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HISTORICAL DEVELOPMENT AND CURRENT FORM OF UNWRITTEN SOURCES OF PUBLIC INTERNATIONAL LAW

HISTORICKÝ VÝVOJ A SÚČASNÁ PODOBA NEPÍSANÝCH PRAMEŇOV MEDZINÁRODNÉHO VEREJNÉHO PRÁVA [1]

Juraj Jankuv,[2] **Peter Kuko**[3]

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ABSTRACT
The article deals with the historical development, legal nature and contemporary significance of three unwritten sources of public international law – international custom, general principles of law and tacit international agreements. The aim is to assess their position in the context of the growing dominance of treaty law and to identify trends in their further development. The research is based on qualitative legal analysis using historical, comparative, normative and teleological methods, with an emphasis on the views of the international law science, the case law of the International Court of Justice and the codification outputs of the UN International Law Commission. The authors conclude that despite the expansion of written sources, unwritten sources remain relevant and irreplaceable parts of the international legal order, especially in filling gaps in written sources of international law, its interpretation and ensuring its flexibility.

ABSTRAKT
Článok sa zaoberá historickým vývojom, právnou povahou a súčasným významom troch nepísaných prameňov medzinárodného práva verejného – medzinárodnej obyčaje, všeobecných právnych zásad a tacitných medzinárodných dohôd. Cieľom je posúdiť ich postavenie v kontexte rastúcej dominancie zmluvného práva a identifikovať trendy ich ďalšieho vývoja. Výskum je založený na kvalitatívnej právnej analýze využívajúcej historickú, komparatívnu, normatívnu a teleologickú metódu, s dôrazom na názory vedy medzinárodného práva, judikatúru Medzinárodného súdneho dvora a kodifikačné výstupy Komisie OSN pre medzinárodné právo. Autori dospeli k záveru, že napriek expanzii písaných prameňov zostávajú nepísané pramene relevantnými a nenahraditeľnými súčasťami medzinárodného právneho poriadku, najmä pri vypĺňaní medzier v písaných prameňoch medzinárodného práva, jeho výklade a zabezpečovaní jeho flexibility.

I. INTRODUCTION

The existence of unwritten sources within public international law has a very long tradition. From a historical point of view, international custom is the most frequently occurring source, which dominated the sources of public international law in the period of the so-called traditional international law, i.e. from the second half of the 17th century practically until 1945. It is indisputable that even in contemporary public international law, it is a still-occurring source, formed through the long-term use of a given rule (lat. *usus longeavus*) in the form of

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legal precedents by States, followed by the emergence of the States' conviction regarding the legal binding nature of this rule (lat. *opinio iuris necessitatis*).

During the second half of the 19th century, another unwritten source of public international law played a significant role in terms of the sources of public international law – general principles of law, created as a source of public international law mainly by transferring important principles of the national legal systems of States into the framework of public international law, mainly through international arbitration, especially in areas where international legal regulation was lacking. The legal life of this source of international law persists and is being revived even today.

In the second half of the twentieth century, the existence of another unwritten source of public international law, the so-called tacit international agreement, was also confirmed. The existence of this source of public international law is confirmed by Article 3 *of the Vienna Convention on the Law of Treaties* (1969),[4]a whole range of case law of international judicial and arbitral bodies as well as the relevant practice of States in applying this source of international law in practice.

The aim of this article is to map the historical development and current form of three unwritten sources of public international law – international custom, general principles of law and tacit international agreement, and subsequently identify their significance in the context of the sources of public international law (hereinafter referred to as international law) as a whole.

In accordance with the stated goal of the paper, the authors formulated the following hypothesis and research question, which consider theoretical and legal research into the issue of the historical development of unwritten sources of law and their current form.

Hypothesis: Despite the growing number of written sources of international law, international customs, general legal principles and tacit agreements are relevant and irreplaceable (unwritten) sources of public international law.

The authors proceed from the assumption that the growing predominance of treaty-based norm formation has not displaced unwritten sources but has rather transformed and differentiated their functions within the international legal system. In order to confirm or reject the above hypothesis, a research question was also set, which is related to the fulfilment of the goal, which the authors defined as follows: "What is the legal nature and effectiveness of the unwritten sources of public international law and what trend can be observed in their development “?

The research is based on qualitative legal analysis, which uses several interconnected methods of scientific research into international law and the policies of the most important States in the creation of unwritten sources of law. A comparative method will be used, which will enable a comparison of selected international customs and general legal principles. The normative method will be applied to the analysis of legal provisions of decisions of the International Court of Justice and related scientific outputs of judges of the International Court of Justice with regard to the identification of the legal nature and binding nature of unwritten sources. The historical method will enable the analysis of interactions between the above types of unwritten sources of public international law and written sources. The teleological method will be used to interpret the content of individual unwritten sources, having regard to the acceptance or rejection, of certain customs, general legal principles or tacit agreements.

The primary sources of research will be the texts of international conventions, protocols and decisions of the International Court of Justice (hereinafter abbreviated as ICJ). Secondary sources will be monographs, textbooks and scientific articles in domestic and foreign scientific journals, including scientific articles indexed in the Scopus and Web of Science databases, as well as annotated codification documents of the UN International Law Commission. Based on the results of legal analysis, comparison and interpretation of the acquired knowledge, the

[4] *Vienna Convention on the Law of Treaties*. Vienna, 23 May 1969. *United Nations Treaty Series*, vol. 1155, p. 331.

authors will evaluate the established hypothesis at the end of the paper, while identifying trends in the development of unwritten sources of law.

II. INTERNATIONAL CUSTOM

International custom has historically been the dominant source of so-called traditional international law, which developed mainly after the adoption of the complex of peace treaties of the Congress of Westphalia in 1648 as the normative basis of the so-called traditional system of international relations. As a source of international law, it fulfilled the role of "central legislation" until 1850, when the first multilateral law-making treaties began to be adopted. Customary international rules were the "central legislation" within international legal relations until 1945, due to the fact that the number of written international treaties had not yet significantly outweighed the existing customary norm formation.[5] The situation is similar in the domestic law of European countries. Legal custom was a fundamental source of law until the mid-20th century—for instance, in the territory of Slovakia, until 1950.[6]

Customary rules of international law were mainly created by the powers of the time in their relations with each other, while other States limited themselves to tacit consent in relation to these customary rules. At the end of the nineteenth century, as a result of the division of the vast majority of overseas territories among the powers, many customary norms in force between European States became universal with *erga omnes* application. Thus, general international law with universal application emerged.[7]

Over time (especially after 1945), customary rules were codified in multilateral treaty form or in so-called non-treaty codification instruments of international codification bodies. In addition to customary rules, multilateral treaties or codification documents created in this way also covered issues not regulated by custom. The expansion of treaty-based norm formation after 1945 substantially increased the importance and functional differentiation of written international law. However, in some areas of international law, customary rules still retain a key importance (e.g. the State responsibility for internationally wrongful acts[8] or legal regulation of individual countermeasures).[9] Universal customary rules also exist in other areas of international law that are partially or almost completely codified in written form. New rules are also constantly emerging in areas of public international law where there were few in the past, such as international environmental law.[10] Jan Klabbers argues that in international law, which is characterized by the absence of a central legislator, customary law has traditionally played and continues to play a very important role.[11]

This development should not, however, be understood as a linear replacement of customary international law by treaty-based law. In the authors' view, the expansion of treaty law has primarily resulted in a functional differentiation between written and unwritten norm formation. Treaty law enables States to regulate increasingly complex areas of international relations in a detailed and deliberate manner, while customary international law continues to provide generally applicable rules in areas where treaty regulation is absent, incomplete or not

[5] JANKUV, J., LANTAJOVÁ, D., ŠMID, M., BLAŠKOVIČ, K. *Medzinárodné právo verejné. Prvá časť.* Plzeň : Aleš Čeněk, 2015. p. 178.
[6] ŠTENPIEN, E. Štefan Werbőczy -- život a dielo. In: *Tripartitum.* Žilina : Eurokódex, 2008. p. 19. ISBN 978-80-89363-24-7.
[7] JANKUV, J., LANTAJOVÁ, D., ŠMID, M., BLAŠKOVIČ, K. *Medzinárodné právo verejné. Prvá časť.* Plzeň : Aleš Čeněk, 2015. p. 178.
[8] *Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the United Nations International Law Commission* (2001), annexed to the Resolution adopted by the General Assembly No. 56/83 "Responsibility of States for internationally wrongful acts", UN Doc. A/RES/56/83 (2002).
[9] JANKUV, J., LANTAJOVÁ, D., ŠMID, M., BLAŠKOVIČ, K. *Medzinárodné právo verejné. Prvá časť.* Plzeň : Aleš Čeněk, 2015. p. 178.
[10] JANKUV, J. *Environmentalizácia medzinárodného práva verejného a jej vplyv na právo Európskej únie a právny poriadok Slovenskej republiky.* Praha : Leges, 2021. p. 76 -- 77.
[11] KLABBERS, J. *International Law.* Cambridge : Cambridge University Press, 2013. p. 26.

universally accepted. Custom may also coexist with treaty rules as an independent source of identical or complementary obligations. The contemporary relevance of customary international law should therefore not be assessed solely by reference to the number of newly emerging customary rules. Its systemic importance also lies in its capacity to operate independently of treaty participation and to maintain normative continuity in areas in which treaty regulation remains incomplete or fragmented.

In addition to international customs of a universal nature, bilateral customs also occur in international legal practice, as confirmed by the ICJ in the case of the *Right of Passage over Indian Territory* (1960).[12] For the sake of completeness, it is also necessary to point out the existence of regional customs, as follows from the Asylum Case (1950),[13] also from the framework of ICJ case law.

The definition of international custom is based on the provision of Article 38(1)(b) of the Statute of the ICJ, which characterizes international custom as evidence of a general practice accepted as law. Some theorists of international law have accepted the wording of Article 38(1)(b) only with serious reservations and argue that this provision is incorrectly formulated, since custom is not evidence of a particular practice, but on the contrary, general practice is evidence of the existence of custom.[14] Despite these reservations, arising from the wording of the provision of Article 38, paragraph 1, letter b) of the Statute of the International Court of Justice, it is possible to define international custom as a binding rule of conduct of States in their mutual relations which has become legally binding because of the belief of States in its legal binding nature, as well as the general long-term practice of at least the majority of States. It should also be emphasized that general practice is perhaps more important today than long-term practice.[15]

From the foregoing definition, it is possible to identify several specific features of international custom. The primary feature is the fact that the binding nature of international custom is identical to the binding nature of an international treaty, i.e. their legal force is the same.

The definition of international custom also indirectly implies the fact that in principle only States participate in the formation of customs. When examining the scope of the international legal personality of other subjects of international law (international intergovernmental organizations, national liberation movements, insurgent movements, etc.), it is necessary to state that their share in the area of customary norm formation is significantly limited. States participate in the formation of international custom to an unequal extent. International custom is mostly created by the economically and politically strongest States and the so-called interested States, while other States limit themselves only to their implicit (tacit) consent to international custom.[16]

For an international custom to arise, it must have been applied for a long time, i.e. the criterion of long-term use (*usus longaevus*) must also be met. International law does not contain any norm that would specify this criterion. The fulfillment of this criterion is therefore assessed individually for each potential custom. The mere long-term use is not sufficient for the emergence of an international custom. Its use must be continuous, with States gradually acquiring a permanent conviction of its legal binding nature (*opinio iuris necessitatis*). Such conviction is confirmed by the fact that States use a customary norm even when it is

[12] *Case concerning Right of Passage over Indian Territory (Merits)*, Judgment of April 12, 1960. ICJ Reports 1960, p. 6.
[13] *Asylum Case*, Colombia v. Peru, Judgment of November 20, 1950, ICJ Reports 1950, p. 266 et seq.
[14] WOLFKE, K. *Custom in Present International Law.* Wroclaw : Polska Akademia Nauk, 1964. p. 26.
[15] JANKUV, J., LANTAJOVÁ, D., ŠMID, M., BLAŠKOVIČ, K. *Medzinárodné právo verejné. Prvá časť.* Plzeň : Aleš Čeněk, 2015. p. 178 -- 179.
[16] JANKUV, J., LANTAJOVÁ, D., ŠMID, M., BLAŠKOVIČ, K. *Medzinárodné právo verejné. Prvá časť.* Plzeň : Aleš Čeněk, 2015. p. 179.

disadvantageous for them. Another characteristic feature of international custom is the fact that custom is an unwritten rule.[17]

The above-mentioned features of international custom allow for the identification of its fundamental differences from an international treaty. The fundamental difference between international custom and an international treaty is the unequal degree of participation of States in the creation of international customs. States generally participate in the creation of international treaties to the same extent. The long-term use necessary for the emergence of international custom is the second difference between international custom and an international treaty, which can also arise in a much shorter period. The unwritten nature of custom is another, third difference between international custom and an international treaty, which is usually written (with the exception of so-called tacit international agreements).

It is therefore necessary to determine the content of international custom, which does not contribute to the legal certainty of subjects. It is possible to arrive at knowledge of custom in several ways. Their summary was carried out by the *UN International Law Commission* in accordance with Article 24 of its Statute. In its report to the UN General Assembly in 1950, it stated that the texts of international treaties (including those that have not yet entered into force), decisions of international judicial and arbitral bodies, decisions of national judicial bodies concerning international law, national legislation regulating issues of international interest and, in particular, legislation implementing multilateral conventions, state constitutions, diplomatic correspondence of States and codification documents of UN bodies can serve as evidence of the existence of international customary rules.[18]

In contemporary international law, intensive codification of customary rules is underway with the aim of replacing customary rules with treaty rules, particularly within the framework of the UN codification body – The United Nations International Law Commission (hereinafter referred to as the ILC). This codification body has since included the issue of identifying customary norms in its codification programme and, in this context, adopted *Draft Conclusions on Identification of Customary International Law with Commentary* (2018),[19] after the second reading. This draft contains a total of 16 conclusions, which, for the purpose of identifying custom, state the need for the existence of the two constitutive elements of custom mentioned above (general practice of States and acceptance of this practice as law), describe in detail the process of identifying these elements, identify the importance of international treaties, resolutions of international organizations and international conferences, judgments of international courts and tribunals, as well as the science of international law in identifying customary rules, define qualified practice of a State, which excludes the possibility of stabilizing a customary rule, and confirm the possibility of the existence of universal, regional or local (bilateral) customs. Wouter Werner argues that this codification draft differs from most other works of the ILC because it seeks to identify the way in which customary international law arises.[20]

The International Court of Justice has also expressed its views on the issue of international custom in several cases. Perhaps the most comprehensive was its statement in the

[17] JANKUV, J., LANTAJOVÁ, D., ŠMID, M., BLAŠKOVIČ, K. *Medzinárodné právo verejné. Prvá časť.* Plzeň : Aleš Čeněk, 2015. p. 179 -- 181.

[18] *Ways and means for making the evidence of Customary International Law more readily available.* Yearbook of the International Law Commission, 1950, Vol. II, p. 367 -- 373. See also: AKEHURST, M. *A Modern Introduction to International Law.* London and New York : Routledge, 1995. p. 26 -- 27.

[19] *Draft Conclusions on the Identification of Customary International Law with Commentaries*, as adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as part of the Commission's report covering the work of that session, A/RES/73/203 (2018), para. 4.

[20] WERNER, W. The Making of Lawmaking: The ILC Draft Conclusions on the Identification of Customary Law. In: KRISCH, N., YILDIZ, E. (eds.). *The Many Paths of Change in International Law.* Oxford : Oxford University Press, 2023. p. 131.

North Sea Continental Shelf case (1969),[21] where he particularly specified the issue of States' belief in legal bindingness. In relation to international custom, the cases of *Continental Shelf* (1985) are also relevant[22] and the *Military and Paramilitary Activities in and against Nicaragua* case (1986).[23]

The science of international law, in connection with the existing international legal regulation and the aforementioned case law, further elaborates in detail the issue of international custom as a source of law. According to the science, custom has two basic levels – static and dynamic. The static level manifests itself as a form of law that grants legal validity to the content of a norm and in which subjects and applying bodies recognize this legal rule. The dynamic level represents the process of its creation, which together with the static element forms a logical unity.[24] *The static level* of the existence of international custom consists of the material element of the qualified long-term practice of subjects of international law (*usus longaevus*) and the subjective element, which is the belief of the State about the legal bindingness of the custom (*opinio iuris sive necesitatis*).[25] State practice is one of the main elements of customary law-making. This fact is confirmed by Article 38(1) of the Statute of the International Court of Justice, as well as by the case-law of the International Court of Justice, which stated that, in accordance with Article 38, *"...it must be ensured that the existence of a rule by opinio iuris is confirmed by the practice of States..."*.[26] Such a practice should, according to Article 38(1), be "general", i.e. respected by all states, and need not consist only in active action, but also in "inaction", i.e. omission of rejection or objection to the applied rule.[27]

State practice doesn´t need be absolutely uniform and may not reflect the content of the emerging customary rule completely. The International Court of Justice has stated in this regard that "*For a rule to become customary law, it is not necessary that the relevant practice of States be in absolute conformity with it. For a court to find that a customary rule exists, it is sufficient that this practice is generally consistent with the rule of conduct and that the conduct of States which is inconsistent with that rule is generally regarded as a breach of that rule and not as recognition of a new rule.*"[28] However, an apparently contradictory and unstable practice cannot be considered part of the formation of customary rules.[29]

Qualified practice is created by a whole series of relevant partial behaviours, some of which act as precedents. A precedent represents an action or omission of subjects of international law that, to one degree or another, changes the existing reality.[30]

The features of precedent in international law comprise six constitutive elements: *repetition, uniformity, continuity, generality, representativeness,* and *long duration*. The concept of repetition means that a customary norm cannot be formed on the basis of a single precedent, but only as a result of a whole series of precedents. Uniformity indicates a practice leading to the emergence of one and the same norm, including inaction, but only such as is manifested by the implicit consent of the State. Continuity represents the consistent conduct of

[21] *North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, ICJ Reports 1969, p. 3.
[22] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment*, ICJ Reports 1985, para. 29.
[23] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, ICJ Reports 1986, para. 97.
[24] MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému.* 5. podstatně upravené a doplněné vydanie. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. p. 186.
[25] MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému.* 5. podstatně upravené a doplněné vydanie. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. p. 187 -- 188.
[26] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, ICJ Reports 1986, para. 97.
[27] KLUČKA, J. *Medzinárodné právo verejné (všeobecná a osobitná časť).* 2. doplnené a prepracované vydanie. Bratislava : Iura Edition, 2011. p. 115.
[28] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, ICJ Reports 1986, para. 97.
[29] KLUČKA, J. *Medzinárodné právo verejné (všeobecná a osobitná časť).* 4. vydanie. Bratislava : Wolters Kluwer, 2023. p. 95.
[30] MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému.* 5. podstatně upravené a doplněné vydanie. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. p. 186.

active States in a given matter, which must be consistent, while they may not behave differently in identical situations. Generality and representativeness do not require the participation of all States in the process of creating customs, the bindingness of which is drawn primarily from the behaviour of the States involved, while the uninvolved States resort to systematic protests to avoid interpreting their passivity as implicit consent.

The conviction of subjects about the legal bindingness of a rule of conduct contained in a given practice is identified as external manifestations of the behaviour of States - e.g. a reference to a valid customary norm in a valid international treaty or an explicit recognition of the bindingness of a customary norm by the State concerned even in a situation where it is materially or otherwise disadvantageous for it.[31] In order to demonstrate the existence of a belief in legal bindingness, according to the International Court of Justice, two conditions must be met. The acts constituting a customary practice must constitute an established practice and must also be carried out in such a way as to give evidence of a belief that the practice is carried out in a binding manner in pursuance of the existence of a legal rule requiring such conduct.[32]

The dynamic dimension of the existence of international custom is ensured by States through their norm formation activities. States that, in the early stages of the process of creating custom, provide practice with precedents often purposefully aim at the emergence of a customary norm. In the science of international law, there are different opinions on this matter as to whether this activity of States is capable of giving the custom-forming development a consensual character, or whether the process as a whole remains spontaneous. However, the truth lies somewhere in the middle. The process of creating custom is spontaneous, but consensus is applied within one of the stages that precede the establishment of a valid customary norm. The precedent of an active State and the tacit consent of other States to its precedent-setting behaviour combine to form a kind of tacit agreement, which, however, operates only once and cannot be interpreted as recognition of the final binding nature of the rule of conduct. This interaction nevertheless should not be understood as equating the formation of customary international law with the conclusion of a tacit agreement. In the authors' view, tacit consent may constitute evidence relevant to the formation of custom, but the legal character of the resulting rule ultimately depends on the fulfilment of the constitutive requirements of customary international law, particularly general practice and opinio juris. However, as a result of the regular repetition of such an agreement, a customary rule may arise over time.[33] On the other hand, if certain conduct of a State gives rise to protests from other States which claim that such conduct is unlawful, such protests deprive the said conduct of any value as evidence of the existence of a customary rule.[34]

From the perspective of the legal life of international custom, it is important to pay attention to the issue of the relationship between international custom and international treaty as the basic sources of international law. The relationship between an international treaty and international custom is that they are legally equivalent, that is, they are equally legally binding. The equivalence of these basic sources of international law is also reflected in the fact that in the event of a breach of the international obligations contained in them, a uniform regime of international legal responsibility comes into play. Provision of Article 12 of the *Draft Articles on the Responsibility of States for Wrongful Conduct of the UN International Law Commission* (2001)[35] in this regard, it states that: "*A breach of an international obligation occurs when the*

[31] MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému.* 5. podstatně upravené a doplněné vydanie. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. p. 192.
[32] *North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands),* ICJ Reports 1969, p. 3.
[33] MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému.* 5. podstatně upravené a doplněné vydanie. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. p. 194.
[34] AKEHURST, M. *A Modern Introduction to International Law.* London and New York : Routledge, 1995. p. 30.
[35] *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001). Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as part of the

conduct of a State is not in accordance with what the obligation requires of it, regardless of its nature and character."[36]

The coexistence of treaty and customary rules also demonstrates that the increasing codification of international law does not necessarily reduce the normative relevance of custom. In certain circumstances, treaty rules may codify pre-existing customary rules, contribute to the crystallization of emerging customary rules, or subsequently generate customary rules through sufficiently general State practice and opinio juris. Conversely, customary law may continue to regulate matters not addressed by a treaty or may bind States that are not parties to the relevant treaty where the customary rule has an independent legal basis. The authors therefore consider the relationship between treaty and customary law to be better described in terms of interaction and functional complementarity than in terms of replacement of one source by another.

Custom and contract *can compete*,[37] it is therefore true that the content of rules of international law which are a treaty norm for certain States may apply as a customary international rule for other States which have not acceded to the treaty norm in question (e.g. the rules enshrined in the *Geneva Protocol for the Prohibition of Chemical and Bacteriological Weapons* (1925)), if they have been recognised as such by such States. A treaty rule may therefore, on the basis of interstate practice, give rise to a new customary rule applicable in parallel with its treaty form. This applies to any new treaty provision of international law which is not based on an existing customary provision. This fact is recalled by Art. 38 of the *Vienna Convention on the Law of Treaties* (1969), according to which: "*Nothing in Articles 34 to 37 shall prevent any provision of a treaty from becoming binding on a third State as a customary rule of international law recognised as such a rule*".

