Thomas; MUHLY, Fabian a ZIMMERMANN, Verena. Implications of cyber incident reporting obligations on multinational organizations headquartered in Switzerland. Online. International Cybersecurity Law Review. 2024. ISSN 2662-9720. Available at: https://doi.org/10.1365/s43439-024-00129-x. [cit. 2025-10-15].

[17] MUHLY, Fabian; CHIZZONIC, Emanuele a LEO, Philipp. AI-deepfake scams and the importance of a holistic communication security strategy. Online. International Cybersecurity Law Review. 2025. ISSN 2662-9720. Available at: https://doi.org/10.1365/s43439-025-00143-7. [cit. 2025-10-15].

[18] Article 34 (1), GDPR.

[19] ÚRAD NA OCHRANU OSOBNÝCH ÚDAJOV SLOVENSKEJ REPUBLIKY. Proceedings on the protection of personal data [online]. Bratislava: Úrad na ochranu osobných údajov SR. Available at: https://dataprotection.gov.sk/en/office/proceedings-on-protection-personal-data/ [cit. 2025-10-24].

depend on the technology used to process personal data. This reduces the risk of legal circumvention, for instance, by using a different technology for the same purpose that produces an equally harmful effect.[20]

In this way, the GDPR not only protects personal data but also contributes to overall cybersecurity, which is regarded as a matter of public interest. Companies that comply with the GDPR rules simultaneously enhance their level of digital protection and reduce the risk of a successful cyberattack.

In our opinion, the GDPR represents the first line of defence of European law against cyberattacks. Its provisions, particularly Article 32(1), clearly emphasize the need to protect the confidentiality, integrity, availability, and resilience of systems, as well as to employ encryption and pseudonymization of data. The protection of communication channels through which data are transmitted is therefore not only a technical but also a legal obligation. At a time when cyberattacks are becoming increasingly sophisticated and AI can generate deepfakes, the GDPR serves as an essential instrument that unites law, technology, and ethics with the goal of safeguarding the digital identity of individuals.

2.2. NIS2 directive

The NIS2 directive[21] represents a cornerstone of the EU's strategy aimed at enhancing the overall level of cybersecurity through legal regulation. It addresses the shortcomings of the original NIS Directive by expanding its scope to a broader range of sectors and introducing stricter cybersecurity requirements. This expansion reflects the European Union's commitment to including additional critical areas of the economy within the reach of its key cybersecurity instruments, thereby ensuring a more comprehensive approach to the protection of digital infrastructure.[22]

The directive establishes a new standard of risk management within the European cyberspace, reflecting the rapid development of AI technologies and, among them, the emerging threat of deepfake attacks. Although NIS2 does not contain an explicit chapter dedicated to deepfakes or phishing, it effectively regulates them in practice through the obligation to conduct comprehensive risk assessments and implement incident response mechanisms. The scope of these measures must take into account current types of cyber threats, including synthetically generated fraud.[23]

According to Article 21 of the NIS2 Directive, entities providing essential and important digital services are required to systematically identify, assess, and manage risks affecting the security of their information systems. This obligation entails recognizing deepfakes and AI-assisted phishing as part of risk scenarios to be incorporated into security policies, internal controls, and employee training programmes. By mandating proactive governance and technical preparedness, NIS2 prevents such attacks from exploiting organisational vulnerabilities.

Specifically, Article 21(2) lists a comprehensive set of risk-management measures that function as the Directive's practical defence mechanism. These include:

- Incident handling and continuity management (Art. 21(2)(b)–(c));
- Supply-chain and vulnerability management (Art. 21(2)(d)–(e));
- Encryption, authentication, and secure communication (Art. 21(2)(h)–(j)); and
- Cybersecurity training and awareness-raising (Art. 21(2)(g)).

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[20] KAMARA, Irene. Co-regulation in EU personal data protection: the case of technical standards and the privacy by design standardisation 'mandate'. Online. European journal of law and technology. 2017, vol. 8, no. 1. ISSN 2042-115X. [cit. 2025-10-15].

[21] Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive).

[22] KIANPOUR, Mazaher; DAVIS, Peter a IWONA MARIA WINDEKILDE. Digital sovereignty in practice: analyzing the EU's NIS2 directive. Online. International Journal of Information Security. 2025, vol. 24, no. 4. ISSN 1615-5262. Available at: https://doi.org/10.1007/s10207-025-01090-4. [cit. 2025-10-15].

[23] see: Article 21-22 NIS2.

Through secure communication channels, encryption, and multi-factor authentication, NIS2 reduces the likelihood of phishing attempts and identity spoofing. By promoting continuous monitoring, anomaly detection, and vulnerability disclosure, it enhances the early identification of manipulated or deepfake-based content. Moreover, the requirement of cybersecurity awareness and training ensures that employees can recognise AI-generated deception, including synthetic voice or video instructions an increasingly common vector of social engineering.

Complementary provisions reinforce this preventive framework. Article 20 imposes management accountability for approving and overseeing cybersecurity risk-management measures, transforming AI-related risk mitigation from a technical task into a legal obligation. Article 22 (cybersecurity risk-management measures and reporting) and Article 23 (incident notification) establish mandatory early-warning mechanisms through national Computer Security Incident Response Teams (CSIRTs), which allow for coordinated detection of cross-border deepfake and phishing campaigns.

In conclusion, the NIS2 Directive establishes a proactive and legally binding framework that equips organizations to anticipate and counter AI-driven cyber threats such as deepfakes and phishing. By integrating technical safeguards, governance accountability, and continuous risk assessment, it transforms cybersecurity from a reactive defence into a preventive legal obligation within the European digital space.

2.3. AI Act

The Artificial Intelligence Act[24] represents the first comprehensive legal framework for AI in the world. It introduces a risk-based regulatory model that classifies AI systems according to their potential impact on safety, fundamental rights, and democratic integrity. Within this framework, deepfake technologies systems capable of generating or manipulating audiovisual content that appears authentic are explicitly recognized and subject to specific transparency obligations.

According to Article 3(60), a deepfake is defined as "AI-generated or manipulated image, audio, or video content that resembles existing persons, objects, places, entities, or events and would falsely appear authentic to a person viewing it." Deepfakes fall under the category of "limited-risk" AI systems rather than high-risk, provided they are not used in contexts that directly endanger public safety or individual rights. Their regulation is primarily based on transparency obligations established in Article 50. Under Article 50(3), providers and deployers of AI systems that generate or manipulate image, audio, or video content must clearly disclose that the content has been artificially generated or manipulated. This requirement aims to ensure that individuals are not deceived by synthetic media. However, the provision allows certain exceptions for instance, in cases of artistic expression, satire, or national security provided the artificial nature of the content is obvious to a reasonable person.[25]

While deepfakes are generally considered limited-risk systems, their risk classification may escalate depending on the purpose and context of use. If a deepfake system is employed to impersonate a person, manipulate electoral processes, or spread disinformation affecting public order, it could be reclassified as high-risk under Annex III of the AI Act, which lists high-risk uses in areas such as biometric identification, critical infrastructure, and access to public services. Furthermore, Article 5 explicitly prohibits "AI systems that deploy subliminal techniques or manipulation causing significant harm," which could encompass malicious deepfake applications.

From a regulatory perspective, the AI Act complements NIS2 by focusing not on the cybersecurity of systems but on the accountability and transparency of AI-generated content. Together, they create a

[24] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

[25] ŁABUZ, Mateusz. Deep fakes and the Artificial Intelligence Act—An important signal or a missed opportunity? Online. Policy & Internet. 2024. ISSN 1944-2866. Available at: https://doi.org/10.1002/poi3.406. [cit. 2025-10-15].

dual layer of protection: NIS2 safeguards the technical infrastructure from AI-driven attacks, while the AI Act governs the ethical and legal use of AI tools capable of generating deceptive digital content.

In summary, while deepfakes are not per se classified as high-risk AI systems, their misuse in contexts that threaten democratic processes, security, or fundamental rights can elevate them into the high-risk category. The Act thus establishes a nuanced approach one that regulates through transparency, while maintaining the flexibility to impose stricter obligations when societal or ethical harm is likely.

2.4. Summary

The analysis of the GDPR, NIS2 Directive, and AI Act demonstrates that the European Union has developed a multilayered legal framework designed to address the evolving risks of the digital era. Each of these instruments contributes to cybersecurity and the protection of digital integrity from a distinct but complementary perspective.

The GDPR establishes the foundation by safeguarding personal data and ensuring lawful, secure, and transparent processing practices, forming the first legal barrier against the misuse of data in cyberattacks. The NIS2 Directive builds upon this foundation by strengthening the operational resilience of digital infrastructures and introducing legally enforceable obligations for risk management, accountability, and cross-border cooperation effectively transforming cybersecurity from a reactive to a preventive legal duty. Finally, the AI Act adds an ethical and transparency-oriented dimension by regulating the design and use of AI systems, including deepfakes, through a risk-based approach that balances innovation with the protection of fundamental rights.

Together, these instruments form an integrated legal architecture that not only enhances Europe's capacity to withstand AI-driven cyber threats such as deepfakes and phishing but also reinforces the principles of trust, accountability, and human oversight in the digital environment. This comprehensive model positions the European Union as a global leader in shaping a secure, transparent, and rights-based digital future.

CONCLUSION

The analysis confirmed that artificial intelligence profoundly transforms the nature of cyber threats, posing new challenges for personal data protection and legal accountability. The study's primary objective to examine the legal aspects of personal data protection in the era of AI-driven cyberattacks was successfully fulfilled through the analysis of the GDPR, the NIS2 Directive, and the AI Act. Each of these instruments contributes to digital security from a distinct legal perspective: the GDPR ensures lawful and secure data processing, the NIS2 Directive strengthens systemic resilience and risk management, and the AI Act introduces transparency and ethical standards for the deployment of AI systems, including deepfakes.

The research hypothesis that current legal frameworks do not provide sufficient protection against AI-enabled cyber risks and therefore require adaptation and harmonization at both the European and global levels has been partially confirmed. While the European Union has made significant progress toward a coherent and comprehensive regulatory framework, the rapid evolution of generative AI technologies continues to outpace existing legislation.

In conclusion, the EU legal framework forms a strong foundation for AI governance and cybersecurity, yet ongoing legislative refinement, international cooperation, and interdisciplinary dialogue remain essential. Only through dynamic adaptation can law maintain its protective function, ensuring that technological progress aligns with the principles of human dignity, security, and trust in the digital age.

To enhance the effectiveness of the regulatory framework, one concrete measure would be the creation of specialized AI–cybersecurity units within national data-protection authorities. Such units would focus on the detection, analysis, and coordination of incidents involving artificial intelligence,

ensuring a faster and more harmonized response to cross-border cyber threats. A comparable model already exists in Slovakia, where the Council for Media Services has been designated as the Digital Services Coordinator (DSC) under the Digital Services Act (DSA). The Council oversees compliance of online platforms and social-media providers with EU transparency, user-protection, and content-moderation obligations.[26] This example illustrates how establishing specialized national supervisory structures can strengthen enforcement capacity and cooperation with EU-level bodies. Applying a similar institutional approach to AI-related cybersecurity risks would significantly enhance the ability of national authorities to identify emerging threats, exchange expertise, and ensure consistent enforcement across the European digital space.

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Special jurisdiction in proceedings concerning actions for unjust enrichment in commercial relations under the Brussels Ia Regulation – challenges in application practice[2]

Osobitná právomoc v konaniach o žalobách na bezdôvodné obohatenie v obchodných vzťahoch podľa nariadenia Brusel Ia – výzvy v aplikačnej praxi

Abstract

Regulation (EU) No 1215/2012 of the European Parliament and of the Council (Brussels Ia) is a fundamental instrument for harmonizing rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Despite its fundamental importance for the functioning of the EU internal market, its application raises significant questions of interpretation, particularly in relation to actions for unjust enrichment arising in cross-border commercial relations. The aim of this paper is to analyze the scope and conditions for the application of special jurisdiction under Article 7 of the Brussels Ia Regulation in such actions, to identify controversial issues in the case law of the Court of Justice of the European Union and national courts, and to assess their impact on the legal certainty of the parties to the proceedings. The research uses a combination of analytical and comparative methods, with particular attention paid to the relationship between contractual and tortious jurisdiction. The paper also points out the shortcomings of current application practice and proposes possible solutions aimed at unifying interpretation and strengthening the predictability of decision-making in cross-border commercial disputes.

Keywords: *special jurisdiction, Brussels Ia Regulation, unjust enrichment, commercial disputes, legal certainty.*

Abstrakt

Nariadenie Európskeho parlamentu a Rady (EÚ) č. 1215/2012 (Brusel Ia) predstavuje zásadný nástroj harmonizácie pravidiel o príslušnosti súdov a o uznávaní a výkone rozhodnutí v občianskych a obchodných veciach. Napriek svojmu kľúčovému významu pre fungovanie vnútorného trhu EÚ jeho aplikácia vyvoláva významné interpretačné otázky, najmä pokiaľ ide o žaloby z bezdôvodného obohatenia vznikajúce v cezhraničných obchodných vzťahoch. Cieľom tohto článku je analyzovať rozsah a podmienky uplatnenia osobitnej príslušnosti podľa článku 7 nariadenia Brusel Ia v takýchto žalobách, identifikovať sporné otázky v judikatúre Súdneho dvora Európskej únie a vnútroštátnych súdov a posúdiť ich vplyv na právnu istotu účastníkov konania. Výskum využíva kombináciu analytických a komparatívnych metód, pričom osobitná pozornosť sa venuje vzťahu medzi zmluvnou a deliktnou príslušnosťou. Článok zároveň poukazuje na nedostatky súčasnej aplikačnej praxe a navrhuje možné riešenia zamerané na zjednotenie výkladu a posilnenie predvídateľnosti rozhodovania v cezhraničných obchodných sporoch.

Kľúčové slová: *osobitná právomoc, nariadenie Brusel Ia, bezdôvodné obohatenie, obchodné spory, právna istota.*

JEL Classification: K12, K15, K33

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INTRODUCTION

The law of EU procedural cooperation in civil and commercial matters is more than just a technical set of procedural or conflict-of-law rules conflict of laws rules – it is an expression of the effort to transform legal certainty from an abstract value into a practically enforceable principle which, through uniform procedural rules, ensures the effective protection of subjective rights in cross-border legal relations. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia) embodies these basic procedural rules, creating a uniform European mechanism for determining jurisdiction and recognizing decisions in cases with a foreign element. Its aim is to ensure legal certainty, predictability and effective judicial protection within the EU internal market through uniform rules on the determination of international jurisdiction.[3] In systematic connection with the Rome I and Rome II Regulations, it also ensures consistency between the determination of jurisdiction and the applicable law, thereby contributing to the uniform and predictable enforcement of private law claims within the European Union.

Article 7 of the Brussels Ia Regulation plays a special role in this system, as it lays down rules on special jurisdiction allowing the plaintiff to bring an action before a court of a Member State ( ) that has a special (closer) connection to the dispute, even if the defendant is not domiciled or has its registered office in that State. This is an exception to the general rule of jurisdiction under Article 4, justified by the principle *of proximity of jurisdiction,* i.e. the requirement of a close relationship between the court and the substantive basis of the claim. This provision was intended to enhance the efficiency and fairness of decision-making, for example by simplifying the taking of evidence, but at the same time it opens up a number of questions of interpretation, particularly in cases where the subject matter of the dispute is claims for unjust enrichment.[4]

In practice, however, Article 7 raises significant questions of interpretation, particularly in the case of actions for unjust enrichment, which in theory fall between contractual and tortious jurisdiction. Even in its revised form, the Brussels Ia Regulation does not contain a specific provision on jurisdiction for claims arising from unjust enrichment, which leads to the need to classify disputes arising from the enforcement of such claims under Article 7(1) or Article 7(2), or there is also the possibility that the dispute will be governed by the basic general jurisdiction under Article 4 of the Regulation.[5] The question of the classification and subsumption of a specific dispute under the articles in question is crucial, as the boundary between contractual and non-contractual obligations under Article 7(1) and Article 7(2) is not always clear-cut.

The question of the legal classification of these claims is crucial, given that the boundary between contractual and non-contractual obligations under Article 7(1) and Article 7(2) is not uniformly defined in practice. Martiny also notes that: *"The case law of the Court of Justice of the European Union (Brogsitter, Wikingerhof, and others) and the case law of national courts are not always consistent with each other as regards the location of the place of enrichment and the application of Article 7(2) of the Brussels I bis Regulation. This inconsistency points to the existence of a conflict that makes it necessary to coordinate contractual and tortious claims under European law on international jurisdiction in order to ensure its internal coherence and the predictability of decisions."* [6]

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3 Silvestri, Caterina. *GLI Accordi Sulla Giurisdizione Nella Nuova Disciplina Degli Artt. 25 E 31 Nel Reg. 1215/2012.* In: International Journal of Procedural Law 5, 1 (2015): 16-37, doi: https://doi.org/10.1163/30504856-00501004

4 Court of Justice of the European Union. Judgment of 25 October 2012 in *Folien Fischer v Fofitec v Ritrama,* C-133/11, ECLI:EU:C:2012:664. Paragraph 38.

5 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). Official Journal of the European Union, L 351, 20.12.2012, pp. 1–32. (hereinafter referred to as 'Brussels Ia' or 'Brussels I-bis')

6 MARTINY, Dieter. *Coordination of Contractual and Tort Claims in the European Law of Jurisdiction.* In: Cuadernos de Derecho Transnacional, 2024, vol. 16, no. 2, pp. 1109–1110. ISSN 1989-4570. DOI: 10.20318/cdt.2024.8963.

The aforementioned interpretative ambiguities, which are also reflected in the different approaches of the Court of Justice of the European Union and national courts, point to the need for a systematic analysis of the scope and conditions for the application of special jurisdiction in actions for unjust enrichment. At the same time, it is necessary to assess their consequences for the legal certainty of participants in commercial legal relationships and subsequent disputes that may arise from these relationships. The aim of this article is therefore to:

- *analyze the systematic position of claims for unjust enrichment within the special jurisdiction under Article 7 of the Brussels Ia Regulation,*
- *to assess the relevant case law of the Court of Justice of the European Union, and*
- *identify challenges in the application of this provision in the practice of national courts of Member States.*

The principal research hypothesis is that the current wording of Article 7 of the Brussels Ia Regulation does not provide a sufficiently predictable framework for determining judicial jurisdiction in proceedings concerning claims of unjust enrichment, which adversely affects the legal certainty of the parties involved (particularly, though not exclusively, in commercial relationships). To verify this hypothesis, the paper employs a comparative and systematic analysis of the case law of the Court of Justice of the European Union and the national courts of selected Member States, supplemented by an analytical-deductive approach and a doctrinal interpretation of the relevant provisions of the Brussels Ia Regulation.

1. THEORETICAL BASIS OF SPECIAL JURISDICTION IN ACTIONS FOR UNJUST ENRICHMENT

1.1. The systematic position of Article 7 of the Brussels Ia Regulation and the principle *of proximity of jurisdiction*

Since its inception, private international law has evolved from a rigid and formalistic model based on fixed jurisdictions to a functional model of jurisdiction in which the decisive criteria have become the proximity of the dispute to the court, but also a more systematically rational arrangement of court jurisdictions in the interest of more effective administration of justice. This shift is aimed at fulfilling the objectives of the Brussels Ia Regulation, in particular at strengthening legal certainty, but also the equality of the parties to proceedings in cross-border disputes. In this sense, courts are the ultimate guarantee of the protection of subjective rights arising from Union law and, therefore, also from the procedural mechanisms by which those rights are enforced.[7]

For the purposes of our analysis, Article 7 is the central provision of Regulation (EU) No 1215/2012 of the European Parliament and of the Council (Brussels Ia) in that its content creates an exception to the general and fundamental rule of jurisdiction under Article 4, based on the principle *of actor sequitur forum rei,* i.e. jurisdiction based on the defendant's place of residence/registered office. However, the following types of jurisdiction take precedence over this basic rule: special jurisdiction relating to the weaker party, exclusive jurisdiction and agreed jurisdiction, including implied jurisdiction. Among these types of jurisdiction, the "strongest" type is exclusive jurisdiction as provided for in Article 24 of the Brussels Ia Regulation, which takes precedence over all other types of jurisdiction within its scope.[8]

The provision of Article 7 is based on the premise that in certain categories of disputes there is a closer, functionally justified link between the factual basis of the dispute and a particular Member State, which legitimizes a departure from the general rule for determining international jurisdiction and allows

[7] G. Gentile. *Effective judicial protection: enforcement, judicial federalism and the politics of EU law.* Cambridge University Press, 2022. p. 130. https://doi.org/10.1017/elo.2022.48

[8] ROZEHNALOVÁ, Naděžda – VALDHANS, Jiří – DRLIČKOVÁ, Klára – KYSELOVSKÁ, Tereza. International Private Law of the European Union. 2nd edition. Prague: Wolters Kluwer ČR, 2018, p. 181. ISBN 978-80-7598-009-5.

the plaintiff to alternatively sue the defendant outside the courts of the state of his domicile/residence, provided that there is a particularly close connection between the dispute and the court concerned.

This systematic exception is doctrinally captured by the principle of proximity of jurisdiction to the subject matter of the dispute. This principle expresses the requirement that the dispute be decided by the court that has the closest material connection to the dispute and, therefore, the best prerequisites for a quick and, above all, fair decision. The EU legislator expressly states that, in addition to jurisdiction based on the place of residence/registered office of the defendant, there should be alternative criteria for jurisdiction based on a close connection between the court and the dispute in question, in order to promote the proper administration of justice.[9] This close connection is intended to ensure legal certainty and prevent the defendant from being surprised by being sued before a court that he could not reasonably have expected.