Both types of sources can exist in *symbiosis*, or in *complementary coexistence*[38] in such a way that international custom supplements an international treaty or vice versa. The Preamble to the *Vienna Convention on the Law of Treaties* (1969) states in this regard that “*the rules of customary law shall continue to govern questions not covered by the provisions of this treaty*”. Thus, not only are contractual and customary regulations mutually compatible in terms of content, but the purposefulness and effectiveness of the entire regulation are conditioned by the coexistence of rules in both forms. If there is competition in terms of content between international custom and an international treaty, i.e. if both sources regulate a certain issue differently and incompatibly, in principle it does not cause the invalidity of either of them.[39]

For their relationship, it is possible to selectively use logical and interpretative principles such as *lex specialis derogat legi generali*, or *lex posterior derogat legi priori*. As an example for the use of the first mentioned principle, it is possible to cite the customary legal regime of the so-called historical bays (e.g. Hudson Bay, Gulf of Riga, etc.), which takes precedence over the more general contractual regulation of bay regimes under the *United Nations Convention on the Law of the Sea* (1982).[40]

The application of the second principle is particularly problematic in the case of the relationship between universal customs and later adopted multilateral international treaties.

Commission’s report covering the work of that session, UN Doc. A/56/10 (2001); annexed to the Resolution adopted by the General Assembly No. 56/83 "Responsibility of States for internationally wrongful acts", UN Doc. A/RES/56/83 (2002).

[36] *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001). Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as part of the Commission’s report covering the work of that session, UN Doc. A/56/10 (2001); annexed to the Resolution adopted by the General Assembly No. 56/83 "Responsibility of States for internationally wrongful acts", UN Doc. A/RES/56/83 (2002).

[37] MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému.* 5. podstatně upravené a doplněné vydanie. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. p. 196.

[38] MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému.* 5. podstatně upravené a doplněné vydanie. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. p. 196.

[39] MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému.* 5. podstatně upravené a doplněné vydanie. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. p. 196 -- 197.

[40] DAVID, V., SLADKÝ, P., ZBOŘIL, F. *Mezinárodní právo veřejné s kazuistikou.* Praha : Leges, 2008. p. 108.

This rule can only be applied if the later adopted multilateral international treaty has the character of a so-called universal codification treaty.[41] If both sources regulate the matter in the same way, i.e. there is a so-called *cumulation*, the principle *lex posterior derogat legi priori* does not apply. If the custom and the treaty are identical in content, the above rules do not cancel each other out. This also applies to so-called *codification conventions*, which practically capture international custom in written form.[42]

There is no rule in current international law that would determine in a binding manner for States which area of potential international legal regulation they have, can, or even must regulate in the form of an international treaty or international custom. Despite this freedom to freely choose any of the basic sources of international law for regulating their new rights and obligations, current developments to date confirm that States *prefer contractual regulation*. This applies not only to the mutual regulation of rights and obligations, but also to entire branches of international law that are codified through international conventions of a “legislative nature”. Current international law is therefore predominantly a law of a *contractual nature* and in many cases customary rules in those branches of international law that have been codified (international maritime law, international diplomatic law, international consular law, the law of international conventions). However, precise boundaries between treaty (written) international law and unwritten customary law do not currently exist, and for this reason, many rules of international law exist in a "mixed" treaty-customary form.[43]

III. TACIT INTERNATIONAL AGREEMENT

Tacit international agreement have been largely overlooked since the second half of the 20th and early 21st centuries. However, the concept of a “tacit agreement” as a binding agreement in international law has existed since the 17th century. Danae Azaria provides us with an overview of the historical theoretical approaches of Grotius, de Vattel and de Martens to the issue of defining tacit treaties, at various levels.[44]

Some States (after 1945) recognized, or at least did not refute, tacit agreement as a type of binding international agreement. However, it is not clear whether the term “*tacit agreement*” was used with a consistent meaning in State practice at the time.[45] In this regard, it is important to note that the consent of a State expressed in the context of a tacit agreement must be distinguished from the consent of a State to a customary rule. Tacit agreements are bilateral and require a high standard of proof to prove consent, whereas customary law is a multilateral process in which consent is implicit, not explicit, and can create rules binding on all States unless another legally relevant entity formally objects to the existence of the custom.

In the authors' view, the decisive criterion distinguishing tacit agreements from customary international law is not merely the duration of State conduct, but the nature and intensity of legally relevant consent. A tacit agreement presupposes that the conduct of the States concerned can be interpreted as demonstrating their intention to establish legally binding rights and obligations between themselves. Customary international law, by contrast, is not dependent upon the identification of such an agreement between particular States; its formation

[41] DAVID, V., SLADKÝ, P., ZBOŘIL, F. *Mezinárodní právo veřejné s kazuistikou*. Praha : Leges, 2008. p. 108.

[42] MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému.* 5. podstatně upravené a doplněné vydanie. Brno : Masarykova univerzita a Nakladatelství Doplněk, 2008. p. 196.

[43] JANKUV, J., LANTAJOVÁ, D., ŠMID, M., BLAŠKOVIČ, K. *Medzinárodné právo verejné. Prvá časť.* Plzeň : Aleš Čeněk, 2015. p. 183.

[44] AZARIA, D. Tacit Agreements. In: HEIDAR, T., BOURKE, N., KIM, H-J. *The Judicial Work of the International Tribunal for the Law of the Sea: Progress and Challenges -- Liber Amicorum Judge Jin-Hyun Paik* (forthcoming, Routledge). Posted: 9 May 2024. [online] [cit. 9. septembra 2026]. Dostupné online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4822624.

[45] AZARIA, D. Tacit Agreements. In: HEIDAR, T., BOURKE, N., KIM, H-J. *The Judicial Work of the International Tribunal for the Law of the Sea: Progress and Challenges -- Liber Amicorum Judge Jin-Hyun Paik* (forthcoming, Routledge). Posted: 9 May 2024. p. 2 -- 5. [online] [cit. 9. septembra 2026]. Dostupné online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4822624.

requires general State practice accepted as law. Consequently, consistent conduct between two States should not automatically be classified as a tacit agreement. The existence of a tacit agreement requires convincing evidence of legally relevant consent, whereas conduct contributing to the formation of customary law must be assessed in the broader context of general practice and opinio juris. The same conduct may therefore have different legal significance depending on the context in which it occurs and the evidence available concerning the intention of the States involved.

In general, an international treaty in a written form is currently considered the predominant basic source of international law. Its dominant position in comparison with international custom is given by the fact that it is more unambiguous in content, provides greater legal certainty and its content is immediately and more easily accessible. A valid international treaty may also provide a more precise legal framework for determining the consequences of a breach, including the applicable mechanisms of international responsibility and, where provided for by the relevant legal regime, specific forms of enforcement or other legal consequences. The *Vienna Convention on the Law of Treaties* (1969) contains detailed regulations on the conditions for the formation, amendment and termination of international treaties in relations between states [46] and in relations between States and international organizations in the *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations* (1986).

Article 3 of the *Vienna Convention on the Law of Treaties* (1969) states that the Convention does not apply to international agreements which are not in written form. The provision of this article indicates that, however, there are also unwritten international agreements in international law, in the form of so-called tacit (silent) agreements. In the spirit of this article, there is also a clear terminological distinction between the concept of a written international treaty and the concept of an unwritten agreement. A written form of this source of international law is called a "treaty“, and an unwritten one is called an "agreement" in this convention.

The concept of a “tacit agreement” in international law is not entirely clear. However, it can be understood, in contrast to an express or explicit written treaties, as an agreement the existence of which can be inferred from the conduct of the parties.[47] In the case of tacit agreements, consensus arises from the implicit behaviour of the parties involved. It is therefore the result of mutual real behaviour that does not raise any doubts.[48]

In this regard, this means that an agreement, express or implied, creates binding rights and obligations only if the parties intend it to do so. The intention of the parties to be bound by the agreement (lat. *animus contrahendi*) determines its legal nature, distinguishing between a legally binding agreement such as a treaty in the strict sense of the word and an instrument that is not legally binding, such as a political agreement.[49]

As regards the intention to be bound by a tacit agreement, the ICJ stated in this regard in the case of *Obligation to Negotiate Access to the Pacific Ocean* (2018),[50] that *“(even) whatever form agreements may take, they require the intention of the parties to be bound by legal obligations. This also applies to tacit agreements.*” A tacit agreement can therefore acquire legal force at the moment when the intention of the parties to create rights and obligations under international law is demonstrated.

[46] *Vienna Convention on the Law of Treaties*, 1155 UNTS 331 (1969).

[47] JIN-HYUN, P. Tacit Agreements. In: *Max Planck Encyclopedia of Public International Law.* Heidelberg : Max Planck Institute for Comparative Public Law and International Law, 2020. Dostupné online: https://opil.ouplaw.com/display/10.1093/law-epil/9780199231690/law-9780199231690-e2265.

[48] ČEPELKA, Č., ŠTURMA, P. *Mezinárodní právo veřejné.* 1. vydanie. Praha : C. H. Beck, 2008. p. 127.

[49] JIN-HYUN, P. Tacit Agreements. In: *Max Planck Encyclopedia of Public International Law.* Heidelberg : Max Planck Institute for Comparative Public Law and International Law, 2020. Dostupné online: https://opil.ouplaw.com/display/10.1093/law-epil/9780199231690/law-9780199231690-e2265.

[50] *Obligation to Negotiate Access to the Pacific Ocean, Bolivia v Chile, Judgment*, ICJ Reports 2018, para. 97.

The concept of tacit agreements has also been recognized in other international jurisprudence. The existence of a tacit agreement has often been invoked, particularly in the context of maritime boundary delimitation before international courts and tribunals. Although such claims have rarely been accepted by international courts and tribunals, the concept of a tacit agreement itself has never been questioned.[51] In this regard, Azaria notes that since 1945, State practice in the form of submissions before international courts and tribunals and decisions of international courts and tribunals have consistently recognized the existence of a tacit agreement. For example, in the case of *Nicaragua vs. Honduras* (2007)[52] the International Court of Justice has acknowledged the possibility of a tacit agreement but has found that "*there was no tacit agreement between the parties (...) of such a nature as to establish a legally binding maritime boundary*". Furthermore, in the case of Ghana vs Côte d'Ivoire (2017)[53] the Special Chamber of the International Tribunal for the Law of the Sea considered that the evidence before it did not prove that a tacit agreement had occurred.[54]

Paik Jin-Hyun points out the ways in which a tacit agreement can arise. In his view, a tacit agreement can arise from the contemporaneous conduct or practice of the parties concerned. It can also arise from the silence or inaction of one party in relation to the conduct of another party, if such conduct requires a response. The International Court of Justice stated in the *Gulf of Maine case* (1984)[55] that a tacit agreement may take the form of consent in the sense of "*tacit recognition expressed by unilateral action which the other party may interpret as consent*". For the conduct or practice of the parties to be relevant to the formation of a tacit agreement, it must be sufficiently clear and related to the subject matter of the agreement. Other relevant factors may include the degree of agreement and consistency of the conduct of the parties, as well as its duration. The higher the degree of agreement and consistency and the longer such conduct lasts, the more likely it is that the conduct constitutes a tacit agreement.[56]

In the case of a tacit agreement arising from silence or inaction, the requirements of consent may be relevant. It is generally understood that consent may arise from the silence or inaction of a State when certain facts were or should have been known to the State (knowledge), are of direct interest to the State (interest), have existed for a considerable period of time (duration) without significant change (consistency) and can be attributed to the State's agent (attribution). A State invoking the existence of a tacit agreement through silence or inaction must demonstrate that these requirements have been met.[57]

Jin-Hyun states that the existence of a tacit agreement must be established in the same way as the existence of an express agreement, in that the intention of the parties to create legal rights and obligations must be demonstrated. However, in the case of a tacit agreement, the lack of express terms indicating the existence of legal obligations may make it more difficult to

[51] JIN-HYUN, P. Tacit Agreements. In: *Max Planck Encyclopedia of Public International Law.* Heidelberg : Max Planck Institute for Comparative Public Law and International Law, 2020. Dostupné online: https://opil.ouplaw.com/display/10.1093/law-epil/9780199231690/law-9780199231690-e2265.

[52] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment,* I.C.J. Reports 2007, p. 659.

[53] *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean*, Ghana v Côte d'Ivoire, Provisional Measures, ITLOS Case No. 23, ICGJ 494 (ITLOS 2015), 25 April 2015, International Tribunal for the Law of the Sea (ITLOS).

[54] AZARIA, D. Tacit Agreements. In: HEIDAR, T., BOURKE, N., KIM, H-J. *The Judicial Work of the International Tribunal for the Law of the Sea: Progress and Challenges -- Liber Amicorum Judge Jin-Hyun Paik* (forthcoming, Routledge). Posted: 9 May 2024. p. 7 -- 8. [online] [cit. 9. septembra 2026]. Dostupné online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4822624.

[55] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v USA), Judgment*, I.C.J. Reports 1984, p. 246.

[56] JIN-HYUN, P. Tacit Agreements. In: *Max Planck Encyclopedia of Public International Law.* Heidelberg : Max Planck Institute for Comparative Public Law and International Law, 2020. Dostupné online: https://opil.ouplaw.com/display/10.1093/law-epil/9780199231690/law-9780199231690-e2265.

[57] JIN-HYUN, P. Tacit Agreements. In: *Max Planck Encyclopedia of Public International Law.* Heidelberg : Max Planck Institute for Comparative Public Law and International Law, 2020. Dostupné online: https://opil.ouplaw.com/display/10.1093/law-epil/9780199231690/law-9780199231690-e2265.

establish such intention. All relevant evidence, such as whether the conduct is sufficiently specific, concurrent and consistent over a significant period of time, must be assessed objectively. The standard of proof for proving a tacit agreement was further specified by the *International Court of Justice* in the context of maritime boundary delimitation in the case of *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (2007).[58] The ICJ held that the standard: "*The proof of a tacit agreement must be convincing. The establishment of a permanent maritime boundary is a matter of extraordinary importance, and agreement cannot be lightly assumed.*" This statement has been consistently upheld in subsequent decisions of international courts and tribunals as the standard of proof for establishing the existence of a tacit agreement.[59]

According to Čepelka and Šturma, tacit agreements also extend the scope of treaties on internationalized rivers and the treaty regime of Antarctica, and they also arise within the framework of the activities of international organizations. A typical example is the sending of an official of an international organization to a non-member state of the organization, which receives him not as a private person, but as a representative of the body of the international organization.[60] Čepelka also identifies an example of a tacit agreement in a situation where States provide refuge to persecuted persons in the buildings of diplomatic missions, although they are not bound to do so by customary or written norms of international law. This is the provision of refuge for humanitarian reasons, while the State of the seat of the mission tolerates this practice. In this case, the provision of refuge is based on an *ad hoc* tacitly negotiated unwritten international treaty that arose on the basis of the "*tacit*" behavior of states. The content of such an unwritten treaty is the right to provide humanitarian refuge to persecuted persons and the obligation to tolerate the safe departure of the person or persons from the country by the state of the seat of the diplomatic mission.[61]

In particular, the existence and functioning of tacit agreements in international environmental law can be mentioned. Tacit agreements are often used to accelerate the entry into force of amendments, technical annexes and supplements to multilateral environmental treaties by means of tacit consent. This mechanism allows for amendments to be adopted by a majority vote and to be automatically binding on all parties after a specified period, unless a certain number of States formally object. For example, amendments to the annexes to the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (1989)[62] concerning hazardous waste.

In connection with the above information, the question may arise in the science of international law as to what is the difference between international custom and tacit agreement. The first difference is that a tacit agreement can arise in the practice of States in a very short time, while the emergence of a customary rule usually requires a long-term practice of States. Another difference is that a tacit agreement is usually a bilateral application of a universal law-making international treaty. However, it is not excluded that a tacit agreement can take the form of a bilateral international custom through long-term use. The main difference between a tacit agreement and a custom is that tacit agreements are based on a high standard of evidence of demonstrated consent of states, although it may only have a tacit (silent) form, whereas the

[58] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment*, I.C.J. Reports 2007, p. 659, para. 253.
[59] JIN-HYUN, P. Tacit Agreements. In: *Max Planck Encyclopedia of Public International Law.* Heidelberg : Max Planck Institute for Comparative Public Law and International Law, 2020. Dostupné online: https://opil.ouplaw.com/display/10.1093/law-epil/9780199231690/law-9780199231690-e2265.
[60] ČEPELKA, Č., ŠTURMA, P. *Mezinárodní právo veřejné.* 1. vydanie. Praha : C. H. Beck, 2008. p. 127 -- 128.
[61] ČEPELKA, Č. Vývoj institutů azylu a uprchlictví v mezinárodním právu. In: ČEPELKA, Č., ŠTURMA, P., BÍLKOVÁ, V., FÁBEROVÁ, A., SKALKOVÁ, M., HONUSKOVÁ, V. *Teorie a praxe azylu a uprchlictví.* Praha : Univerzita Karlova a UNHCR, Scripta Iuridica No. 2, 2006. p. 19. ISBN 80-85889-79-X.
[62] *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, adopted on 22 March 1989, 1673 UNTS 125.

consent of States to a custom is often only implicit with a lower standard of demonstrated consent of States.

As regards the relationship between tacit agreements and customary and general principles of law, we can state that, according to the *Draft Conclusions on General Principles of Law* (2023)[63] of the *UN International Law Commission*, the relationship of general principles of law to international treaties and customary international rules is not hierarchical. All three sources have equal legal force. Any conflict between them must be resolved by generally accepted methods of interpretation and resolution of conflicts between sources of international law. This same approach logically applies to the relationship of the three unwritten sources to written international treaties.

IV. GENERAL PRINCIPLES OF LAW

As regards the historical development of the concept of general principles of law in international law, it should be noted that the legal life of this source of international law began in the nineteenth century. The reason for the emergence of this concept was the fact that in the nineteenth and early twentieth centuries, arbitral bodies and courts, when deciding disputes between States, were faced with cases in which no treaty or customary rule regulated the matter submitted to arbitration. Antonio Cassese writes in this regard that these bodies found it necessary to refer to certain general principles common to the national legal systems of most countries. This was a clever way of filling legal gaps, thus developing what was then a rather rudimentary and incomplete body of international law. No State objected, which is not surprising, since the courts applied general principles known to the States concerned.[64]

After the First World War, the reference to these principles was codified in Article 38, paragraph 3, of the Statute of the *Permanent Court of International Justice* (1921), drawn up by the *Advisory Committee of Jurists* appointed by the *Council of the League of Nations*. Cassese points out that this source was included in the Statute at the suggestion of the President of the aforementioned body, Decamps (E.E.F.) who proposed that the Court should apply, in addition to treaties and customs, "*the rules of international law as recognized by the legal conscience of civilized nations.*"[65] However, the final wording of the Article 38, paragraph 3, of the Statute as for this source of international law was slightly different, in the form *"The general principles of law recognized by civilized nations"*.

The concept of general principles of law is now included in Article 38(1)(c) of the *Statute of the International Court of Justice* (1945), in the same form, together with the historically surviving addition of "*civilized nations*". The whole wording of this article, including this addition, was taken from the abovementioned Statute of the Permanent Court of International Justice. The Permanent Court of International Justice (PCIJ) operated as a court of the League of Nations from 1921 to 1940.

The above wording, as reproduced in Article 38(1)(c) of the *Statute of the International Court of Justice* (ICJ), has drawn criticism because it appeared to be based on the outdated concept that only certain nations can rightly be called civilized.[66] This criticism is evident from the extent of Judge Fouad Ammoun's separate opinion in the *North Sea Continental Shelf* case, which the ICJ delivered (1969),[67] who stated: "First of all, it is important to note that the

[63] *General principles of law.* Text of the draft conclusions provisionally adopted by the Drafting Committee on first reading. International Law Commission, Seventy-fourth session, Geneva, 24 April -- 2 June and 3 July -- 4 August 2023. UN Doc. A/CN.4/L.982 (12 May 2023).
[64] CASSESE, A. *International Law.* Oxford : Oxford University Press, 2001. p. 155 -- 156.
[65] CASSESE, A. *International Law.* Oxford : Oxford University Press, 2001. p. 156.
[66] GAIA, G. General Principles of Law. In: *Max Planck Encyclopaedia of Public International Law*, article last updated: April 2020. Dostupné online: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1410. DOI 10.1163/9789004390935_004.
[67] *North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, ICJ Reports 1969, p. 3.

wording of Article 38, paragraph 1, sub-paragraph (c) of the Statute, which refers to "*general principles of law recognized by civilized nations*", is inapplicable in the form in which it is formulated, because the term "*civilized nations*" is incompatible with the relevant provisions of the Charter of the United Nations and results in an unwise restriction of the concept of general principles of law." Prof. Yu Lu rightly considers this term to be an anachronism and proposes replacing it with the term "*States*".[68]

Although classified as one of the sources of international law, general principles of law remain unclear and undefined to this day. Although there is no complete agreement on what general principles are, they are closely intertwined with the structure of international law and, together with treaties and customary international law, form the international legal system.[69]

The issue of general principles of law is currently the subject of codification by the *UN International Law Commission* (hereinafter UNILC or ILC). In 2023, the UNILC adopted, after first reading, the aforementioned *Draft Conclusions on General Principles of Law* (hereinafter referred to as the "Draft Conclusions (2023)"),[70] which contain a total of 11 draft conclusions. The aforementioned conclusions confirm, in particular, that general principles of law are a source of international law, but as such they must be recognized by the international community. The Draft Conclusions (2023) have already abandoned the use of the aforementioned, historically outdated adjective "*recognized by civilized nations*". This document further states that we distinguish between two categories of the above-mentioned principles, namely general principles of law derived from national legal systems and general principles of law formed within the framework of international law.

According to the Draft Conclusions (2023) and current state practice, general principles of law are, above all, principles that are generally applicable in various legal systems of the world, i.e. within the national legal orders of states in the international community. Usually, these are private law principles of substantive law (e.g. the principle of the obligation to compensate for damage and lost profits from internationally wrongful acts) or public law procedural principles (e.g. the principle of *nemo iudex in causa sua*, the principle of *ne bis in idem*, etc.). They must also be principles that do not contradict the nature of international law, i.e. principles that are by their nature compatible with the system of international law and applicable in international legal relations. In such a case, they can be transformed into the framework of international law.[71] For example, the procedural principle of individual access to courts can only be applied in the field of international human rights law, but not in proceedings before the International Court of Justice or arbitral bodies.[72]A general overview of the principles adhered to by the *Permanent Court of International Justice* and the *International Court of Justice* at certain historical periods is provided by Antonio Cassese.[73]

General principles of law formed within the international legal system appear less frequently in State practice than principles derived from national legal systems. Their relative

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[68] LU, Y. Analysis of the General Principles of Law of Article 38 of the Statute of the International Court of Justice. In: *Beijing Law Review*, 2022, Vol. 13, p. 787. Dostupné online: https://doi.org/10.4236/blr.2022.134051. DOI 10.4236/blr.2022.134051.

[69] DORDESKA, M. *General Principles of Law Recognized by Civilized Nations (1922-2018).* Queen Mary Studies in International Law, Volume 39. Leiden : Brill/Nijhoff, 2020. p. 684.

[70] Regarding the progress of the codification work on the Draft Conclusions on General Principles of Law, it should be noted that, at its 77th session in July 2026, the ILC adopted, at second reading, a set of 12 Draft Conclusions on General Principles of Law, together with the commentaries. However, at the time this article was submitted for publication, the draft in question had not been published or included in the official version of the ILC documents. It was therefore necessary to proceed from the version of the draft after the first reading of 2023. In this regard, only the working document VÁZQUEZ-BERMÚDEZ, M. *Fourth report on general principles of law*, UN Doc. A/CN.4/785, International Law Commission, 76th Session (2025), is available, according to which Conclusion 12 concerning "General principles of law with a limited scope of application" was added to the text, and certain other conclusions were amended, though not substantially.