1.2. Absence of explicit special jurisdiction for claims based on unjust enrichment

The Brussels Ia Regulation (No 1215/2012) has retained specific (alternative) jurisdictions in essentially the same wording as the previous rules governing the matter in question, in order to ensure continuity in their interpretation and to follow on from existing case law. Article 7 of the Brussels Ia Regulation is a historical continuation of Article 5 of the 1968 Brussels Convention and Article 5 of the Brussels I Regulation (No 44/2001). For example, the wording of Article 7(2) of Regulation 1215/2012 is identical to that of Article 5(3) of Regulation 44/2001 and also corresponds to Article 5(3) of the Brussels Convention. These provisions governing special jurisdiction in contractual and tort matters have been taken over without change.[10] The fact that continuity between the 1968 Brussels Convention, Regulation 44/2001 and the current regulation is to be maintained is also expressly confirmed by the explanatory memorandum to the Brussels Ia Regulation, in which the legislator explicitly states this, emphasizing the need to maintain continuity in the interpretation of these provisions by the Court of Justice of the European Union.[11]

It can be inferred from the text of the regulation in question that it does not *expressly* regulate, in the section devoted to special (alternative) jurisdiction, claims for unjust enrichment as a separate legal ground for derogating from general jurisdiction. Nevertheless, it does not follow that an action for unjust enrichment cannot automatically fall within the concept *of 'matters relating to a contract'* or *'matters relating to a tort, delict or quasi-delict'*. ; on the contrary, depending on the circumstances of the specific case, the nature of an action for unjust enrichment may be either contractual or tortious.[12]

In the precedent case *of Kalfelis*, the Court of Justice of the European Union ruled that if a court has jurisdiction under Article 5(3) of the Brussels Convention[13] for a claim arising from a tort, it cannot extend that jurisdiction to parts of the action that are not based on a tort.[14] It follows from the above that the special jurisdiction under Article 7(2) covers only those claims which in themselves satisfy the criteria of tort/quasi-tort and other claims (such as unjust enrichment) cannot be subject to it if they do not meet these criteria.

As Grušić notes, claims for unjust enrichment lie at the intersection of contractual and tortious liability, as they may arise either in connection with an existing contractual relationship or as a result of unlawful conduct outside the contractual framework. According to him, this hybrid nature of unjust enrichment thus represents a critical test of the boundary between Article 7(1) and Article 7(2) of the

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9 Point 16 Recital of Regulation No. 1215/2012 (Brussels Ia).

10 Gtflix Tv v DR. C-251/20. Opinion of the Advocate General. Point 11.

11 Point 32. Recital of Regulation No. 1215/2012 (Brussels Ia).

12 MIKA, Bára. Articles 7(1) and 7(2) of the Brussels I bis Regulation in Czech and CJEU Case Law. Access to Justice in Eastern Europe, 2023, vol. 6, no. 2, pp. 43–66. ISSN 2663-0575. DOI: 10.5817/CZ.MUNI.P280-0469-2023-2.

13 Now Article 7(2) of the Brussels Ia Regulation – author's note.

14 Court of Justice of the European Union. Judgment in *Kalfelis v. Bankhaus Schröder,* Münchmeyer, Hengst and Co., C-189/87, EU:C:1988:459.

Brussels Ia Regulation, within which the Court of Justice of the European Union has the opportunity to further develop the methodology for interpreting special jurisdiction.[15]

2. DISTINCTION BETWEEN CONTRACTUAL AND NON-CONTRACTUAL CLAIMS

2.1. Contractual claims

In the context of special jurisdiction, the distinction between contractual and non-contractual claims primarily serves to ensure that each existing dispute can be assigned to a court that has a substantive or geographical connection to it, in order to improve the predictability of determining the jurisdiction of courts in cross-border proceedings.[16] In view of the above, the distinction between contractual and non-contractual obligations is also of practical importance in cases where an entrepreneur - the plaintiff intends to bring an action before a court whose jurisdiction is to be based on Article 7(1) or Article 7(2) of Brussels Ia, seeking claims arising from unjust enrichment.

The concept *of a contract* and the related concept *of contractual claims* under Article 7(1) of the Brussels Ia Regulation cannot be interpreted in accordance with the national legal systems of individual Member States, but must be interpreted autonomously in accordance with European Union law. This approach stems from the desire to ensure uniform and predictable application of the rules on jurisdiction, regardless of differences in national concepts of contractual obligation. As Pranevičienė and Gaubienė emphasize, an autonomous interpretation of concepts is a necessary condition for maintaining the coherence of the system of special jurisdiction under the Brussels Ia Regulation, as this is the only way to avoid differences in interpretation between national courts, which would undermine the effectiveness of the objectives pursued by that regulation.[17]

The interpretation of the concept *of the place of performance of the contract* is only partially autonomous. It is not entirely independent of the national law applicable to the contractual relationship in question. The Brussels Ia Regulation contains a rebuttable presumption that defines what is considered to be the place of performance of the contract in certain situations. In other cases, this place is determined by the applicable law (*lex causae)*, i.e. the legal system governing the specific obligation.[18] This approach has also been confirmed by the Court of Justice of the European Union, which further states: *"It should be noted, however, that although the parties are free to agree on the place of performance of their contractual obligations, they cannot, for the sole purpose of choosing the competent court, designate a place of performance which has no real connection with the substance of the contractual relationship and where, under the terms of that relationship, the obligations arising from it could not be performed."*[19]

Unlike the Brussels Ia Regulation, the Brussels Convention determined the place of performance exclusively according to *the lex causae*, i.e., the legal order applicable to the contract.[20] The Court also noted that a single contract may not have only one place of performance. Each separate obligation under the contract may have its own place of performance – for example, the delivery of goods is assessed

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15 GRUŠIĆ, Uglješa. Unjust Enrichment and the Brussels I Regulation. International & Comparative Law Quarterly, 2019, vol. 68, no. 4, pp. 861–862. ISSN 0020-5893. Cambridge University Press.

16 Article 7(1) of the Brussels Regulation uses the term "in matters relating to a contract" and Article 7(2) uses the term "in matters relating to non-contractual obligations".

17 PRANEVIČIENĖ, Kristina – GAUBIENĖ, Neringa. Rules of Jurisdiction of the Brussels I bis Regulation – Application of General Jurisdiction Rule and Special Jurisdiction Rule under Close Connecting Factor (Article 7(1)) – Lithuanian Perspective. Teisė, 2024, vol. 132, p. 59. eISSN 2424-6050 ISSN 1392-1274. DOI: 10.15388/Teise.2024.132.4.

18 CSACH, Kristián – GREGOVÁ ŠIRICOVÁ, Ľubica – JÚDOVÁ, Elena. Introduction to the Study of Private International Law and Procedural Law. 2nd edition. Trnava: Trnava University in Trnava, 2018. ISBN 978-80-8168-783-9.

19 Court of Justice of the European Union. *Česká spořitelna, a. s. v. Gerald Feichter.* Judgment of 14 March 2013. Case C-419/11. ECLI:EU:C:2013:165.

20 Court of Justice of the European Union. *Indépendance de l'Administration des Douanes v. Société de Commerce et d'Industrie de Machines Agricoles et de Matériel de Construction SA (Tessili v. Dunlop).* Judgment of October 6, 1976. Case 12/76. ECLI:EU:C: 1976:133.

separately from the claim for damages for non-delivery.[21] If the subject matter of the dispute is the provision of services in several Member States, the place of performance of the contract is deemed to be the place where the service is principally performed, determined by the actual performance of the contract. If such a place cannot be objectively determined, it is deemed to be the place where the service provider has its registered office.[22]

2.2. Non-contractual claims

We agree with the opinion of legal scholars that the term *"claims arising from non-contractual liability"* in Article 7(2) of Brussels Ia is not entirely clear, and it appears to be a narrower concept than *"non-contractual claims"* within the meaning of the Rome II Regulation.[23] It is interesting to note that, based on Article 7(2) of the Regulation, according to the case law of the Court of Justice of the European Union, it is possible to claim not only damages but also *non-pecuniary damage, an injunction* or *the removal of an unlawful situation,* as well as *a negative declaratory action.*[24]

The Court of Justice has also had to repeatedly rule on the question of the relationship between the concepts of contractual and non-contractual obligations. The established case law on the definition of the relationship between contractual and non-contractual obligations can be simplified into two points:

1. *An obligation arising from a contract is an obligation voluntarily accepted by a contracting party (including membership in an association); the mere existence of a contract (under national law) is not necessary or may be disputed. The existence of consideration is not required for the creation of a contractual claim; consent to a binding offer is sufficient, provided that the offer is sufficiently clear and precise in terms of its subject matter and scope to give rise to a contractual relationship, in that the offer must clearly express the proposer's willingness to be bound by this obligation if it is accepted by the other party. A tacit agreement resulting from long-term practice is also sufficient. A contractual obligation within the meaning of the above-mentioned European rules is interpreted broadly and is based on the voluntary assumption of an obligation, which is not limited to a classic bilateral legal act.*
2. *An obligation to pay damages arising from a non-contractual relationship is any other obligation to pay damages falling under the Brussels Ia Regulation.*[25]

The judgment of the Court of Justice in *Bolagsupplysningen* was also an interesting contribution to the discussion on the interpretation of Article 7(2) of the Brussels Ia Regulation. The Court confirmed that legal persons, like natural persons, may bring an action in the courts of the Member State in which they have their center of interests, i.e., the place where they carry out the decisive part of their economic activity, in cases of infringement of their personality rights through online publications. This interpretation strengthens the protection of the injured party compared to the case law in *Shevill and eDate Advertising,* as it allows them to claim compensation for the entire damage suffered and, at the same time, to bring the case before the court in the state with which they have the closest connection. The Court also clarified that the center of interests of a profit-oriented legal entity is determined by the

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[21] Court of Justice of the European Union. De Bloos v. Bouyer. Judgment of October 6, 1976. Case 14/76. ECLI:EU:C: 1976:134.

[22] Court of Justice of the European Union. Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA. Judgment of 11 March 2010. Case C-19/09. ECLI:EU:C: 2010:137.

[23] CSACH, Kristián – GREGOVÁ ŠIRICOVÁ, Ľubica – JÚDOVÁ, Elena. Introduction to the Study of Private International Law and Procedural Law. 2nd edition. Trnava: Trnava University in Trnava, 2018. ISBN 978-80-8168-783-9.

[24] Court of Justice of the European Union. Judgment of 25 October 2012 in the case of Folien Fischer / Fofitec v. Ritrama, C-133/11, ECLI:EU:C:2012:664. Point 36 et seq.

[25] CSACH, Kristián – GREGOVÁ ŠIRICOVÁ, Ľubica – JÚDOVÁ, Elena. Introduction to the Study of Private International Law and Procedural Law. 2nd edition. Trnava: Trnava University in Trnava, 2018. ISBN 978-80-8168-783-9.

place where the majority of its business activities are carried out, which may not coincide with the company's registered office.[26]

In the *Wikingerhof* (C-59/19) judgment, the Court of Justice of the European Union adopted a so-called minimalist approach in interpreting the boundary between contractual and non-contractual obligations. This approach is based on the premise that a claim may be classified as contractual only where an examination of the contractual terms between the parties is indispensable in order to determine whether the defendant's conduct complied with or breached the contract. Conversely, if the lawfulness or unlawfulness of the conduct in question can be assessed without examining the content of the contract concluded between the parties, because the obligation allegedly breached exists independently of that contract, the claim is of a non-contractual nature and falls under Article 7 (2) of the Brussels Ia Regulation.[27] We concur with the views expressed in legal scholarship, which – relying on the above-mentioned judgment of the Court of Justice – reject the so-called maximalist approach, according to which any conduct in some way connected to an existing contractual relationship should automatically be classified as contractual. Such an interpretation would lead to an unwarranted expansion of contractual jurisdiction at the expense of tortious jurisdiction, thereby undermining the principle of proximity of jurisdiction and weakening the predictability of the determination of international jurisdiction.[28]

2.3. Can claims for unjust enrichment be subsumed under Article 7(2)?

In commercial law relationships, particularly in the case of performance without a proper legal basis or in the case of invalid or canceled contracts, the issue of unjust enrichment arises relatively often, with disputes arising from such situations being initiated mainly by entrepreneurs in the course of their cross-border activities. In the development of the case law of the Court of Justice of the European Union, the question of whether an action for the surrender of unjust enrichment constitutes *a "matter of non-contractual liability"* under Article 5(3)[29] of Regulation No 44/2001 (Brussels I) has been repeatedly addressed.

In the *Siemens* case, the Court of Justice of the European Union concluded that the action for the restitution of unjust enrichment did not fall within the scope of the Brussels I Regulation. This conclusion was based on the fact that the dispute over the restitution of unjust enrichment was between *the* Hungarian *Competition Authority (Gazdasági Versenyhivatal)* and the Austrian company *Siemens Aktiengesellschaft Österreich.* The dispute concerned a fine imposed on Siemens for violating competition rules, and therefore the subject matter of the proceedings was not civil or commercial in nature within the meaning of Article 1 of the Brussels I Regulation. For this reason, the Regulation did not apply to the dispute in question, as it did not concern civil or commercial matters. However, in his opinion, the Advocate General went beyond the question of whether the case was civil or administrative and provided a broader interpretation of the possibility of subsuming actions for the recovery of unjust enrichment under Article 5 of the Brussels I Regulation. The Advocate General concluded that an action for the restitution of unjust enrichment cannot be considered *a "matter relating to non-contractual liability"* under Article 5(3) of the Brussels I Regulation. This type of claim differs in nature from a

[26] VANLEENHOVE, Cedric. The European Court of Justice in Bolagsupplysningen: The Brussels I Recast Regulation's jurisdictional rules for online infringement of personality rights further clarified. Computer Law & Security Review, vol. 34, no. 3, 2018, pp. 640–646. ISSN 0267-3649. https://doi.org/10.1016/j.clsr.2017.11.010 (646)

[27] Court of Justice of the European Union. Judgment of 24 November 2020, Wikingerhof GmbH & Co. KG v. Booking.com BV, Case C-59/19, ECLI:EU:C:2020:950. Point 33.

[28] PROVAZNÍK, Patrik. The Boundary between the Qualification of Contractual and Tort Claims for the Purposes of the Alternative Jurisdictional Rules of the Brussels System. Advokátní deník [online]. Brno: Czech Bar Association, 28 March 2021. ISSN 2788-8383. Available at: https://advokatnidenik.cz/2021/03/28/hranice-mezi-kvalifikaci-zalob-ze-smlouvy-a-z-deliktu-pro-ucely-alternativnich-jurisdikcnich-pravidel-bruselskeho-systemu/ [accessed 14 October 2025].

[29] Currently Article 7(2) of the Brussels Ia Regulation – author's note.

classic action for damages. The key arguments of the Advocate General's opinion can be summarized as follows:

I. Absence of cumulative fulfillment of the double condition of tort: Special jurisdiction under Article 5(3) requires (a) the absence of a contract and (b) the objective of the action to attribute liability to the defendant for the damage caused. In this case, although there is no contractual relationship, the plaintiff is not claiming damages or seeking to establish the defendant's liability for the damage.
II. Restitutionary vs. tortious nature of the claim: An action for the surrender of unjust enrichment is aimed at depriving the defendant of the benefit obtained without legal grounds, not at compensating the plaintiff for damage. It is not a matter of compensation for damage caused by unlawful conduct, but of the return of an unjustly acquired advantage. Therefore, there is no typical "damaging event" and no demonstrable damage on the part of the plaintiff.
III. Absence of unlawful conduct or fault: In tort (non-contractual liability), certain unlawful conduct, fault, or other grounds for liability are generally presumed. However, in claims for unjust enrichment, the mere fact that the defendant has acquired a financial advantage without a legal reason that would legitimize such enrichment is sufficient. Therefore, the obligation to surrender the property does not require proof of unlawful conduct, fault, or any other tortious element on the part of the enriched party.
IV. The case law of the Court of Justice of the European Union confirms that restitution claims, such as actions for unjust enrichment, cannot automatically be subsumed under the special jurisdiction in tort matters under Article 7(2) (formerly Article 5(3)) of the Brussels Ia Regulation.[30]
V. Preservation of the system of jurisdiction: Not every non-contractual claim must fall under contractual or tortious jurisdiction. If the action is neither contractual nor tortious (which is precisely the case with unjust enrichment), the general rule under Article 2 of the[31] Regulation applies – the court of the defendant's domicile (residence). This interpretation respects the systematics and predictability of the Brussels I Regulation in the sense that special jurisdictions (such as Article 5(3)) are exceptions and must be interpreted narrowly. Extending the scope of Article 5(3) to claims for unjust enrichment would unjustifiably upset the balance of this system.[32]

The *Profit Investment* case concerned performance under a contract that had been declared invalid by the court. The Court of Justice of the European Union ruled that an action seeking a declaration of invalidity of a contract and the return of sums paid without legal basis under that contract falls within the scope of Article 5(1) of the Brussels I Regulation[33] . The Court of Justice of the European Union based its reasoning on the premise that a claim for the return of unjust enrichment can only arise if there was a contractual obligation between the parties that was freely accepted and subsequently not fulfilled. It was precisely this causal link between the claim asserted and the original contractual relationship that was the decisive criterion for classifying the action for restitution of unjust enrichment within the scope of contractual jurisdiction under Article 7(1) of the Brussels Ia Regulation.[34] At the same time, however,

[30] In the *Reichert* judgment, the Court of Justice held that an *actio Pauliana* action does not seek to obtain compensation for damage but aims to restore the creditor's financial position and is therefore not subject to tort jurisdiction. Similarly, in the *Kalfelis* case, the Court of Justice made a clear distinction between claims based on tortious liability and those based on other legal grounds, thereby emphasizing the need to distinguish between different types of claims within the framework of special jurisdiction.

[31] Currently, Article 4 of the Brussels Ia Regulation – author's note.

[32] Court of Justice of the EU. *Neroli-Csach* (Advocate General *Wahl),* C-102/15. Opinion of the Advocate General delivered on April 7, 2016. ECLI:EU:C:2016:225.

[33] Now Article 7(1) of the Brussels Ia Regulation.

[34] Court of Justice of the EU. *Profit Investment SIM SpA v Stefano Ossi* and *others.* Judgment of 20 April 2016. Case C-366/13. ECLI:EU:C: 2016:282.

the Court of Justice of the European Union expressly indicated that this interpretation *cannot be generalized* to all forms of unjust enrichment. The scope of the decision is limited only to situations where the claim arises from the disappearance of the legal basis for performance, i.e., from a contractual relationship that originally existed but subsequently became invalid or was terminated. Other cases of unjust enrichment that are not based on a contractual relationship between the parties do not fall under this interpretation and require separate assessment in terms of non-contractual jurisdiction.[35]

The legal regime governing claims for unjust enrichment was substantially clarified in the judgment of the Court of Justice of the European Union in the *Hrvatske Šume* case. The Court of Justice of the EU stated that an action for the restitution of unjust enrichment does not, as a rule, fall within the concept *of "matters relating to tort, delict or quasi-delict"* under Article 7(2) of the Brussels I bis Regulation, unless it is based on the defendant's unlawful conduct. Such a claim arises independently of the fault or unlawful conduct of the enriched person and does not involve a damaging event as a prerequisite for liability for damage. At the same time, the Court of Justice of the European Union stated that a claim for the surrender of unjust enrichment cannot be considered *a contractual matter* under Article 7(1) if there is no *sufficiently close connection* between the parties arising from a freely assumed obligation. As a result, such claims may be excluded from the scope of the special jurisdiction under Article 7, in which case the only option is to apply the general rule of jurisdiction based on the defendant's place of residence.[36] This conclusion reflects a systematic approach to the interpretation of the Brussels I bis Regulation, according to which special jurisdiction constitutes an exception to the principle *of actor sequitur forum rei* and can only be applied if there is a sufficiently close and objectively justified connection between the legal relationship in dispute and the chosen court.

2.4. Application practice of national courts

The practical consequences of the interpretation of Article 7 of the Brussels I bis Regulation were also reflected in the decision-making practice of national courts, which, when assessing international jurisdiction in disputes concerning the surrender of unjust enrichment, reflected the case law of the Court of Justice of the European Union. In its resolution of 19 September 2023[37] , the Supreme Court of the Czech Republic followed up on the judgment of the Court of Justice of the European Union in the case of Hrvatske Šume (C-242/20) and elaborated on its conclusions for national practice. It stated that in order to determine whether an action for the restitution of unjust enrichment falls within the scope of *tortious matters* under Article 7(2) of the Brussels I bis Regulation, it is decisive whether (i) it is not related to a contract and (ii) it seeks to determine the defendant's liability for unlawful conduct. If the obligation to surrender unjust enrichment does not arise from a voluntarily assumed obligation or from damage caused by unlawful conduct, it is neither a "contractual" nor a "tortious" matter. The Court thus followed the Court of Justice's approach, according to which three categories must be distinguished:

A. *Unjust enrichment related to a contract - jurisdiction under Article 7(1)*
B. *Unjust enrichment arising from a tort or quasi-tort - jurisdiction under Article 7(2),*
C. *Unjust enrichment not related to a contract or tort - the general rule of jurisdiction under Article 4(1) applies.*

With this decision, the Supreme Court of the Czech Republic confirmed that the Hrvatske Šume case law also applies to the interpretation of the Brussels I bis Regulation and represents a significant clarification of jurisdiction in actions for the recovery of unjust enrichment.

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35 Ibid.

36 Court of Justice of the EU. Judgment of 9 December 2021, *Hrvatske šume d.o.o. v BP Europa SE,* Case C-242/20, ECLI:EU:C:2021:963.

37 Supreme Court of the Czech Republic. Resolution of 19 September 2023, ref. no. 27 Cdo 2327/2022.

The case law of Slovak courts shows a consistent interpretation of Article 7(2) According to this interpretation, in cases of non-contractual liability, a person domiciled (or headquartered) in another Member State may also be sued before the court of the place where the event giving rise to such a claim occurred or could occur. An example of this is the judgment of the District Court Bratislava III of November 6, 2018[38] , which dealt with the question of the jurisdiction of a Slovak court in a case concerning the return of unjust enrichment paid on the basis of a decision that was subsequently revoked. The court of first instance concluded that the courts of the Slovak Republic had jurisdiction under Article 7(2) of the Brussels I bis Regulation in conjunction with Sections 3 and 12 of the Civil Procedure Code, since the decisive fact – the revocation of a final decision on the costs of the proceedings – occurred in the territory of the Slovak Republic. It considered the seat of the Supreme Court of the Slovak Republic, which issued the resolution in question, to be the place where the event giving rise to the plaintiff's claim occurred.

As an appeal was lodged against the judgment of the court of first instance, the case was subsequently dealt with by the Regional Court in Bratislava as the court of appeal. The court of appeal fully agreed with the legal opinion of the court of first instance. In the grounds for its decision[39] , it expressly stated that the Slovak courts had jurisdiction to hear and decide the case on the basis of Articles 7(1) and (2) and Article 63(1) and (2) of the Brussels I bis Regulation in conjunction with Article 16 of the Preamble to that Regulation, Section 4 of Act No. 371/2004 Coll. on the Seats and Districts of Courts of the Slovak Republic, and Sections 3 and 12 of the Code of Civil Procedure. The Court of Appeal emphasized that this is not a case of exclusive jurisdiction of a foreign court, and therefore the District Court Bratislava III is entitled to act and decide also in relation to the defendant based in the Republic of Cyprus, which is a Member State of the European Union. The Court of Appeal also noted that the appellant (defendant) had formulated his objection to lack of jurisdiction only in general terms, without specifying specific factual and legal reasons, and that the jurisdiction of the courts of the Slovak Republic also stems from the close connection between the place where the decisive fact arose (the annulment of the decision by the Supreme Court of the Slovak Republic) and the action for the surrender of unjust enrichment. In accordance with Article 16 of the preamble to the Brussels I bis Regulation, the principle of effective administration of justice was thus applied through an alternative criterion of jurisdiction based on the local connection of the dispute.[40]

We therefore consider that the national application practice in interpreting Article 7(2) 2 of the Brussels I bis Regulation consistently follows *the ratio legis* of that provision, which is to ensure real procedural access to the courts for the injured party and to strengthen the territorial connection between the court and the subject matter of the dispute within the single EU area of justice.

CONCLUSION

In conclusion, it can be stated that Article 7 of the Brussels Ia Regulation is a key but interpretatively problematic element of the EU system for determining jurisdiction in cases with a foreign element.[41] In commercial disputes, it is of fundamental importance in determining jurisdiction in cases of unjust enrichment, which occur to a large extent between entrepreneurs. The case law of the Court of Justice of the European Union confirms that these claims are hybrid in nature and may fall under Article 7(1), Article 7(2) or the general rule on jurisdiction under Article 4. In practice, this leads to inconsistency and reduced predictability, which is contrary to the objective of legal certainty in cross-border

38 District Court Bratislava III. Judgment of November 6, 2018, ref. no. 19C 62/2017-230.

39 Regional Court in Bratislava, resolution of December 30, 2022, ref. no. 15Co/85/2021.

40 Ibid.

41 Erb, Mirjam – Kaztaridou, Alexia. EU Commission's report released: signalling a shift towards Brussels I tris? Linklaters, June 11, 2025. (cited October 12, 2025). Available at: https://www.linklaters.com/en-us/knowledge/publications/alerts-newsletters-and-guides/2025/june/06/eu-commissions-report-released-signalling-a-shift-towards-brussels-i-tris#:~:text=Also%20more%20generally%2C%20the%20Commission,action s%20in%20several%20Member%20States

commercial relations. For business practice, it is therefore essential that the contractual documentation contains precise and unambiguous provisions on the choice of court, including an explicit determination of jurisdiction also for any restitution claims arising from the invalidity, annulment or ineffectiveness of a particular contract.

Following the European Commission's Report on the application of Regulation (EU) No 1215/2012[42], it can be concluded that the Commission has identified the need to revise and systematically simplify Article 7(1) and (2) in order to ensure its functional adaptability to the current conditions of the internal market. The Commission emphasizes that the development of digital business models and online transactions is disrupting the traditional links between the legal relationship and the place of its performance, which complicates the determination of the competent court and creates room for interpretative ambiguities.[43] According to the Commission, in practice, there is an increasing number of disputes relating to digital content and cross-border services, where difficulties arise in determining jurisdiction and the enforceability of decisions, leading to parallel proceedings before the courts of several Member States.

In light of these findings, it can be concluded that, *de lege ferenda*, it would be appropriate to supplement the Regulation with a specific provision on actions for unjust enrichment, thereby bringing it into line with the Rome II Regulation and taking into account the digital aspects of cross-border commercial relations.[44] This would strengthen the coherence between jurisdiction and applicable law and reduce the risk of conflicts in the interpretation of special jurisdiction. The proposed changes would contribute to greater predictability and legal certainty for parties (not only) to commercial disputes within the EU internal market.

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[43] Erb, Mirjam – Kaztaridou, Alexia. EU Commission's report released: signalling a shift towards Brussels I tris? Linklaters, 11 June 2025. (cited 12 October 2025). Available at: https://www.linklaters.com/en-us/knowledge/publications/alerts-newsletters-and-guides/2025/june/06/eu-commissions-report-released-signalling-a-shift-towards-brussels-i-tris#:~:text=Also%20more%20generally%2C%20the%20Commission,action s%20in%20several%20Member%20States

[44] As Mirjam Erb and Alexia Kaztaridou state in their analysis *EU Commission's report released: signalling a shift towards Brussels I tris?* the Commission's current considerations indicate a possible shift towards a comprehensive revision of the Brussels I bis Regulation and its transformation into a new generation of legal framework, working title *"Brussels I - tris"*. Although this is a systemically significant initiative aimed at deeper modernization of EU procedural cooperation, its assessment goes beyond the scope of our article, which focuses exclusively on the issue of special jurisdiction under Article 7.

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DLT regulation as a new tool to facilitate alternative financing[3]

Regulácia DLT ako nový nástroj na uľahčenie alternatívneho financovania

Abstract

The aim of this paper is to analyze the current pilot stage of the regulation of distributed ledger technologies (DLT) in the European Union. The paper summarizes the findings published in the ESMA Report on the functioning and review of the DLT Pilot Regime – pursuant to Article 14 of Regulation (EU) 2022/858 – which identified the benefits, limitations, and challenges of using DLT technology. The paper focuses on the potential use of DLT technologies as a means of facilitating alternative financing for small and medium-sized enterprises, by means of token emittance. The current DLT Pilot Regime allows for time-limited regulatory exemptions for DLT infrastructures in order to support innovative models of trading and settlement of tokenized financial instruments. Although the number of participants in the regime remains limited, the pilot framework encourages experimentation and lays the groundwork for expanding alternative financing opportunities, particularly for small and medium-sized enterprises. In addition to technical challenges, the ESMA Report also identifies significant legal issues. Greater experience with the use of DLT reveals the need for clearer rules governing smart contracts and transaction settlement systems. This paper offers the basic theoretical foundations that could be used as a basis when implementing DLT technologies.
Keywords: *distributed ledger technology, DLT, tokenization.*

Abstrakt

Cieľom príspevku je analyzovať súčasný pilotný stav regulácie technológií distribuovaných záznamov (DLT) v Európskej únii. Príspevok sumarizuje zistenia publikované v Správe ESMA o fungovaní a preskúmaní pilotného režimu DLT – podľa článku 14 nariadenia (EÚ) 2022/858, ktorá identifikovala prínosy, obmedzenia a výzvy pre využívanie DLT technológie. Príspevok sa zameriava na možnosti využitia DLT technológií ako spôsobu uľahčenia alternatívneho financovania malých a stredných podnikov, pre obchodovanie s tokenmi. Súčasný DLT pilotný režim umožňuje časovo obmedzené regulačné výnimky pre DLT infraštruktúry s cieľom podporiť inovatívne modely obchodovania a vyrovnávania tokenizovaných finančných nástrojov. Aj keď je teraz účastníkov režimu zatiaľ málo, pilotný režim podporuje experimentovanie a vytvára základ pre ďalšie rozširovanie možností alternatívneho financovania najmä pre malé a stredné podniky. Okrem technických úskalí správa ESMA identifikuje aj zásadné právne výzvy. Hlbšie skúsenosti z využívania DLT odhaľujú potrebu jasných pravidiel pre smart kontrakty a systém vyrovnávania transkacií. Tento príspevok ponúka základné teoretické východiská, z ktorých by pri implementácií DLT technológií bolo možné vychádzať.
Kľúčové slová: *distribuované záznamy, DLT, tokenizácia.*

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INTRODUCTION

The topic of legal regulation of cryptocurrencies is one of the most discussed questions from the perspective of alternative financing possibilities. Although not entirely precise, it can be said that if Bitcoin is the best-known example of a cryptocurrency, then the most prominent European regulation addressing cryptocurrencies is MiCA.[4] In the context of MiCA Regulation, which primarily focused on regulating crypto-assets and trading with them, it also addresses the underlying technology that enables their operation. This technology is legally known as Distributed Ledger Technology (hereinafter referred to as the "DLT"). DLT represents a revolutionary approach to data management and exchange, with the potential to transform various business sectors.

The MiCA Regulation (Markets in Crypto-Assets Regulation) emerged as a response to demand for legal certainty in the area of crypto-assets. Its goal is to create uniform rules for the issuance, processing, recording, and trading of digital assets across the EU, emphasizing investor protection, market stability, and transparency. However, practical implementation of MiCA faces several ambiguities — especially regarding definitional issues, investor protection in new crowdfunding models, and cross-border supervision.[5]

The DLT Pilot Regime, implemented under Regulation EU 2022/858, is a special "sandbox" environment where infrastructure based on DLT can be practically tested without needing to comply fully with traditional legal norms (such as MiFID II, CSDR). This experiment protects the market from risks posed by new technologies and allows learning from real-world data to validate innovations before wider market adoption.[6]

In the context of alternative financing for companies, DLT could offer innovations in transparency, efficiency, and the security of financial transactions[7]. DLT has the potential to bring significant changes to the way companies raise capital, in contrast to traditional methods such as bank loans. One of the examples is the tokenization and sale of crypto-assets (e.g., through Initial Coin Offerings – ICOs), which are conducted via DLT platforms, such as blockchain.[8] Tokenization may represent the next level of innovation in equity-based crowdfunding.[9]

In our previous paper, we concluded that it is possible to issue digital assets (tokens or coins) that fall outside the MiCA regulatory regime; however, they cannot be used as a means of raising capital other than through the sale of already existing goods and services (if they fit regulatory exemptions).[10] The DLT Regulation raises the following question of whether it is possible to legally transfer such tokens (that fits MiCA regulatory exemptions) on a centrally operated DLT network?

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4 For further regulation of crypto-assets in MiCA see HRABČÁK, L., ŠTRKOLEC, M. EU Regulation of the Crypto-Assets Market. In: *Białostockie Studia Prawnicze*, 2024, vol. 29, no. 1, p. 33.

5 MAUME, P., KESPER, F. Kesper. The EU DLT Pilot Regime for Digital Assets. *forthcoming in European Company Law (ECL)*. Available at SSRN: https://ssrn.com/abstract=4639017 or http://dx.doi.org/10.2139/ssrn.4639017. — overview of legal benefits and limits of the pilot, emphasizing temporality and the need for long-lasting legislative solutions.

6 ZACCARONI, G. Decentralized Finance and EU Law: The Regulation on a Pilot Regime for Market Infrastructures Based on Distributed Ledger Technology. In. *European papers*, 2022, vol. 7, no. 2. – This article describes the pilot regime as a sandbox, stressing the need for partnerships between traditional financial institutions and DLT firms, as well as the challenges of decentralized issuance of financial instruments.

7 PRIEM, R. A European distributed ledger technology pilot regime for market infrastructures: finding a balance between innovation, investor protection and financial stability. In: *Journal of Financial Regulation and Compliance*, 2022, vol. 30, issue 3, p. 385.

8 For more on ICO's, see ROSTÁŠ, D., SOKOL. M. Sale of Crypto-assets as an Alternative Form of Financing Business Companies. In: PRIMORAC, Ž., JEKNIĆ, R. (ed.) *Law, legality, justice and jurisprudence - modern aspects and new challenges: book of proceedings*, 2025, p. 407 et. seq.

9 ROTH, J., SCHÄR, F., SCHÖPFER, A. The Tokenization of Assets: Using Blockchains for Equity Crowdfunding. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3443382 (cit. 26.09.2025).

10 For complex analyses see ROSTÁŠ, D., SOKOL. M. Sale of Crypto-assets as an Alternative Form of Financing Business Companies. In: PRIMORAC, Ž., JEKNIĆ, R. (ed.) *Law, legality, justice and jurisprudence - modern aspects and new challenges: book of proceedings.* ISBN 30446813, 2025.

There for the aim of this paper is to examine the legal and regulatory framework governing the application of DLT within the European Union, with a particular emphasis on its role in facilitating alternative forms of financing. The paper seeks to analyse the interaction between Regulation (EU) 2022/858 on the DLT Pilot Regime and the MiCA Regulation as complementary pillars of the emerging European digital finance framework. By drawing on the ESMA Report on the Functioning and Review of the DLT Pilot Regime (hereinafter referred to as the "ESMA report"), the study aims to identify the key legal, technical, and institutional challenges that currently hinder broader market adoption of DLT-based infrastructures and to lueluate their implications for the future harmonization of EU financial services law. In addition, the paper considers the adaptation of the Slovak legal framework, particularly the Securities Act, to ensure its compatibility with forthcoming EU developments and to explore the potential of DLT as a tool for enhancing access to capital markets for small and medium-sized enterprises. After analyzing the DLT regulation, we will answer the question of whether tokens that meet the MiCA regulatory exemptions, can be legally transferred within a DLT network, without special regulatory permission.

1. DLT – WHAT IS IT AND WHY IS IT IMPORTANT?

The basic definitional framework of terms related to DLT is provided by the Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU (hereinafter referred to as the "DLTR"), which states:

- ***distributed ledger technology*** or ***DLT*** means a technology that enables the operation and use of distributed ledgers,[11]
- ***distributed ledger*** means an information repository that keeps records of transactions and that is shared across, and synchronised between, a set of DLT network nodes using a consensus mechanism,[12]
- ***consensus mechanism*** means the rules and procedures by which an agreement is reached, among DLT network nodes, that a transaction is validated,[13]
- ***DLT network node*** means a device or process that is part of a network and that holds a complete or partial replica of records of all transactions on a distributed ledger.[14]

As is evident from the four-component definition above, the very nature of defining DLT technology presents a legislative challenge. Based on the definitions above, it may be quite challenging to fully understand how DLT functions. DLT is a term that refers to technologies that involve the sharing of transaction records (for example, the sale of tokens[15]) among DLT network nodes.[16]

Simply put, it describes situations where transaction records are copied, synchronized, and updated across a distributed network of computers, without any central management or centralized database.

When a transaction takes place, all nodes receive the information and verify the transaction through a consensus mechanism. If the transaction is verified, it is recorded in the ledger, and copies of this

[11] Article 2 num. 1 of DLTR.
[12] Article 2 num. 2 of DLTR.
[13] Article 2 num. 3 of DLTR.
[14] Article 2 num. 4 of DLTR.
[15] For more on tokenization, see ROSTÁŠ, D., SOKOL. M. Sale of Crypto-assets as an Alternative Form of Financing Business Companies. In: PRIMORAC, Ž., JEKNIĆ, R. (ed.) *Law, legality, justice and jurisprudence - modern aspects and new challenges: book of proceedings*, 2025, p. 407 et. seq.
[16] ALT, R. GRÄSER, M. Distributed ledger technology. In: *Electronic Markets*, 2025, vol. 35, issue 1. p. 3.

record are simultaneously updated across all nodes. This structure increases transparency, security, and reliability.[17] One of the most common examples of DLT is blockchain.[18]

DLTR enables the operation of market infrastructures that use DLT for trading and settling transactions in crypto-assets considered financial instruments under MiFID II. It facilitates the creation of new market infrastructure types including: DLT multilateral trading facilities (DLT MTF), DLT settlement systems (DLT SS), and DLT trading and settlement systems (DLT TSS).

DLT technology represents a fundamental change in financial processes and infrastructure, as it enables secure, verifiable, immutable, and transparent data storage without centralized authority. The particular advantages of DLT for alternative financing should be identified[19] as:

- the possibility of decentralization and removal of traditional intermediaries,
- transparency for all network participants,
- enhanced security through encryption and consensus,
- more efficient trade settlement and legal rule automation via smart contracts,
- greater liquidity through tokenization and asset fractionation, allowing broader investor participation,
- tokenization as a DLT application enables issuance of digital shares (security tokens) that can represent ownership of traditional securities or other types of assets, including real estate, company shares, bonds, or other investment forms,
- shorter settlement times and automation of legal obligations by smart contracts,
- reduced transaction costs and removal of some intermediaries,
- direct investor involvement and SME financing support via simplified onboarding, direct listings, and lower administrative barriers.

2. REGULATORY FRAMEWORK FOR DLT

As stated before, the basic legal framework is established by the DLTR. The purpose of adopting this legislation is to create a temporary framework for testing the use of DLT, while ensuring investor protection, financial stability, and market integrity.[20] The need to adopt this regulation arises directly from the DLTR itself, which points out that the drafting of EU financial services legislation did not consider DLT and crypto-assets.[21] The DLTR therefore naturally concludes that existing EU legislation does not reflect the needs and specific features of these new financial instruments.

In this context, it is also necessary to point out that MiCA Regulation focuses on crypto-assets and their trading while the DLT framework targets service providers involved in transaction processing. The current DLT pilot regime is not a permanent regulation, but rather a temporary sandbox for officially licensed operators, allowing for the testing of the technology.

In contrast with MiCA, the DLTR is primarily focused on enhancing innovation for licensed entities, including: Multilateral trading facilities (MTFs), Central securities depositories (CSDs), Investment firms authorized under MiFID II, and other market operators who meet regulatory requirements and receive permission under the pilot regime. As noted by Maume and Kesper, if the regulatory challenges

[17] NEVIL, S. What Is Distributed Ledger Technology (DLT) and How Does It Work? Available at: https://www.investopedia.com/terms/d/distributed-ledger-technology-dlt.asp (cit. 26.09.2025).

[18] PUTERA, M., *Kryptoaktíva, ich zdaňovanie a exekúcia. 1. vydanie*., C. H. Beck, Bratislava 2024, p. 29.

[19] ROTH, J., SCHÄR, F., SCHÖPFER, A. The Tokenization of Assets: Using Blockchains for Equity Crowdfunding. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3443382 (cit. 26.09.2025). This article outlines practical tokenization possibilities and advantages for crowdfunding and capital markets.

[20] ESMA Report, p. 6.

[21] DLTR recital 4.

associated with DLT are addressed effectively, then DLT could become a key catalyst for trading and tokenization of assets within the EU.[22]

In other words, while MiCA primarily affects issuers and traders of crypto-assets, the DLT regime extends into the domains of payment services, settlement systems, and financial market operations.

In line with the above, the DLTR is based on the possibility of granting exemptions from the application of existing EU legislation (e.g., MiFID II and CSDR). At the same time, however, it sets out that any exemptions must be accompanied by appropriate measures that sufficiently safeguard investor protection and uphold market integrity.

For the purposes of this article, it is important to note that the DLTR established an obligation for ESMA to prepare a report assessing the functioning of the pilot regime under the DLTR.[23] On 25 June 2025, ESMA published a report entitled ESMA Report.

2.1. ESMA report and its findings – a summary

The ESMA Report represents an assessment of the functioning of the DLT pilot regime during the period from 23 March 2023 to 31 May 2025 and provides key recommendations for the future of the tokenization of financial instruments in the EU. The Report first notes that, although the uptake of the DLT regime remains low, the pilot regime has nonetheless encouraged experimentation with DLT-based models.[24]

Firstly, it is important to note that according to the ESMA report, only three DLT infrastructures have been authorised under the pilot regime, namely CSD Prague, 21X AG and 360X AG.[25] The ESMA report also makes it clear that trading activity remains relatively insignificant.[26] Nevertheless, we consider the pilot regime to be very important, and the conclusions of the ESMA report to be beneficial, especially in light of the potential future development of DLT.

The ESMA report also came to various and very important conclusions. One key issue highlighted was the lack of connection with central securities depositories and the TARGET2 payment system, which hinders the smooth transfer of assets.

Furthermore, Regulation (EU) No 909/2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 encourages the settlement of transactions in central bank money. The ESMA report states that neither of the DLT infrastructures has access to central bank money settlement, which means that cash settlement cannot be provided through accounts opened with a central bank of issue of the relevant currency.[27]

Another aspect described in the ESMA report is Article 3 of the DLTR, which sets limits for financial instruments that may be admitted to trading within the DLT framework. It is stated that, given the current situation (a low number of DLT infrastructures and their early stage of operation), these thresholds have mitigated potential risks; however, based on stakeholders' feedback, it is recommended to increase these thresholds.[28]

Naturally, a significant question remains regarding the future direction of DLT regulation and the focus areas for its development. In this context, the ESMA report sets out certain short-term and long-term recommendations. Below, we briefly describe some of those we consider the most significant.