[71] CASSESE, A. *International Law.* Oxford : Oxford University Press, 2001. p. 157.

[72] JANKUV, J., LANTAJOVÁ, D., ŠMID, M., BLAŠKOVIČ, K. *Medzinárodné právo verejné. Prvá časť.* Plzeň : Aleš Čeněk, 2015. p. 184.

[73] CASSESE, A. *International Law.* Oxford : Oxford University Press, 2001. p. 157.

rarity in practice, however, should not be understood as establishing an exhaustive or closed category. The Draft Conclusions (2023) recognise the possibility of identifying such principles where the relevant conditions for their existence and recognition within the international legal system are fulfilled. According to the Draft Conclusions (2023) of the ILC, the existence and content of such a principle must be confirmed by the recognition of such a principle as an integral part of international law by the international community. Examples of such principles are, for example, the principle of the consent of a State to the compulsory jurisdiction of an international court or the principle of respect for the historical administrative boundaries of former colonial territories when establishing borders between newly emerging States (the principle of *uti possidetis iuris*), and others.[74]

According to the Draft Conclusions (2023), general principles of law are used in particular when other rules of international law do not address a specific issue in whole or in part. They are also intended to contribute to the coherence of the international legal system by being able to interpret and complement other rules of international law, to serve as a basis for primary rights and obligations, as well as for secondary rights and procedural rules. They therefore serve as aids to the interpretation of treaties and customary law, help to integrate legal norms and promote systemic stability, and can provide a basis for judicial decision-making in order to avoid a situation where no rule applies.

According to the Draft Conclusions (2023), the relationship between general principles of law and international treaties and customary international rules is not hierarchical. All three sources have equal legal force. The relationship between general principles of law and customary international law requires particular attention because both sources may perform a function of normative supplementation within the international legal system. Their similarity, however, should not lead to their conceptual conflation. In the authors' view, the principal distinction lies in the legal basis through which the relevant norm is identified.

Customary international law requires the existence of general State practice accepted as law. A general principle of law is identified on a different basis, depending on the category concerned. Principles derived from national legal systems require their recognition across a sufficiently broad and representative range of legal systems and their compatibility with the international legal order. Principles formed within the international legal system require recognition as principles inherent in the international legal system itself in accordance with the conditions reflected in the ILC Draft Conclusions (2023).

The subsequent application of a general principle by States does not, by itself, transform that principle into customary international law. Such a transformation would require the independent fulfilment of the constitutive requirements of custom, including the existence of general State practice accepted as law. Conversely, the fact that a principle may influence State practice or judicial reasoning does not deprive it of its character as a general principle.

The authors therefore consider the relationship between these two sources to be one of possible normative interaction rather than automatic transformation. A general principle may influence the development of State practice and may contribute to the clarification or development of customary rules, while a customary rule may provide evidence relevant to the application or interpretation of a general principle. Nevertheless, the legal basis for identifying the two sources remains distinct and should be maintained when determining the applicable rule of international law.

In this context, it should be noted that the conflict between rules is a very complex issue. There is no hierarchy of sources and treaties may deviate from custom and vice versa, but there are imperative norms – *ius cogens*, from which no deviation is permitted. An imperative norm

[74] The inclusion of these principles in the Draft Conclusions (2023) has sparked extensive discussion within the ILC. For more information, see: BJORGE, E. General Principles of Law Formed within the International Legal System. In: *International & Comparative Law Quarterly*, 2023, Vol. 72, No. 4, p. 846 -- 849.

can only be changed by another imperative norm. Imperative norms exist predominantly in customary form.

As regards the practical application of all three sources of international law, it must be said that in practice international treaties often function as a *lex specialis* with reference to relevant customary law and general principles.[75]

The use of general principles of law is therefore particularly important in cases of gaps in international law. In such cases, either analogy of law or general principles of law are used. However, the application of general principles of law is referred to in many judgments of international judicial and arbitral bodies. The application of general principles of law is envisaged, for example, in Article 21 of the *Statute of the International Criminal Court* (1998).[76] General legal principles therefore still have their place within the sources of international law.

It is particularly appropriate to mention the issue of the applicability of general legal principles in international environmental law. Among the general legal principles of national origin, the principle of non-damage to the environment beyond the jurisdiction of States (lat. *sic utere tuo ut alienum non laedas*) is clearly applicable to environmental protection, which contains the obligation of states not to use their territory in such a way as to cause serious damage to the territory of other states. This is a principle found in all national legal systems of states, but which has also been transformed into a customary form in the meantime. The second principle of national legal origin is the "*polluter pays principle*", the existence of which has also been confirmed at the international level.[77]

In connection with the above information, the question may arise in the science of international law as to what the difference between international customs and general principles of law is. The main difference between these two sources is that a general principle of law fills a gap in those areas of international law where there is no customary regulation or only partial, incomplete customary regulation. The subsequent development of State practice may, under the conditions required for the formation of customary international law, lead to the emergence of a customary rule corresponding in substance to a general principle of law. This should not, however, be understood as an automatic transformation of the general principle into custom, since the two sources retain distinct legal bases.

From the general principles of law under Article 38 of the ICJ Statute, it is necessary to distinguish general principles of international law that arise by generalizing existing specific norms of international law that do not originate in national law (e.g. the principle of prohibition of the use of force and threat of force). Science has not yet been able to take a definitive position on the issue of the relationship between general legal principles of international law, origin and general principles of international law. However, it is clear from the approach of the ILC to date that the above-mentioned groups of principles can be distinguished. Within the framework of general legal principles born within the framework of international law, the Commission, in the spirit of the Draft Conclusions on general legal principles, has included only some selected principles created in those areas of international law where there was only partial customary or treaty regulation or none at all. Ultimately, these are principles that differ, for example, from fundamental principles of international law that arose by generalizing existing more complex groups of norms of international law.

[75] *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* UN Doc. A/CN.4/L.682 (2006), p. 178.
[76] KLUČKA, J. *Medzinárodné právo verejné (všeobecná a osobitná časť).* 4. vydanie. Bratislava : Wolters Kluwer, 2023. p. 99.
[77] ZÁSTĚROVÁ, J. Prameny mezinárodního práva životního prostředí. In: ŠTURMA, P., DAMOHORSKÝ, M., ONDŘEJ, J., ZÁSTĚROVÁ, J., SMOLEK, M. *Mezinárodní právo životního prostředí, I. časť (obecná).* Beroun : IFEC -- Eva Rozkotová, 2004. p. 75.

V. CONCLUSION

The aim of this article was to examine the historical development, legal nature and contemporary form of three unwritten sources of public international law – customary international law, general principles of law and tacit international agreements – and to determine their significance within the contemporary system of sources of international law. The analysis confirms the hypothesis that the growing number and importance of written sources of international law have not resulted in the disappearance of unwritten sources. The research nevertheless demonstrates that their contemporary significance cannot be explained merely by their continued existence. Their position within the international legal system has been transformed through an increasing functional differentiation between written and unwritten forms of international norm formation.

The first finding concerns customary international law. Its development since the nineteenth century, and particularly since 1945, demonstrates that the expansion of treaty-based norm formation has not displaced custom as an autonomous source of international law. The increasing codification of customary rules has instead changed the circumstances in which custom operates. Customary international law continues to perform an important function where treaty regulation is absent, incomplete or not universally accepted and may coexist with treaty rules as an independent or complementary legal basis for international obligations. Its contemporary relevance should therefore not be assessed solely according to the number of newly emerging customary rules. Its systemic importance also lies in its ability to provide generally applicable rules independently of participation in a particular treaty regime and to maintain normative continuity in areas in which written regulation remains incomplete.

The analysis further demonstrates that the formation of customary international law cannot be reduced to the mere repetition of State conduct over a prolonged period. The decisive elements remain general State practice and its acceptance as law. The temporal duration of practice may constitute relevant evidence, but it does not operate as an autonomous and universally applicable threshold. The identification of custom therefore requires an assessment of the quality, consistency and representativeness of State practice together with evidence of opinio juris. This confirms that contemporary customary international law is not simply a product of historical repetition, but a continuing process of normative development.

The second finding concerns tacit international agreements. Their character lies primarily in the nature and intensity of legally relevant State consent. Although tacit agreements may arise through conduct and may therefore resemble customary international law in their unwritten form, they should not be regarded as merely an accelerated form of custom. A tacit agreement requires sufficiently convincing evidence that the conduct of the States concerned demonstrates their intention to establish legally binding rights and obligations between them. Customary international law, by contrast, is based on general State practice accepted as law and does not require the identification of an agreement between particular States. The distinction between the two sources should therefore be based principally on the legal basis and evidentiary character of State consent rather than solely on the duration of the relevant practice.

The third finding concerns general principles of law. Their position is particularly complex because of the continuing doctrinal debate concerning their origin, identification and relationship with customary international law. The analysis supports the view that general principles of law and customary international law cannot be treated as interchangeable sources. Their legal bases remain distinct. Customary international law requires general State practice accepted as law, whereas general principles of law are identified on the basis of the conditions applicable to their respective categories, including principles derived from national legal systems and principles formed within the international legal system. The subsequent application of a general principle by States does not automatically transform that principle into customary international law. Such a transformation would require the independent fulfilment of the requirements for the formation of custom. The relationship between the two sources should therefore be understood as one of possible normative interaction rather than automatic transformation.

The comparison of the three examined sources consequently leads to a broader conclusion concerning the contemporary structure of international law. The development of international law after 1945 cannot be adequately described as a transition from an unwritten system dominated by custom towards a written system dominated exclusively by treaties. Rather, it represents a process of functional differentiation. Treaty law increasingly provides detailed and deliberate regulation of international relations, while customary international law, tacit agreements and general principles continue to perform distinct functions that cannot be completely replaced by written norm formation. The contemporary system of sources is therefore characterised by coexistence and interaction rather than by the progressive disappearance of unwritten sources.

This conclusion also modifies the understanding of the relationship between the individual sources. Their significance cannot be determined solely by their formal classification or by an abstract hierarchy. Treaty rules, customary rules and general principles may regulate the same subject matter while deriving their legal force from different sources. Similarly, tacit agreements may produce legally binding effects without taking the form of a written treaty. The decisive issue is therefore not which source is generally superior, but which legal basis is applicable in the particular circumstances and how the relevant rule can be methodologically identified.

From a de lege ferenda perspective, greater methodological precision is desirable in the identification and differentiation of unwritten sources of international law. Particular attention should be paid to distinguishing customary international law from general principles of law and tacit agreements in situations where similar State conduct may provide evidence relevant to more than one source. The continuing work of the International Law Commission is therefore important not only for the codification of individual sources but also for clarifying the methodological relationship between them. Further development of international law should seek to preserve the flexibility of unwritten sources while maintaining sufficiently clear criteria for their identification in order to protect legal certainty and prevent the attribution of legal effects to State conduct without an adequate legal basis.

The research question can therefore be answered as follows: the legal nature and effectiveness of unwritten sources of public international law remain grounded in distinct mechanisms of international norm formation, while their contemporary development is characterised by increasing interaction with written sources and by differentiation of their respective functions. Their importance has not disappeared as treaty-based regulation has expanded; rather, their role within the international legal system has changed. The principal finding of this article is consequently that the development of contemporary international law has transformed, rather than displaced, unwritten sources. Their continuing relevance derives precisely from their capacity to perform normative functions that cannot be fully substituted by treaty-based regulation.

KEY WORDS

Public international law, unwritten sources, international custom, general legal principles, tacit international agreements

KĽÚČOVÉ SLOVÁ

Medzinárodné právo verejné, nepísané pramene, medzinárodná obyčaj, všeobecné právne zásady, tacitné medzinárodné dohody

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THE DAYBREAK OF COMMERCIAL USE OF OUTER SPACE IN THE REPUBLIC OF POLAND AND THE NEW POLISH SPACE ACT

ÚSVIT KOMERČNÉHO VYUŽÍVANIA VESMÍRU V POĽSKEJ REPUBLIKE A NOVÝ POĽSKÝ ZÁKON O VESMÍRE

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ABSTRACT

On March 24, 2026, the President of the Republic of Poland, Karol Nawrocki, signed the long-awaited new Polish Act on Space Activities (Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej). Poland has thus joined the European countries that have already incorporated their international obligations regarding space use into their own legislation. As with other national regulations already adopted, the new Polish regulation also reflects the phenomenon of the privatisation and commercialisation of space. The new Polish Act on Space Activities aims to create a transparent and predictable legal framework for the implementation of activities by private entities in Outer Space, including rules for permitting, registration, and liability of private operators. One such operator is the Polish company SpaceForest, which plans to launch the Perun rocket from a spaceport in the Azores, from a floating platform in the North Sea, and also directly from the territory of the Republic of Poland in 2026. This article aims to present the new legal regulation of neighbouring Poland to the Czech and Slovak legal audience. The authors aim to present the new Polish law in a comparative perspective. Last but not least, attention will also be paid to the relationship between the new Polish law and the EU legislation being prepared in the field of space activities.

ABSTRAKT

Dne 24. března 2026 podepsal prezident Polské republiky Karol Nawrocki dlouho očekávaný nový polský zákon o kosmických aktivitách (Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej). Polsko se tak připojilo k evropským zemím, které jí začlenily své mezinárodní závazky týkající se využívání vesmíru do své vlastní legislativy. Stejně jako jiné již přijaté národní předpisy, i nová polská úprava odráží fenomén privatizace a komercializace vesmíru. Nový polský zákon o kosmických aktivitách si klade za cíl vytvořit transparentní a předvídatelný právní rámec pro realizaci aktivit soukromými subjekty ve vesmíru, včetně pravidel pro povolování, registraci a odpovědnost soukromých provozovatelů. Jedním z takových provozovatelů je polská společnost SpaceForest, která plánuje v roce 2026 vypustit raketu Perun z kosmodromu na Azorských ostrovech, z plovoucí plošiny v Severním moři a také přímo z území Polské republiky. Tento článek si klade za cíl představit české a slovenské právnické veřejnosti novou právní úpravu sousedního Polska. Autoři si kladou za cíl představit nový polský zákon v komparativní perspektivě. V neposlední řadě bude pozornost věnována také vztahu mezi novým polským zákonem a připravovanou legislativou EU v oblasti kosmických aktivit.

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I. INTRODUCTION[3]

On March 24, 2026, the President of the Republic of Poland, Karol Nawrocki, signed the new Polish Act regulating activities in Outer Space.[4] This marked the culmination of a long-standing process of adopting new Polish space legislation, which had been regularly covered in both Polish and English academic literature.[5] The new Polish Act on Space Activities was published in the Journal of Laws of the Republic of Poland[6] on April 3, 2026, and entered into force two weeks later, i.e., on April 18, 2026.[7]

By adopting the new Act on Space Activities, the Republic of Poland fulfilled one of the objectives set out in its 2017 National Space Strategy.[8] That strategy identified the space sector as one of the key segments for the further development of the Polish economy. The National Space Strategy of 2017 no longer conceives of the space sector as a state monopoly (*Old Space*). Still, it envisages a robust process of privatisation and commercialisation of space activities (*New Space, or Space 4.0*).[9] Space activities are no longer to be carried out exclusively by the state for research, development, and defence. Still, they are to be opened up to commercial activities of Polish private companies. As the strategy explicitly states, globally and in Europe—and increasingly in Poland as well—the fact that a company has documented experience with space activities, for example through projects of the European Space Agency (ESA), functions as a kind of *quality certificate* confirming the credibility of a potential partner and its technological competence.

The activities of the company SpaceForest undoubtedly accelerated the adoption of the new Polish Act. In 2024, SpaceForest signed a contract with the European Space Agency (ESA) to develop and subsequently commercialise the new Perun rocket. This rocket was designed to reach a range of up to 150 km above Earth's surface and can carry a payload of up to 50 kg. The primary purpose of the Perun rocket is the commercial testing of new technologies in a microgravity environment.[10] The Perun rocket enables testing of technologies in the Outer Space environment, thereby facilitating their further development for future use in space flights or for deployment on the Moon or other celestial bodies. The first test flight of the Perun rocket was carried out in November of last year (2025); further test flights are planned for 2026 – the Perun rocket is to be launched from a spaceport in the Azores, Portugal, and from a floating platform in the North Sea under Danish jurisdiction. In 2026, a test flight of the rocket is also to be conducted directly from Polish territory – from the Central Aviation Training Facility in the city of Ustka, Pomeranian Voivodeship, northern Poland.

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[3] Tento článek vznikl v rámci projektu GAUK „Aktivity ve vesmíru jako výzva pro správní právo" (reg. č. 488126), realizovaného na Právnické fakultě Univerzity Karlovy v Praze, a současně v rámci projektu VEGA „Nová vesmírná éra a výzvy pro moderné vesmírné právo v krajinách strednej Európy", realizovaného na Právnickej fakulte Trnavskej univerzity.

[4] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Dziennik Ustaw Rzeczypospolitej Polskiej, 3 kwietnia 2026 r., poz. 465.

[5] Pozri JASIUK, E. The Draft of the Polish Space Law. In: KONERT, A., VAN DER DUNK, F. (eds), National Space Law in Poland. Past, Present, and Future. Leiden : Brill, 2023, s. 191 – 220. HOFMANN, M., MALINOWSKA, K. Poland Goes to Space: The Draft Polish Space Law. In: Proceedings of the International Astronautical Congress, vol. 66, 2022, s. 419 – 431. KŁODA, M., MALINOWSKA, K., MALINOWSKI, B., POLKOWSKA, M. Polskie prawo kosmiczne – wyzwania i kompromisy. In: Przegląd Sejmowy, vol. 3, 2022, no. 170, s. 94 – 119. PIOTROWSKI, M. Projekt polskiego prawa kosmicznego – regulacja na miarę XXI wieku? In: Studia Iuridica, vol. 77, 2018, s. 101 – 118. MYSZONA-KOSTRZEWA, K., KULINSKA-KĘPA, Z. (eds.), Prawo kosmiczne międzynarodowe, europejskie i krajowe. Warszawa : Wydawnictwo C. H. Beck, 2025, s. 320.

[6] Dziennik Ustaw Rzeczypospolitej Polskiej, poz. 465.

[7] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 74.

[8] Pozri SMOLIK, B. Poland's Policy in the Space Sector: The Institutional Dimension Since The European Space Agency. In: Polish Political Science Review. Polski Przegląd Politologiczny, vol. 9, 2021, no. 1, s. 65 – 78.

[9] CLECK, P. Towards a new legal ecosystem for the exploitation of space. In: SMITH, L., BAUMANN, I., WINTERMUTH, S. (eds.), Routledge Handbook of Commercial Space Law. Milton Park : Routledge, 2024, s. 20 – 35.

[10] Napríklad elektronika určená na použitie vo vesmíre. Testujú sa však aj potraviny – nevyhnutné pre pobyt človeka vo vesmíre.

There are several reasons why the above-outlined activities of SpaceForest posed a challenge for Polish domestic legislation:

1. Space 100 km and above sea level is, according to the existing expert consensus, Outer Space.[11] It is a space which, in accordance with the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty)[12], has the character of *res communis* – i.e., a space common to all states. The rules for the use of this common space are currently governed primarily by instruments of public international law. This simultaneously means that these rules bind, in the first instance, the contracting states of these instruments, and not commercial entities.

2. The Outer Space Treaty stipulates that contracting states bear international responsibility for national activities in Outer Space, including the Moon and other celestial bodies, whether such activities are carried out by governmental agencies or by non-governmental entities, and for ensuring that national activities are carried out in conformity with the provisions contained in the Treaty. The launch of the Perun rocket to an altitude of 150 km above sea level therefore undoubtedly constitutes a national activity in Outer Space for which Poland bears international responsibility under the Outer Space Treaty.[13] This implies the need to enact Polish domestic legislation to regulate the activities of commercial entities in Outer Space.[14]

3. The Outer Space Treaty further stipulates that each contracting state that launches or procures the launching of objects into Outer Space is internationally liable for damage caused by such objects or their parts to another contracting party or to its natural or legal persons on Earth, in airspace or in Outer Space, including the Moon and other celestial bodies.[15] This regulation means that the Republic of Poland would be liable for any damage caused by the Perun rocket, regardless of whether a private entity operates it. The adoption of new domestic legislation was therefore an essential step from the perspective of the Republic of Poland, aimed at regulating the liability aspects of the commercial use of Outer Space. If there were no national legal framework in place, the Republic of Poland would bear direct and exclusive liability for any damage caused by the Perun rocket. At the same time, its right of recourse against the rocket operator would not be legally regulated, leaving the state without a clearly defined mechanism to recover such damages. In other words, in the absence of domestic legislation, damage caused by the Perun rocket would be compensated not from the operator's private funds but from the Republic of Poland's public budget.[16]

At this point, it should be noted that the adoption of the new Polish Act on Space Activities is not an isolated phenomenon in Europe. The process of privatisation and commercialisation of Outer Space is global. During the past decade, similar domestic regulations have been adopted in several other European jurisdictions – e.g., Greece (2017), Portugal (2019), Luxembourg (2020), Slovenia (2022), Cyprus (2023), and, most recently, Slovakia (2024). In 2025, the Italian Parliament also adopted a new act regulating commercial

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[11] DODGE, M. Delimitation of Outer Space: where air ends, as space begins. In: HOFMANN, M., BLOUNT, PJ. (eds.), Elgar Concise Encyclopedia of Space Law. Cheltenham : Edward Elgar Publishing, 2025, s. 59 – 62.

[12] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205.

[13] Pozri KŁODA, M. Rzeczpospolita Polska „w przestrzeni" międzynarodowego prawa kosmicznego. In: Przepis na Rzeczpospolitą. Subiektywny komentarz do wybranych regulacji Konstytucji. Warszawa : Wolters Kluwer Polska, 2025, s. 67 – 76.

[14] Pozri KYRIAKOPOULOS, GD. Responsibility for national activities. In: HOFMANN, M., BLOUNT, PJ. (eds.), Elgar Concise Encyclopedia of Space Law. Cheltenham : Edward Elgar Publishing, 2025, s. 245 – 248.

[15] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205, Art. VII.

[16] Pozri HETLOF, J., KUNERT-DIALLO, A. The Polish Vision on Space Activities: A Review of Current and Proposed Legislation and Space Policy Developments. In: KONERT, A., VAN DER DUNK, F. (eds.), National Space Law in Poland. Past, Present, and Future. Leiden : Brill, 2023, s. 255.

activities in Outer Space. Domestic regulations of similar content are currently being prepared in Spain[17] and in the Czech Republic[18]. In 2025, the long-awaited proposal for an EU Regulation on the safety, resilience, and sustainability of space activities (*EU Space Act*) was also published.[19] New domestic regulations on commercial activities in Outer Space have also been adopted outside Europe in recent times. An example is the new Brazilian regulation of 2024.

The Republic of Poland is one of the key economies in Central Europe and one of our most significant neighbours. The aim of this article is therefore to present the new Polish legal regulation to the domestic professional audience.

When presenting the new legislation in Poland, we aim to analyse the newly adopted Act in a comparative perspective. In this respect, the authors aim to compare the newly adopted Polish Act on Space Activities with other recently adopted legal regulations on space activities – primarily those adopted in other Central European countries (such as Slovenia and Slovakia). In selected cases, other recently adopted pieces of national space legislation in Europe will also be used as the subject of comparison.