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22 MAUME, P., KESPER, F. Kesper. The EU DLT Pilot Regime for Digital Assets. forthcoming in European Company Law (ECL). Available at SSRN: https://ssrn.com/abstract=4639017 or http://dx.doi.org/10.2139/ssrn.4639017 or MAUME, P., KESPER, F. Kesper. The EU DLT Pilot Regime for Digital Assets. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4639017 or http://dx.doi.org/10.2139/ssrn.4639017

23 DLTR recital 53 and Article 14.

24 ESMA report p. 4.

25 ESMA report p. 8.

26 ESMA report p. 11.

27 ESMA report p. 17 and 18.

28 ESMA report p. 29.

First and foremost, ESMA proposes that the EU creates a permanent legal framework for DLT and removes the maximum six-year license duration for DLT infrastructures. As previously mentioned, ESMA further proposes creating greater flexibility for the thresholds of the pilot regime.[29] Another recommendation again concerns Article 3 of the DLTR, with ESMA proposing to expand the eligible assets listed in this article, thereby broadening the range of financial instruments and increasing flexibility.[30]

Overall, ESMA has adopted a supportive stance toward the use of DLT and has proposed measures to create a more flexible legal framework.

2.2. Regulatory framework in Slovakia

The combination of DLT technology and tokenization of assets brings significant opportunities, particularly in the context of equity crowdfunding[31] for small and medium-sized enterprises (SMEs), due to the cost of token creation.[32] If the tokens are linked with some assets like business shares, this may pose a risk to non-professional investors or consumers. Protection of financial consumers is one of the goals of MiCA and, more broadly, a fundamental principle of financial market regulation. As Mizerski, Pinior and Rostáš stated the act of tokenization is an "act" of dematerialisation" of share and it is not prohibited, but when assessing the legality of that process, we need to assess the nature of tokens in the context of MiFID II.[33]

Contemporary Act No. 566/2001 Coll. on Securities and Investment Services and on the Amendment and Supplementation of Certain Acts (the Securities Act), in Sec. 5 par. 2 states as follows: "For financial instruments, financial instruments under paragraph 1 shall also be considered as such when these instruments are issued through the technology of a distributed transaction database." From the perspective of potential tokenization, this legislative attempt could be seen as a regulatory barrier that might hinder tokenization. However, in reality, such a provision is redundant because, in our opinion, tokenization was already addressed by the amendment to the MiFID Directive. Regarding the transposition of MIFID in Slovak legal order and constitutionally recognized principle of the "euroconform interpretation of law"[34] tokenized shares should be legally assessed as a financial instrument with or without the above-mentioned provision of the Slovak Securities Act. From this perspective, simplifying the process of tokenization and alternative financing is beyond the competence of Slovak legislators.

In general, tokens can operate on public or permissioned blockchains and may represent various securities such as SME shares, stocks, or bonds. Securities essentially represent a complex of certain rights and obligations. Assuming that it is possible to consider the separability of individual rights, it is possible to consider that potential place for tokenization remains open for non-property rights (e.g., voting rights, information rights). Due to the independent nature of regulation between MiCA and DLT, operating a trading platform for such tokens would require authorization for the operation of DLT technology according to the DLT pilot regime.

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29 ESMA report p. 30 and 31.

30 ESMA report p. 33.

31 To learn more about crowdfunding, see SOKOL, M. *Digitalizácia a umelá inteligencia v obchodných spoločnostiach*. 1. vydanie. Bratislava: C. H. Beck, 2024, p. 34 et. seq.

32 We asked ChatGPT whether there are any free internet tools for creating tokens and what the estimated costs are. The answer was that the cost of developing a token on low-cost networks typically does not exceed 50 to 500 EUR.

33 MIZERSKI, D., PINIOR, P. ROSTÁŠ, D. The Admissibility of Blockchain-Based Solutions for Share Trading and Maintaining Shareholders' Register in the Context of the Dematerialisation of Shares. In: *Białostockie Studia Prawnicze*, 2025, vol. 30, no. 3, p. 33.

34 BENKO, R. Právo EÚ v konaní o súlade právnych predpisov pred Ústavným súdom Slovenskej republiky – aktuálne problémy a výzvy. In: MIHALÍKOVÁ, V. (ed.): *15 rokov v Európskej únii: aktuálne otázky a súčasné výzvy. Zborník vedeckých prác z medzinárodnej vedeckej konferencie*. UPJŠ, Košice, 2019, p. 153 et. seq.

Besides that, there are several other issues worth mentioning. Slovak law has not yet recognized a blockchain-based public register of ownership as a fully valid shareholder or ownership registry. As a result, while tokenized shares can be effectively used for internal record-keeping and management within firms, they do not represent official proof of ownership in relation to the state, courts, or third parties. Although the EU Pilot Regime enables Slovak entities to participate under certain authorization conditions, broader adoption of such solutions remains limited by regulatory uncertainty and practical barriers. Another complicating factor is the lack of clarity regarding how existing legislation—particularly that governing payment services—overlaps with the emerging framework for digital assets and tokenized financial instruments.

CONCLUSIONS AND DISCUSSION

The ESMA Report confirms that Distributed Ledger Technology (DLT) represents a disruptive innovation with transformative potential for the financial sector, particularly in the field of alternative financing. The establishment of the DLT Pilot Regime under Regulation (EU) 2022/858 and the MiCA Regulation together form the foundation of an evolving European legal framework designed to balance technological innovation with investor protection and market stability.

From a broader perspective, the MiCA Regulation focuses on crypto-asset issuance and market transparency, while the DLT Pilot Regime provides a controlled experimental environment aimed at understanding the implications of DLT applications on capital markets. This combination of norms is an important step toward a harmonized pan-European approach to digital assets and distributed infrastructure. However, as the ESMA Report (2025) indicates, the current uptake of DLT-based infrastructure remains limited, and practical integration challenges persist.

The key insights arising from the ESMA Report can be summarized as follows:
The experiment successfully initiated cross-border cooperation and technological experimentation but encountered operational barriers, such as the lack of access to central bank money settlements and the absence of full integration with TARGET2 and traditional financial institution systems.

The regulatory thresholds and limitations on financial instruments imposed by Article 3 of the DLTR, although designed for risk mitigation, may now restrain further experimentation and exploring the potential of technology. ESMA's recommendations, especially concerning the permanent establishment of a DLT framework, removal of license duration limits, and broadening of eligible asset categories, demonstrate a strong institutional commitment to advancing tokenized financial markets in the EU.

From a legal and policy perspective, these findings carry several implications. The European Union now appears to be moving from experimentation toward the institutionalization of DLT as part of its digital finance architecture. However, to achieve functional integration, technical interoperability, legal certainty, and regulatory coordination among Member States remain necessary. The successful transition beyond the pilot phase will require consistent adaptation of core EU financial services legislation—particularly MiFID II, CSDR, and PSD2—to recognize and accommodate blockchain-based registries and automated settlement mechanisms. Our hypothesis that DLT Regulation allows to legally transfer such tokens (that fits MiCA regulatory exemptions) on a centrally operated DLT network, has been confirmed, however such company must meets DLT Rrgulation criteria.

Regarding Slovakia, the current regulatory landscape already recognizes tokenized instruments under the Securities Act. Regardless of barriers arising from the nature of their classification as financial instruments, practical use remains limited also due to the absence of official blockchain-based registries and a lack of administrative infrastructure for ownership recognition. Moreover, operation of DLT infrastructure for MiCA exempted tokens should be probably considered as operation of DLT network that needs approval of national regulator under DLT Regulation. That means, that DLT Regulation has not significantly facilitated the alternative financing.

For Slovakia and other member states, adapting national laws to ensure compatibility with future EU developments will be essential. Once the regulatory environment matures and technical barriers are

overcome, DLT could become a cornerstone of modern capital markets—enabling decentralized, transparent, and efficient systems of asset issuance and trading that are fully aligned with European financial law principles.

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Legal aspects of the protection of consumers' personal data in the provision of digital content and digital services

Právne aspekty ochrany osobných údajov spotrebiteľov pri poskytovaní digitálneho obsahu a digitálnych služieb

Abstract

The adoption of 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 and its subsequent transposition into the legal order of the Slovak Republic via Act No. 108/2024 Coll. introduced a new contractual type, namely the contract with digital performance. This contractual type allows the trader and the consumer to conclude a contractual relationship whose subject matter is digital service or digital content, including the possibility of combining a digital performance with another performance. The conclusion and performance of this contract are associated with the processing of consumers' personal data on several levels. Firstly, a contract with digital performance may provide for the provision of personal data to consumers as a condition for the proper performance of the contract. Secondly, the consumer's personal data may constitute a form of consideration by which the consumer fulfils his obligation to pay the trader remuneration for the subject matter of the contract. Furthermore, personal data may be provided or made available to third parties. The aim of this paper is therefore to analyse the impact of the introduction of this new contractual type on the processing of consumers' personal data and on their protection under applicable legislation.
Keywords: *contracts with digital performance, consumer, consumer protection, personal data, GDPR.*

Abstrakt

Prijatie smernice Európskeho parlamentu a Rady (EÚ) 2019/770 z 20. mája 2019 o určitých aspektoch zmlúv o poskytovaní digitálneho obsahu a digitálnych služieb a jej následná transpozícia do právneho poriadku Slovenskej republiky prostredníctvom zákona č. 108/2024 Z. z. zaviedli nový zmluvný typ, a to zmluvu s digitálnym plnením. Tento zmluvný typ umožňuje obchodníkovi a spotrebiteľovi uzatvoriť zmluvný vzťah, ktorého predmetom je digitálna služba alebo digitálny obsah, pričom umožňuje aj kombináciu digitálneho plnenia s iným plnením. Uzavretie a plnenie tejto zmluvy je spojené so spracúvaním osobných údajov spotrebiteľov na viacerých úrovniach. Po prvé, zmluva s digitálnym plnením môže ustanoviť poskytovanie osobných údajov spotrebiteľom ako podmienku riadneho plnenia zmluvy. Po druhé, osobné údaje spotrebiteľa môžu predstavovať formu protiplnenia, ktorým spotrebiteľ splní svoju povinnosť poskytnúť obchodníkovi odmenu za predmet zmluvy. Okrem toho môžu byť osobné údaje poskytované alebo sprístupňované tretím osobám. Cieľom tohto príspevku je preto analyzovať vplyv zavedenia tohto nového zmluvného typu na spracúvanie osobných údajov spotrebiteľov a na ich ochranu podľa platnej legislatívy.
Kľúčové slová: *zmluvy s digitálnym plnením, spotrebiteľ, ochrana spotrebiteľa, osobné údaje, GDPR.*

JEL Classification: D18, K12

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INTRODUCTION

Currently, the dynamic development of digital technologies and the digital environment also affects the regulation of relations between consumers and traders. Concluding consumer contracts with digital performance and providing digital performance in the form of digital content or digital services to consumers is becoming an integral part of everyday practice. For this reason, a new type of contract, namely a contract with digital performance, has been incorporated into the legal system of the Slovak Republic. Its inclusion is the result of the transposition of Directive (EU) 2019/770 of the European Parliament and of the Council of May 20, 2019, on certain aspects concerning contracts for the supply of digital content and digital services *(hereinafter referred to as the "Directive")*. The aim of the Directive was, among other things, to create a single digital market and increase legal certainty in the digital environment, while maintaining a high level of consumer protection in the digital market. Prior to the adoption of the Directive, the legal system allowed contracts with digital performance, specifically consumer contracts, to be concluded only as innominate contracts, i.e. contracts not explicitly named by law. In such cases, in practice, traders could take different approaches to compliance with statutory and contractual conditions, including consumer protection. In this context, the introduction of a special type of contract, regulated in Sections 852a to 852n of Act No. 40/1964 Coll. Civil Code *(hereinafter referred to as the "Civil Code")*, is therefore a significant milestone in strengthening the legal certainty of consumers. Although the inclusion of the aforementioned contract with digital performance helps to regulate a specific legal area of consumer relations comprehensively and systematically, it also brings new challenges. One aspect of the inclusion of the new contract with digital performance is the pitfalls associated with the issue of consumer personal data. Consumer personal data can play a significant role in the conclusion of a consumer contract with digital performance, as it serves as consideration, i.e., the consumer's payment for the subject matter of the contract. The consumer can thus fulfil their obligation to the trader under the conditions set out by law and the contract by providing their personal data instead of monetary compensation. In addition, personal data may also play an important role in the performance of the contract as a necessary tool without which the trader cannot fulfil its obligation to deliver the subject matter of the contract properly and on time, or it may be made available to third parties on the basis of contractual clauses.

The aim of this paper is therefore to analyse the impact of the introduction of this type of contract on the processing and protection of personal data in accordance with applicable legislation. It is based on the hypothesis that the introduction of a new specific type of contract, namely a contract with digital performance, as part of the harmonization of European Union law, has the potential to fundamentally affect the processing of consumers' personal data. The new legislation represents a specific method of obtaining and using consumer personal data, which in certain cases is directly linked to the performance of the contract.

The methodological basis of the paper is an analysis of the impact of the introduction of the new type of contract into the legal system through an analysis of relevant sources of law in the area of personal data processing and protection. A systematic interpretation will help to understand the position of contracts with digital performance in the Slovak consumer law system and, in particular, will enable an analysis of the consumer's right to the protection of their personal data. The conclusions of the paper are then formulated on the basis of a synthesis of knowledge gained from scientific research.

The issue of consumer law and consumer protection has long been the subject of extensive scientific research, as evidenced by a number of scientific and professional publications. While personal data protection issues are generally examined separately, the specific impact of the newly introduced contract with digital performance on this area remains virtually unexamined. Mesarčík focuses specifically on personal data protection issues and, together with Andraško, focuses his publishing activities on the challenges of digitization in various areas.

1. LEGAL FRAMEWORK FOR THE PROVISION OF DIGITAL CONTENT AND DIGITAL SERVICES

The provision of digital performance in consumer contracts is now an integral part of the consumer sphere. In addition to traditional consumer contracts with classic subject matter, consumers are increasingly turning to contracts whose subject matter is digital performance. This mainly involves the provision of digital content or digital services, which may take the form of applications, software, streaming services, cloud storage, or other digital products, including digital content that the trader supplies to the consumer on a tangible medium, such as DVDs, CDs, USB sticks, or memory cards. This dynamic development in the relationship between traders and consumers therefore calls for legal regulation, particularly with regard to the position of consumers as the weaker party in the consumer relationship. In this context, the European Union has been making efforts for several years to create a comprehensive legal framework that would harmonize consumer laws[2] across Member States and thus ensure uniform consumer protection in the digital environment.

1.1. Legal framework at European Union level

The Directive on contracts for the supply of digital content and digital services to consumers, mentioned at the beginning, is a key legislative instrument that reflects efforts to harmonize consumer contracts in the digital environment. At the same time, it introduces a new type of contract, namely a contract with digital performance. This type of contract was subsequently transposed into the legal system of the Slovak Republic by Act No. 108/2024 Coll. on consumer protection and on amendments to certain acts, which also amended the Civil Code. The aforementioned act also transposed another important directive into the legal system of the Slovak Republic. This is Directive (EU) 2019/771 of the European Parliament and of the Council of May 20, 2019, on certain aspects concerning contracts for the sale of goods *(hereinafter referred to as the "Directive on the sale of goods")*. The transposition of this directive introduces into the legal system the regulation of aspects of consumer sales contracts and regulates the obligations arising from the legislation for the seller and the consumer. The aim is to ensure a uniform approach and harmonization of consumer rights and trader obligations in accordance with European legislation. The Directive on the sale of goods thus applies to contracts for the sale of goods, including goods containing digital elements. It also applies to any digital content or digital service that is part of the goods sold or is linked to the goods in such a way that, without the digital performance, it prevents the goods from performing their functions. In case of doubt between the seller and the consumer regarding the digital performance supplied and its inclusion in the sales contract, the rules of this Directive on the sale of goods shall apply.[3] In contrast, if the absence of digital performance to be incorporated or linked to the goods does not prevent the goods from performing their basic functions, such a contract is considered to be separate from the contract for the sale of goods. This applies in particular where the seller acts as an intermediary in the latter's contract with the supplier or a third party, and the contract could fall within the scope of the Directive.[4] This rule also applies to the conclusion of a contract for the supply of digital content or a digital service that is not part of a contract for the sale of goods with digital elements.[5] A practical example is downloading an app from an app store to smart watches that function independently but allow consumers to connect to a third-party app. This app allows users to download additional features beyond those offered by the watch itself, creating a separate digital performance.

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[2] EUROPEAN COMMISSION. *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A New Deal for Consumers [online]*. 2018. Brussels: European Commission, COM/2018/183 final, 2018. Available at: https://eur-lex.europa.eu/legal-content/SK/TXT/?uri=CELEX%3A52018DC0183.

[3] Recital 15 of the Directive on the Sale of Goods.

[4] Ibid., Recital 16.

[5] Ibid., Recital 16.

From the point of view of the legal classification of contracts, the consequence of the consumer's withdrawal of the application is that the contract for the supply of digital content (the application itself) is considered separate and distinct and therefore not part of the contract for the sale of smart watches. The Directive on the sale of goods will apply to the purchase contract for smart watches, while the delivery of the application falls within the scope of the Directive. European legislation thus consistently distinguishes between forms of digital performance, liability, consumer protection mechanisms, and strictly separates the individual legal relationships that may arise between a trader and a consumer or between a seller and a consumer.

In addition to the above-mentioned directives, 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 *(hereinafter referred to as the "General Data Protection Regulation")* plays an important role in the provision of digital performance in relation to personal data. Its purpose is to provide specific protection for personal data and consumers. In addition to protecting the fundamental rights and freedoms of natural persons, Article 1 of this regulation also sets out the objective of establishing uniform rules for the processing of personal data and rules on the free movement of data. This creates space for the free movement of data throughout the European Union. In some of its provisions, the Directive refers not only to the application of the Directive on the sale of goods, but also to the application of the General Data Protection Regulation, leaving the legal regulation of the conditions for the processing of personal data exclusively to that Regulation. Any processing of personal data related to contracts with digital performance, regardless of whether their subject matter is the provision of digital content or digital services, provided that it is lawful processing, only meets the condition of lawfulness if it complies with the General Data Protection Regulation.[6] At the same time, the Directive does not apply to the issue of the validity of the consent given by consumers, and therefore all legal issues arising in connection with this part of the consumer contract are assessed in accordance with this regulation itself. In the event of a conflict between the provisions of the Directive and Union law on the protection of personal data, Union law shall prevail, [7] and the same applies to the primacy of the General Data Protection Regulation. The Directive also does not in any way affect or limit the consumer's rights under this regulation, in particular the right to erasure of personal data and the right to accuracy.

The current legal regulation of digital performance at the European Union level is the result of several significant acts that fundamentally influence the functioning of consumer relations. In order to properly understand the concept of consumer law, it is necessary to define the relevant legislation clearly and comprehensively and to emphasize the importance of the General Data Protection Regulation.

1.2. Legal framework at the level of the Slovak Republic

The basic legal regulation at the level of digital performance provision, including consumer protection, is *lex generalis* Civil Code. Section 852a of the Civil Code reads as follows: *"The trader supplies or undertakes to supply digital performance, and the consumer pays or undertakes to pay the price, including the digitally expressed value, or provides or undertakes to provide the trader with their personal data, even if the digital performance is developed according to the consumer's specifications,"* regulates specific aspects of the consumer relationship between the trader and the consumer, which is based on the conclusion of a consumer contract with digital performance.[8] According to Sections 852a to 852n of the Civil Code, the subject matter of a consumer contract is digital performance. Digital performance is defined in Section 119a of the Civil Code. Digital performance can be defined in two ways in a contract. On the one hand, the trader and the consumer may conclude a contract whose subject

6 Ibid., Recital 38.

7 Ibid., Recital 37.

8 In addition to the positive definition of a contract with digital performance, the Civil Code also defines it negatively. The provisions of Section 852a (2) to (3) of the Civil Code define cases in which a contractual relationship will not be considered a contract with digital performance.

matter is digital content, [9] or they may conclude a contract whose subject matter is a digital service. [10] Digital content is defined by the Civil Code as *"data created and delivered in digital form"* pursuant to Section 119a (2). According to Section 119a (3) of the Civil Code, a digital service is *"a service that enables the consumer to create, process, or store data in digital form or to access such data, or that enables the exchange or any interaction of data in digital form that is uploaded or created by users of the service."* The subject matter of a contract with digital performance need not be digital performance alone. The consumer and the trader may enter into a contract with combined performance, i.e., performance in another form in addition to digital performance. If the trader and consumer conclude such a form of combined contract, the subject matter of which is also performance other than digital, only the part of the contract relating to digital performance is governed by the relevant provisions.[11] The Civil Code thus makes a fundamental distinction between digital and non-digital types of performance and thus protects consumers from being unable to use digital performance without the relevant non-digital performance, if necessary for its proper use. If the consumer cannot properly use the digital performance, the Civil Code allows for an exception and permits the consumer to withdraw from the contract as a whole, including the part concerning non-digital performance.