Further, the authors also aim to identify selected aspects that could serve as inspiration for future Czech legislation. The fact remains that in the Czech Republic, as in the neighbouring Federal Republic of Germany, similar domestic legislation has not yet been adopted.

II. THE NEW POLISH SPACE ACT IN A BROADER CONTEXT

The adoption of the new Act on Space Activities in the neighbouring Republic of Poland must be understood and its content interpreted in the broader context of current developments. Its provisions primarily reflect the obligations arising for Poland from international conventions. At the same time, the adoption of the new Polish Act must be understood in the context of other domestic regulations adopted in individual European states in recent years. Last but not least, attention must be drawn to the EU context of the newly adopted Polish legislation – i.e., the preparation of an EU regulation on activities in Outer Space (*EU Space Law*), which has been repeatedly announced.

The following lines will be devoted to placing the newly adopted Polish Act on Space Activities in this context.

1. International space law

Although the newly adopted Act represents the first comprehensive domestic regulation of activities in Outer Space in the Republic of Poland, it is not the first legal framework regulating this area in Poland. The Republic of Poland is a party to several international conventions governing the exploration and use of Outer Space.[20] These include, in particular, the Outer Space Treaty, the Convention on Registration of Objects Launched

[17] Pozri GONZALES FERREIRO, E. Principales ítems que debería incluir la ley espacial española. In: Revista Española de Derecho Aeronáutico y Espacial, 2023, no. 3, s. 371 – 421.
[18] Pozri HANDRLICA, J. České právo na prahu nové kosmické éry a skica budoucího zákona o kosmických činnostech. In: HAVEL, B., VOSTRÁ, L. (eds.), Pocta Karlu Eliášovi. Praha : Wolters Kluwer, 2025, s. 27 – 40.
[19] Pozri Proposal for a Regulation of the European Parliament and of the Council on the safety, resilience and sustainability of space activities in the Union, Brussels, 25 June 2025, COM(2025) 335 final.
[20] Pozri KŁODA, M. Rzeczpospolita Polska „w przestrzeni" międzynarodowego prawa kosmicznego. In: Przepis na Rzeczpospolitą. Subiektywny komentarz do wybranych regulacji Konstytucji. Warszawa : Wolters Kluwer Polska, 2025, s. 67 – 76.

into Outer Space (Registration Convention),[21] and the Convention on International Liability for Damage Caused by Space Objects (Liability Convention).[22]

The aforementioned international conventions enshrine fundamental requirements that the Republic of Poland is obliged to fulfil in relation to entities other than the state – *so-called non-state actors*. The Outer Space Treaty, in this regard, requires Poland to *authorise* and *continuously supervise* the activities of non-state actors in Outer Space.[23] The requirement of authorisation and continuous supervision applies not only to the space above the territory of the Republic of Poland but also to the entirety of Outer Space, which is common to all states. The Registration Convention further enshrines the requirement that the Republic of Poland maintain a registry of space objects and register therein objects launched into orbit around the Earth or beyond. The fact remains, however, that international conventions establish rights and obligations that exist at the level of public international law – i.e., between the contracting parties to the convention. Their transposition in relation to non-state actors, which include, for example, the company SpaceForest, requires the form of domestic legislation.[24]

The use of Outer Space by non-state actors simultaneously poses a challenge to the state under the Liability Convention. As outlined above, this convention enshrines that the state bears liability for damage caused by its space objects. The Liability Convention thus links a state's jurisdiction over space objects to liability for damage caused by them.[25] A state that permits non-state actors to carry out activities in Outer Space within its jurisdiction must simultaneously regulate the question of their liability for damage in its domestic legal order. For this reason, the newly adopted Polish legislation also contains provisions regulating the permit holder's liability and the state's right of recourse against the permit holder in cases of liability for damage arising under international law.[26]

The instruments of international space law are also crucial for domestic regulation because they define the content of fundamental concepts[27], such as *Outer Space*[28], *space objects* and *activities in Outer Space (space activities).*[29]

2. The Sofia Guidelines for a Model Law

The fact is that while the aforementioned international conventions contain obligations that individual contracting states are to implement in relation to private persons, they do not provide any guiding template for what domestic legislation should look like. A key role is played here by the text of the Sofia Guidelines for a Model Law on National Space Legislation, adopted at the 75th Congress of the International Law Association (ILA) in Sofia, Bulgaria, on August 30, 2012.[30] These were prepared under the auspices of the Space Law Committee established by the International Law Association. The Sofia Guidelines for a

[21] Convention on Registration of Objects Launched into Outer Space (adopted 12 November 1974, entered into force 15 September 1976) 1023 UNTS 15.

[22] Convention on International Liability for Damage Caused by Space Objects (adopted 29 March 1972, entered into force 1 September 1972) 961 UNTS 187.

[23] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205, Art. VI.

[24] Pozri FROEHLICH, A., SEFFINGA, V. Rationale for the Enactment of National Space Legislation. In: FROEHLICH, A., SEFFINGA, V. (eds.), National Space Legislation. A Comparative and Evaluative Analysis. Heidelberg : Springer, 2018, s. 1 – 15.

[25] Convention on International Liability for Damage Caused by Space Objects (adopted 29 March 1972, entered into force 1 September 1972) 961 UNTS 187, Art. II.

[26] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 27 – 30.

[27] Pozri PIETKIEWICZ, M. Polska ustawa kosmiczna. Kilka postulatów de lege ferenda. In: Ad Astra. Program badań nad astropolityką i prawem kosmicznym, 2023, no. 9, s. 19 – 20.

[28] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 2.10.

[29] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 8.1.

[30] International Law Association (ed.), Report of the 75th ILA Conference in Sofia. International Law Association (ILA), 2012, s. 307 – 313.

Model Law are therefore not a source of public international law and do not have a binding character per se.

The Sofia Guidelines define the so-called building blocks of domestic legislation (authorisation regime, continuous supervision, registration regime, operator liability for damage caused, right of recourse by the state) and contain model provisions for their implementation.[31] Despite their non-binding character, after 2012, all European domestic regulations governing activities in Outer Space were influenced, to varying degrees, by the text of the Sofia Guidelines.[32] Specifically, one can cite the legal regulations of Denmark (2016), Greece (2017), Finland (2018), the United Kingdom (2018), Portugal (2019), Luxembourg (2020), Slovenia (2022), Cyprus (2023), and Liechtenstein (2023). The text of the Sofia Guidelines for a Model Law has also recently influenced the new Slovak (2024)[33] and Italian (2025)[34] regulations on activities in Outer Space. Likewise, the new Polish legislation is also built on the building blocks of the Sofia Guidelines.

At this point, it should also be noted that, while adopting individual domestic regulations, legal systems also influence one another. The text of the new Cypriot legal regulation was influenced by the British regulation, which is understandable given that both states follow the *common law* tradition.[35] The fact remains, however, that the process of mutual influence does not always respect the boundaries delineated by traditional families of legal traditions. For example, the text of the newly adopted Slovak Space Act was influenced, among other things, by New Zealand's regulations on space activities.[36]

3. EU Space Act

Binding EU legislation for the commercial activities of non-state actors in Outer Space has been absent to date. The rapid onset of commercial use of Outer Space by private entities and the wave of adoption of domestic legislation in individual Member States of the European Union raise the question of the extent to which conditions for the commercial use of Outer Space should be harmonised in the future through EU law. The intention to adopt a new EU regulation governing activities in Outer Space (EU Space Law) was first announced in Ursula von der Leyen's letter to the President of the European Parliament on September 13, 2024. In April 2024, it was decided that the intention would be implemented only by the new European Commission following the European Parliament elections. The use of Outer Space became one of the priorities for this new Commission, as demonstrated by the establishment, for the first time, of a Commissioner with a portfolio for defence and space. On June 25, 2025, the European Commission published its proposal for a new Regulation on the safety, resilience, and sustainability of space activities in the Union.[37] At present, this is merely a proposal that

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[31] GERHARD, M., MOLL, K. The Gradual Change from "Building Blocks" to a Common Shape of National Space Legislation in Europe – Summary of Findings and Conclusions. In: HOBE, S., SCHMIDT-TEDD, B., SCHROGL, K. (eds.), Towards a Harmonised Approach for National Space Legislation in Europe. Cologne : Carl Heymanns Verlag, 2004, s. 28 – 30.

[32] Pozri MARBOE, I. The Influence of the Work of the ILA's Space Law Committee on the Development of International Law. In: KESSEDIJAN, C., DESCAMPS, O., FABRIZI, T. (eds.), Au service du droit international. Les 150 ans de l'Association de droit international. Paris : Éditions Panthéon-Assas, 2023, s. 535 – 550.

[33] Pozri HANDRLICA, J. Nad novým slovenským zákonem o regulaci vesmírných aktivit. In: Právny obzor, roč. 109, 2026, č. 1, s. 28 – 41. Pozri tiež HANDRLICA, J., NOVOTNÁ, M. The Dawn of National Space Legislation in Central Europe and the New Act on Space Activities in the Slovak Republic. In: Juridical Tribune – Review of Comparative and International Law, vol. 15, 2025, no. 4, s. 614 – 634.

[34] Pozri CAPURSO, A. The Italian Law on Space Economy: A Model of 'New Space Law'. In: Air & Space Law, vol. 51, 2026, no. 1, s. 83 – 108.

[35] Pozri HANDRLICA, J., DEVETZIS, D. O νέος «περί Διαστήματος Νόμος (93(I)/2023)» της Κυπριακής Δημοκρατίας. In: Κυπριακή Νομική Επιθεώρηση, vol. 4, 2025, no. 2-3, s. 50.

[36] Pozri ŠOPKOVÁ, K., MATOUŠKOVÁ, M. III. soirée kosmického práva na pražské právnické fakultě – Co přinese nové unijní nařízení o bezpečnosti, odolnosti a udržitelnosti kosmických aktivit v Unii? In: Právník, vol. 165, 2026, no. 3, s. 301.

[37] Pozri Proposal for a Regulation of the European Parliament and of the Council on the safety, resilience and sustainability of space activities in the Union, Brussels, 25 June 2025, COM(2025) 335 final.

must undergo the ordinary legislative procedure. The proposal envisages entry into force from January 1, 2030.

In relation to the newly adopted Polish Act, it can be stated that the proposed EU Regulation does not aspire to replace this domestic regulation in the future. The EU Space Act, by contrast, is intended to operate in parallel with existing national regimes, establishing a comprehensive structure for the governance of space activities within the European Union, comprising both national and EU bodies. The conditions for authorising space activities and their supervision should, in the future, be harmonised; however, the competence for authorisation and supervision is, even under the planned EU regulation, to remain with the relevant national supervisory authorities.[38] At this point, it should also be emphasised that the newly proposed EU Space Act does not aim to harmonise the regulation of liability for damage caused by operators of space technologies. Thus, even in the future, liability for damage caused by space objects will remain a matter of regulation within domestic legal frameworks.

It can therefore be assumed that in the future, not only the newly adopted Act but also the planned EU Regulation will apply to the conduct of activities in Outer Space within the Polish legal order.

III. WHAT DOES THE NEW POLISH REGULATION OF SPACE ACTIVITIES BRING?

As is the case with other recently adopted regulations abroad, the newly adopted Polish Act on Activities in Outer Space is essentially built on the building blocks contained in the Sofia Guidelines for a Model Law. The new Polish regulation on space activities thus regulates:[39]

1. The conditions for the conduct of activities in Outer Space;
2. The registration of space objects;
3. The procedure in the event of an unforeseen incident related to the conduct of space activities, or in the event of the discovery of an object that could be space debris.

From the above enumeration, it is apparent that, like several other newly adopted regulations abroad, the new Polish Act does not contain a comprehensive regulation of the use of Outer Space. In particular, rules governing the conduct of research and development, rules promoting education in the field of space technologies, and rules on public procurement in this area are absent. This subject matter is left to be regulated by special legal provisions under the newly adopted Act.

1. Scope of the Act

The definition of the scope of the newly adopted Act reflects the international obligations arising for the Republic of Poland from the international conventions concluded by it. The use of Outer Space represents what the Outer Space Treaty classifies as *national activities.*[40] Regardless of whether these activities are carried out by state or private (non-state) actors, the Republic of Poland is always responsible for them under international law. This gives rise to the state's need to define the scope of domestic legislation clearly and to establish corresponding rules for the entities and activities that fall within it.

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[38] Pozri BARTÓKI-GÖNCZY, B., MALINOWSKA, K. Paradigm Shift in the European Union's Space Policy: Institutional Restructuring and Its Possible Consequences for the CEE Region. In: Frontiers in Political Science, vol. 7, 2025, no. 1, s. 1 – 13.

[39] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 1.

[40] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205, Art. VI.

In accordance with the text of the Sofia Guidelines for a Model Law, the newly adopted Polish Act defines[41] its scope through a combination of territorial and personal criteria, applying to activities in Outer Space carried out:

1. from the territory of the Republic of Poland;
2. from a vessel or aircraft registered in the Republic of Poland:
   a) a maritime vessel;
   b) a civil or state aircraft;
3. by an operator from the territory of a foreign state or from an area not subject to the sovereignty of any state.

This broadly defined scope aims to subject to the Act all activities that, from the perspective of instruments of international law, may be considered national activities and for which the Republic of Poland may be liable under international conventions. In addition to all activities carried out by any person from the territory of the Republic of Poland, or by persons on maritime vessels and aircraft registered under the Polish flag, this includes any activities of persons registered in Poland carried out abroad. If a Polish commercial entity launches space objects from a spaceport in the Azores, this will still constitute a national activity of the Republic of Poland.

Unlike several other European legal regulations already adopted[42], the new Polish regulation expressly envisages a situation in which a legal person registered in Poland carries out space activities from territory not subject to the sovereignty of any state. In practice, one could consider, for example, the use of Antarctic territory. Even in such a case, the Polish entity would be subject to the regime of the newly adopted space act.

At this point, it can also be mentioned that, in the same vein as many other national space acts, neither the newly adopted Act does provide rules for activities such as:

1. support of research & development in the space sector,
2. public procurement for space activities,
3. university education in space technologies.

All these issues have been left to regulation by separate legal norms of the legal framework of the Republic of Poland.

2. Conditions for the conduct of space activities under the New Polish Act

The newly adopted Polish Act on Activities in Outer Space reflects the legal regime enshrined in the Outer Space Treaty. This regime renders the Republic of Poland internationally liable for any space activity conducted under its jurisdiction. As in several other recently adopted domestic regulations, the newly adopted Polish regulation implements international obligations by establishing relatively strict conditions for the conduct of space activities under the jurisdiction of the Republic of Poland. These conditions consist of two interconnected regimes: On the one hand, there is the authorisation regime, which is intended to ensure that space activities under Polish jurisdiction are operated safely by qualified operators. On the other hand, there is the regime of operator liability for damage caused by space objects operated by the operator to third parties.

[41] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 3 – 5.

[42] Pozri napríklad Art. 2.1. Decreto-Lei n.º 16/2019 de 22 de janeiro, Diário da República, 1.ª série – N.º 15 – 22 de janeiro de 2019; Art. 2 Zakon o vesoljskih dejavnostih (ZVDej), Uradni list Republike Slovenije, Št. 43, Ljubljana, 25. 3. 2022. Naopak, obdobné ustanovenie obsahuje aj vnútroštátny zákon o vesmírnych aktivitách Luxemburského veľkovojvodstva (Loi du 15 décembre 2020 portant sur les activités spatiales, Journal officiel du Grand-Duché de Luxembourg, A 1086/2020) v čl. 1.1. Slovenský zákon o regulácii vesmírnych aktivít neobsahuje žiadne ustanovenie o svojej územnej pôsobnosti.

2.1. Authorisation of space activities

The conduct of activities in Outer Space is, under the new Polish legal regulation, conditional upon the issuance of an authorisation (*zezwolenie*). The President of the Polish Space Agency is competent to issue the authorisation.[43] An authorisation is required for:

– the launch of a given carrier rocket into Outer Space with or without another space object;

– the launch of a given space object that is not a carrier rocket into Outer Space;

– the operation of a given space object in Outer Space;

– the control of a given space object in Outer Space;

– the removal of a given space object from Outer Space, including its deorbiting.

In accordance with the provisions of the Sofia Guidelines, Polish legislation establishes several prerequisites that the applicant must fulfil to obtain authorisation.[44] These include technological, safety, and personnel prerequisites. The applicant should also be financially capable of fulfilling its obligations. These relatively rigorous requirements aim to ensure that, under Polish jurisdiction, the risk of damage from activities in Outer Space is minimised to the greatest extent possible.[45]

At this point, it can be stated that the new Polish regulation introduces several innovative elements in the area of authorisation of activities in Outer Space:

1. As is the case with the Portuguese legal regulation[46], the Polish Act also allows[47] the issuance of a single authorisation for the handling of *multiple space objects*.

2. The regulation differentiates the authorisation process depending on whether the space object is to be launched from the territory of Poland or from abroad.[48]

3. The Polish regulation also provides a very detailed regulation of the transfer of the authorisation to a new acquirer.[49] For example, under Luxembourg or Portuguese law, the new Polish regulation creates the prerequisites for commercial transfers of space objects, with the acquirer able to obtain the right to operate them by transferring the authorisation (i.e., a new authorisation procedure will not be necessary).

At this point, it should be noted that the authorisation regime enshrined in the new Polish Act will likely be supplemented in the future by the regulation in the proposed EU Regulation. This envisages that, within the European administrative space, a regime of mutual recognition of national authorisations for the conduct of space activities will be established.[50] Under this regime, authorisations issued by the competent authorities of other Member States should also be recognised as equivalent by the Polish supervisory authority, provided they comply with the minimum standards set out in this Regulation.

2.2. Liability of the authorisation holder for damage

One of the reasons several states adopted their own domestic regulations governing activities in Outer Space over the past decade was the need to create a transparent and effective framework for liability and compensation for potential damage caused by space objects. The Liability Convention, to which the Republic of Poland is bound, distinguishes between two liability regimes in this regard. First, there are cases where damage is caused by a space object on Earth’s surface or to an aircraft in flight. In these cases, the Liability

[43] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 11.1.
[44] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 12.
[45] Pozri POLKOWSKA, M. Prawo kosmiczne. Kilka uwag tytułem wprowadzenia. In: Ad Astra. Program badań nad astropolityką i prawem kosmicznym, 2022, no. 5, s. 54 – 56.
[46] Decreto-Lei n.º 16/2019 de 22 de janeiro, Diário da República, 1.ª série – N.º 15 – 22 de janeiro de 2019, Art. 6.1.
[47] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 11.3.
[48] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 12.5.
[49] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 22.
[50] Proposal for a Regulation of the European Parliament and of the Council on the safety, resilience and sustainability of space activities in the Union, Brussels, 25 June 2025, COM(2025) 335 final, Art. 6.2.

Convention stipulates that the state's liability for damage is absolute.[51] This reflects the assumption that in these cases, damage will be caused to those entities that did not voluntarily expose themselves to risk. This, in turn, determines the character of the state's liability for damage caused in these situations. Second, if damage is caused elsewhere than on the surface of the Earth to a space object of one launching state or to persons or property on board such a space object by a space object of another launching state, the launching state is liable only if the damage is due to its fault or the fault of persons for whom it is responsible.[52] The Liability Convention thereby reflects the fact that while in the first case the liability was in relation to injured parties who did not themselves expose themselves to any risk, in the second case the liability relationships are with injured parties who themselves carried out activities in Outer Space and thus had to reckon with a certain degree of risk.

The Sofia Guidelines for a Model Law expressly recommend that liability for damage caused by space objects under domestic regulation be linked to the relevant authorisation holder. Otherwise, the state would bear liability for damage caused by non-state or commercial entities. The new Polish legal regulation, therefore, explicitly declares that "the operator shall be liable for damage caused by a space object".[53][54] The regime of liability for damage is also linked to the regime of mandatory insurance.[55] Following the above-mentioned liability regime enshrined in the Liability Convention, the Polish legal regulation distinguishes the following situations:

1. First, the authorisation holder is liable for damage caused by a space object on the Earth's surface or to an aircraft in flight. In these cases, liability is conceived as strict, i.e., regardless of fault, and applies even if the damage was caused as a result of force majeure. Liability may neither be excluded nor limited.[56]

2. Conversely, for damage caused by a space object at a location other than on the Earth's surface, or for damage other than that caused to an aircraft in flight, the operator shall be liable in accordance with general principles.[57]

3. At this point, it should also be noted that the Polish regulation does not target exclusively the liability of persons who hold an authorisation. The Polish Act simultaneously stipulates that liability for damage is also borne by "an entity that, in contravention of the law, carries out space activities without an authorisation".[58]

The fact remains, however, that the liability of the State (in this case, the Republic of Poland) under the Liability Convention persists even in this arrangement. This means that the State continues to bear liability under international law for damage caused by activities under its jurisdiction. The Sofia Guidelines for a Model Law recommend addressing this situation in domestic legislation by establishing a right of recourse by the State against the authorisation holder.[59] This recommendation is also reflected in the newly adopted Polish Act,[60] which governs cases in which the Republic of Poland must compensate another State for damage under the Liability Convention. In this case, the State Treasury has a right of *recourse* primarily against the insurer and secondarily against the authorisation holder. The new Polish

[51] Convention on International Liability for Damage Caused by Space Objects (adopted 29 March 1972, entered into force 1 September 1972) 961 UNTS 187, Art. II.
[52] Convention on International Liability for Damage Caused by Space Objects (adopted 29 March 1972, entered into force 1 September 1972) 961 UNTS 187, Art. III.
[53] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 27.1.
[54] V tejto súvislosti je potrebné poznamenať, že slovenská právna úprava aktivít vo vesmíre neobsahuje obdobné explicitné ustanovenie o zodpovednosti držiteľa povolenia.
[55] Povinnosť povinného poistenia sa nevzťahuje (Art. 32.2. Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej) na výskumné a obranné (vojenské) aktivity vo vesmíre.
[56] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 28.1.
[57] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 29.1.
[58] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 27.1.
[59] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 31.
[60] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 11.1.

regulation stipulates that the amount of the right of recourse is *limited* to the amount of mandatory insurance held by the authorisation holder. The right of recourse of the State Treasury is unlimited only[61] in cases where the damage:

1. arose as a result of intentional conduct or gross negligence of the operator;

2. was caused by a space object launched into Outer Space by an entity that, in contravention of the law, carries out space activities without authorisation.

For comparison, it can be noted that a similar approach to resolving this issue was adopted, for example, in the legal regulations of Portugal and Slovenia.[62] Conversely, the national space act of the Grand Duchy of Luxembourg[63] (and, under its influence, the legal regulation adopted in the Principality of Liechtenstein[64]) does not in any way limit the volume of the state's right of recourse against the authorisation holder.

At this point, it is appropriate to emphasise that, unlike the above-outlined issue of authorisation, the newly proposed EU Regulation (EU Space Act) does not address questions of liability for damage. It can therefore be inferred that, even in the future, this area will remain primarily regulated at the level of international law, or within the legal orders of individual Member States.