Lex generalis is subsequently supplemented by *lex specialis* legislation in the area of consumer protection. The basic consumer protection regulation is Act No. 108/2024 Coll. on Consumer Protection. The legal framework for consumer protection is largely the result of the implementation of European Union law. As is Act No. 18/2018 Coll. on the protection of personal data *(hereinafter referred to as the "Personal Data Protection Act")*. The relationship between the Personal Data Protection Act and the General Data Protection Regulation is enshrined in recital 10 of the Regulation, which allows Member States to maintain or specify the application of the Regulation and its rules when processing personal data. The General Data Protection Regulation is thus directly applicable in all Member States of the European Union, including the Slovak Republic. The legislator has also defined Section 3 (2) of the Consumer Protection Act as follows: this Act *(with the exception of Section 2, Section 5, Parts Two and Three of the Act)* applies to the processing of personal data covered by a special regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The legislator drafted this provision to cover situations not covered by European Union law and, at the same time, drafted the Consumer Protection Act so that its content literally corresponds to the General Data Protection Regulation.[12] There are currently three basic models for applying the General Data Protection Regulation and the Personal Data Protection Act. The essence of the first model is that if the processing of personal data within the scope of the activities of a data controller falls under European Union law, the General Data Protection Regulation and Sections 78 of the Personal Data Protection Act apply, including provisions relating to the activities of the Office for Personal Data Protection of the Slovak Republic. [13] The second model is based on the same principle, except that if the activities of the data controller do not fall under European Union law, the Personal Data Protection Act applies.[14] The last, third model, where personal data is processed by the competent authorities for the purposes of criminal proceedings, applies the third part of the Personal Data Protection Act in accordance with Section 3(3) of that Act, entitled "*Special rules for the protection of personal data of natural persons when processed by the competent authorities"*.[15]

The Personal Data Protection Act also sets out certain specifics, namely in the aforementioned Section 78. In certain cases, the controller may, on the basis of the law, process data without the consent

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[9] Examples of digital content include the provision of software, applications, digital gaming content, digital files, and various online databases and information portals.

[10] Examples include the provision of digital storage, streaming services, digital tools.

[11] Section 852a (5) of the Civil Code.

[12] ANDRAŠKO, J., MESARČÍK, M. Právne aspekty otvorených údajov. Bratislava: C. H. Beck, 2019, p. 87 – 88.

[13] ÚRAD NA OCHRANU OSOBNÝCH ÚDAJOV. Kedy zákon a kedy nariadenie? In: MESARČÍK, M. Ochrana osobných údajov. Bratislava: C. H. Beck, 2020, p. 34.

[14] Ibid.

[15] Ibid.

of the data subject. These are situations where the controller processes them for academic, artistic, or literary purposes. According to Section 2 of the aforementioned Section, the controller may process personal data, also without consent, if this is necessary for the purposes of informing the public through mass media. However, the controller is obliged to meet the condition that processing must result from the subject matter of its activity. The Act allows (Section 78, Section 3) the possibility of providing personal data, such as name, surname, job title, personal number, place of work and other data about the employee, provided that this is necessary for the performance of his/her work or functional duties. However, only the employer may provide the data. In any case, the employer must ensure that the dignity, respect and safety of the data subject are respected. The provision does not directly require employees to give consent.

2. PROTECTION OF CONSUMER PERSONAL DATA IN THE DIGITAL ENVIRONMENT

Every natural person has the right to privacy.[16] The essence of privacy is to protect the sphere of a person's life that cannot be interfered with without their consent, and the right to privacy itself guarantees that person the ability to decide independently on matters that are considered to be their private affairs.[17] The right to privacy also includes the right to personal data protection. Within the European Union, the protection of fundamental rights and freedoms of natural persons, including the right to privacy in relation to the processing of personal data, is reflected in legal regulations.[18] The issue of personal data protection can therefore be considered part of the issue of protecting the privacy of natural persons. However, there is no consensus on the understanding and nature of the distinction between the right to privacy and personal data issues, and opinions tend to differ.[19] At the same time, data protection cannot be considered an absolute right, but must always be assessed in relation to the function in society. And it must be balanced with fundamental rights.[20]

Before defining the protection and methods of protection of consumer personal data, it is necessary to define the data itself. The General Data Protection Regulation defines personal data in Article 4 (1) as follows, personal data *"means any information relating to an identified or identifiable natural person"*. The Regulation further specifies identifiers that further specify a given natural person as follows: *"an identifiable natural person is a person who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, online identifier, or reference to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of that natural person."* This definition is supplemented by a reasonable probability test,[21] which essentially involves identifying a natural person by any means that the controller or any other person is likely to use, regardless of whether they are used for direct or indirect identification. [22]

The test includes the use of means to identify a natural person, considering all objective factors, such as the costs and time required for identification, with regard to the technology available at the time of processing and technological developments.

This is a relatively broad definition of data, consisting of four main characteristics:

- *"any information";*
- *"relating to…";*

16 Article 16 (1) of Act No. 460/1992 Coll. Constitution of the Slovak Republic.

17 Constitutional Court of the Slovak: PL. ÚS 10/2024.

18 Article 1(1) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

19 For more details, see: LYNSKEY, O. The Foundations of EU Data Protection Law. Oxford: Oxford University Press, 2015, p. 89 – 106.

20 KERBER, W. Digital markets, data, and privacy: competition law, consumer law and data protection. In Journal of Intellectual Property Law & Practice, Volume 11, 2016, Number 11, p. 8.

21 BERTHOTY, J. a kol. Všeobecné nariadenie o ochrane osobných údajov. Praha: C. H. Beck. 2018, p. 127 – 128.

22 Recital 26 of the General Data Protection Regulation.

- *"identified" or "identifiable";*
- *"natural person."*[23]

In order for data to be considered personal, the above characteristics must be met. Not all personal data of a natural person falls under the General Data Protection Regulation, but there are certain exceptions.[24] Personal data is thus characterized by a fundamental feature, namely a meaningful context that gives individual data meaning and turns it into information.[25] Three aspects are relevant for assessing whether the information relates to a person: the purpose aspect, the result aspect, and the impact aspect.[26] There is a terminological discrepancy between the terms *"personal data"* and *"personal information".* According to the above definition, information is only a subset of a certain type of personal data.[27] In general, this does not only concern information from the private and family life of the person concerned, but also any other aspects of the person's private life, such as employment relationships, criminal liability, administrative liability, and the like.[28] In general, however, not all information will be considered personal data, but rather all personal data will be considered information.

Information containing personal data may be in numerical, verbal, or graphic form, and the medium on which it is recorded is not decisive, with paper, electronic documents, binary code, and other media all being possible.[29] With the current development of digital technologies, it is necessary to perceive the concept of *"personal data"* in a broader context. An IP address stored by a service provider in connection with viewing a particular website can also be considered personal data.[30] According to the decision, a condition for a dynamic IP address and its understanding as personal data is that the service provider had legal means which enabled it to identify the data subject with additional data that the internet service provider has about that person, IP addresses than represent protected personal data because they allow users to be precisely identified. In the event that the means for which the data controller or *"another person"* is likely to use them, everything indicates that for certain data to qualify as "*personal data"* it is not necessary that all information allowing the identification of the data subject must be in the hands of a single person.[31] Personal data in e-commerce can also include payment information such as card numbers, bank details, or information about consumers' online orders, including other information about their interactions with the trader.

The General Data Protection Regulation also distinguishes between so-called sensitive data. This refers to personal data that is linked to a specific fact. According to Article 9 (1), sensitive data is data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation. It is therefore a subcategory of personal data. Any processing of such data by the data collector is explicitly prohibited. Certain exceptions to processing are included in Article 9 (2). An exception may be granted directly by the data subject in the form of consent to the processing of such data and other exceptions.

The digital environment, which is characterized by specific aspects of the relationship between the trader and the consumer, includes several models of business approaches to user data and their privacy. These are the models:

- *"Data as a payment model"* - a business model based on the collection and monetization of consumer data;

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23 BERTHOTY, J. a kol. Všeobecné nariadenie o ochrane osobných údajov. Praha: C. H. Beck. 2018, p. 123.
24 Article 2 (2) of the General Data Protection Regulation.
25 BERTHOTY, J. a kol. Všeobecné nariadenie o ochrane osobných údajov. Praha: C. H. Beck. 2018, p. 124.
26 Ibid., p. 126.
27 Ibid., p. 124 – 125.
28 Ibid., 125.
29 MESARČÍK, M. Ochrana osobných údajov. Bratislava: C. H. Beck, 2020, p. 42.
30 Court of Justice of the European Union: case no. C-582/14 *(Patrick Breyer v Bundesrepublik Deutschland).*
31 Ibid.

- *"Freemium Model"* - a business model based on consumers paying for access to free features;
- *"Pay for privacy"* - a business model based on paying for the protection of consumer data;
- *"Privacy as a luxury"* - a business model based on high fees for data protection, while these are competitively priced;
- and other models.[32]

Just like models, there are different ways to collect data from consumers, and we distinguish between three categories: volunteered, observed, and inferred data.[33] The essence of volunteered data is their disclosure based on the consumer's voluntary decision; in practice, these are often data that are fully disclosed in response to a request for data transfer under Article 20 of the General Data Protection Regulation.[34] These include data such as name, date of birth, email address, published image, etc. Observed data is collected by subjects through the use of a device, website or service, and the user may not be aware of its collection.[35] It is data obtained from purchases made, maps used, geographical location. Inferred data represents the boundary between observed data and voluntary data and is derived by refining and recombining these two categories. In practice, derived data is thus the basis of economic competition between data-intensive companies, while voluntary data and observed data are inputs to *"raw data"*.[36]

Businesses themselves can monitor consumer habits in the digital environment, not only on the part of the consumer of the product, but also through cookies and other mechanical data collection and tracking, even when the product processes information.[37] In the digital environment, it is therefore particularly important to set out the obligations of the trader towards the consumer, also with regard to the protection of his personal data.

2.1. The trader's obligations regarding the protection of consumers' personal data

As a data controller, a trader has several essential obligations under the law relating to the protection of the personal data of the data subject, i.e. the consumer. First and foremost, the data collector, i.e. the trader, must process data lawfully and transparently. Secondly, the trader must comply with the basic principles of processing. These principles are as follows:

- *principle of lawfulness, fairness, and transparency (Article 5(1)(a));*
- *principle of purpose limitation (Article 5(1)(b));*
- *principle of data minimization (Article 5(1)(c));*
- *principle of data accuracy (Article 5(1)(d));*
- *principle of storage limitation (Article 5(1)(e));*
- *principle of integrity and confidentiality (Article 5(1)(f));*
- *principle of accountability (Article 5(2)).*

The main purpose of these principles is to embed the idea and philosophy of compliance with them, while also serving as rules of interpretation in the event of problems interpreting the General Data Protection Regulation.

In connection with the principles, the controller's obligations subsequently serve, which have a legal basis in the aforementioned principles and must be complied with.

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[32] ELVY, A. S. Paying for Privacy and the Personal Data Economy. In Columbia Law Review, Volume 117, 2017, Number 6, p. 1384 – 1397.

[33] KRAEMER, J. Personal Data Portability in the Platform Economy: Economic Implications and Policy Recommendations. In Journal of Competition Law & Economics, Volume 17, 2021, Issue 2, p. 268.

[34] Ibid.

[35] Ibid., p. 270 – 271.

[36] Ibid.

[37] ELVY, A. S. Paying for Privacy and the Personal Data Economy. In Columbia Law Review, Volume 117, 2017, Number 6, p. 1386.

First and foremost, the trader must ensure that the required legal basis for processing personal data is in place. The legal basis for processing personal data (six) is as follows:

1. the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
2. processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
3. processing is necessary for compliance with a legal obligation to which the controller is subject;
4. processing is necessary in order to protect the vital interests of the data subject or of another natural person;
5. processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
6. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

The purpose of processing personal data must be clearly defined and explicitly stated in advance. This purpose must be determined at the latest at the time when the data is collected.[38] The data subject must be clearly aware of what processing of personal data they are consenting to, i.e. for what purpose and by whom their data will be processed. In practice, they must express their consent, e.g. by ticking a checkbox, because it is not acceptable to express consent passively, i.e. by not expressing disagreement, or to express it tacitly by accepting the terms and conditions, which include such consent.[39] The action of the data subject must be expressed in a specific manner in order to be considered in accordance with the provisions of the Regulation in question.

Under the General Data Protection Regulation, the trader, as the data controller, also has the following obligations:

- *inform the consumer about the processing of personal data (Articles 13 and 14);*
- *obtain the consumer's consent, if it is necessary;*
- *enable the consumer to exercise their rights (Articles 15 to 18, Articles 20 to 22).*

In addition to the above obligations, the trader also has an obligation to ensure an adequate level of data protection in accordance with Article 32 of the General Data Protection Regulation. In connection with the processing, they must keep records of their processing.

In cases where personal data protection cannot be applied under the General Data Protection Regulation, the relationship between the data controller and the data subject will be governed by the Personal Data Protection Act. However, given the aforementioned similarity between the two sources in the area of personal data, this article is based primarily on the directly applicable General Data Protection Regulation in order to ensure greater clarity of legal regulation in this area.

2.2. Consumer rights regarding personal data protection

Under the General Data Protection Regulation and the national Personal Data Protection Act, consumers have the following rights, which merchants must guarantee:

- *right of access to personal data and information (Article 15 GDPR, § 21 PDA);*
- *right to rectification of inaccurate personal data (Article 16 GDPR, § 22 PDA);*

[38] DATA PROTECTION WORKING PARTY. *Opinion 03/2013 on purpose limitation. [online]*. 2013. Brussels: European Commission. Available at: https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf, p. 17.

[39] NONNEMANN, F. Osobní údaje jako platidlo? In Právní rozhledy, 2020, no. 5, p. 174.

- *the right to erasure of personal data (“right to be forgotten”) (Article 17 GDPR, § 23 PDA);*
- *right to restriction of processing (Article 18 GDPR, § 24 PDA);*
- *right to data portability (Article 20 GDPR, § 26 PDA);*
- *right to object to the processing of personal data (Article 21 GDPR, § 27 PDA);*
- *right not to be subject to a decision based solely on automated processing, including profiling (Article 22 GDPR, § 28 PDA).*

This is a wide range of rights that ensure that, in the event of the application of the General Data Protection Regulation, the trader processes the consumer's data in accordance with the regulation and does not violate the obligations laid down therein. Similarly, the regulation guarantees rights that consumers can exercise in the event of a breach of the trader's obligations as data controller. This is primarily the right to rectify, erase, or restrict the processing of personal data of the consumer as the data subject.

3. SPECIFIC FEATURES OF PERSONAL DATA PROTECTION IN CONTRACTS WITH DIGITAL PERFORMANCE

Consumer personal data plays an important role in contracts with digital performance. There are several aspects in practice that relate to personal data in these contracts. For example:

- *consumer personal data is processed on the basis of the General Data Protection Regulation;*
- *personal data is necessary to ensure that the trader fulfils their obligations;*
- *personal data is necessary to ensure that the consumer fulfils their obligations;*
- *personal data is a tool for selling to third parties.*

In a contract with digital performance, special data relating to the consumer is handled in a specific manner. Firstly, the new type of contract under Section 852a of the Civil Code grants the consumer's personal data the status of an equivalent to monetary performance of the contract. The consumer thus provides the trader with their own personal data as consideration. However, personal data cannot be considered a commodity, especially given that its protection is a fundamental right of the consumer. [40] Personal data may be provided to the trader before the conclusion of the contract or later, if the trader obtains the consumer's consent to use it.

Digital content or digital services are often supplied even when the consumer does not pay a monetary price but provides personal data to the trader. Such business models are already used in various forms in a significant part of the market. While it is fully recognized that the protection of personal data is a fundamental right and that personal data cannot therefore be considered a commodity, this Directive should ensure that consumers are entitled to contractual remedies in the context of such business models. The transposed legislation should therefore apply to any contract with digital performance that a consumer concludes in cases where the consumer opens a social media account and provides their name and email address; or it should also apply to cases where the consumer gives consent to the trader to further use material containing the consumer's personal data for marketing purposes.[41] The performance of activities falling within the scope of the Directive could also include the processing of personal data and, in part, fall within the scope of the General Data Protection Regulation.[42]

If personal data does not serve as consideration in a contract, i.e. the consumer does not provide it to the trader in exchange for a price, this Directive will not apply to situations where the trader collects personal data solely for the purpose of delivering digital content or merely complying with legal

[40] Recital 24 of 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.

[41] Ibid.

[42] For more information on the relationship between the General Data Protection Regulation and the above-mentioned directive, see the chapter of the contribution: *1.1.Legal framework at European Union level*, p. 2 – 4.

requirements. [43] This includes, for example, situations where consumer registration is required under specific regulations for security or identification purposes. The provisions of the Directive shall therefore not apply to the collection of metadata by traders, except where the conditions for the conclusion of a contract between the trader and the consumer under national law are met. [44] Nor should it apply to cases where the consumer, without concluding a contract with the trader, is exposed to advertising messages solely for the purpose of gaining access to digital content or a digital service. [45] It could be permissible for a service provider to agree in a contract with a user that it will provide the user with a specific service and, in return, the user will provide the service provider with their personal data, such as sociodemographic data, contact details, and identification data, and the provider obtains the data for the purpose of improving the services provided, this procedure could be lawful even if the service provider is not interested in other consideration and it is up to the user whether they pay or will provide the "price" for the service.[46] If, in practical terms, digital performance is provided and personal data is used by consumers for the purpose of improving digital performance, whether by removing errors or technical deficiencies, it is precisely the legal regulation in the area of contracts with digital performance that can clarify the uncertain boundaries of the law, as well as the status of certain providers of services or goods.[47] If the above relationship were conditional on the conclusion of a contract under which the consumer provides their data and information about their activities on the internet and information about their activities on the internet so that the controller can develop or fully develop their application, this would constitute clearly disproportionate and illegitimate processing.[48] The Directive clearly sets out its scope of application in recitals 24 to 25, recital 37, recital 69, and in Article 3.

In summary, the Directive always applies to cases where a trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content or digital service in accordance with this Directive or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose." The only exception is when the trader is fulfilling their obligation to deliver digital content, and the consumer's personal data is only a necessary means of fulfilling that obligation, without which the trader would not be able to fulfil their obligation. For example, a consumer has concluded a contract with a trader for digital performance, the subject of which is the delivery of digital content, namely e-books. The consumer thus provides the trader with personal data in the form of an email address, where the trader subsequently makes the digital content available to the consumer at that address. In this case, the trader may only use the consumer's personal data for the purpose of delivering the performance and is obliged to process, store, and handle it in accordance with the General Data Protection Regulation. When a consumer provides personal data to a trader, the trader should comply with its obligations under the Regulation, even if the consumer pays the price and provides personal data. [49] The trader is also obliged to comply with the Regulation in the event of termination of the contract with the consumer.[50]

The major problems with the transposed directive lie in the issues that it does not regulate but (perhaps intentionally) leaves to the legal systems of the Member States, either explicitly or because they do not fall within the scope of the directive. Such issues include, in particular, the question of liability for damage, the right of Member States to limit liability, limitation periods and, where

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43 Recital 25 of the 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.

44 Ibid., Recital 25.

45 Ibid., Recital 25.

46 NONNEMANN, F. Osobní údaje jako platidlo? In Právní rozhledy, 2020, no. 5, p. 174.

47 Ibid.

48 Ibid.

49 Recital 69 of the 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.

50 Ibid., Article 16 (2).

applicable, the right of consumers to terminate a long-term contract for digital performance.[51] In the case of personal data protection, however, it can be said that there is currently a sufficient level of protection for the data subject, i.e. the consumer, as confirmed by the wide range of rights and obligations laid down in the General Data Protection Regulation or, where applicable, in national consumer protection legislation. This is also due to the similarity in content between the two sources in this area. It does not answer questions that are not covered by the aforementioned sources, which may raise legal issues in the future.

CONCLUSION

At the level of national law, the Personal Data Protection Act is supplemented by legal regulations in the form of Regulation (EU) 2016/679 of the European Parliament and of the Council (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, as well as Act No. 18/2018 Coll. on the protection of personal data. Together, they create a stable basis for the protection of personal data and consumers as data subjects. In Slovak law, a contract with digital performance represents a new concept of consumer relations between a trader and a consumer, which will be subject to personal data protection issues under the above-mentioned sources in this area. It is important to note that a contract with digital performance introduces a new concept of consumer consideration in the form of personal data instead of financial consideration. Moreover, the provision of personal data to cannot currently be considered a commodity by consumers. In addition, personal data may be processed lawfully or serve as a necessary tool for the trader to fulfil their obligation to deliver digital performance or they may be processed on the basis of legal requirements. This article is based on the hypothesis that the introduction of a new specific type of contract, namely a contract with digital performance, as part of the harmonization of European Union law, has the potential to fundamentally affect the processing of consumers' personal data. The new legislation represents a specific method of obtaining and using consumer personal data, which in certain cases is directly linked to a contract with digital performance. This hypothesis is confirmed, but the establishment of a new method of handling personal data will not affect consumers. The reason for this is the existence of sufficient legal regulations at the level of personal data protection and a clear definition of the situations to which Regulation (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, applies. The provisions of both regulations clearly and comprehensively define their application. Traders should comply with the obligations under the General Data Protection Regulation, even if consumers pay with personal data. Finally, regarding the term *"personal data"*, it is important to note the expansion of the term's meaning due to the digitization of consumer relations. Currently, the IP address of the consumer or data subject may also be considered personal data for the purposes of processing. Even today, the formation of personal data in digital environments can clearly be observed.

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[51] For more details, see: BEALE, H. *Digital Content Directive And Rules For Contracts On Continuous Supply. [online]*. 2021. In: JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law. Volume 12, Issue 2. Available at: https://www.jipitec.eu/jipitec/issue/view/jipitec-12-2-2021/50, p. 109.

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Directive (EU) 2024/825 as a tool to eliminate greenwashing?[3]

Smernica (EÚ) 2024/825 ako nástroj na elimináciu greenwashingu?