3. Registration of space objects

Another building block of domestic regulation, in accordance with the Sofia Guidelines for a Model Law, is the legal regulation of the registration of space objects, which must comply with the requirements set out in the Registration Convention. This requires, in particular, that:

1. Domestic legislation regulates the maintenance of a registry of space objects, into which each object must be entered without delay after its launch into orbit around the Earth or beyond;[65]

2. A competent domestic authority should be designated as responsible for fulfilling the obligations arising from the Registration Convention. These include, in particular, the obligation to inform the Secretary-General of the United Nations of the establishment of the registry of space objects[66] and the obligation to transmit information about space objects that have been entered in the registry;[67]

3. The Registration Convention further stipulates that *"the contents of each registry and the conditions under which it is maintained shall be determined by the State of registry concerned"*.[68] Domestic legislation must therefore establish both the conditions regarding the content of the registry of space objects and the conditions under which this registry will be maintained.

The newly adopted Polish regulation reflects these obligations by establishing a national registry (*Krajowy Rejestr Obiektów Kosmicznych*).[69] The Sofia Guidelines for a

[61] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 30.2.
[62] Pozri Art. 18.2. Decreto-Lei n.º 16/2019 de 22 de janeiro, Diário da República, 1.ª série – N.º 15 – 22 de janeiro de 2019 a Art. 16.4. Zakon o vesoljskih dejavnostih (ZVDej), Uradni list Republike Slovenije, Št. 43, Ljubljana, 25. 3. 2022.
[63] Pozri Art. 12.4. Loi du 15 décembre 2020 portant sur les activités spatiales, Journal officiel du Grand-Duché de Luxembourg, A 1086/2020.
[64] Art. 9 Gesetz vom 5. Oktober 2023 über die Genehmigung von Weltraumaktivitäten und die Registrierung von Weltraumgegenständen.
[65] Convention on Registration of Objects Launched into Outer Space (adopted 12 November 1974, entered into force 15 September 1976) 1023 UNTS 15, Art. II.1.
[66] Convention on Registration of Objects Launched into Outer Space (adopted 12 November 1974, entered into force 15 September 1976) 1023 UNTS 15, Art. II.1. in fine.
[67] Convention on Registration of Objects Launched into Outer Space (adopted 12 November 1974, entered into force 15 September 1976) 1023 UNTS 15, Art. IV.
[68] Convention on Registration of Objects Launched into Outer Space (adopted 12 November 1974, entered into force 15 September 1976) 1023 UNTS 15, Art. II.3.
[69] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 10.1.

Model Law recommend that, in this regard, the national registry be administered by the same authority that decides on the authorisation of activities.[70] The Polish legislator reflected this recommendation and entrusted the operation of the national registry to the President of the Polish Space Agency.[71]

In connection with the registration of space objects, it should also be noted that the newly proposed EU Regulation envisages establishing a unified EU registry of space objects.[72] This EU registry (*the Union Register of Space Objects*) should, in the future, exist alongside national registries of space objects. Its administration should be entrusted to the EU Agency for the Space Programme, headquartered in Prague.

4. Regulation of special situations

At this point, it is appropriate to note that the newly adopted Polish Act not only provides a general regulation, but also expressly addresses several specific situations that have hitherto been overlooked in comparable legal regulations.

Space activities are generally perceived as highly risky: although they are based on cutting-edge technologies and contingent upon the fulfilment of several demanding requirements, the occurrence of unforeseeable events associated with their conduct, which may lead to significant damage, including threats to human life, cannot be ruled out. It is precisely this potentially serious impact that the Polish legislator seeks to address by conferring upon the President of the Polish Space Agency the power to establish a special commission to examine these extraordinary situations.[73]

In the event of its establishment, the competences of the commission shall include:

1. ascertaining the circumstances and causes of the event and determining its consequences;

2. cooperation with entities and services involved in clarifying the circumstances of the event and with the relevant crisis management centres;

3. Preparation of a final report on the work of the commission, which shall contain, in particular, a discussion of the circumstances and causes of the event, as well as conclusions and recommendations, and submission of this report to the President of the Polish Space Agency.

The second special situation that the Polish regulation now addresses is the discovery of an object that could be space debris on the terrestrial surface.[74] Anyone who discovers an object on the territory of the Republic of Poland suspected of being space debris is obliged to inform the police immediately. The police shall inform the President of the Polish Space Agency of the discovery of the object no later than 24 hours after discovery. The storage of the found object is within the President's competence, who shall determine the place and duration of storage and ensure its proper safeguarding.

IV. CONCLUSION

The adoption of the new Polish Act on Space Activities marks a significant milestone in regulating the commercial use of Outer Space in Central Europe. It is not merely a formal filling of a legislative deficit, but a qualitative shift towards the systematic regulation of non-state actors' activities in Outer Space. As demonstrated in this article, this step cannot be understood in isolation but rather as a natural culmination of several concurrent processes. On the one hand, there are obligations arising from international space law that impose on states

[70] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 44.1.
[71] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 44.2.
[72] Proposal for a Regulation of the European Parliament and of the Council on the safety, resilience and sustainability of space activities in the Union, Brussels, 25 June 2025, COM(2025) 335 final, Art. 24.
[73] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 52.1.
[74] Ustawa z dnia 13 lutego 2026 r. o działalności kosmicznej, Art. 57.

the duty to authorise and supervise the activities of non-state actors and to bear international responsibility for them. On the other hand, the dynamic development of commercial space activities creates pressure on the government to provide a predictable and functional domestic framework.

It could be said that a significant accelerator for the adoption of the new Act was the activities of the company SpaceForest, which in 2024 concluded a contract with the European Space Agency for the development and commercialisation of the Perun rocket, designed for the commercial testing of new technologies in a microgravity environment at altitudes of up to 150 km above the Earth's surface with a payload of up to 50 kg. The planned launches of the Perun rocket from a spaceport in the Azores in Portugal, from a floating platform in the North Sea under Danish jurisdiction, and also directly from Polish territory – from the Central Aviation Training Facility in the city of Ustka – subsequently gave rise to the need for the urgent adoption of domestic legislation.

The new legal regulation systematically draws on the building blocks of international space law and the Sofia Guidelines for a Model Law, which it transposes into a domestic framework encompassing the conditions for the conduct of space activities, the registration of space objects, and the resolution of extraordinary situations. The Polish legal regulation must also be perceived in the context of the forthcoming EU Space Act. According to current developments, this will likely lead to the harmonisation of conditions for the authorisation of space activities at the EU level, without intervening in the area of liability for damage, which will continue to remain the domain of domestic law. In the future, the parallel operation of national and EU regulation can therefore be expected.

In the area of authorisation, the Act introduces elements that reflect the needs of commercial practice, in particular the possibility of issuing a single authorisation for multiple space objects, the differentiation of the regime by place of launch, and the regulation of the transferability of authorisation. In the area of liability, the legal regulation preserves the international framework of state liability. It supplements it at the domestic level with mechanisms aimed at transferring the economic impacts to the operator, in particular through the state's right of recourse and the mandatory insurance system. The liability of the Republic of Poland under the Liability Convention thus persists but is modified precisely by the existence of the right of recourse against the insurer and the authorisation holder. Its amount is fundamentally limited to the extent of mandatory insurance, except in cases of intentional conduct, gross negligence, or the conduct of space activities without the relevant authorisation. In the area of registration, the new Polish regulation establishes a national registry of space objects (*Krajowy Rejestr Obiektów Kosmicznych*), the administration of which is entrusted to the President of the Polish Space Agency. This approach aligns with the Sofia Guidelines, which state that the administration of the national registry should be carried out by the same authority that decides on the authorisation of space activities.

A rather interesting element of the legal regulation is its approach to special situations, which reflects the inherently risky nature of space activities. The Act in this regard empowers the President of the Polish Space Agency to establish an ad hoc commission for the examination of unforeseen events, the task of which is, in particular, to clarify the factual circumstances, causes, and impacts of the given event, to coordinate cooperation with relevant entities and crisis services, and to prepare a final report for the President of the Agency. A special regime also applies to discoveries of potential space debris, under which the Act imposes on the finder the obligation to immediately inform the Police, which, without delay and no later than 24 hours, transmits the information to the Polish Space Agency for further expert assessment.

In the broader European context, the new Polish regulation thus ranks among modern regulatory frameworks reflecting the onset of the so-called New Space era. It simultaneously represents a relevant source of inspiration for states that have not yet adopted comprehensive domestic regulation of space activities. This also applies to the Czech Republic, where the adoption of a similar act is expected in the foreseeable future. This contribution therefore seeks to contribute to the professional discussion on its future form.

KEY WORDS
space law; Outer Space; space activities; New Space Era; space law in Central Europe

KLÍČOVÉ SLOVÁ
kosmické právo; kosmický prostor; kosmické aktivity; New Space Era; kosmické právo – Střední Evropa

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POTENTIAL PRINCIPLES FOR HARMONIZING VIETNAM'S COMPETITION LAW WITH EUROPEAN UNION REGULATIONS

POTENCIÁLNE ZÁSADY HARMONIZÁCIE VIETNAMSKÉHO PRÁVA HOSPODÁRSKEJ SÚŤAŽE S PREDPISMI EURÓPSKEJ ÚNIE

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ABSTRACT

This study examines potential guiding principles for aligning Vietnam's Competition Law with the broader regulatory framework of the European Union (EU). Using a qualitative structural comparative method, the article analyses similarities and differences in substantive rules, legal concepts, enforcement institutions, and procedural safeguards. While both systems seek to protect fair competition and consumer welfare, they are shaped by different legal traditions and policy rationalities. EU competition law operates within an ordoliberal and supranational framework that emphasizes market integration, economic efficiency, consumer welfare, transparency, and judicial review. Vietnam's competition regime, by contrast, functions within a socialist-oriented market economy where competition policy is closely connected to state management, development priorities, and the continuing role of state-owned enterprises. The study, therefore, argues that harmonization should not be understood as mechanical legal transplantation, but as a context-sensitive process of functional adaptation. It proposes guiding principles including functional equivalence, functional independence of the National Competition Commission, clearer procedural safeguards, publication of reasoned decisions, enhanced judicial review, and stronger mechanisms for cross-border cooperation. Particular attention is given to merger control in the digital economy, including Vietnam's transaction-value threshold as a potentially useful tool for addressing high-value, low-revenue acquisitions, provided that local nexus and enforcement capacity are clarified. The findings suggest that Vietnam can learn from EU experience while preserving institutional feasibility within its own legal and political context. The article contributes practical recommendations for policymakers, regulators, and legal practitioners involved in Vietnam's competition law reform and international economic integration.

ABSTRAKT

Táto štúdia sa zaoberá potenciálnymi usmerňujúcimi zásadami harmonizácie vietnamského práva hospodárskej súťaže so širším regulačným rámcom Európskej únie (EÚ). Pomocou kvalitatívnej štrukturálnej komparatívnej metódy článok analyzuje podobnosti a rozdiely v hmotnoprávnych pravidlách, právnych koncepciách, presadzovacích inštitúciách a procesných

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zárukách. Hoci sa oba systémy snažia chrániť spravodlivú hospodársku súťaž a blaho spotrebiteľa,, sú formované odlišnými právnymi tradíciami a politickými racionalitami. Súťažné právo EÚ funguje v rámci ordoliberálneho a nadnárodného rámca, ktorý zdôrazňuje trhovú integráciu, ekonomickú efektívnosť, blaho spotrebiteľa, transparentnosť a súdny prieskum. Vietnamský súťažný režim naproti tomu funguje v rámci trhovej ekonomiky so socialistickým zameraním, kde je politika hospodárskej súťaže úzko spojená so štátnym riadením, rozvojovými prioritami a pretrvávajúcou úlohou štátnych podnikov. Štúdia preto argumentuje, že harmonizácia by nemala byť chápaná ako mechanická právna transplantácia, ale ako kontextovo citlivý proces funkčnej adaptácie. Navrhuje usmerňujúce zásady vrátane funkčnej ekvivalencie, funkčnej nezávislosti Národnej komisie pre hospodársku súťaž, jasnejších procesných záruk, zverejňovania odôvodnených rozhodnutí, posilneného súdneho prieskumu a silnejších mechanizmov cezhraničnej spolupráce. Osobitná pozornosť sa venuje kontrole koncentrácií v digitálnej ekonomike, vrátane vietnamského prahu hodnoty transakcie ako potenciálne užitočného nástroja na riešenie akvizícií s vysokou hodnotou a nízkymi príjmami, za predpokladu, že sa vyjasní miestna väzba (nexus) a kapacita presadzovania práva. Zistenia naznačujú, že Vietnam sa môže učiť zo skúseností EÚ a zároveň si zachovať inštitucionálnu realizovateľnosť vo vlastnom právnom a politickom kontexte. Článok prináša praktické odporúčania pre tvorcov politík, regulátorov a právnikov zapojených do reformy vietnamského súťažného práva a medzinárodnej hospodárskej integrácie.

I. INTRODUCTION

In recent years, the forms of economic governance and legal regulation have undergone powerful changes in the rapid process of globalisation. As goods, services, capital, and technology are no longer constrained within the national boundary, such movement across borders has provided new economic opportunities; however, difficult challenges arise due to complex regulatory coordination.[3] One of the most important developments is the growing importance of competition law, which is viewed as playing a fundamental role in establishing market economies, preventing anti-competitive conduct, and protecting consumer welfare. This is because the rise of global trade and cross-border investments has contributed much to harmonising newfound interests in international competition law. This harmonisation ensures that domestic enterprises are able to compete fairly on the international stage and, equally important, foreign investors are guided by predictable and transparent rules.[4] The European Union (EU), with a high degree of economic integration and strong legal frameworks, serves as a prototype for the formulation of contemporary competition laws as a result of its highly integrated legal mechanisms and standards; notwithstanding, for third-world economies like Vietnam, the issue of measuring local standards vis-à-vis international ones has become a matter of integrating and extending their capacity for trading. Like many developing economies, Vietnam expects to establish a modern competition law regime as a part of its broader transition from a centrally

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planned economy to a market-oriented one. The enactment of the Competition Law in 2004, as revised in 2018,[5] represents a significant milestone in Vietnam's legal reform towards international integration and in improving the operation of the domestic market. The 2018 competition law is comprehensive in scope, covering anti-competitive agreements, abuse of dominant market positions, economic concentration, and unfair competition, as well as the organization and authority of regulatory bodies. Despite that the Vietnamese competition law system remains relatively nascent compared to that of the EU in terms of doctrinal development and enforcement capacity.[6] Many enforcement mechanisms are still emerging, and Vietnam is in the process of cultivating the institutional autonomy, procedural rigor, and compliance culture necessary to support effective implementation. The origins of EU competition law can be traced back to its roots in the signing of the Treaty of Rome in 1957,[7] with further elaboration in the Treaty on the Functioning of the European Union (TFEU), especially in Articles 101 and 102.[8] The competition policy of the EU has been considered to be among the most developed in the world and is designed to deliver a remarkably comprehensive set of goals, substantive rules, procedural protections, and institutional enforcement. Only parties adversely affected by specific decisions may appeal to the General Court, and subsequently, to the Court of Justice of the EU on points of law.[9]

It is widely acknowledged that there are a number of peculiarities in the EU model. It has initially established a well-functioning jurisprudence via the European Court of Justice and the General Court, which generates predictability or legal certainty for businesses and regulators.[10] A second distinguishing characteristic of the EU system is its high degree of procedural transparency, respect for rights of defense, and avenues for judicial review, ensuring effective and legitimate decisions accepted by stakeholders.[11] Lastly, the enforcement regime continues to evolve to meet new demands, such as digitalisation, globalisation and sustainability, through allowing a broader interpretation of the rules and policy orientation, which is set by the European Commission.[12]

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By contrast, in Vietnam, the National Competition Commission (NCC) may be subject to judicial review under specific conditions defined in the Law on Competition. Judicial review requires the complainant to demonstrate a direct legal interest affected by the NCC's decision, and courts primarily assess compliance with procedural requirements and legal norms rather than the merits of economic reasoning. Although Vietnam is inspired by global models in its legal regime and is in the process of creating a robust corpus of case law, it still has to develop institutional autonomy for the competition body and a compliance culture on the part of market-based participants. These differences highlight both the achievements and limitations of Vietnam's current competition law as instruments for further economic integration. Consequently, this research is motivated by the necessity to empirically analyse the long-lasting deficiencies that hinder the harmonisation of Vietnam's competition law with EU standards. Regarding the level of substantive law, there are still concerns about the significant differences in the conceptualisation and interpretation of key legal principles. These arguments might be what constitutes "dominance" in a market, how to evaluate "anti-competitive agreements," and what thresholds or criteria should apply for the control of mergers and acquisitions.[13] These differences are not merely academic; they influence enforcement outcomes and business operations. For example, the Vietnamese law would stipulate different thresholds, such as market share rather than turnover or adopt other methodologies for assessment of relevant markets, leading to differences in enforcement outcomes compared to the EU.[14] Another important one is the procedural law, Vietnam continues to confront challenges related to institutional independence, transparency, and effective deterrence, areas in which the EU model, supported by decades of practice and supranational oversight, offers valuable lessons.[15] Loopholes in enforcement mechanisms, including limited resources, overlapping mandates, and gaps in investigative powers, have resulted in inconsistent or insufficient remedies for anti-competitive conduct.

Additionally, the efforts of Vietnam's legislative harmonisation can be recognised in the acceleration of Vietnam's relations with the EU after the acceptance of the EU-Vietnam Free Trade Agreement (EVFTA).[16] The EVFTA contains significant competition policy provisions and supports regulatory cooperation and convergence.[17] The failure to adequately harmonise the legislation could undermine Vietnam's credibility as a trading partner and reduce the

Princeton University Press – Torrossa, 2021. Dostupné online: https://www.torrossa.com/en/resources/an/5564851?digital=true.; KADAR, M. European Union competition law in the digital era. In: *Zeitschrift Für Wettbewerbsrecht,* Vol. 13, No. 4, 2015, p. 342 – 363. DOI 10.15375/zwer-2015-0403.; TOMÁŠEK, M., ŠMEJKAL, V., PETR, M. In search of a competition law model for ASEAN through a case study of Singapore, Malaysia and Vietnam: does the EU competition law model fit? In: *Digitální Repozitář UK,* 2022. [online] [cit. 9. septembra 2026]. Dostupné online: https://dspace.cuni.cz/handle/20.500.11956/179960.

[13] MORTON, F. S. The three pillars of effective European Union competition policy. Bruegel, 2024. [online] [cit. 9. septembra 2026]. Dostupné online: http://www.jstor.org/stable/resrep63077.

[14] SAMUEL, G. *An Introduction to Comparative Law Theory and Method.* Vol. 11. Oxford : Hart Publishing, 2014.

[15] FRENZ, W. The significance of freedom of competition in the European Union Law. In: Springer eBooks, 2015, p. 3 – 106. DOI 10.1007/978-3-662-48593-4_1.; GABATHULER, D., DEVROE, W. The European Union competition law framework. In: CAUFFMAN, C., HAO, Q. (eds). *China-EU Law Series,* Vol. 3, 2016, p. 7 – 37. DOI 10.1007/978-3-662-48735-8_2.; TRAN, V. P., DUONG, A. S. The concerns of nation-state sovereignty and international commercial law: a path to harmonisation. In: *Khazanah Hukum,* Vol. 6, No. 1, 2024, p. 34 – 45. DOI 10.15575/kh.v6i1.33809.

[16] TTWTO VCCI – (FTA). *Full Text of EU-Vietnam Trade and Investment Agreements.* [online] [cit. 9. septembra 2026]. Dostupné online: https://wtocenter.vn/chuyen-de/12778-eu-vietnam-trade-and-investment-agreements.

[17] HEYL, K., EKARDT, F., ROOS, P., STUBENRAUCH, J., GARSKE, B. Free trade, environment, agriculture, and plurilateral treaties: the ambivalent example of Mercosur, CETA, and the EU–Vietnam free trade agreement. In: *Sustainability,* Vol. 13, No. 6, 2021, p. 3153. DOI 10.3390/su13063153.; HOANG, H. H., SICURELLI, D. The EU's preferential trade agreements with Singapore and Vietnam: market vs. normative imperatives. In: *Contemporary Politics,* Vol. 23, No. 4, 2017, p. 369 – 387. DOI 10.1080/13569775.2017.1289303.; TRÖSTER, B., GRUMILLER, J., GROHS, H., RAZA, W., STARITZ, C., ARNIM, R. Combining trade and sustainability? The free trade agreement between the EU and Vietnam. In: *ÖFSE Policy Note,* No. 29/2019, 2019. [online] [cit. 9. septembra 2026]. Dostupné online: https://www.econstor.eu/bitstream/10419/192973/1/1048633047.pdf.

effectiveness of its domestic reforms in fostering investment and competition. Simultaneously, the lack of harmonisation can create legal uncertainties for businesses that operate across both jurisdictions, and it potentially hinders trade and investment flows.[18] While some studies have addressed the legal reforms and enforcement challenges in Vietnam or examined the EU competition law model, there is still a significant gap in the literature to investigate actionable, context-sensitive principles for harmonisation that consider Vietnam's unique institutional, economic, and social context. For that reason, this research aims to apply a qualitative, comparative structural approach to analyse legal frameworks, enforcement structures, and underlying policy objectives in Vietnam and the EU.[19] The ultimate goal is to identify a set of guiding principles that can assist policymakers, legislators, and practitioners as Vietnam continues to refine its competition law to comply with its international commitments. This study, therefore, informs academic debate on comparative competition law as well as the practical advancement of fair and effective market regulation in a rapidly changing global economy. Overall, this study informs both academic debate on comparative competition law and the practical advancement of fair and effective market regulation. The research aims to answer the following questions:

1. What are the key differences between Vietnam's Competition Law and EU competition regulations?
2. What major challenges hinder harmonization of competition laws between Vietnam and the EU?
3. Which principles can effectively guide the harmonization of Vietnam's Competition Law with EU standards?

II. METHODS

This qualitative study adopts a comparative structural research design with the concept of legal comparative method by Samuel[20] to provide a rigorous examination of competition law frameworks between Vietnam and the European Union. The research was based on secondary sources to review official legal instruments and regulations from both jurisdictions. Specifically, the analysis concentrates on the TFEU, particularly Article 101[21] on anti-competitive agreements and Article 102[22] on abuse of dominance. Besides, it reviewed the EU Merger Regulation (Regulation (EC) No 139/2004)[23] and Regulation (EU) No 1/2003,[24] because this regulation

[18] CALBOLI, I. The intricate relationship between intellectual property exhaustion and free movement of goods in regional organizations: comparing the EU/EEA, NAFTA, and ASEAN. In: *Queen Mary Journal of Intellectual Property,* Vol. 9, No. 1, 2019, p. 22 – 41. DOI 10.4337/qmjip.2019.01.02.; MA, B., YU, D. Balancing regional integration and national diversity in IP harmonization: lessons from the EU and ASEAN. In: *Asian Journal of Technology Innovation,* 2025, p. 1 – 20. DOI 10.1080/19761597.2025.2495354.; PHUONG, N. C., NGUYEN, T. D. K. International harmonization and national particularities of accounting. In: *Journal of Accounting & Organizational Change,* Vol. 8, No. 3, 2012, p. 431 – 451. DOI 10.1108/18325911211258371.

[19] MALINAUSKAITE, J., ERDEM, F. B. Competition law and sustainability in the EU: modelling the perspectives of national competition authorities. In: *JCMS Journal of Common Market Studies,* Vol. 61, No. 5, 2023, p. 1211 – 1234. DOI 10.1111/jcms.13458.; TRUONG, H. T. A comparative study on goals of competition law with the case of merger regulation and recommendations to Vietnam. In: *Science & Technology Development Journal – Economics – Law and Management,* Vol. 5, No. 1, 2020. DOI 10.32508/stdjelm.v5i1.684.