Abstract

The article deals with the issue of misleading environmental advertising. This marketing, which uses claims such as 'climate neutral' or 'environmentally neutral', can in some cases be misleading and lead to the phenomenon of greenwashing. Greenwashing involves false or misleading claims about environmental practices, which can mislead consumers, providing unfair competitive advantages. The authors refer to the decision-making practice of the German courts in this area, including a landmark decision of the Federal Court of Justice. The article also includes an analysis of Directive (EU) 2024/825 on environmental claims, which has extended consumer rights in this area.
Keywords: *environmental advertising, greenwashing, consumer protection, Directive (EU) 2024/825.*

Abstrakt

Článok sa zaoberá problematikou klamlivej environmentálnej reklamy. Tento typ marketingu, ktorý využíva tvrdenia ako „klimaticky neutrálny" či „environmentálne neutrálny", môže byť v niektorých prípadoch zavádzajúci a viesť k fenoménu greenwashingu. Greenwashing zahŕňa nepravdivé alebo mätúce tvrdenia o environmentálnych postupoch, ktoré môžu uviesť spotrebiteľov do omylu a poskytnúť neoprávnené konkurenčné výhody. Autori poukazujú na rozhodovaciu prax nemeckých súdov v tejto oblasti, vrátane významného rozhodnutia Spolkového súdneho dvora. Článok zároveň obsahuje analýzu smernice (EÚ) 2024/825 o environmentálnych tvrdeniach, ktorá v tejto oblasti rozšírila práva spotrebiteľov.
Kľúčové slová: *environmentálna reklama, greenwashing, ochrana spotrebiteľa, smernica (EÚ) 2024/825.*

JEL Classification: K200

INTRODUCTION

Ecological advertising is particularly effective because it appeals to ethical values and the desire of individuals to contribute to sustainable development. Practical examples demonstrate that many advertisements employ incomplete or misleading information. Exploiting consumers' emotional vulnerabilities in decision-making is particularly reprehensible, as it not only affects the individuals concerned but also undermines one of the few mechanisms through which market forces can promote environmental standards.[4] Accordingly, it is unsurprising that such misleading advertising frequently results in litigation, compelling market participants to reconsider their marketing strategies and enhance the transparency of their environmental claims. On 28 February 2024, Directive (EU) 2024/825 of the European Parliament and of the Council was adopted, amending Directives 2005/29/EC and

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3 This paper was written within the framework of VEGA project no. 2/0049/2025 – *Effectiveness of Legal Remedies for Protection Against Unfair Competition and Procedural-Legal Aspects of Their Application*.

4 MÖLLER-KLAPPERICH, J. Reduktion, Kompensation, Information – Werbung und die Rolle der Konsumenten im Klimaschutz*. In Neue Justiz, 2024, č.10, s. 441.*

2011/83/EU. The Directive aims to strengthen consumer protection in the context of the green transition by enhancing safeguards against unfair commercial practices and improving access to reliable information. Among other measures, the Directive emphasizes precise and verifiable environmental claims, increases traders' accountability, and introduces mechanisms that allow consumers to more effectively assess and evaluate the environmental credibility of products and services.

1. GREENWASHING: WHEN A LIE IS „GREEN"

Green marketing frequently employs terms such as „climate neutral" or „environmentally neutral" in ways that are neither verifiable nor clearly explained.[5] Some market participants seek to cultivate a green image through incomplete or misleading claims, even though their practices are no more sustainable than those of their competitors. As the market trend demonstrates, „if consumers desire to be green, traders are motivated to appear green."[6] This negative aspect of otherwise legitimate advertising emphasizing environmental benefits is commonly referred to as *greenwashing*.[7]

Most often, greenwashing is understood as activities designed to mislead consumers, hence its definition as „the act of misleading consumers regarding the environmental practices of an organization (firm-level) or the environmental benefits of a product or service (product/service-level)."[8] Such practices may involve vague formulations, misleading ecological certifications, half-truths, or even outright false statements.[9]

The primary consequences of greenwashing include:

- **Consumer deception.** It generates informational opacity and confusion, impairing consumers' ability to make informed purchasing decisions. Consumers are thereby transformed from market referees into deceived parties.
- **Unfair competitive advantage.** Market participants who strive for genuine sustainability and often incur higher costs may be disadvantaged if competitors falsely promote their products as environmentally friendly.

This paper contributes to the discussion on legal remedies against greenwashing and underscores the importance of clear and effective regulatory measures that protect both consumers and fair competition.

2. GERMAN JURISPRUDENCE IN THE FIGHT AGAINST GREENWASHING

This analysis focuses on selected German court decisions illustrating how German courts address greenwashing from the perspective of unfair competition and consumer protection. German case law was selected deliberately: German law against unfair competition (UWG) has long influenced Slovak legislation,[10] and German jurisprudence continues to exert significant authority within the broader Central European context. The high environmental awareness of German consumers, combined with

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5 ERNST, S. Irreführende Werbung mit „Klimaneutralität" In *Monatsschrift für Deutsches Recht,* č. 21, 2022, s. 1320-1324.

6 ZINKHAN, G., CARLSON, L. Green Advertising and the Reluctant Consumer. In: *Journal of Advertising*, 1995, 24(2), 1–6. Elektronicky dostupné [13.09.2025]: https://doi.org/10.1080/00913367.1995.10673471.

7 The term originated as a combination of the words *"green"* (a color symbolizing ecology) and *"whitewashing"* (attempting to cover up or mitigate a negative image)

8 DE FREITAS NETTO, S. V., SOBRAL, M. F. F., RIBEIRO, A. R. B., & SOARES, G. R. D. L. (2020). Concepts and forms of greenwashing: A systematic review. *Environmental Sciences Europe*, 32(1), 1–12. https://doi.org/10.1186/s12302-020-0300-3.

9 The "Six Sins of Greenwashing". A Study of Environmental Claims in North American Consumer Markets. Elektronicky dostupné [13.09.2025]: https://sustainability.usask.ca/documents/Six_Sins_of_Greenwashing_nov2007.pdf

10 The First Czechoslovak Act No. 111/1927 Coll., on Protection Against Unfair Competition, was inspired by the contemporary German Act Against Unfair Competition No. 499/1909. In KARMÁN, J. *Zákon proti nekalej súťaži.* Bratislava : „Academia", 1928, s. 9 – 10.

active consumer and trade associations that frequently initiate proceedings in greenwashing cases, contributes substantially to the enforcement of relevant legal standards.

German courts have consistently scrutinized marketing claims for accuracy, transparency, and potential to mislead consumers.[11] In Slovak jurisprudence, no final court decision addressing greenwashing has yet been registered, although initial legal commentary on the issue has begun to appear.[12]

2.1. Federal Court of Justice Decision in the „Umweltengel" Case

The Federal Court of Justice (BGH) decision of 20 October 1988 (*Umweltengel*) is widely regarded as a landmark ruling in the regulation of environmental advertising. The case concerned whether the use of products labeled *umweltfreundlich* („environmentally friendly") and bearing the *Umweltengel* symbol,[13] without specifying the criteria for conferring the label, constituted misleading conduct. The BGH confirmed that environmental claims—analogous to health-related claims—are subject to particularly strict legal scrutiny. It emphasized that terms such as „environmentally friendly" lack a uniform, precise meaning for the average consumer. Given this ambiguity, advertisers are obliged to provide a clear and visible explanation of what the claimed environmental attributes entail. The Court also noted that the *Umweltengel* label may appear to be official or state-endorsed, thereby heightening consumer expectations regarding accuracy and truthfulness.

The decision established the foundations of the German *Strengeprinzip*,[14] a principle of strict interpretation in environmental marketing, which continues to inform the evaluation of green claims.[15] Advertising featuring environmental labels must be unambiguous, factually accurate, and immediately comprehensible.

Although the term *greenwashing* did not exist at the time and was not used in the 1988 ruling, the legal principles articulated in *Umweltengel* constitute a foundational precedent for the contemporary approach of German courts in assessing environmental claims in commercial communications.

2.2. Climate-Neutral Candles

In this case, the defendant marketed all of its candles as climate neutral, although CO_2 compensation was achieved solely through the purchase of CO_2 certificates. The plaintiff, a competitor in candle production and distribution, contended that describing the candles as climate neutral was misleading, because candles made from paraffin emit CO_2 when burned. The advertisement did not adequately clarify that the neutrality was achieved exclusively through certificate purchases.

The Düsseldorf Regional Court determined that the claim „climate-neutral candles" constituted false information regarding the essential characteristics of the goods, as such candles do not exist, and stated:[16]

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11 HAJN, P. *Jak jednat s konkurencí*. Praha : Linde, 1995, s. 219-222.

12 KOPČOVÁ R. *Environmentálne klamlivé vyhlásenia v kontexte práva proti nekalej súťaži*. In. HUSÁR, J., HUČKOVÁ, R. (eds.): Právo, obchod, ekonomika. Košice: Univerzita P. J. Šafárika v Košiciach, 2024, s. 231-248. ZLOCHA, Ľ., VOZÁR, J. *Novodobý fenomén greenwashingu a jeho protiprávne aspekty (úvod do problematiky)*. In. HUSÁR, J., HUČKOVÁ, R. (eds.): Právo, obchod, ekonomika. Košice: Univerzita P. J. Šafárika v Košiciach, 2024, s. 456-470

13 The use of the symbol "Umweltengel" cannot be considered incidental. It evokes the name "Blauer Engel," a German environmental label awarded by the German Federal Ministry for the Environment to products and services that are more environmentally friendly compared to conventional alternatives.

14 PEIFER, K. Zulässigkeit der Werbung mit Umweltschutzbegriffen – klimaneutral. In GRUR *Gewerblicher Rechtsschutz und Urheberrecht (GRUR)*, 2024, č. 14, s. 1128.

15 The *Strengeprinzip* (literally "principle of strictness") refers to the legal standard applied in German case law when assessing advertising related to sensitive areas—particularly health and environmental claims. It entails heightened requirements regarding the truthfulness, completeness, clarity, and verifiability of statements in advertising content.

16 Decision of the Regional Court of Düsseldorf dated 19 July 2013, case no. 38 O123/12.

1. *„The advertising statement 'The candles produced are climate neutral' must be regarded as an unfair commercial practice, as it contains false information regarding the essential characteristics of the product.*
2. *Advertising claims concerning environmental aspects possess strong emotional appeal and are subject to strict requirements, due to the generally low level of factual knowledge among the public regarding scientific interconnections and interactions, given the complexity of environmental issues. Such requirements can only be fulfilled if the product's attributes and the company's philosophy are clearly separated."*[17]

2.3. Climate-Neutral Waste Bags

The Federal Office against Unfair Competition also filed another lawsuit against a competitor who marketed its products as „climate-neutral" without providing sufficient information on how this neutrality was achieved.[18] The plaintiffs argued that the advertisement was misleading because it did not clearly disclose the methods used to achieve climate neutrality, potentially creating a false impression among consumers that the competitor as a whole was climate-neutral.

The court held the claim to be justified under § 8 UWG (injunction and cessation) and § 5a(2) UWG (misrepresentation by omission). For the average consumer, the advertisement was misleading, as it suggested that the company's entire product range was climate-neutral, even though some products remained environmentally harmful. Consumers might not have understood that the term „climate neutrality" applied only to specific products, which created a deceptive impression, the court noted. The court further observed that climate neutrality can be achieved through various means, making it essential for consumers to have easy access to information on how neutrality is attained to make an informed purchasing decision. In this case, the advertisement again claimed that the products were climate-neutral but did not provide sufficient information about how this neutrality was achieved, potentially misleading consumers. The court assessed the advertisement from the perspective of the average consumer and concluded that it was misleading because it could create the false impression that the company or all of its products were climate-neutral. Consumers may not have been aware that the designation applied only to selected products or that climate neutrality was achieved solely through offsetting mechanisms.

2.4. Advertising Using the „Climate-Neutral" Slogan Need Not Be Misleading

Thus far, we have examined German court decisions that rejected the use of the slogan „climate-neutral" when employed in a manner likely to mislead consumers. However, the Higher Regional Court in Düsseldorf clarified the conditions under which such labeling is lawful.

Labeling products as „climate-neutral" is not misleading per se, stated the Higher Regional Court in Düsseldorf in two decisions dated 6 July 2023.[19] Competitors, however, must comply with relevant information obligations. In injunction proceedings concerning the labeling of products as „climate-neutral," the defendants were a manufacturer of fruit gummies and a manufacturer of jams.

The court explained how the average consumer understands the term. According to the court, consumers interpret „climate-neutral" as a balanced CO_2 footprint of a specific product, recognizing that neutrality can be achieved either by emission reductions or through offsetting measures (e.g., trading carbon credits). The court noted that consumers understand that goods and services where emissions cannot be fully eliminated, such as air travel, may be labeled climate-neutral through offsetting payments. The court did not consider the term „climate-neutral" misleading when transparent and

[17] Electronically available [30 September 2025]: https://research.wolterskluwer-online.de/document/9d953a68-8f40-3cf7-af5f-c4efb7ab5b2a

[18] Decision of the Regional Court of Kiel dated 2 July 2021, case no. 14 HKO 99/20.

[19] Higher Regional Court Düsseldorf, judgments dated 6 July 2023 – I-20 U 72/22 and I-20 U 152/22.

verifiable information was provided regarding how the product's carbon neutrality was achieved. This means:

- The producer must clearly indicate whether neutrality is achieved through emission reductions or solely through offsets.
- Specific offset measures must be disclosed, e.g., whether carbon credits were purchased and to which projects the funds were allocated.
- Information must be easily accessible and understandable for consumers.

The court acknowledged practical limits on providing detailed information on product packaging or advertising campaigns and accepted the use of modern technological tools, such as QR codes, directing consumers to detailed information about the product's carbon footprint and methodologies.

The significance of this decision lies in its recognition of the admissibility of appeals on matters of fundamental legal importance, noting that questions regarding when advertising with the term „climate-neutral" is permissible frequently arise in case law and had not yet been addressed by the highest court.

2.5. Federal Court of Justice Decision on „Climate-Neutral"

According to the judgment of the Federal Court of Justice (BGH), advertising with the general claim „climate neutral" is misleading and therefore inadmissible.[20] It is a landmark decision of the Court in the field of greenwashing, which is legally binding on the lower courts. The Court made it clear that it would adhere to the strict limits for environmental advertising already established in the judgment of the Federal Court of Justice of 20 October 1988, Case No. I ZR 219/87.

In the present case, a German confectionery manufacturer advertised its jelly candies in the trade journal *Lebensmittel Zeitung*[21] with the claim that since 2021 it has been producing all its products as climate neutral. The same designation „climate neutral" also appeared on the packaging of the candies. Consumers were able to access more detailed information about this claim via a QR code in the journal, which led to the manufacturer's website. However, a local consumer protection organization considered the claim misleading and brought an action against the manufacturer.[22]

The BGH held that the lower courts had failed to adequately take into account the potential for consumer deception in advertising with environmental claims, which requires a higher standard due to the increased risk of misleading consumers. The Court decided that the strict requirements for advertising with environmental references had not been fulfilled, and ordered the manufacturer to refrain from such advertising. In its headnotes, the BGH stated:

a) When assessing whether advertising with terms and symbols relating to environmental protection (in this case „climate neutral") is misleading, strict requirements apply regarding the correctness, unambiguity and clarity of advertising claims—similar to advertising with health-related claims.
b) Due to the increased need to clarify the meaning and content of environmental claims for the targeted audience, strict requirements must be imposed on explanatory statements necessary to prevent deception. These requirements are, in the case of advertising with a multi-meaning environmental term, generally only satisfied if the specific decisive meaning is clearly and unambiguously explained directly in the advertisement.
c) An explanation within the advertisement itself is indispensable when using the term „climate neutral," especially because the term covers both the reduction of CO_2 emissions and their compensation. However, reduction and compensation of CO_2 emissions are not equivalent

[20] Judgment of the Federal Court of Justice (BGH) dated 27 June 2024, file no. I ZR 98/23.

[21] *Lebensmittel Zeitung* is a leading German weekly specializing in consumer goods trade, particularly food products. It is intended for a professional audience, not ordinary consumers. www.lebensmittelzeitung.net

[22] The Regional Court of Kleve, acting as the court of first instance, held that the advertising did not constitute a misleading commercial practice The Higher Regional Court of Düsseldorf, which decided on the appeal and is also discussed in this contribution, upheld the lower court's decision and considered the average consumer capable of understanding that "climate neutrality" can be achieved not only through the reduction of CO_2 emissions but also via compensatory measures.

measures to achieve climate neutrality. The principle of reduction taking precedence over compensation applies.

According to the Court's decision, the risk of deception is particularly high in the area of environmental advertising. In order to avoid misleading consumers, the meaning must be explained already within the advertisement itself. This should take the form of a concise explanation within the advertising text, comparable to pharmaceutical advertising, which refers to the necessity of consulting a doctor before use.[23]

An explanation in the advertisement is particularly important with the term „climate neutral," since it includes:

- reduction of CO_2 emissions,
- compensation of CO_2 emissions.

These measures are not equivalent, as emission reduction takes priority over compensation. According to the Court's judgment, mere CO_2 compensation is not sufficient to justify the use of the term „climate neutral." Reduction of CO_2 emissions must also form part of the measure.

The Court also considered references to further information outside the environmental advertisement inadequate. Ambiguous or unclear statements regarding environmental impact, without explanation within the advertisement itself, were found to be misleading and inadmissible under § 5 UWG.[24]

Overall, the decision establishes stricter rules for environmental advertising using the words „climate neutral" and places emphasis on the responsibility of companies to communicate their environmental actions clearly and truthfully. The Court stressed the importance of distinguishing between reduction and compensation of CO_2 emissions. In legal practice, this means that companies may not designate their products or services as „climate neutral" solely on the basis of compensation of emissions through external projects (such as tree planting) if they do not also implement measures to reduce their own emissions.

The decision of the Federal Court of Justice of 27 June 2024, Case No. I ZR 98/23, represents a consistent confirmation of the principle of strict assessment of advertising relating to the environment.[25] However, legal literature debates whether the strict standard established by the BGH reaches the level of requirements laid down by the most recent European legislation in this area.[26]

As German case law shows, the courts have been able to deal with unlawful environmental advertising on the basis of existing legislation, even though the latter did not expressly regulate the issue of greenwashing. Judicial lawmaking is always linked to a normative legal act which the court, through its decision, clarifies, supplements or corrects.[27] Judicial jurisprudence represents a dynamic supplementation and development of the legal order in cases where the legislator leaves room for interpretation. Its value lies in the fact that it connects the normative framework with concrete social reality and responds to needs that legislation cannot fully anticipate. However, it also has its limits: its development depends on the initiative of the parties to the dispute, who must bring the matter before the court. For this reason, the European legislator decided to regulate this issue by means of a directive.

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[23] The authors of the article proposed the following example of a "climate-neutral" statement: "In the production of this product, we have reduced CO_2 emissions by 10% thanks to a new, more environmentally friendly production process. The remaining 90% of emissions have been offset through investment in projects (specify exact name) supporting renewable energy sources.

[24] PURNHAGEN**,** K. Klimaneutral und Irreführung – Was ein Blick ins EU-Recht bringen kann" *In Europäische Zeitschrift für Wirtschaftsrecht*, 2024, č. 16, s. 738-740

[25] MOLL, D. Verschärfte Anforderungen für Werbung mit mehrdeutigem Umweltbegriff „klimaneutral". In. *Neue Justiz Wochenschrift* (NJW) 2024, č. 42. s. 3042-3046.

[26] GSELL, B., MEYER S. How to Combat 'Greenwashing. In *Journal of European Consumer and Market Law* (EuCML), 2025, č.1, s. 23.

[27] BÁRÁNY, E.: Súdne rozhodnutie ako prameň práva a jeho výklad. Právny obzor, 2025, č. 1, s. 22.

Jurisprudence has indeed provided important interpretative guidelines, but its scope was limited to individual cases and individual Member States

3. EUROPEAN UNION LEGISLATION AGAINST GREENWASHING

German case law demonstrates frequent overstepping of permissible boundaries. A 2020 European Commission study found that 53% of environmental claims were vague, misleading, or unsupported; 40% lacked substantiating evidence; and half of all green labels offered weak or no verification.[28] Therefore, stricter legal regulation at the EU level is necessary, particularly given the cross-border nature of advertising within the internal market.

3.1. Guidance on the Implementation of Directive 2005/29/EC on Unfair Commercial Practices

High environmental protection standards and sustainable development are guaranteed under Article 37 of the EU Charter of Fundamental Rights. On 25 May 2016, the European Commission issued guidance on implementing Directive 2005/29/EC, requiring that environmental claims be clear, truthful, precise, non-misleading, and based on reliable, independent, verifiable, and widely recognized evidence, taking into account updated scientific methods. The burden of proof lies with the trader, who must demonstrate the accuracy of all factual claims. The guidance aims to reduce consumer deception and promote transparency, sustainable consumption, and fair market competition.

3.2. Directive 2024/825 on Strengthening Consumer Rights in the Green Transition

On 28 February 2024, Directive (EU) 2024/825 of the European Parliament and of the Council was adopted, amending Directives 2005/29/EC[29] and 2011/83/EU[30] with regard to strengthening consumer rights in the context of the green transition through enhanced protection against unfair commercial practices and improved consumer information. The objective of the Directive is to empower consumers by providing better protection against unfair commercial practices.

The Directive introduces a comprehensive set of new rules concerning misleading practices, specifying that misleading conduct may now relate to the „environmental or social impact," „durability," and „repairability" of a product, which are added to the list of relevant product features in Article 6(1)(b) of the Unfair Commercial Practices Directive.[31] Directive 2024/825 further supplements the list of misleading practices by including cases in which an environmental claim regarding future environmental performance is made without clear, objective, and verifiable commitments and targets, and without an independent monitoring system.[32]

Protection against misleading practices also extends to omissions: situations in which a trader withholds material information, provides it in an unclear, incomprehensible, ambiguous, or premature manner, or fails to specify the commercial intent of the practice where it is not apparent from the text.[33]

Directive 2024/825 expands the rules on misleading omissions in Article 7 of the Unfair Commercial Practices Directive, specifically addressing product comparisons: „Where a trader provides a service that compares products, and provides the consumer with information on the environmental or social

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28 Electronically available [13 September 2025]: https://environment.ec.europa.eu/topics/circular-economy/green-claims_en

29 Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU with regard to strengthening consumers' position in the context of the green transition through better protection against unfair practices and improved information provision.

30 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending and supplementing 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.

31 Article 1(2)(a) of Directive 2024/825.

32 Article 1(2)(b) of Directive 2024/825.

33 Articles 7(1) and 7(2) of the Unfair Commercial Practices Directive.

characteristics, or on the circularity aspects of the products, such as durability, repairability, or recyclability, or on the suppliers of such products, information on the comparison method, the products being compared, the suppliers of those products, and the measures adopted to ensure the information is kept up to date shall be considered material information."

Annex I of the Unfair Commercial Practices Directive – the so-called „blacklist" of commercial practices that are always deemed unfair – is expanded to include additional prohibited practices, of which the following are particularly relevant to environmental claims:

- Displaying a sustainability label that is not based on a certification system or not introduced by public authorities;
- Making a general environmental claim where the trader is unable to demonstrate that the claim reflects recognized outstanding environmental performance;
- Making an environmental claim relating to the entire product or the entire business of the trader where it only concerns a specific aspect of the product or a specific activity of the trader;
- Making a claim, based on greenhouse gas emission compensation, that the product has a neutral, reduced, or positive environmental impact in terms of greenhouse gas emissions.

The requirements of Directive 2024/825 can be summarized into three main areas:

a) Verifiable information
- All claims must be verifiable and supported by reliable sources, such as independent studies and research. Where a reduction of emissions or other environmental impact is stated, such data must be accurate and properly documented.

b) Relevance and specificity of information
- Green claims must relate to the most significant aspects of the product or service.
- Information that is immaterial, irrelevant, or outdated should not be used in a manner that could mislead consumers.

c) Comprehensive and clearly formulated information
- Claims must include all material information that could affect the consumer's interpretation and must be presented in a clear and understandable manner.
- If the environmental benefit relates only to a specific aspect of the product, this fact must be clearly explained.

The introduction of more detailed rules regarding environmental advertising is intended to enable more effective enforcement against violators, as it will no longer be necessary to prove the misleading nature of a claim under general provisions. Consumers will have greater assurance that corporate environmental claims are genuinely accurate and substantiated. This ensures the uniform application of rules throughout the EU, thereby preventing market fragmentation.[34]

Directive 2024/825 on strengthening consumer rights in the context of the green transition does not have direct effect. It is our view that national courts may, even prior to the expiration of the transposition period, take Directive 2024/825 into account as an interpretative guide when applying domestic law. Although the Directive does not have direct horizontal effect, its provisions may be used for a consistent interpretation of the relevant domestic legal provisions. Member States are required to adopt and publish, by 27 March 2026 (the transposition deadline), the measures necessary to achieve compliance with Directive 2024/825 on strengthening consumer rights in the context of the green transition. Based on this, a substantial amendment to the Slovak Consumer Protection Act can be expected in the near future.

[34] In this context, it should not be overlooked that a significant portion of practices falling under the term *greenwashing* is carried out via online platforms with substantial market power, which are subject to ex ante regulation under the Digital Markets Act; see, for example: RUDOHRADSKÁ, S., HUČKOVÁ, R. Ku vzťahu Aktu o digitálnych trhoch a súťažného práva. In: Právník, 2023, roč. 162, č. 10, s. 944–958.

It should be noted that the German Federal Ministry of Justice submitted on 9 December 2024 for public consultation a draft of the third amendment to the Act against Unfair Competition (UWG), aiming at the implementation of Directive 2024/825 on combating greenwashing.[35]The draft specifies Section 5(1) UWG (prohibition of misleading commercial practices) through new paragraphs 2 and 3, the addition of Section 5b(3a) UWG, and the extension of the annex to Section 3(3) UWG. It introduces specific requirements for environmental claims in corporate commercial communications. It provides that such claims must either be clearly explained, based on objectively measurable environmental performance, or supported by credible sustainability certificates. Claims regarding future environmental objectives are subject to particularly strict rules, requiring that they be based on realistic plans with binding and publicly available data. Certificates must be verified by an independent third party. The explanatory memorandum emphasizes the need to provide consumers with reliable and comprehensible information, enabling them to make informed decisions and support the market for sustainable products.

Experience from the German legal environment indicates that lawsuits under the German Act against Unfair Competition (UWG) have limited effectiveness:

- They are contingent upon the initiative of competitors or consumer organizations. Lawsuits depend on the willingness of competing entities or organizations representing consumers to take action. Consumer organizations may, through litigation, obtain a prohibition on advertising or other unfair practices; however, they cannot claim compensation for non-material damages, which significantly limits the overall effectiveness of such lawsuits.
- They may last for extended periods and concern specific cases. Court proceedings often take months or years, which substantially weakens their practical impact. The effect of a lawsuit often pertains only to the specific case or party that filed it.
- They often lack a deterrent effect and have a limited scope of protection. Court costs and litigation expenses are, in most cases, negligible compared to the turnover of large companies involved in these disputes. Even if lawsuits are successful, the financial consequences for the infringers are minimal. The effect of the lawsuit applies only to the specific case or party that filed it, so liability and remedial action are not systematically extended to the entire market.
- Conditions for effectiveness of the model. This model is likely to be effective primarily in environments where there is a long-standing respect for the law, high legal awareness, and strong consumer organizations and competition protection agencies.

Under these circumstances, it appears that public-law instruments for sanctioning violations of rules on environmental claims could be more effective, especially when deriving from consumer protection legislation or advertising law. These instruments enable state authorities to systematically monitor compliance, impose administrative sanctions, and thereby create a genuinely preventive effect.

It is expected that the implementation of Directive 2024/825 into national law will contribute to the reduction of greenwashing, as it establishes clear and verifiable criteria for environmental claims, increases the accountability of businesses, and improves consumer awareness. Nevertheless, complete elimination of greenwashing cannot be assumed. Any regulation inevitably faces the adaptability and ingenuity of the addressees of the legal norm, who may seek gaps in the legal framework or adjust their claims to avoid sanctions. Therefore, the success of the regulation depends not only on the precision and clarity of the legal provisions and effective monitoring and enforcement, but also on the responsible attitude of businesses towards ethical and transparent communication with consumers.

[35] Drittes Gesetz zur Änderung des Gesetzes gegen den unlauteren Wettbewerb. Elektronicky dostupné [30.09.2025]: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/2024_AendG_UWG_EmpCo.html

CONCLUSION

This paper addresses misleading ecological advertising, whereby products or businesses are presented as environmentally sustainable without objective, verifiable support. This phenomenon poses risks for consumers and fair competition, disadvantaging businesses that genuinely comply with legal standards and offer sustainable products.

German jurisprudence demonstrates that existing laws allowed courts to address misleading environmental advertising, though effectiveness was limited due to time, cost, and lack of broad deterrence. Cross-border advertising further underscores the need for harmonized EU measures.

Directive 2024/825 is a key tool in combating greenwashing, requiring precise, verifiable environmental claims, shifting the burden of proof to businesses, and enhancing transparency. These measures are expected to promote environmental innovation, improve consumer awareness, and strengthen fair competition in the EU market.

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Regulation of internet content in the context of generative artificial intelligence and the impact of European legislation on national digital sovereignty

Regulácia internetového obsahu v kontexte generatívnej umelej inteligencie a vplyv európskej legislatívy na národnú digitálnu suverenitu

Abstract

This article analyzes the systemic deficiencies within the Slovak legal framework for internet content regulation, defined as „regulatory lag" and an „implementation gap". Serving as a key case study, the deepfake incident during the 2023 parliamentary elections exposed the inability of the existing legal framework to adequately respond to threats associated with generative artificial intelligence. The paper examines the fundamental tension between the constitutional prohibition of censorship (Art. 26 of the Slovak Constitution) and the need for an effective response to technologically sophisticated disinformation. The article further explores the inadequacy of existing criminal offenses in prosecuting the creation and dissemination of synthetic media, contrasting it with the practical dysfunction of the website blocking mechanism under the Cyber Security Act, which is attributed to institutional and capacity deficits. Subsequently, it addresses the role of European Union legislation, particularly the Artificial Intelligence Act (AI Act) and the Digital Services Act (DSA), as primary instruments for filling the domestic legislative vacuum. The article concludes that while the European legal framework provides an essential structure, its real-world effectiveness is contingent upon overcoming national institutional and capacity deficits, which poses a key challenge for the Slovak rule of law in the digital age.

Keywords: *hate speech, deepfake, disinformation, AI act, DSA, censorship.*

Abstrakt

Článok analyzuje systémové nedostatky slovenského právneho rámca pre reguláciu internetového obsahu, označované ako „regulačné oneskorenie" a „implementačná medzera". Ako kľúčová prípadová štúdia slúži incident s deepfake nahrávkou počas parlamentných volieb v roku 2023, ktorý odhalil neschopnosť existujúceho právneho rámca primerane reagovať na hrozby spojené s generatívnou umelou inteligenciou. Príspevok skúma základné napätie medzi ústavným zákazom cenzúry (čl. 26 Ústavy SR) a potrebou efektívnej reakcie na technologicky sofistikovanú dezinformáciu. Ďalej sa venue nedostatočnosti existujúcich trestných činov pri postihovaní tvorby a šírenia syntetických médií, pričom ju porovnáva s praktickou dysfunkciou mechanizmu blokovania webových stránok podľa zákona o kybernetickej bezpečnosti, ktorá je pripisovaná inštitucionálnym a kapacitným deficitom. Následne sa článok zaoberá úlohou práva Európskej únie, najmä nariadenia o umelej inteligencii (AI Act) a nariadenia o digitálnych službách (DSA), ako hlavnými nástrojmi na zaplnenie vnútroštátneho legislatívneho vákua. Článok uzatvára, že hoci európsky právny rámec poskytuje nevyhnutnú štruktúru, jeho praktická účinnosť závisí od prekonania vnútroštátnych inštitucionálnych a kapacitných deficitov, čo predstavuje kľúčovú výzvu pre právny štát na Slovensku v digitálnom veku.

Kľúčové slová: *nenávistné prejavy, deepfake, dezinformácie, AI Act, DSA, cenzúra.*

JEL Classification: K24

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INTRODUCTION

The Slovak legal framework for regulating internet content is characterized by two key systemic deficiencies: (i) a „*regulatory lag*“, which represents the inability of legislation to keep pace with rapid technological development, (ii) and an „*implementation gap*“, which denotes the chasm between enacted laws and their real and effective enforceability. In the digital age, these parallel deficits create a significant vulnerability for democratic processes and social cohesion in Slovakia, a country that is exceptionally susceptible within the European Union to the influence of disinformation, propaganda, and foreign influence operations. The level of belief in conspiracy theories in Slovakia is alarmingly high; according to data from 2022, up to 54% of respondents believe in narratives about secret elites controlling the world, a situation amplified by a historical narrative of an oppressed nation and deep-seated distrust in institutions. Since 2022, Slovakia has become a focal point for influence operations with an intensity it has never faced before.[2]

The catalyst that exposed these systemic failures in their entirety was a deepfake recording incident that emerged just two days before the parliamentary elections in September 2023.[3] The fake audio recording, which purported to feature Progressive Slovakia leader Michal Šimečka and journalist Monika Tódová allegedly planning to manipulate the election and buy votes from the Roma community, was not merely a technological curiosity but a direct assault on the integrity of the electoral process. This incident was not a marginal event but a systemic shock that demonstrated the absolute unpreparedness of the existing legal and institutional infrastructure. Paradoxically, the dissemination of this sophisticated digital disinformation occurred during the 48-hour pre-election moratorium - a legal instrument designed for the analog media era, which in this context paradoxically prevented an effective and timely institutional response and the exposure of the fraud. This very moment acutely illustrated the essence of „regulatory lag“: the legal order not only lacked the tools to combat the new threat, but its outdated elements actively hindered an effective defense.

The aim of this article is therefore to conduct an in-depth analysis of these systemic failures and to assess the impact of new European legislation. The structure of the paper is as follows: The first section will focus on the analysis of the constitutional tension between the prohibition of censorship and the need for regulation, which shapes the boundaries of any national effort to control content. The second section will examine in detail the failures of the national framework in criminal and administrative law, specifically the inadequacy of criminal law instruments, the practical dysfunction of the website blocking mechanism, and the role of self-regulatory mechanisms. The third section will be dedicated to evaluating the new legislative instruments of the European Union - the Digital Services Act (DSA) and the Artificial Intelligence Act (AI Act) - as a response to these national deficits. In the final synthesis, we will assess the challenges associated with the implementation of these complex European norms and their implications for digital sovereignty and the rule of law in Slovakia.

1. THE CONSTITUTIONAL DILEMMA - FREEDOM OF EXPRESSION VERSUS THE NEED FOR REGULATION

At the core of any discussion about internet content regulation in Slovakia lies a fundamental tension between the constitutionally enshrined protection of freedom of expression and the legitimate need of the state to protect the democratic order and the rights of others from harmful content. This tension defines the legal and political boundaries within which any legislative effort must operate.

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1.1. The Constitutional Basis (Article 26 and the Prohibition of Censorship)

The cornerstone of the Slovak constitutional order in this area is Article 26(3) of the Constitution of the Slovak Republic, which concisely but categorically states: *„Censorship shall be prohibited.“* This provision is not merely a political preference but represents one of the pillars of a democratic rule of law, intended to prevent any form of prior control and approval of content by state authorities. However, in paragraph 4 of the same article, the Constitution allows that freedom of expression and the right to information may be limited by law if such measures are necessary in a democratic society for the protection of the rights and freedoms of others, the security of the state, public order, or the protection of public health and morals.

The constitutional provision on censorship has not yet been protected in proceedings before the Constitutional Court of the Slovak Republic. This leaves censorship classified as a constitutional mystery. It is impossible to predict how broadly the Constitutional Court of the Slovak Republic will define censorship in the future, what content it will assign to it, and to what extent it will be willing to place it under constitutional protection. Given the serious consequences that censorship has for the availability of freedom of expression, and therefore for the existence and protection of a democratic state, it is surprising how little attention has been paid in Slovak legal literature to identifying the scope and content of the prohibition of censorship under Article 26(3) of the Constitution of the Slovak Republic.[4]

The scope of these permissible limitations has been strictly and narrowly defined by the case law of the Constitutional Court of the Slovak Republic. In the landmark decision *PL. ÚS 7/96*, the Constitutional Court established that any limitation on freedom of expression must be interpreted restrictively and must pass a rigorous proportionality test. This test requires public authorities to demonstrate not only that the restriction serves a legitimate aim but also that it is the least intrusive means necessary to achieve that aim. This principle was further reinforced in the decision *II. ÚS 28/96*, in which the Constitutional Court defined freedom of expression as a fundamental *political* right, essential for the formation of public opinion and the proper functioning of a democratic society. The classification of freedom of expression as a political right underscores its privileged position and high degree of protection within the Slovak constitutional order.

The Constitutional Court has also addressed the concept of disinformation, distinguishing between disinformation and falsehoods in its decision *III. ÚS 288/2017*, and in decision *PL. ÚS 26/2019*, it pointed to the absence of a legal definition of disinformation in the Slovak legal order.[5] Slovak law does not contain an explicit legal definition of „hate speech“ either. It addresses such actions through criminal law provisions prohibiting incitement to hatred, defamation of a nation, race or belief, and support of extremist groups.[6] Slovak legislation generally does not make specific distinctions between online and offline disinformation or hate speech in terms of their core definitions.

1.2. Balancing in Practice - when Expression Can Be Limited

Despite this strong protection, Slovak case law recognizes that freedom of expression is not absolute. Courts have repeatedly confirmed that this protection does not extend to speech that crosses the line of legitimate criticism and falls into the category of hate speech or the denial of crimes. Key precedents in this area are the conviction of Member of Parliament Milan Mazurek[7] for his anti-Roma hate speech and

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4 see DRGONEC, J. Zákaz cenzúry podľa Ústavy Slovenskej republiky: implikované základné právo alebo ústavný princíp a súvisiace otázky. In *Právník* - ISSN 0231-6625 - Roč. 154, č. 1(2015), pp. 61 a nasl.

5 Finding of the Constitutional Court of the Slovak Republic, file no. PL. ÚS 7/96.
Finding of the Constitutional Court of the Slovak Republic, file no. II. ÚS 28/96.
Finding of the Constitutional Court of the Slovak Republic, file no. PL. ÚS 10/2014.

6 Defamation of nation, race, and belief (Section 423); Incitement to national, racial, and ethnic hatred (Section 424) These provisions apply whether harmful speech occurs in person, in print, or online.

7 https://dennikn.sk/1571676/mazurek-v-parlamente-konci-sud-mu-potvrdil-vinu-za-rasisticke-reci-v-radiu/

the conviction of magazine publisher Tibor Rostas[8] for publishing anti-Semitic narratives. In the case of Milan Mazurek, the Supreme Court of the Slovak Republic confirmed that his xenophobic and defamatory statements against the Roma minority constituted the criminal offense of defamation of a nation, race, and belief. In its reasoning, the court explicitly stated that freedom of expression is not an absolute right and does not provide a shield for hate speech that incites discrimination and violence. These judgments authoritatively established that the criminal prosecution of such speech is not unconstitutional censorship but a necessary and legitimate limitation on freedom of expression, justified by the protection of the rights of others and the maintenance of public order. Both the Mazurek and Rostas cases set important precedents for applying hate speech laws to public figures.

This approach is also shaped by the influence of the case law of the European Court of Human Rights (ECtHR). The *Ringier Axel Springer* cases[9] have been pivotal for the Slovak judiciary. In these rulings, the ECtHR repeatedly found that Slovak courts had violated Article 10 of the European Convention on Human Rights (ECHR) by failing to properly balance the right to privacy with the public's interest in receiving information on matters of public concern. These judgments compelled the domestic judiciary to adopt a more nuanced approach, distinguishing between factual statements and value judgments and affording greater protection to speech on matters of public interest.

The result of this case law is the creation of a two-track approach to freedom of expression in Slovakia. For political speech and matters of public interest, the protection is extremely high, creating a chilling effect on legislators who might consider broad regulations against „disinformation." On the other hand, in the case of hate speech, the courts have shown a willingness to set firm boundaries. The challenge posed by generative artificial intelligence is that it blurs this line: a political deepfake is a form of political speech, but its inherently deceptive nature pushes it into the category of harmful, regulatable content. The existing judicial framework thus does not provide a clear answer on how to approach synthetic media, and any attempt to regulate it will inevitably face constitutional challenges, requiring new and complex balancing by the courts. This legal uncertainty significantly contributes to the „regulatory lag".

2. SYSTEMIC DEFICIENCIES OF THE NATIONAL FRAMEWORK IN THE AGE OF ARTIFICIAL INTELLIGENCE

This chapter provides a detailed diagnosis of the failures of the Slovak national legal framework, using the concepts of „regulatory lag" and „implementation gap" to systematize the analysis.

2.1. Regulatory Lag - The Inadequacy of Criminal and Civil Law in the Face of Synthetic Media

A key manifestation of regulatory lag is the absence of specific and targeted legislation. The Slovak legal order does not yet explicitly define or recognize terms such as „deepfake" or AI-generated content. There is no specific criminal offense aimed at the creation or dissemination of synthetic media, forcing law enforcement authorities to rely on existing, but often unsuitable, legal instruments.[10]

The attempt to apply existing criminal offenses to the phenomenon of deepfakes encounters fundamental practical and conceptual obstacles.

- ***Spreading Alarming News (§ 361 of the Criminal Code)***
  Although more than 500 cases related to this offense were identified in the first half of 2025, its application is problematic. Sophisticated disinformation, such as a political deepfake, may not necessarily meet the criteria of an

[8] https://dennikn.sk/2586962/rostas-je-vinny-z-hanobenia-rasy-a-naroda-rozsudok-potvrdil-najvyssisud-do-sudnej-siene-ho-bez-ruska-nepustili/

[9] Cases before the ECtHR in the matter of The Ringier Axel Springer, e.g. complaints no. 41262/05, 37986/09 and 26826/16.

[10] ADAMKOVIČ, M., HOCHMANN, R., KOREC, B. Deepfake pornografia – nová výzva v oblasti kyberkriminality. In *Justičná revue*, vol. 77, 2025, no. 4, pp. 414 – 422.

„alarming report“ in the traditional sense, which causes serious concern to at least a part of the population.

- ***Defamation and Fraud (§ 221 of the Criminal Code)***
  These offenses may be theoretically applicable, but proving intent and, especially, identifying the perpetrator of anonymous digital content represents an almost insurmountable obstacle. The National Bank of Slovakia has warned about the use of deepfake videos in investment scams, where the act would be prosecuted as fraud, but the context of political disinformation is different, and its harm is not primarily measured by financial loss.
- ***Obstruction of the Preparation and Conduct of Elections (§ 345 of the Criminal Code)***
  This offense represents a potential but legally untested path. The key challenge is to prove that the deepfake was used with „deceit“ to prevent voters from exercising their right to vote. However, the term „deceit“ is not legally defined in this context, and there is no judicial precedent applying this concept to cases of large-scale disinformation aimed at influencing entire elections.
- ***Extremist Crimes and Hate Speech (§ 423 and § 424 of the Criminal Code)***
  Although these offenses are key in prosecuting hate speech, their application to political deepfakes is complex unless the content directly meets the criteria for defamation of a nation, race, or incitement to hatred.