[20] STYLIANOU, K., IACOVIDES, M. The goals of EU competition law: a comprehensive empirical investigation. In: *Legal Studies,* Vol. 42, No. 4, 2022, p. 620 – 648. DOI 10.1017/lst.2022.8.

[21] THE EUROPEAN UNION (EU). *Treaty on the Functioning of the European Union,* Article 102 (Abuse of dominance). 2012. [online] [cit. 9. septembra 2026]. Dostupné online: http://data.europa.eu/eli/treaty/tfeu_2012/art_102/oj.

[22] THE EUROPEAN UNION (EU). *Treaty on the Functioning of the European Union,* Article 102 (Abuse of dominance). 2012. [online] [cit. 9. septembra 2026]. Dostupné online: http://data.europa.eu/eli/treaty/tfeu_2012/art_102/oj.

[23] THE EUROPEAN UNION (EU). *EU Merger Regulation (Regulation (EC) No 139/2004): The Control of Concentrations between Undertakings.* 2004. [online] [cit. 9. septembra 2026]. Dostupné online: http://data.europa.eu/eli/reg/2004/139/oj.

greatly governs the implementation of competition rules under Articles 81 and 82 of the Treaty.[25] For the Vietnamese context, the 2018 Competition Law[26] was thoroughly utilized as the main legal source. Additionally, this study explicitly considers the procedural possibility for Vietnamese parties to challenge National Competition Commission decisions in court under administrative procedure law. Hence, the analytical method of comparison engages in a doctrinal examination of each system's legal structures, which involve central concepts and enforcement mechanisms in the two selected systems. The comparison incorporates an analysis of the underlying policy objectives and socioeconomic contexts, such as the EU's ordoliberal focus on market integration and Vietnam's socialist-oriented market model, to highlight divergences that affect enforcement outcomes. The study systematically identifies changes to substantive provisions, such as the treatment of market dominance, anti-competitive practices, and merger control. It further examines the treatment of emerging challenges in the digital economy, including transaction value thresholds in Vietnam as a potential mechanism to capture high-value, low-revenue acquisitions. It considers the procedural dimensions of regulation through the lens of enforcement and institutional design. This includes the assessment of institutional independence, functional separation between investigative and adjudicative functions, transparency of decisions, and potential conflicts arising from state ownership of enterprises. The study goal intends to establish guiding principles for harmonisation that draw from the strengths and address the weaknesses of both legal frameworks through a critical review of these legislative instruments. Consequently, the finding facilitates deeper comparisons between competition laws between Vietnam and the EU and provides practical policy recommendations for policy-makers and practitioners who strive for effective and context-sensitive legal alignment.

III. DISCUSSION

1. Comparative analysis of Vietnam's competition law and European Union regulatory frameworks

The EU and Vietnam have the same views on fundamental values of competition law, which play a role in maintaining the transparency of a market economy. They have a substantive scope of competition law that indeed settled for the control of anti-competitive agreements, abuse of dominant position, and the control of mergers and acquisitions.[27] Nonetheless, the analysis highlights the structural and epistemological differences between the two systems, including the EU's ordoliberal approach versus Vietnam's socialist-oriented market model, which affect enforcement practices and policy objectives. Thus, competition law in the EU operates within an extensive legal and regulatory landscape, which is known as the TFEU to provide not only substantive prohibitions but also institutional regimes for enforcement and development of competition policy itself.[28] The EU competition law has a broad context, it covers all

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[24] THE EUROPEAN UNION (EU). *Regulation (EU) No 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty.* 2009. [online] [cit. 9. septembra 2026]. Dostupné online: http://data.europa.eu/eli/reg/2003/1/2009-07-01.

[25] THE EUROPEAN UNION (EU). *Regulation (EU) No 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty.* 2009. [online] [cit. 9. septembra 2026]. Dostupné online: http://data.europa.eu/eli/reg/2003/1/2009-07-01.

[26] THE NATIONAL ASSEMBLY OF VIETNAM. *Competition Law, Law No. 23/2018/QH14.* 2018. [online] [cit. 9. septembra 2026]. Dostupné online: https://datafiles.chinhphu.vn/cpp/files/vbpq/2022/07/23-2018-qh14..pdf.

[27] BERNATT, M., ZOBOLI, L. Competition law. Edward Elgar Publishing eBooks, 2023, p. 398 – 414. DOI 10.4337/9781802208030.00035.

[28] CRAIG, P., BÚRCA, G., KLAMERT, M. *The Principle of Loyalty in EU Law.* Oxford Studies in European Law. Oxford : Oxford University Press, 2014. DOI 10.1093/acprof:oso/9780199683123.001.0001.; DAMRO, C., GUAY, T. R. *European*

undertakings that operate within the internal market, it is not concerned about any nationality. It is designed to preserve market integration, prevent distortions of trade, and protect consumer welfare. Otherwise, Vietnam's Competition Law, especially after its comprehensive reform in 2018, has a substantive scope similar to that of the EU model. It regulates anti-competitive agreements, abuse of dominant position and economic concentration;[29] however, it is national law tailored to domestic priorities, with additional provisions for administrative aspects and unfair competition specific to Vietnam.[30]

The definition and regulation of anti-competitive agreements is a foundational element of the EU and Vietnamese competition law regimes. In the EU, Article 101 of the TFEU prohibits agreements between undertakings, decisions by associations of undertakings, and concerted practices because these actions may affect trade between member states and lead to some negative impacts on the prevention, restriction, or distortion of competition within the internal market. As such, this regulation enshrines horizontal and vertical agreements, including price-fixing, market sharing, output limitation, and collusive tendering.[31] The EU legal system recognizes exemptions for certain agreements that contribute to improving production, promoting technical or economic progress, or benefiting consumers, provided they do not impose unnecessary restrictions or eliminate competition.[32] Notably, Vietnam's Competition Law follows a similar approach in prohibiting both horizontal and vertical anti-competitive agreements that restrict competition in the market.[33] Notably, Vietnam's Competition Law follows a similar approach, listing prohibited agreements such as price-fixing, customer or market sharing, bid rigging, and agreements to prevent market entry, while allowing exemptions for pro-competitive purposes subject to review by the National Competition Commission. Nonetheless, while the EU system places significant emphasis on the effect-based analysis and balances anti-competitive and pro-competitive aspects, Vietnam's law is still developing its analytical sophistication and tends to adopt a more formalistic approach.[34] Furthermore, while the EU has established detailed guidance and block exemptions for specific sectors (i.e., vertical agreements in the motor vehicle or technology markets), Vietnam is in the early stages of developing such sector-specific frameworks. This difference highlights the need for Vietnam to gradually incorporate economic-effect assessments and sectoral guidelines to move closer to an effect-based approach.

Competition Policy and Globalization. Palgrave Macmillan UK eBooks, 2016. DOI 10.1057/9781137318671.; EZRACHI, A. EU competition law goals and the digital economy. In: *SSRN Electronic Journal,* 2018. DOI 10.2139/ssrn.3191766.

[29] LE, T. T. A., LE, Q. T., DO, T. T. T., TRAN, T. T., MAI, X. D., VO, X. V. The evolution of economics and law in Vietnam. In: *Asian Journal of Law and Economics,* 2025. DOI 10.1515/ajle-2025-0048.; LUU, H. L. Regional harmonization of competition law and policy: an ASEAN approach. In: *Asian Journal of International Law,* Vol. 2, No. 2, 2012, p. 291 – 321. DOI 10.1017/s2044251312000124.

[30] GABATHULER, D., DEVROE, W. The European Union competition law framework. In: CAUFFMAN, C., HAO, Q. (eds). *China-EU Law Series,* Vol. 3, 2016, p. 7 – 37. DOI 10.1007/978-3-662-48735-8_2.; SAMUEL, G. *An Introduction to Comparative Law Theory and Method.* Vol. 11. Oxford : Hart Publishing, 2014.

[31] GSTÖHL, S., BIÈVRE, D. *The Trade Policy of the European Union.* London : Bloomsbury Publishing, 2017.; LORENZ, M. *An Introduction to EU Competition Law.* Cambridge : Cambridge University Press, 2013. DOI 10.1017/cbo9781139087452.

[32] MIRON, D. European Union trade policy. In: DIMA, A. (ed). *Doing Business in Europe. Contributions to Management Science.* Cham : Springer, 2018, p. 51 – 77. DOI 10.1007/978-3-319-72239-9_3.

[33] LONG, T. T., HOA, N. X. Controlling collusion in the era of algorithms: a comparative analysis of European and Vietnamese competition laws. In: *Asian Journal of Law and Economics,* 2025. DOI 10.1515/ajle-2025-0023.; PHUONG, N. C., NGUYEN, T. D. K. International harmonization and national particularities of accounting. In: *Journal of Accounting & Organizational Change,* Vol. 8, No. 3, 2012, p. 431 – 451. DOI 10.1108/18325911211258371.

[34] TOMÁŠEK, M., ŠMEJKAL, V., PETR, M. In search of a competition law model for ASEAN through a case study of Singapore, Malaysia and Vietnam: does the EU competition law model fit? In: *Digitální Repozitář UK,* 2022. [online] [cit. 9. septembra 2026]. Dostupné online: https://dspace.cuni.cz/handle/20.500.11956/179960.

The concept of abuse of dominance is addressed in Article 102 of the TFEU, which prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it.[35] Examples of prohibited conduct include imposing unfair purchase or selling prices, limiting production or technical development, discriminating between trading partners, and tying or bundling unrelated products. The EU regime places significant weight on market definition and market share in assessing dominance, but also considers other factors such as barriers to entry, market structure, and the conduct of the undertaking.[36] Vietnamese law similarly prohibits abuse of dominance but sets clearer quantitative thresholds (30% for a single enterprise, 50% for two enterprises), creating practical differences with the EU's flexible, case-by-case assessment. More significantly, Vietnam's approach remains largely formalistic, whereas EU jurisprudence considers economic effects, efficiencies, and consumer welfare in determining abuse.[37]

Merger control is another key area of convergence and divergence between the two systems. The EU Merger Regulation (Regulation (EC) No. 139/2004)[38] establishes a comprehensive framework for reviewing mergers and acquisitions that have a "community dimension" – that is, transactions likely to have significant effects on competition within the EU.[39] Vietnam's transaction value thresholds may offer advantages in capturing high-value, low-revenue mergers, such as potential "killer acquisitions" in the tech sector, provided that the local nexus is properly addressed. Vietnam's Competition Law contains provisions on economic concentration, including mergers, consolidations, acquisitions, and joint ventures, and subjects such transactions to review if certain market share or transaction value thresholds are met.[40] The Vietnamese system sets out mandatory notification requirements and empowers the National Competition Commission to assess whether a proposed concentration would significantly restrict competition in the market. Nevertheless, Vietnam's merger control regime is less mature than the EU's, with fewer published decisions, less detailed procedural guidance, and a less developed practice of substantive assessment.[41] Yet, Vietnam's merger control regime is less mature, with fewer published decisions, less detailed guidance, and developing methodologies for market definition and impact assessment.

Enforcement mechanisms in the EU and Vietnam reflect important institutional and procedural differences, despite some common features. In the EU, competition law enforcement

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[35] MEUNIER, S. *Trading Voices: The European Union in International Commercial Negotiations.* Princeton : Princeton University Press – Torrossa, 2021. Dostupné online: https://www.torrossa.com/en/resources/an/5564851?digital=true.; MORTON, F. S. The three pillars of effective European Union competition policy. Bruegel, 2024. [online] [cit. 9. septembra 2026]. Dostupné online: http://www.jstor.org/stable/resrep63077.

[36] CASTELEIRO, A. D. The European Union's preferential trade agreements: between convergence and differentiation. In: *Yearbook of European Law,* Vol. 42, 2023, p. 102 – 134. DOI 10.1093/yel/yead003.; ŠMEJKAL, V. Competition law and the social market economy goal of the EU. In: *International Comparative Jurisprudence,* Vol. 1, No. 1, 2015, p. 33 – 43. DOI 10.1016/j.icj.2015.10.002.

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[38] THE EUROPEAN UNION (EU). *EU Merger Regulation (Regulation (EC) No 139/2004): The Control of Concentrations between Undertakings.* 2004. [online] [cit. 9. septembra 2026]. Dostupné online: http://data.europa.eu/eli/reg/2004/139/oj.

[39] THE EUROPEAN UNION (EU). *EU Merger Regulation (Regulation (EC) No 139/2004): The Control of Concentrations between Undertakings.* 2004. [online] [cit. 9. septembra 2026]. Dostupné online: http://data.europa.eu/eli/reg/2004/139/oj.

[40] TRUONG, H. T. A comparative study on goals of competition law with the case of merger regulation and recommendations to Vietnam. In: *Science & Technology Development Journal – Economics – Law and Management,* Vol. 5, No. 1, 2020. DOI 10.32508/stdjelm.v5i1.684.

[41] LONG, T. T., HOA, N. X. Controlling collusion in the era of algorithms: a comparative analysis of European and Vietnamese competition laws. In: *Asian Journal of Law and Economics,* 2025. DOI 10.1515/ajle-2025-0023.; VERGHESE, A. S. Trade and competition policy. In: Edward Elgar Publishing eBooks, 2023, p. 151 – 168. DOI 10.4337/9781800882867.00015.

is primarily carried out by the European Commission, which acts as either an investigator or a decision-maker in complex cases, which are likely to infringe the provisions of Articles 101 and 102 of the TFEU.[42] On that account, the Commission has extensive investigative powers, namely the authority to conduct dawn raids, request information, interview witnesses, and impose substantial fines on violating enterprises. Notably, the enforcement of the EU competition law is further supplemented by national competition authorities, promoting cooperation through the European Competition Network.[43] Importantly, Decisions of the European Commission may be subject to judicial review by the General Court and, subsequently, by the Court of Justice of the EU, depending on the procedural context. On the contrary, Vietnam's enforcement framework is administered by the National Competition Commission, which is responsible for investigating, prosecuting, and sanctioning violations of the Competition Law. Although the National Competition Commission has been empowered with a range of investigative and decision-making functions, the institutional structure is still relatively new, and competition law enforcement practice is still evolving.[44] Compared to the EU, Vietnam experiences many challenges in terms of institutional independence, resource allocation, and the technical capacity of enforcement officials. Administrative processes can be slower and less transparent, and there is a need to further strengthen procedural rights, such as the right of defence and opportunities for appeal.[45] Furthermore, public awareness of competition law and the culture of compliance among businesses are still not as strong as in the EU, which leads to limited private enforcement and fewer landmark cases. Another noteworthy difference is the degree of transparency and guidance that market participants easily have access to. The European Commission and national competition authorities in the EU regularly issue guidelines, policy statements, and decisions, which are publicly available and serve as references for businesses and practitioners. Otherwise, Vietnam is developing its own body of guidance to enhance predictability and legal certainty, including public decisions and detailed procedural rules.[46]

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[42] MALINAUSKAITE, J., ERDEM, F. B. Competition law and sustainability in the EU: modelling the perspectives of national competition authorities. In: *JCMS Journal of Common Market Studies*, Vol. 61, No. 5, 2023, p. 1211 – 1234. DOI 10.1111/jcms.13458.; LORENZ, M. *An Introduction to EU Competition Law*. Cambridge : Cambridge University Press, 2013. DOI 10.1017/cbo9781139087452.

[43] CRAIG, P., BÚRCA, G., KLAMERT, M. *The Principle of Loyalty in EU Law*. Oxford Studies in European Law. Oxford : Oxford University Press, 2014. DOI 10.1093/acprof:oso/9780199683123.001.0001.; GABATHULER, D., DEVROE, W. The European Union competition law framework. In: CAUFFMAN, C., HAO, Q. (eds). *China-EU Law Series*, Vol. 3, 2016, p. 7 – 37. DOI 10.1007/978-3-662-48735-8_2.

[44] KURNIAWAN, I. G. A., DISANTARA, F. P., THUONG, M. T. H., NUTAKOR, B. S. M. The business law in contemporary times: a comparison of Indonesia, Vietnam, and Ghana. In: *Substantive Justice International Journal of Law*, Vol. 7, No. 2, 2024, p. 114 – 141. DOI 10.56087/substantivejustice.v7i2.297.; NGO, T. T. Vietnam's implementation of labour provisions in the European Union – Vietnam Free Trade Agreement: recent developments and insights. In: *Legal Issues of Economic Integration*, Vol. 52, No. 1, 2025, p. 67 – 88. DOI 10.54648/leie2025004.

[45] BERNATT, M., ZOBOLI, L. Competition law. Edward Elgar Publishing eBooks, 2023, p. 398 – 414. DOI 10.4337/9781802208030.00035.; TOMÁŠEK, M., ŠMEJKAL, V., PETR, M. In search of a competition law model for ASEAN through a case study of Singapore, Malaysia and Vietnam: does the EU competition law model fit? In: *Digitální Repozitář UK*, 2022. [online] [cit. 9. septembra 2026]. Dostupné online: https://dspace.cuni.cz/handle/20.500.11956/179960.

[46] MORTON, F. S. The three pillars of effective European Union competition policy. Bruegel, 2024. [online] [cit. 9. septembra 2026]. Dostupné online: http://www.jstor.org/stable/resrep63077.; LICETTI, M., MIRALLES, G., TEH, R. Competition policy. In: MATTOO, A., ROCHA, N., RUTA, M. (eds). *Handbook of Deep Trade Agreements*. 2020, p. 502 – 505. [online] [cit. 9. septembra 2026]. Dostupné online: https://documents1.worldbank.org/curated/en/685311594363725995/pdf/Handbook-of-Deep-Trade-Agreements.pdf.; TRÖSTER, B., GRUMILLER, J., GROHS, H., RAZA, W., STARITZ, C., ARNIM, R. Combining trade and sustainability? The free trade agreement between the EU and Vietnam. In: *ÖFSE Policy Note*, No. 29/2019, 2019. [online] [cit. 9. septembra 2026]. Dostupné online: https://www.econstor.eu/bitstream/10419/192973/1/1048633047.pdf.

2. Key challenges in harmonizing Vietnam's competition law with EU Regulations: Legal traditions, institutions, and policy objectives

A number of approaches have been identified in the process of harmonising the Vietnamese Competition Law with existing EU regulations. These challenges are rooted not only in differences in statutory provisions but also in the underlying legal and institutional structures, as well as broader economic, historical, and political contexts that influence each country's competition policy. Accordingly, an in-depth review of these approaches will identify the complexities and limitations of pursuing legal convergence, while highlighting the importance of context-sensitive solutions.

2.1. Divergent legal traditions and philosophical foundations

Differences in legal traditions are one of the main reasons for the slow pace of harmonisation in Vietnam. The EU competition law system is unique in that it is rooted in the civil law tradition, but it has developed into a supranational legal system with significant regulatory and judicial review.[47] The EU competition law has been evolving for the functional objective of market integration, which has been shaped over decades by the Court of Justice of the European Union (CJEU) and policy refinements by the European Commission. This reflects a jurisprudence-based and effect-oriented approach, contrasting with Vietnam's more formalistic, practice-oriented, and legislation-driven approach. This casuistic legal regime has demonstrated the necessity of putting in place clear legal rules, the principle of proportionality, the principle of proportionality, and the balance of various policy interests between numerous policy objectives, economic efficiency, consumer welfare, and the integrity of the single market.[48] Meanwhile, Vietnam has recently adopted competition law, as its economy has transitioned from a centrally planned economy to a socialist-oriented market economy in recent decades.[49] The legal tradition in Vietnam has a mixed legal system that includes civil law, socialist law, and significant local adaptations. As a consequence, Vietnam relies less on judicial precedents and has a limited culture of independent judicial review, creating challenges in adopting EU-style jurisprudence.[50] Contrariwise, the issue is that the lack of a well-rooted legal culture of independent judicial review in economic regulation remains a significant challenge when Vietnam tries to integrate with the EU model, which is more flexible and jurisprudence-based. Moreover, the EU competition law operates within the highly diverse context of a single market, while Vietnam's competition law has been designed to meet domestic needs and developmental priorities. The philosophical foundations of competition law, especially the emphasis on the economic efficiency of industrial policy and commissions of policy, and consumer welfare, have a

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[48] LAURSEN, F., ROEDERER-RYNNING, C. Introduction: the new EU FTAs as contentious market regulation. In: Routledge eBooks, 2020, p. 1 – 17. DOI 10.4324/9780429060052-1.; ŠMEJKAL, V. Competition law and the social market economy goal of the EU. In: *International Comparative Jurisprudence,* Vol. 1, No. 1, 2015, p. 33 – 43. DOI 10.1016/j.icj.2015.10.002.

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significant divergence, which causes challenges for diverse interpretations and enforcement practices.[51] Thus, harmonisation requires understanding these fundamentally different modes of legal reasoning and policy objectives.

2.2. Institutional capacities and administrative frameworks

Institutional capacity is another critical area in which harmonisation encounters serious barriers. This is quite opposite to Vietnam where the EU has an established enforcement system with a strong institutional infrastructure where enforcement is conducted by a combination of different actors that includes the European Commission, national competition authorities (NCAs) in Member States, and an established system of judicial review by the CJEU and the General Court.[52] Since each of these institutions has the technical expertise, autonomy, and resources, they can conduct investigations authoritatively and enforce developmental policy effectively. Conversely, the NCC in Vietnam, established under the 2018 Competition Law, is still relatively new and faces challenges in functional independence, budgetary allocations, staffing, and training for enforcement officials.[53] There is an overlap in functions between different government bodies that causes defective enforcement or a lack of authority. Nevertheless, the ability to conduct thorough investigations, such as dawn raids, forensic analysis of electronic evidence, and economic assessments, relies upon specialised skills and resources which are still in the developmental process in Vietnam.[54] Quite opposite, the Directorate-General for Competition of the European Commission has been actively involved in conducting complex cross-border enforcement actions, applying sophisticated economic analysis and using investigative measures backed by well-established procedural and legal protections. As far as the enforcement of competition laws is concerned, the independence of enforcement agencies has an important role in successful competition law enforcement. In contrast, the EU system provides guarantees of both institutional and decisional independence to its enforcement bodies, while institutions may be subject to administrative or political influence, which can reduce both the consistency and impartiality of enforcement outcomes.[55] Such a lack of equal institutional power and autonomy is an important impediment to full harmonisation, which remains nothing more than transplanting legal norms without taking into account different enforcement practices. These risks could result in a “law on the books” without meaningful practice of this law.

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2.3. Enforcement approaches and procedural challenges

The comparison of the enforcement measures brings additional complexity and challenges for this harmonisation process. The EU has created a complex, multi-level system of enforcement that combines public enforcement through the Commission and NCAs with private enforcement via courts.[56] This dual system creates a variety of remedies, including civil fines, cease and desist orders, and private actions for damages. This offers a regime of deterrence and redress to the victim parties. Vietnam has a specific system of administrative enforcement and limited possibilities for recourse to the judiciary or private mechanisms for cases.[57] The procedural safeguards for businesses and individuals to conduct investigations, such as the right of defence, access to evidence, and opportunities for appeal, are less robust than in the EU, where procedural fairness and judicial review are central tenets.[58] Consequently, businesses in Vietnam are likely to view competition law enforcement as less predictable and more susceptible to administrative discretion or external pressures. Transparency and legal certainty are mainly central to effective enforcement. Indeed, the EU regularly publishes detailed guidelines, notices, and decisions, which help build up a well-developed body of interpretative guidance for market participants. In another case, Vietnam's competition law regime is still developing such resources, but these resources are likely to encounter few published decisions and limited interpretative guidance available to businesses and practitioners.[59] The absence of such transparency can lead to inconsistent application, uncertainty for investors, and reduced incentives for voluntary compliance. Another challenge concerns the use of economic analysis and market definition in enforcement. EU authorities make extensive use of economic evidence in defining relevant markets, assessing dominance, and evaluating anti-competitive effects, drawing on a deep pool of expertise in law and economics.[60] Vietnamese enforcement bodies are gradually building such capacity, but still tend to rely more heavily on formalistic criteria such as market share thresholds, with less emphasis on dynamic market effects, efficiencies, and consumer welfare impacts.

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[56] CALBOLI, I. The intricate relationship between intellectual property exhaustion and free movement of goods in regional organizations: comparing the EU/EEA, NAFTA, and ASEAN. In: *Queen Mary Journal of Intellectual Property,* Vol. 9, No. 1, 2019, p. 22 – 41. DOI 10.4337/qmjip.2019.01.02.; EZRACHI, A. EU competition law goals and the digital economy. In: *SSRN Electronic Journal,* 2018. DOI 10.2139/ssrn.3191766.; FRESE, M. J. *Sanctions in EU Competition Law: Principles and Practice.* London : Bloomsbury Publishing, 2014. DOI 10.5040/9781474201674.; LE, T. T. A., LE, Q. T., DO, T. T. T., TRAN, T. T., MAI, X. D., VO, X. V. The evolution of economics and law in Vietnam. In: *Asian Journal of Law and Economics,* 2025. DOI 10.1515/ajle-2025-0048.

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[60] CHEN, V., GODWIN, A., RAMSAY, I. An ASEAN framework for cross-border cooperation in financial consumer dispute resolution. In: *Asian Journal of Comparative Law,* Vol. 12, No. 1, 2017, p. 167 – 196. DOI 10.1017/asjcl.2017.1.; ŠMEJKAL, V. Competition law and the social market economy goal of the EU. In: *International Comparative Jurisprudence,* Vol. 1, No. 1, 2015, p. 33 – 43. DOI 10.1016/j.icj.2015.10.002.

2.4. Policy objectives and socioeconomic contexts

The far-reaching socioeconomic frameworks and overarching goals frequently complicate the process of legislative harmonisation. The EU competition law serves several policy goals such as maintaining market integration, promoting consumer welfare, ensuring economic efficiency, and addressing social and environmental considerations.[61] For this reason, the competition law of the EU is continuously modified to accommodate new issues like digital platforms, globalisation, and sustainability. Decisions are guided by a sophisticated balance of interests and are informed by extensive stakeholder consultation and judicial oversight. So, Vietnam's competition policy intertwines with the balance of liberalised markets and national development goals, social stability, and industrial policy.[62] Currently, Vietnam is undergoing a transitional period; thereby, competition law during this period of transition cannot focus on market efficiency. Instead, it can be used to defend certain sectors of domestic industry, promote small and medium-sized enterprises (SMEs), or pursue other developmental objectives. These broader objectives can sometimes lead to tensions with pure economic efficiency, which generates differences in how exemptions are granted, how dominance is defined, or how public interest criteria are incorporated into merger control. Likewise, Vietnam's economic development, industrial structure, and the role of state-owned enterprises (SOEs) pose particular issues for the enforcement of competition law due to Vietnam's development level. The prominence of SOEs and the ongoing privatisation process suggest that competition policy will maybe intersect with other governmental policy goals such as socio-political equality, employment, and regional development-oriented priorities.[63] Conversely, the EU's system is based on a distinct separation between regulatory authorities and market participants, which emphasises less scope for political or developmental considerations in enforcement. Lastly, cultural factors on policy convergence, such as business practices, public culture on compliance, and public attitude on competition, have a significant impact and determine the effectiveness and direction of convergence.[64] In the EU, the enforcement and implementation of these marketing campaigns has fostered a compliance-oriented business culture, while the efforts to promote

[61] MALINAUSKAITE, J., ERDEM, F. B. Competition law and sustainability in the EU: modelling the perspectives of national competition authorities. In: *JCMS Journal of Common Market Studies,* Vol. 61, No. 5, 2023, p. 1211 – 1234. DOI 10.1111/jcms.13458.; SAMUEL, G. *An Introduction to Comparative Law Theory and Method.* Vol. 11. Oxford : Hart Publishing, 2014.

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[64] LE, T. T. A., LE, Q. T., DO, T. T. T., TRAN, T. T., MAI, X. D., VO, X. V. The evolution of economics and law in Vietnam. In: *Asian Journal of Law and Economics,* 2025. DOI 10.1515/ajle-2025-0048.; NGUYEN, M., BENSEMANN, J., KELLY, S. Corporate social responsibility (CSR) in Vietnam: a conceptual framework. In: *International Journal of Corporate Social Responsibility,* Vol. 3, No. 1, 2018. DOI 10.1186/s40991-018-0032-5.; TRUONG, H. T. A comparative study on goals of competition law with the case of merger regulation and recommendations to Vietnam. In: *Science & Technology Development Journal – Economics – Law and Management,* Vol. 5, No. 1, 2020. DOI 10.32508/stdjelm.v5i1.684.

understanding and acceptance of the competition law in Vietnam remain in the developmental stage.

2.5. Cross-border and international coordination

An additional challenge concerns the coordination of enforcement in cross-border cases. As Vietnam becomes increasingly integrated into the global economy, its relations with the EU deepen through agreements like the EVFTA, which increases the likelihood of cases involving multinational or transnational anti-competitive practices.[65] Harmonisation is a matter of legal texts, and it establishes effective mechanisms for cooperation, information sharing, and mutual assistance between Vietnamese authorities and their EU counterparts. Currently, significant differences exist in the level of international cooperation, investigative capacity, and mutual recognition of decisions, highlighting the need for trust-building, alignment of procedures, and enhancement of technical and legal capacity for Vietnamese authorities to achieve effective cross-border enforcement. While the EU has developed extensive tools for cooperation with both Member States and third countries, Vietnam's mechanisms are still in the early stages of development.[66] Consequently, the establishment of practical international cooperation will require building trust, aligning procedures, and enhancing the technical and legal capacity of Vietnamese authorities.

3. Guiding principles for legislative and procedural harmonization of Vietnam's Competition Law with European Union regulations

The harmonisation of Vietnam's Competition Law with the EU regulations is not a matter of mere legal transplantation, but a process that requires thoughtful adaptation of concepts, procedures, and institutional frameworks to the domestic context. This approach mainly rests upon the principle of functional equivalence, which calls for Vietnamese lawmakers and policymakers to identify the core functions and objectives of EU competition law and then tailor local measures to achieve analogous outcomes within Vietnam's own legal, economic, and administrative environment, mitigating the risk of legal transplant failure and accounting for local institutional realities.[67] For instance, where the EU operates with flexible, jurisprudence-driven definitions of market dominance or anti-competitive agreements, Vietnam may initially adopt formal benchmarks or statutory criteria while gradually integrating more sophisticated, effects-

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[65] HEYL, K., EKARDT, F., ROOS, P., STUBENRAUCH, J., GARSKE, B. Free trade, environment, agriculture, and plurilateral treaties: the ambivalent example of Mercosur, CETA, and the EU–Vietnam free trade agreement. In: *Sustainability*, Vol. 13, No. 6, 2021, p. 3153. DOI 10.3390/su13063153.; HOANG, H. H., SICURELLI, D. The EU's preferential trade agreements with Singapore and Vietnam: market vs. normative imperatives. In: *Contemporary Politics*, Vol. 23, No. 4, 2017, p. 369 – 387. DOI 10.1080/13569775.2017.1289303.; TRÖSTER, B., GRUMILLER, J., GROHS, H., RAZA, W., STARITZ, C., ARNIM, R. Combining trade and sustainability? The free trade agreement between the EU and Vietnam. In: *ÖFSE Policy Note*, No. 29/2019, 2019. [online] [cit. 9. septembra 2026]. Dostupné online: https://www.econstor.eu/bitstream/10419/192973/1/1048633047.pdf.

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based analyses as local administrative capacity and case law accumulate, reflecting EU practices.[68] Adapting legal standards through functional equivalence can help mitigate the risk of "legal transplant failure," which occurs when borrowed rules or procedures do not align with the institutional realities or cultural expectations of the receiving country. This approach has precedent in the gradual adaptation of competition law in ASEAN member states, where convergence with international models has been shaped by local administrative practices and regulatory priorities.[69] The functional equivalence for Vietnam might be the maintenance of some formalistic elements, such as clear market share thresholds for dominance, while it introduces economic assessment tools, sectoral guidelines, and capacity-building measures to enable deeper, more context-sensitive analysis of anti-competitive effects.

Another foundational principle for harmonization is the strengthening of independent regulatory enforcement. The effectiveness of any competition law hinges on the legal provisions themselves and the authority and integrity of the institutions tasked with their implementation. The EU's enforcement model, led by the European Commission and complemented by empowered national competition authorities, is noted for its institutional independence, professional expertise, and procedural rigor.[70] Vietnam's National Competition Commission, although relatively new, has the potential to fulfill a similar role provided it is granted both legal and operational autonomy. Legislative reforms should ensure that appointments to the Commission are based on professional merit and that the agency is shielded from undue political or administrative influence.[71] Adequate resources and ongoing training are vital to enable the Commission to keep pace with increasingly complex markets and sophisticated anti-competitive practices.[72] Institutional independence is particularly important in economies where powerful state-owned enterprises or vested interests may exert significant influence. In Vietnam, the successful implementation of competition policy will depend on the Commission's capacity to investigate, adjudicate, and sanction cases objectively, even where politically sensitive or high-profile market actors are involved. The EU's experience shows that independent enforcement bodies, properly resourced and supported by the judiciary, can maintain market confidence and investor trust while driving continuous improvements in market practices.[73]

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[68] BERNATT, M., ZOBOLI, L. Competition law. Edward Elgar Publishing eBooks, 2023, p. 398 – 414. DOI 10.4337/9781802208030.00035.; EZRACHI, A. EU competition law goals and the digital economy. In: *SSRN Electronic Journal*, 2018. DOI 10.2139/ssrn.3191766.

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[73] MEUNIER, S. *Trading Voices: The European Union in International Commercial Negotiations.* Princeton : Princeton University Press – Torrossa, 2021. Dostupné online: https://www.torrossa.com/en/resources/an/5564851?digital=true.;

Equally vital is the principle of procedural transparency and due process. The legitimacy of competition law depends in large part on the fairness and openness of its enforcement processes. In the EU, procedural safeguards – such as the right of defense, access to the case file, reasoned decisions, and avenues for judicial review – are deeply embedded in the legal framework and have been continuously reinforced through legislative updates and case law.[74] Vietnam has made commendable progress by introducing basic procedural rights in its Competition Law, but the next step should be to further clarify and expand these protections. This can be accomplished through detailed procedural guidelines, regular publication of enforcement decisions, and clear communication of investigation processes and standards of proof. Ensuring procedural transparency means that parties under investigation should have meaningful opportunities to respond to evidence, make submissions, and be heard before any sanctions are imposed. Moreover, all decisions should be well-reasoned, referencing both the facts and the legal grounds, and published in a way that informs future conduct and enhances predictability for businesses and practitioners. Robust mechanisms for judicial review – either before specialized administrative tribunals or within the general court system – are necessary to check regulatory overreach and to foster the gradual development of a Vietnamese body of competition law jurisprudence.[75]

Another fundamental principle for harmonisation is an improvement of the cooperation mechanisms, so that effective cross-border competition cases are pursued. As Vietnam continues to deepen its economic integration through agreements like the EU–Vietnam Free Trade Agreement and becomes more embedded in global value chains, competition issues are increasingly likely to have a transnational dimension, highlighting the need for coordinated cross-border enforcement.[76] The EU's model – particularly its European Competition Network agreements with third countries provides important lessons for constructing the analytical and administrative procedures that would enable information sharing, coordinated investigations and mutual assistance in enforcement. For Vietnam, strengthening cooperation could involve negotiating formal memoranda of understanding with the European Commission and with national authorities in key trading partners, establishing secure channels for exchanging information and best practices, harmonising procedural rules for taking and examining evidence, and ensuring confidentiality and due process across jurisdictions.[77] Vietnam's active participation in regional competition law networks, such as those within ASEAN countries, can further

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[77] MEUNIER, S. *Trading Voices: The European Union in International Commercial Negotiations.* Princeton : Princeton University Press – Torrossa, 2021. Dostupné online: https://www.torrossa.com/en/resources/an/5564851?digital=true.; VERGHESE, A. S. Trade and competition policy. In: Edward Elgar Publishing eBooks, 2023, p. 151 – 168. DOI 10.4337/9781800882867.00015.

promote convergence and mutual learning, helping to build both capacity and credibility at the international level.[78] In addition to the headline principles, a comprehensive harmonisation strategy may emphasise risk-based and proportionate enforcement, competition advocacy, and the development of a compliance culture. A risk-based approach encourages authorities to focus on conduct that poses the greatest threat to competition and consumer welfare, while allowing them to simplify procedures for less grave infringements.[79] Advocacy efforts, such as public education campaigns, business outreach, and the development of guidance documents, are essential to foster an environment where competition law is understood, respected, and actively integrated into business planning and government decision-making.[80]

Gradual implementation and ongoing review of reforms are very important. Rather than attempting to adopt EU standards across all areas, Vietnam could prioritize reforms in high-impact areas or legislative regulations, experiment with new enforcement tools, and adjust policies based on regular impact assessments and stakeholder feedback.[81] This iterative approach allows for the gradual accumulation of expertise and legitimacy, reduces the risks associated with abrupt regulatory changes, and builds a robust, locally-based competition regime over time. Therefore, the adaptation of Vietnam's Competition Law to EU regulations is best conceptualized as a dynamic process rather than a one-time legal event. The principles outline, such as functional equivalence, independent enforcement, procedural and judicial transparency, and cross-border cooperation, should guide the legislative reform and the daily practice of Vietnamese competition authorities, courts, businesses, and legal professionals.[82] Accordingly, by adjusting and incorporating such principles into the policy formulation process, Vietnam can develop a competition law regime that is simultaneously responsive to local realities and aligned with international standards, supporting domestic economic development and integration into the global economy.

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IV. CONCLUSION

The efforts of Vietnam to align its Competition Law with the EU framework should focus on context-sensitive adaptation rather than mere legal transplantation. The challenge for Vietnam is developing a competition regime that balances domestic imperatives with the demands of globalised markets, as its economy becomes more deeply integrated in the global market. The comparative analysis between Vietnam's legal framework and the EU's system highlights similarities and key differences that will contribute to the reform of the competition policy issues in Vietnam later. The fact is that, apart from the core three areas of concern, i.e., anti-competitive agreements, abuse of dominance and economic concentration, which are somewhat similar to those in the EU, there is a significant disparity in legal approaches and enforcement mechanisms applied between Vietnam and the EU. The European competition law framework, however, has been well-established, and this law has distinctive features with a flexible, effects-based approach. The competition law framework of the EU is well developed with a flexible and effects-based method. It is underpinned by decades of legal precedent and a powerful European Commission. Remarkably, it is supported by independent national authorities to ensure effective enforcement. The strength of the EU's competition regime derives from its independent institutions, clear decision-making processes, and well-developed systems of judicial review, all of which together give businesses predictable rules and encourage voluntary compliance. In contrast, Vietnam's competition law system is still quite new, which is monitored by the National Competition Commission. Concerning the competition law, Vietnam tends to apply more formalistic measures in dealing with its competition laws by using predetermined criteria and statutory thresholds. While this provides certainty and predictability, it does not have the necessary adaptability to handle complicated, evolving market realities. The Vietnamese system is still developing the level of institutional independence and transparency, which characterises the EU system, but there still requires a great effort to ensure procedural fairness and enhance enforcement practices. Despite these differences, Vietnam and the EU share common policy goals. In general, Vietnam's readiness to adjust and revamp its legal and institutional framework generally reflects its commitment to adopting the best international standards and further integration with the world economy.

This systematic, comparative study reveals that Vietnam faces several challenges in harmonising its Competition Law with the EU's system. Those obstacles are not limited to technical and legal issues, but also encompass institutions and culture, with differences in administrative capacity, a high level of economic development, and the significant presence of state-owned enterprises. As a result, solving these problems will require a nuanced set of measures that reflect the unique political and economic environment in Vietnam. More distinctly, functional equivalence is one of the most fundamental principles for legal modernisation in Vietnam. Rather than simply adopting EU regulations, Vietnam should pursue equivalent regulatory outcomes by recalibrating legal definitions, performance standards, and enforcement mechanisms to domestic realities. This would allow a method for step-by-step adjustment of the approach and space for change and creativity within the Vietnamese context. Besides, it is greatly important to promote the independence of the National Competition Commission. To achieve this, the Commission must be granted unequivocal mandates, adequate financial and human capital, and protection from political influence. The ongoing enhancement of institutional capacity through specialised training initiatives and sector-specific expertise will empower the Commission to confront competition issues with renewed authority, especially when engaging powerful market participants, including state-owned enterprises. Transparency and procedural fairness are, in essence, fundamental to the effectiveness of competition law enforcement.

Extending procedural protections, recognition of the right to a fair trial, and ensuring access to relevant case materials are critical initial steps in regaining public confidence in the system. Moreover, the regular issuance of decisions and interpretative legal instruments within the framework will create a strong binding of the law and develop an enduring culture of compliance among enterprises. At the same time, it is very important to promote cooperation with foreign competition authorities further because it tries to integrate itself into the world economy on a broader scale to effectively coordinate the investigations and address the cross-border anti-competitive practices. Therefore, Vietnam can strengthen its competition law framework to create equal access to markets and become a reliable trading partner in the world market by adopting flexible principles that reconcile the needs of most countries with existing international standards.

KEY WORDS
competition law, economic integration, functional equivalence, legal reform, regulatory enforcement

KĽÚČOVÉ SLOVÁ
právo hospodárskej súťaže, hospodárska integrácia, funkčná ekvivalencia, právna reforma, presadzovanie práva

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EXTENSION OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE'S COMPETENCE TO ENVIRONMENTAL CRIME: IS THE CURRENT MODEL SUFFICIENT?[1]

ROZŠÍRENIE PRÁVOMOCI EURÓPSKEJ PROKURATÚRY NA ENVIRONMENTÁLNU KRIMINALITU: JE SÚČASNÝ MODEL POSTAČUJÚCI?

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ABSTRACT
The article addresses the issue of extending the competence of the European Public Prosecutor's Office to environmental crime within the context of the fragmented system of criminal law enforcement in the European Union. It is based on an analysis of environmental crime as a specific form of cross-border criminality that exceeds the capacity of individual Member States to respond effectively. The author examines the current competence framework of the European Public Prosecutor's Office, identifies its limitations and assesses its ability to respond to emerging forms of criminality. Attention is also given to the problems of fragmented enforcement and conflicts of jurisdiction. On the basis of this analysis, the article presents models for the possible extension of the EPPO's competence and evaluates their implications, including from a national perspective with a focus on the Slovak Republic. The article concludes with de lege ferenda proposals aimed at enhancing the effectiveness and coherence of environmental criminal law enforcement at the level of the European Union.

ABSTRAKT
Príspevok sa zaoberá otázkou rozšírenia právomoci Európskej prokuratúry na environmentálnu kriminalitu v kontexte fragmentovaného systému presadzovania trestného práva v Európskej únii. Východiskom je analýza environmentálnej kriminality ako špecifického druhu cezhraničnej trestnej činnosti, ktorá presahuje možnosti efektívneho riešenia na úrovni jednotlivých členských štátov. Autor skúma súčasný kompetenčný rámec Európskej prokuratúry, identifikuje jeho limity a hodnotí jeho schopnosť reagovať na nové formy kriminality. Pozornosť je venovaná aj problémom fragmentácie presadzovania práva a konfliktom jurisdikcie. Na základe analýzy sú predstavené modely možného rozšírenia právomoci Európskej prokuratúry a ich implikácie, vrátane národného pohľadu so zameraním na Slovenskú republiku. Záverom autor formuluje návrhy de lege ferenda smerujúce k efektívnejšiemu a koherentnejšiemu presadzovaniu environmentálneho trestného práva na úrovni Európskej únie.

I. INTRODUCTION

The increasing scale and complexity of environmental crime within the European Union (hereinafter "EU") have exposed significant structural deficiencies in the existing framework

[1] The contribution was elaborated as a part of the research project VEGA No. 1/0248/26 '*Perspectives on Enhancing Judicial Co-operation in Criminal Matters through Transnational Units*' [Slovak: Perspektívy zefektívnenia justičnej spolupráce v trestných veciach prostredníctvom nadnárodných jednotiek].
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of criminal law enforcement. Environmental offences, particularly those with a cross-border dimension, frequently transcend the territorial and jurisdictional limits of individual Member States, thereby challenging the effectiveness of decentralised enforcement mechanisms. At the same time, the progressive development of European criminal law, especially in the field of the protection of the EU's financial interests, has led to the establishment of new supranational instruments, most notably the European Public Prosecutor's Office (hereinafter "EPPO"). However, the current mandate of this body remains limited in scope, raising questions as to its capacity to address emerging forms of transnational criminality, including environmental crime.

Against this background, the present article examines the potential extension of the competence of the EPPO to environmental crime. The central research question addressed in this study is whether the current model of the EPPO, based on a limited material competence and a decentralised operational structure, is sufficient to ensure effective enforcement in the field of environmental protection, or whether further integration at the European level is required. The analysis is situated within the broader context of fragmentation in EU criminal justice and the evolving relationship between national sovereignty and supranational enforcement mechanisms. The primary objective of the article is to assess the legal, institutional and practical implications of extending the EPPO's mandate beyond offences affecting the financial interests of the EU. In doing so, the article seeks to identify the key limitations of the existing framework, evaluate possible models of competence expansion, and consider their compatibility with fundamental principles of EU law, including the principle of conferral, subsidiarity and respect for national legal systems. Particular attention is paid to the specific nature of environmental crime as a form of transnational criminality with both ecological and economic consequences.

From a methodological perspective, the article is based on a doctrinal analysis of primary and secondary sources of EU law, including relevant Treaty provisions, legislative instruments and case-law where applicable. This is complemented by a critical examination of academic literature in the field of European criminal law and environmental law, as well as selected policy documents of EU institutions. The analytical approach is further supported by comparative considerations, particularly with regard to the interaction between national and supranational levels of enforcement. The structure of the article reflects these objectives. Following the introductory remarks, Section II examines the nature and characteristics of environmental crime within the EU. Section III outlines the current competence framework of the EPPO, while Section IV addresses the broader issue of fragmentation in EU criminal justice. Section V focuses on the legal challenges associated with extending the EPPO's mandate. Section VI proposes and evaluates different models of competence expansion, which are subsequently analysed from a national perspective in Section VII, with a particular focus on the Slovak Republic. Finally, Section VIII formulates *de lege ferenda* proposals aimed at enhancing the effectiveness and coherence of enforcement in this field.