In addition to criminal law, civil law also offers protection, specifically the protection of personality rights under § 11 of the Civil Code. The advantage of this instrument is objective liability, meaning the victim does not need to prove the perpetrator's malicious intent. It is sufficient to demonstrate that an unauthorized interference with personality rights occurred, which was capable of causing harm. Available remedies include a court order to cease the action, remove the content, and satisfaction in the form of an apology or financial compensation for non-pecuniary damages.

The General Data Protection Regulation (GDPR) can also be indirectly helpful, as the creation and dissemination of a deepfake recording with an identifiable person constitutes the processing of personal data. The data subject can thus exercise their right to erasure (the „right to be forgotten“) under Article 17 of the GDPR and request the removal of the content.

The definitive proof of „regulatory lag“ is the unsuccessful investigation of the above-mentioned criminal complaint filed by Michal Šimečka and Monika Tódová after the 2023 elections. The course of the investigation was emblematic: after an initial, widely criticized dismissal of the case, the supervising prosecutor ordered it to be reopened. However, in late 2024, the investigator again proposed to halt the criminal proceedings, this time citing the inability to identify the perpetrator.[11] This outcome underscores not only the technical but also the legal and jurisdictional hurdles in tracing the origins of anonymized and digitally manipulated content, effectively leaving the victims without criminal redress despite the clear harm caused.[12] The failure to prosecute this case was not just a technical failure of the investigation but a profound legal failure. It revealed that the fundamental concepts of Slovak criminal law - evidence, intent, perpetrator identity - are built on analog-world principles and fail when faced with anonymous, globally distributed content generated by artificial intelligence. This is not a gap that can be filled by increasing resources; it requires a conceptual rethinking of criminal liability in the digital age.

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[11] KOVÁČIK, T., FRANKOVSKÁ, V. How AI-generated content influenced parliamentary elections in Slovakia: The Slovak Police will investigate the recording for a third time. 2024. In *Cedmo*. (online). (cited 2025-09-05). Available at: https://cedmohub.eu/how-ai-generated-content-influenced-parliamentary-elections-in-slovakia-the-slovak-police-will-investigate-the-recording-for-a-third-time/ See also BACHŇÁKOVÁ RÓZENFELDOVÁ, L. *Regulácia nezákonného obsahu a súvisiacich deliktov na internete*. Prague: C. H. Beck, 2025. ISBN 978-80-8232-063-6, pp. 344.

[12] ŁABUZ, M., NEHRING, CH. On the way to deep fake democracy? Deep fakes in election campaigns in 2023. In *Eur Polit Sci* 23, pp. 454–473 (2024). (online). (cited 2025-09-05). Available at: https://link.springer.com/article/10.1057/s41304-024-00482-9

2.2. Implementation Gap - The Practical Dysfunction of Website Blocking

Besides legislative lag, the second key problem is the state's inability to effectively implement and enforce existing legal instruments. The best example of this „implementation gap" is the website blocking mechanism under Act No. 69/2018 Coll. on Cyber Security (hereinafter „ZoKB"). This act grants the National Security Authority (NBÚ) the power to block websites that disseminate „harmful content" or conduct „harmful activity," which explicitly includes „serious disinformation" and „hybrid threats." However, the definitions of „harmful content" and „hybrid threat" are formulated very broadly in the act, without precise, objective criteria, giving the NBÚ considerable discretion.[13]

Requirements for blocking websites within the meaning of the case law of the ECtHR and the CJEU, the blocking mechanism must be (i) based on law, (ii) pursue a legitimate aim, (iii) respond to a pressing social need, (iv) reflect the requirements of proportionality, which are primarily manifested through an appropriate technical solution for blocking, and (v) contain safeguards against abuse in the form of prior notification, equality of arms, transparency, and independent oversight.[14]

Despite the existence of this legal basis, the mechanism itself is deeply flawed and fails to meet basic European standards for the protection of fundamental rights, as formulated by the case law of the ECtHR and the Court of Justice of the EU. Its main shortcomings include:

i. Absence of independent oversight
The decision to block is solely in the hands of an administrative body (NBÚ) without any requirement for prior judicial approval. This is a critical failure compared to European standards, which require independent control for such an invasive intervention.

ii. Insufficient procedural safeguards
The act contains no provisions for prior notification of the website operator, does not provide an effective and swift remedy, and does not respect the principle of „equality of arms." Affected parties can challenge the blocking in an administrative court only *ex post*, and filing a lawsuit does not in itself have a suspensive effect, meaning the block remains in place throughout the court proceedings.

iii. Low transparency
The detailed criteria for blocking are not public, and the act refers to so-called „Blocking Rules," published in a legally non-binding form.[15] There is also no blocking decision published yet.

This poorly designed mechanism is also non-functional. The „implementation gap" is fully evident here: the NBÚ's power to block disinformation websites was used in practice shortly after the Russian invasion of Ukraine in 2022, and has not been applied since, although the authority's power was later partially restored. This non-use is attributed to a combination of the NBÚ's institutional and capacity deficits and a lack of political will. Academic analyses directly attribute the limited practical application of the blocking mechanism to insufficient technical and human resources within the NBÚ.

The fact that this is not a problem of a lack of legal know-how, but a failure of political will and implementation, is evidenced by a comparison with the blocking mechanism under Act No. 30/2019 Coll. on Gambling. This model, designed to combat illegal online gambling, contains all the missing safeguards: it requires prior court approval, mandates prior notification of the operator, and the Office for the Regulation of Gambling maintains a transparent and public list of blocked sites. This mechanism

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[13] NBÚ may decide on its own initiative to block access only until June 30, 2022. This limit does not apply to blocking based on a request from another authority.

[14] Judgment of the Court of Justice of the EU of 27 March 2014, C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*; Judgment of the ECtHR of 18 December 2012, no. 3111/10, *Ahmet Yıldırım v. Turkey*; Judgment of the ECtHR of 1 December 2015, no. 48226/10 and 14027/11, *Cengiz and Others v. Turkey*; Judgment of the ECtHR of 23 June 2020, no. 12468/15 and others, *OOO Flavus and Others v. Russia*.

[15] National Security Authority - *Rules for blocking attacks*. (cited 2025-09-05). Available at: https://www.nbu.gov.sk/data/att/1135.pdf

is not only constitutionally compliant but also actively used. Efforts to reform the flawed mechanism in the ZoKB have failed; a government-proposed amendment that would have introduced the requirement of prior approval from the Supreme Administrative Court never reached parliament, underscoring the political paralysis in this area.[16]

The stark contrast between the functional, rights-respecting mechanism in the Gambling Act and the dysfunctional, deficient mechanism in the Cyber Security Act reveals that the „implementation gap" is not accidental but a product of political choice. For a non-controversial topic like illegal gambling, the state was able to design a system according to best practices. For the politically sensitive issue of „disinformation," it created a powerful but legally dubious tool that it subsequently lacked the capacity or political courage to use, leaving it in a state of practical irrelevance.

Table no. 1 - Comparative Analysis of Website Blocking Mechanisms in the Slovak Legal Order

Feature / Safeguard	**Gambling Act (No. 30/2019 Coll.)**	**Cyber Security Act (No. 69/2018 Coll.)**
Legal Basis	Explicit and detailed in § 85.	Vague definitions („harmful content," „hybrid threat"); refers to legally non-binding „Blocking Rules."
Decision-Making Body	Office for the Regulation of Gambling	National Security Authority (NBÚ).
Prior Judicial Approval	**Required.** The Office must obtain a court order.	**Not required.** Administrative decision by the NBÚ.
Prior Notification of Operator	**Required.** 10-day period for correction.	**Not required.**
Availability of Effective Remedy	Operator can demonstrate compliance and prevent the issuance of an order.	Only *ex post* administrative action, which does not have a suspensive effect.
Transparency	**High.** Public list of blocked sites and court orders.	**Low.** No public register; criteria are not public.
Practical Application	**Actively used** (more than 300 blocked sites).	**Practically unused** (briefly in 2022).

Source: Own processing based on.

2.3. Self-Regulatory and Civic Initiatives (An Alternative Approach)

Alongside state regulation, a multi-level system exists in Slovakia that combines legal regulation with self-regulatory initiatives and civil society activities. The Press and Digital Council of the Slovak Republic acts as the main self-regulatory body for journalistic ethics, where the public can file complaints about content, they consider unethical, including hate speech or gross factual errors. In the field of advertising, the Advertising Council operates to ensure that advertising is ethical and truthful. Although it does not primarily focus on disinformation, its activities are relevant in cases where misleading or hateful elements appear in commercial communications.

The Code of Practice on Disinformation also plays a significant role, with major platforms (e.g., Google, Meta, TikTok), research organizations, and civil society entities as signatories. Its goal is to empower users, provide data for research, and increase the transparency of technology companies in

[16] ŠVEC, M., MADLEŇÁK, A., HLADÍKOVÁ, V., MÉSZÁROS, P. Slovak Mimicry of Online Content Moderation on Digital Platforms as a Result of the Adoption of the European Digital Services Act. In *Media Literacy and Academic Research*, vol. 7, no. 2, 2024, pp. 88 -91.

content moderation. The fight against disinformation would not be complete without third-sector initiatives. Projects like

Hoaxy a podvody (Hoaxes and Scams), *demagog.sk* (fact-checking politicians' statements), *konšpirátori.sk* (a database of disinformation websites), and other initiatives such as the *Bratislava Policy Institute*, *Gerulata Technologies*, and *Slovenskí elfovia* (Slovak Elves) are actively involved in fact-checking, promoting media literacy, and debunking false claims in the online space.

3. EUROPEAN INTERVENTION - THE DSA AND AI ACT AS PRIMARY REGULATORY INSTRUMENTS

The European Union has recently adopted two key legislative instruments - the Digital Services Act (DSA) and the AI Act - to create a harmonized, safe, and innovative digital single market. These directly applicable regulations require Member States, including the Slovak Republic, to establish national implementation and supervisory mechanisms. Into the legislative and implementation vacuum in Slovakia enters a complex and harmonized regulation at the European Union level. The Digital Services Act and the Artificial Intelligence Act represent a fundamental intervention with the potential to address many of the identified national deficiencies.

3.1. The Digital Services Act (DSA) - A New Paradigm for Content Moderation

Regulation (EU) 2022/2065, known as the Digital Services Act (DSA), creates a harmonized framework for the liability of intermediaries, replacing fragmented national approaches. Its central principle is „what is illegal offline should also be illegal online," thereby aiming to establish uniform rules for the entire digital single market.

The DSA imposes new due diligence obligations on providers of intermediary services, which are tiered according to their size and influence. Key obligations include:

a) ***Notice-and-action mechanisms***
   Platforms must implement user-friendly mechanisms that allow for the reporting of illegal content and must act on these notices.
b) ***Transparency***
   Providers must be transparent in their content moderation decisions and must provide users with a statement of reasons if their content is removed or restricted. Transparency is also required in the area of online advertising.
c) ***Specific obligations for Very Large Online Platforms (VLOPs)***
   Platforms with more than 45 million users in the EU face stricter obligations, including the duty to conduct and publish annual assessments of the systemic risks their services may pose and to adopt measures to mitigate them. An audit by the Council for Media Services in the first half of 2024 showed mixed results in fulfilling these obligations: approximately 50% of requests to remove hate speech were processed by TikTok and Twitter, 36% by Facebook, but only 8% by YouTube.
d) ***Protection of minors***
   Article 28 of the DSA explicitly prohibits displaying targeted advertising based on the profiling of minors, thereby strengthening protection beyond the General Data Protection Regulation (GDPR).

The Slovak Republic formally transposed the requirements of the Digital Services Act (Regulation (EU) 2022/2065) through an amendment to Act No. 264/2022 Coll. on Media Services, designating the Council for Media Services as the national Digital Services Coordinator (DSC). The Council has already demonstrated procedural competence in applying its new powers, having issued cross-border removal orders against platforms X and Facebook in accordance with Article 9 of the DSA.

However, the key deficiency in Slovakia's implementation is a substantive misalignment in the definition of „illegal content." While Article 3(h) of the DSA defines this term broadly to cover any information that is non-compliant with Union or Member State law - encompassing not only criminal offenses but also violations in areas such as consumer protection, intellectual property, and unfair competition - the Slovak legislation in § 151(2) of the Media Services Act dangerously narrows this definition almost exclusively to a list of serious criminal offenses (e.g., child pornography, extremist material, Holocaust denial, and incitement to hatred).

This discrepancy has severe practical consequences: Slovak users are unable to utilize the DSA's mechanisms to report and address a wide range of online illegalities, such as fraudulent offers on online marketplaces, copyright infringement, or the sale of unsafe products. They are thus relegated to more complex and costly legal remedies, which weakens their protection and undermines the DSA's goal of a harmonized approach across the EU.[17]

3.2. The Artificial Intelligence Act (AI Act) - A Targeted Response to the Threat of Synthetic Media

In parallel with the DSA comes Regulation (EU) 2024/1689, known as the Artificial Intelligence Act (AI Act), which represents the world's first comprehensive legal framework for artificial intelligence. Its approach is risk-based, dividing AI systems into four categories: unacceptable risk (prohibited systems), high risk (subject to strict requirements), limited risk (subject to transparency obligations), and minimal risk.[18] For the problem of AI-generated disinformation, two areas are key:

a) ***Harmonized definition of „deepfake"***
   The AI Act, in Article 3, point 60, provides a uniform legal definition of „deepfake" as *„AI-generated or manipulated image, audio or video content that resembles existing persons, objects, places or other entities or events and would falsely appear to a person to be authentic or truthful."* This fills a definitional gap in the Slovak legal order, which will directly rely on this European definition.
b) ***Key tool – transparency obligations (Article 50)***
   The main tool of the AI Act in the fight against disinformation is not prohibition but the enforcement of transparency. Article 50 imposes on providers and deployers of systems that generate or manipulate image, audio, or video content the obligation to clearly and conspicuously disclose that the content has been artificially created or manipulated. These systems must ensure that their outputs are marked in a machine-readable format (e.g., with a watermark) to be identifiable as artificially created.

The Act also includes exceptions for content that is part of *an „overtly artistic, creative, satirical, [or] fictional"* work, thereby seeking to balance the transparency requirement with the freedom of artistic expression. The national implementation of this regulation in Slovakia is underway as part of the legislative process LP/2025/401,[19] which will designate national supervisory authorities such as the Ministry of Investments, Regional Development, and Informatization (MIRRI) as the central supervisory authority and other sectoral bodies like the NBÚ and the Office for Personal Data Protection. The draft law also envisages the establishment of a regulatory sandbox for artificial intelligence and is proposed to take effect from January 1, 2026. In addition to state regulation, civil society initiatives are

[17] RUDOHRADSKÁ, S. Practical application of Digital Services Act – The case of Slovak republic (2025). *EU and Comparative Law Issues and Challenges Series* (ECLIC), vol. 9, pp. 521-544. (cited 2025-09-05). Available at: https://ojs.srce.hr/index.php/eclic/article/view/38129/18193

[18] PINTEROVÁ, D. Právna regulácia umelej inteligencie (perspektívy a výzvy). In *Právny obzor*, vol. 107, no. 4, 2024, pp. 361 – 380.

[19] https://www.slov-lex.sk/elegislativa/legislativne-procesy/SK/LP/2025/401 (Draft law on the organization of state administration in the field of artificial intelligence and on amendments to certain laws).

also emerging; in June 2025, the Association for Artificial Intelligence (ASAI) introduced the first comprehensive ethical code for artificial intelligence in Slovakia, which emphasizes transparency, the labelling of AI-generated content, and the protection of personal data.

The AI Act's approach, which focuses on enforcing transparency rather than outright prohibition, is strategically significant. It thus avoids the constitutional challenges associated with banning a certain form of political speech, as discussed in the first chapter. Instead of censoring content, it regulates its *context*, giving users the tools to critically assess information. This approach is more resilient and constitutionally sustainable than the blunt instrument of website blocking and represents a targeted response to „regulatory lag" without creating a new constitutional crisis.

However, major challenges lie in the implementation and translation of strategic goals into a functional legal framework:

1. ***Coordination of Supervisory Bodies***
   The draft law anticipates cooperation between MIRRI and sector-specific authorities, such as the Office for Personal Data Protection and the National Security Authority. However, it lacks a clear and legally binding mechanism for this cooperation, which could lead to jurisdictional ambiguity and inconsistent enforcement.
2. ***Absence of Regulatory Sandboxes***
   The AI Act requires Member States to establish at least one regulatory sandbox by August 2, 2026, to support innovation, especially for Small and Medium-sized Enterprises (SMEs). Stakeholders, represented by the AI Chamber, have criticized the Slovak draft law for its lack of clear and binding provisions for their establishment and operation. This omission represents a strategic disadvantage that could slow the development of the Slovak AI ecosystem and deter innovators.

To achieve full compliance with EU digital legislation and strengthen Slovakia's position in the digital space, the following steps are necessary. Urgently amend Act No. 264/2022 Coll. on Media Services to align the definition of „illegal content" with the broad scope defined in the DSA. Simultaneously, it is necessary to ensure sufficient personnel, technical, and financial resources for the Council for Media Services to perform its expanded competencies. Finalize the national law with clearly defined cooperation mechanisms between MIRRI and sector-specific regulators. Crucially, the law must legislate the mandatory establishment and operation of accessible regulatory sandboxes to actively support innovation and the competitiveness of Slovak SMEs and startups.[20]

4. SYNTHESIS AND DISCUSSION: DIGITAL SOVEREIGNTY AND THE NATIONAL IMPLEMENTATION CHALLENGE

The combined effect of the Digital Services Act and the Artificial Intelligence Act provide Slovakia with a modern, comprehensive, and necessary legal framework that addresses the specific deficiencies identified in the national system. The DSA introduces harmonized rules and institutional oversight where fragmentation and inaction previously prevailed, while the AI Act offers targeted tools against new technological threats such as deepfakes.

However, the central argument of this analysis is that the real effectiveness of this European framework is entirely *conditional* on overcoming the national institutional and capacity deficits that define the „implementation gap." Past failures are a direct predictor of future challenges. The inability of law enforcement authorities to investigate the 2023 deepfake incident points to a lack of technical and legal capacity that will similarly hinder the enforcement of the complex provisions of the AI Act.

[20] *Commentary on the Draft Slovak Law Implementing the EU AI Act – Regulatory Sandboxes*. (online). (cited 2025-09-05). Available at: https://aichamber.eu/wp-content/uploads/2025/08/Commentary-on-the-Draft-Slovak-Law-Implementing-the-EU-AI-Act-%E2%80%93-Regulatory-Sandboxes.pdf

Likewise, the practical non-functionality of the website blocking mechanism under the ZoKB raises serious doubts about whether the newly empowered RPMS and other designated bodies like MIRRI and the NBÚ will have sufficient resources, political independence, and technical expertise to effectively enforce the DSA and the AI Act against global tech giants.

These challenges open up a fundamental question about Slovakia's digital sovereignty. The threat is not the introduction of EU rules itself, but the potential inability of Slovakia to function as a sovereign and effective enforcer of these rules on its own territory. A failure to implement the European framework would not be an expression of sovereignty but its abdication, leading to the creation of a *de facto* unregulated space dominated by platforms and malicious actors. The arrival of the DSA and the AI Act thus represent a critical moment and a „stress test" for the Slovak rule of law and its administrative and judicial capacities. If Slovakia successfully builds the institutional competence to enforce these acts - for example, through a well-funded and independent RPMS - it will strengthen its digital sovereignty. If it fails, it will confirm the chronic „implementation gap" that undermines its role within the EU's digital single market and leaves its democracy vulnerable.

CONCLUSION

The analysis of the current state of internet content regulation in Slovakia has revealed two profound systemic problems: „regulatory lag" and an „implementation gap." The first problem, illustrated by the inability of criminal law to respond to the threat of deepfake technologies during the 2023 elections, shows how rapid technological progress outpaces the slow legislative process. The second problem, personified by the dysfunctional and practically unused website blocking mechanism under the Cyber Security Act, demonstrates that even existing laws remain without real effect due to institutional and capacity deficits.

Into this domestic vacuum enters the legislative framework of the European Union, particularly the Digital Services Act and the Artificial Intelligence Act. These regulations provide a necessary and modern structure that directly addresses the identified shortcomings - from introducing harmonized rules for content moderation and creating a strong national supervisory authority to establishing transparency obligations for generative artificial intelligence systems.

However, the final conclusion of this paper is that although the European legal framework provides an indispensable structure, the ultimate responsibility and the greatest challenge remain at the national level. The real test for the Slovak rule of law in the digital age is not its ability to enact laws, but its capacity to build and sustain robust, independent, and well-funded institutions that are necessary to give these laws meaning and real effect. Overcoming the implementation gap is therefore a key condition not only for protecting democracy from new threats but also for preserving meaningful digital sovereignty within the European Union.

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24. Act No. 69/2018 Coll. on Cyber Security and on Amendments to Certain Acts, as amended
25. Act No. 30/2019 Coll. on Gambling and on Amendments to Certain Acts, as amended
26. Act No. 264/2022 Coll. on Media Services and on Amendments to Certain Acts (Media Services Act), as amended
27. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act)
28. Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act)

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