II. ENVIRONMENTAL CRIME AS A CROSS-BORDER CRIMINAL PHENOMENON

1. Definition and Legal Nature of Environmental Crime

Environmental crime represents a specific category of criminal conduct directed against environmental components such as air, water, soil, biodiversity and ecosystems, typically characterised by its regulatory complexity and strong dependence on administrative law frameworks. Unlike traditional forms of criminality, environmental offences often arise at the intersection of criminal law and environmental regulation, which contributes to their fragmented legal treatment across jurisdictions. At the level of the EU, environmental crime has been progressively harmonised, particularly through secondary legislation establishing *minimum rules* on criminalisation.[3] These *minimum rules* are based primarily on Article 83(2) of the Treaty on the Functioning of the European Union[4], which allows the European Union to establish minimum rules concerning the definition of criminal offences and sanctions where such approximation is essential to ensure the effective implementation of a Union policy that has been subject to harmonisation measures. This harmonisation has evolved from *Directive 2008/99/EC on the protection of the environment through criminal law*[5] to the recently adopted *Directive (EU) 2024/1203 on the protection of the environment through criminal law*[6], which significantly broadens the catalogue of environmental offences and strengthens requirements concerning sanctions, investigative tools and enforcement mechanisms. However, despite these efforts, the legal qualification of environmental offences remains partially divergent among Member States, reflecting differences in national legal traditions and enforcement priorities. This divergence significantly complicates both detection and prosecution.

Environmental crime may be understood not only as a violation of environmental norms, but also as conduct endangering collective goods of supranational relevance. In this sense, the protection of the environment transcends purely national interests and increasingly constitutes a shared European value, which justifies enhanced forms of supranational intervention. A defining feature of environmental crime is its inherently cross-border nature. Illegal activities such as waste trafficking, illegal logging, wildlife trafficking or pollution frequently involve multiple jurisdictions, either in terms of the location of criminal conduct or its effects. This transnational dimension significantly limits the effectiveness of purely national enforcement mechanisms. Environmental crime is also closely linked to organised crime structures. Criminal networks exploit regulatory disparities between Member States, differences in enforcement intensity and gaps in cross-border cooperation. These actors benefit from relatively low detection rates and comparatively lenient sanctions, which render environmental crime a highly profitable and low-risk activity.[7]

The cross-border character of such offences reflects broader structural challenges identified in European criminal justice cooperation. National authorities are often unable to adequately respond to criminality exceeding their territorial scope, which necessitates enhanced coordination and, potentially, centralised enforcement mechanisms. Moreover, the development of the internal market, including the free movement of goods and services, has unintentionally facilitated certain forms of environmental crime, particularly in areas such as waste shipment. This further strengthens the argument that environmental crime cannot be effectively addressed without a coordinated European response.[8]

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[3] KLIP, André. *European Criminal Law: An Integrative Approach*. 4th ed. Cambridge – Antwerp : Intersentia, 2021, s. 168 (674 s.). ISBN 978-1-78068-968-5; SATZGER, Helmut. *International and European Criminal Law*. 2nd ed. München : C.H. Beck, 2018, s. 219 (342 s.). ISBN 978-3-406-69475-2; HECKER, Bernd. *Europäisches Strafrecht*. 7th ed. Berlin – Heidelberg : Springer, 2024, s. 203 (542 s.). ISBN 978-3-662-47368-9; KLIMEK, Libor. *Základy trestného práva Európskej únie*. Bratislava : Wolters Kluwer, 2017, s. 115 a nasl. (264 s.). ISBN 978-80-8168-601-6.

[4] Zmluva o funkovaní Európskej únie (konsolidované znenie), Ú. v. EÚ C 326, 26.10.2012, s. 47 – 390. [online] [cit. 2025-10-09]. Dostupné online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

[5] Smernica Európskeho parlamentu a Rady 2008/99/ES z 19. novembra 2008 o ochrane životného prostredia prostredníctvom trestného práva, Ú. v. EÚ L 328, 6.12.2008, s. 28 – 37. [online] [cit. 2025-10-09]. Dostupné online: https://eur-lex.europa.eu/eli/dir/2008/99/oj/eng.

[6] Smernica Európskeho parlamentu a Rady (EÚ) 2024/1203 z 11. apríla 2024 o ochrane životného prostredia prostredníctvom trestného práva a o nahradení smerníc 2008/99/ES a 2009/123/ES, Ú. v. EÚ L, 2024/1203, 30.4.2024. [online] [cit. 2025-10-09]. Dostupné online: https://eur-lex.europa.eu/eli/dir/2024/1203/oj/eng.

[7] COMTE, Françoise. Environmental Crime and the Police in Europe: A Panorama and Possible Paths for Future Action. In: *European Energy and Environmental Law Review*, 2006, vol. 15, no. 7, s. 190 – 231. DOI 10.54648/EELR2006022.

[8] COMTE, Françoise. Environmental Crime and the Police in Europe: A Panorama and Possible Paths for Future Action. In: *European Energy and Environmental Law Review*, 2006, vol. 15, no. 7, s. 190 – 231. DOI 10.54648/EELR2006022; RABBI, Mohammad Fazle. Unveiling Environmental Crime Trends and Intensity in the EU Countries Through a Sustainability Lens. In: *European Journal on Criminal Policy and Research*, 2025, vol. 31, s. 637 – 665. DOI 10.1007/s10610-024-09607-8; PEREIRA, Ricardo. A Critical Evaluation of the New EU Environmental Crime Directive 2024/1203. In: *Eucrim*, 2024, vol. 19, no. 2, s. 158 – 163. DOI 10.30709/eucrim-2024-009; GARRUTO, Luigi Igino – GRASSIN, Selina. Fighting Waste

Although environmental crime is not formally included within the material competence of the *European Public Prosecutor's Office*[9] (also known as EPPO), its impact on the financial interests of the EU is increasingly recognised. Environmental offences may directly or indirectly affect EU funds, for example through the misuse of subsidies, fraud in environmental projects or costs associated with remediation and environmental damage. In this context, environmental crime may be conceptualised as a "hybrid" form of criminality, combining elements of traditional environmental harm with economic and financial consequences. This perspective opens the possibility of interpreting certain environmental offences as falling within the broader framework of crimes affecting the financial interests of the EU, as defined in relevant EU legislation.[10] Furthermore, the failure to effectively combat environmental crime may result in substantial financial losses for the EU, including the depletion of natural resources, increased public expenditure and distortion of lawful economic activities. These consequences reinforce the need to reassess the current scope of EU criminal law instruments.

From the perspective of institutional design, the progressive harmonisation of environmental criminal law reveals a structural asymmetry within the EU enforcement framework. While substantive criminal law has become increasingly Europeanised through common definitions of offences and sanctions, investigation and prosecution remain predominantly national. This divergence raises the question whether the current decentralised enforcement model remains adequate for a category of criminality that is both highly harmonised and inherently transnational. The issue is particularly relevant when considering the future scope of the EPPO's competence.

2. Enforcement Challenges and the Need for a Supranational Enforcement Approach

The enforcement of environmental criminal law within the EU is characterised by a high degree of fragmentation. Competence for investigation and prosecution remains primarily at the national level, while EU bodies such as *Europol*[11] and *Eurojust*[12] provide only supportive and coordinating functions without direct prosecutorial powers. Existing mechanisms of judicial cooperation are often insufficient to ensure effective prosecution of complex cross-border cases, particularly where multiple jurisdictions are involved. The absence of a centralised prosecutorial authority for environmental crime may lead to parallel or even conflicting proceedings. The establishment of the EPPO has partially addressed these issues in relation to crimes affecting the financial interests of the EU. However, its current mandate does not extend to environmental crime, despite the existence of legal mechanisms allowing for such an extension in the future.

The cumulative effect of the above-mentioned factors – cross-border nature, involvement of organised crime, financial implications and fragmented enforcement – indicates

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Trafficking in the EU: A Stronger Role for the European Anti-Fraud Office. In: *Eucrim*, 2024, vol. 19, no. 2, s. 143 – 145. DOI 10.30709/eucrim-2024-009.

[9] Nariadenie Rady (EÚ) 2017/1939 z 12. októbra 2017, ktorým sa vykonáva posilnená spolupráca na zřiadení Európskej prokuratúry (EPPO), Ú. v. EÚ L 283, 31.10.2017, s. 1 – 71. [online] [cit. 2025-10-09]. Dostupné online: https://eur-lex.europa.eu/eli/reg/2017/1939/oj/eng.

[10] *Environmental crime affecting EU financial interests, the economic recovery and the EU's Green Deal objectives*. Brussels : European Parliament, 2022 (PE 737.869). [online] [cit. 2025-10-09]. Dostupné online: https://www.europarl.europa.eu/RegData/etudes/STUD/2022/737869/IPOL_STU(2022)737869_EN.pdf; OLSEN LUNDH, Christina. The Revised EU Environmental Crime Directive. In: *Eucrim*, 2024, vol. 19, no. 2, s. 164 – 172. DOI 10.30709/eucrim-2024-013.

[11] Nariadenie Európskeho parlamentu a Rady (EÚ) 2016/794 z 11. mája 2016 o Agentúre Európskej únie pre spoluprácu v oblasti presadzovania práva (Europol), Ú. v. EÚ L 135, 24.5.2016, s. 53 – 114. [online] [cit. 2025-10-09]. Dostupné online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016R0794-20260111.

[12] Nariadenie Európskeho parlamentu a Rady (EÚ) 2018/1727 z 14. novembra 2018 o Agentúre Európskej únie pre justičnú spoluprácu v trestných veciach (Eurojust) a o nahradení a zrušení rozhodnutia Rady 2002/187/SVV, Ú. v. EÚ L 295, 21.11.2018, s. 138 – 183. [online] [cit. 2025-10-09]. Dostupné online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02018R1727-20251104.

that environmental crime constitutes a category of criminality that is particularly suited for supranational intervention. The *principle of subsidiarity*, which underpins the distribution of competences within the EU, suggests that action at the EU level is justified where objectives cannot be sufficiently achieved by Member States acting alone.[13] The adoption of Directive (EU) 2024/1203 on the protection of the environment through criminal law itself reflects the Union legislator's assessment that environmental crime can no longer be effectively addressed solely through divergent national approaches and therefore requires a higher degree of legal and institutional coordination at the European level. In the case of environmental crime, this condition appears to be fulfilled, as national enforcement mechanisms are often unable to address its transnational complexity effectively. At the same time, any extension of supranational competence must respect the limits imposed by the principle of conferral and the sensitive nature of criminal jurisdiction as a core element of state sovereignty. The establishment of the EPPO itself illustrates the political and legal challenges associated with transferring prosecutorial powers to the European level. In light of these considerations, environmental crime represents not only a pressing policy issue but also a significant legal challenge, raising fundamental questions regarding the future development of European criminal law and the potential expansion of supranational prosecutorial mechanisms.

III. LEGAL BASIS OF THE EUROPEAN PUBLIC PROSECUTOR’S OFFICE AND ITS COMPETENCE

The European Public Prosecutor’s Office (EPPO) was formally established by *Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office*[14]. It was established on the basis of Article 86 of the *Treaty on the Functioning of the European Union*[15], which provides the legal foundation for the creation of a supranational prosecutorial authority within the EU legal order. This provision enables the establishment of the EPPO through enhanced cooperation, reflecting the absence of unanimous political consensus among Member States. Pursuant to Article 86(1) of the Treaty on the Functioning of the European Union, the EPPO is entrusted with combating criminal offences affecting the financial interests of the EU. At the same time, Article 86(4) of the Treaty on the Functioning of the European Union explicitly allows for a future extension of its competence to include serious crime having a cross-border dimension, subject to a unanimous decision of the European Council.[16] This provision constitutes a crucial normative basis for considering the potential inclusion of environmental crime within the EPPO’s mandate.

[13] CRAIG, Paul – DE BÚRCA, Gráinne. *EU Law: Text, Cases, and Materials*. 5th ed. Oxford : Oxford University Press, s. 121 a nasl. (1155 s.). ISBN 978-0-19-957699-9; BARNARD, Catherine – PEERS, Steve (eds.). *European Union Law*. 7th ed. Oxford : Oxford University Press, s. 101 a nasl. (901 s.). ISBN 978-0-19-885575-0.

[14] Nariadenie Rady (EÚ) 2017/1939 z 12. októbra 2017, ktorým sa vykonáva posilnená spolupráca na zřiadení Európskej prokuratúry (EPPO), Ú. v. EÚ L 283, 31.10.2017, s. 1 – 71. [online] [cit. 2025-10-09]. Dostupné online: https://eur-lex.europa.eu/eli/reg/2017/1939/oj/eng.

[15] Zmluva o funkovaní Európskej únie (konsolidované znenie), Ú. v. EÚ C 326, 26.10.2012, s. 47 – 390. [online] [cit. 2025-10-09]. Dostupné online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

[16] BLANKE, Hermann-Josef – MANGIAMELI, Stelio (eds.). *Treaty on the Functioning of the European Union – A Commentary. Volume I: Preamble, Articles 1–89*. Cham : Springer, s. 1623 a nasl. (1739 s.). ISBN 978-3-030-43511-0; BACHMAIER WINTER, Lorena (ed.). *The European Public Prosecutor’s Office: The Challenges Ahead*. Cham : Springer, 2018, s. 65 (289 s.). ISBN 978-3-319-93915-5; MEIJ, A.W.H. – ERKELENS, L.H. – PAWLIK, M. *The European Public Prosecutor’s Office: An Extended Arm Or a Two-Headed Dragon?* The Hague : T.M.C. Asser Press, 2014, s. 41 a nasl. (285 s.). ISBN 978-94-6265-035-0; KLÁTIK, Jaroslav – DESET, Miloš – KLIMEK, Libor. *Európská prokuratúra a perspektívy jej činnosti pri ochrane finančných záujmov EÚ*. Prague : Leges, 2019, s. 17 (144 s.). ISBN 978-80-7502-407-7; MITSILEGAS, Valsamis – GIUFFRIDA, Fabio. *The Role of EU Agencies in Fighting Transnational Environmental Crime: New Challenges for Eurojust and Europol*. Leiden – Boston : Brill, 2017, s. 119 (160 s.). ISBN 978-90-04-34155-5; HERNÁNDEZ LÓPEZ, Alejandro. *Conflicts of Criminal Jurisdiction and Transfer of Proceedings in the EU*. Cham : Springer, 2022, s. 92 (217 s.). ISBN 978-3-031-15691-5; HERRNFELD, Hans-Holger – BRODOWSKI, Dominik – BURCHARD, Christoph. *European Public Prosecutor’s Office: Article-by-Article Commentary*. Baden-Baden : Nomos, 2021 (820 s.). ISBN 978-3-8487-4884-6.

The EPPO embodies a hybrid model of European prosecution situated between *intergovernmental cooperation* and *supranational integration*, reflecting an inherent tension between the effectiveness of EU-level enforcement and the preservation of national sovereignty in criminal matters.[17]

The material competence (*ratione materiae*) of the EPPO is currently limited to criminal offences affecting the financial interests of the EU, as further specified in *Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law*[18] (also known as PIF Directive). These offences primarily include fraud, corruption, money laundering and cross-border VAT fraud exceeding the relevant thresholds. This limitation reflects the original rationale behind the creation of the EPPO, namely the need to ensure more effective protection of the EU budget, which had previously suffered from insufficient enforcement at the national level. The fragmentation of enforcement mechanisms and the lack of direct prosecutorial powers at the EU level were identified as key deficiencies in the existing system. Although the EPPO's competence is formally confined to PIF crimes (criminal offences affecting the financial interests of the EU, such as fraud, corruption, money laundering, and serious cross-border VAT fraud), the legal framework allows for a certain degree of interpretative flexibility. In particular, offences that are inextricably linked to crimes affecting the financial interests of the EU may fall within the EPPO's jurisdiction, provided that they are closely connected to the main offence. Nevertheless, environmental crime, as such, does not currently fall within the EPPO's material competence, unless it can be directly linked to financial damage to the EU budget. This creates a structural gap, especially in cases where environmental harm produces indirect or long-term financial consequences for the EU.

The EPPO is characterised by a hybrid institutional structure combining *supranational* and *national* elements. It operates as an independent body of the EU with its own legal personality, while simultaneously relying on national judicial systems for the execution of its powers. This structure is typically described as decentralised, consisting of a central level and a national level. The central level includes the European Chief Prosecutor, the College, Permanent Chambers and European Prosecutors, while the national level is composed of European Delegated Prosecutors operating within Member States. Such a model reflects a compromise between the need for effective supranational prosecution and the preservation of national sovereignty in criminal matters. The EPPO does not replace national prosecution systems but rather complements them by exercising delegated powers within domestic legal frameworks.[19] At the same time, this hybrid structure introduces a number of operational complexities, particularly regarding the coordination between central and national levels, as well as the dual role of European Delegated Prosecutors, who act both as EU and national authorities. The issue of judicial review represents a crucial safeguard within the EPPO framework, as its decisions to initiate criminal proceedings may significantly affect fundamental rights and therefore require effective judicial control mechanisms at both national and EU levels.[20]

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[17] MITSILEGAS, Valsamis. European Prosecution between Cooperation and Integration: The European Public Prosecutor's Office and the Rule of Law. In: *Maastricht Journal of European and Comparative Law*, 2021, vol. 28, no. 2, s. 245 – 264. DOI 10.1177/1023263X211005933.

[18] Smernica Európskeho parlamentu a Rady (EÚ) 2017/1371 z 5. júla 2017 o boji proti podvodom, ktoré porušujú finančné záujmy Únie, prostredníctvom trestného práva, Ú. v. EÚ L 198, 28.7.2017, s. 29 – 41.

[19] BACHMAIER WINTER, Lorena (ed.). *The European Public Prosecutor's Office: The Challenges Ahead*. Cham : Springer, 2018, s. 65 (289 s.). ISBN 978-3-319-93915-5; MEIJ, A.W.H. – ERKELENS, L.H. – PAWLIK, M. *The European Public Prosecutor's Office: An Extended Arm Or a Two-Headed Dragon?* The Hague : T.M.C. Asser Press, 2014, s. 41 a nasl. (285 s.). ISBN 978-94-6265-035-0; KOŘÍNEK, Štěpán. Evropský veřejný žalobce. In: *Acta Universitatis Carolinae Iuridica*, 2019, vol. 65, no. 4, s. 9 – 25. DOI 10.14712/23366478.2019.36.

[20] NOVOKMET, Ante. The European Public Prosecutor's Office and the Judicial Review of Criminal Prosecution. In: *New Journal of European Criminal Law*, 2017, vol. 8, no. 3, s. 374 – 402. DOI 10.1177/2032284417729934.

The territorial competence (*ratione loci*) of the EPPO extends to offences committed wholly or partially within the territory of participating Member States, as well as to cases where the offender is a national of such a Member State or where the damage occurs within the EU. This broad territorial scope reflects the transnational nature of the crimes falling within the EPPO's jurisdiction. However, the application of territorial competence may give rise to conflicts of jurisdiction, particularly in cases involving both participating and non-participating Member States, due to the mechanism of enhanced cooperation.

In terms of personal competence (*ratione personae*), the EPPO has jurisdiction over natural persons suspected of committing criminal offences within its material scope. The prosecution of legal persons depends on national law, as EU criminal law does not fully harmonise corporate liability.

The combination of these jurisdictional elements illustrates the complexity of the EPPO's competence framework and highlights the challenges associated with its practical application in cross-border cases. Despite its innovative character, the current competence framework of the EPPO is subject to several important limitations. First, its material competence is narrowly defined and does not cover other forms of serious cross-border criminality, including environmental crime, unless a direct link to the EU's financial interests can be established. Second, the use of enhanced cooperation results in a fragmented territorial scope, as not all Member States participate in the EPPO. This may complicate investigations involving non-participating states and reduce the overall effectiveness of the system. Third, the hybrid institutional model, while offering certain advantages, also creates coordination challenges and potential tensions between EU-level and national authorities. These issues are further exacerbated by the sensitive nature of criminal jurisdiction as a core element of state sovereignty. Finally, although Article 86(4) of the Treaty on the Functioning of the European Union provides a legal pathway for extending the EPPO's competence, such an extension requires unanimous political agreement, which may be difficult to achieve in practice.

These limitations are particularly relevant in the context of environmental crime, where the absence of a centralised prosecutorial authority at the EU level continues to hinder effective enforcement and coordination.

IV. FRAGMENTATION OF ENFORCEMENT IN EU CRIMINAL JUSTICE

1. Structural Fragmentation of Criminal Law Enforcement in the EU

The system of criminal law enforcement within the EU is characterised by a fundamentally fragmented structure, rooted in the principle that criminal jurisdiction remains primarily within the competence of Member States. Despite the progressive development of European criminal law, including *harmonisation* measures and instruments of judicial cooperation, enforcement powers continue to be exercised predominantly at the national level. This structural fragmentation is particularly visible in the division between normative harmonisation and institutional enforcement. While the EU has increasingly adopted legislative measures defining criminal offences and sanctions, the responsibility for investigation and prosecution has largely remained decentralised. As a result, the effectiveness of enforcement varies significantly across Member States, depending on their institutional capacities, legal traditions and enforcement priorities.[21] The persistence of this fragmented model reflects the sensitivity of criminal law as a core domain of state sovereignty. As highlighted in the literature,

[21] KLIP, André. *European Criminal Law: An Integrative Approach*. 4th ed. Cambridge – Antwerp : Intersentia, 2021, s. 103 (674 s.). ISBN 978-1-78068-968-5; SATZGER, Helmut. *International and European Criminal Law*. 2nd ed. München : C.H. Beck, 2018, s. 179 (342 s.). ISBN 978-3-406-69475-2; AMBOS, Kai. *European Criminal Law*. Cambridge : Cambridge University Press, 2018, s. 160 (663 s.). ISBN 978-1-107-11969-7; HECKER, Bernd. *Europäisches Strafrecht*. 7th ed. Berlin – Heidelberg : Springer, 2024, s. 155 (542 s.). ISBN 978-3-662-47368-9; SCHMEER, Laura. *The European Public Prosecutor's Office: From Sovereignty to Supranationalism*. Cham : Springer, 2025, s. 137 (264 s.). ISBN 978-3-031-75550-7.

the transfer of prosecutorial powers to the supranational level has historically encountered strong political resistance, leading to the adoption of compromise solutions such as the establishment of the EPPO through enhanced cooperation rather than a fully integrated model.

Within the current framework of EU criminal justice, *Eurojust* and *Europol* play key roles in facilitating cooperation among national authorities. However, their competences are limited to coordination, support and information exchange, without direct powers to conduct criminal investigations or prosecutions. Eurojust acts as a judicial cooperation body, assisting national prosecutors in coordinating cross-border investigations and resolving conflicts of jurisdiction. Europol, on the other hand, serves primarily as a law enforcement agency focused on intelligence gathering, analysis and operational support. Despite their importance, both institutions lack autonomous prosecutorial authority. This limitation has been widely recognised as a structural weakness of the EU criminal justice system, particularly in cases involving complex cross-border criminality. As noted by the European Commission and academic commentators, the absence of direct intervention powers restricts their ability to ensure effective and coherent enforcement. Consequently, while Eurojust and Europol contribute to improving coordination, they cannot overcome the fundamental fragmentation resulting from the decentralised nature of enforcement. Despite their important coordinating role, EU agencies such as Eurojust and Europol do not possess autonomous prosecutorial powers, and their potential in combating transnational environmental crime remains only partially utilised, which limits the overall effectiveness of the EU enforcement framework.[22]

2. The EPPO as a Partial Response to Fragmentation

The establishment of the EPPO represents a significant step towards addressing the fragmentation of criminal law enforcement within the EU. By introducing a body with direct prosecutorial powers at the EU level, the EPPO departs from the traditional model based solely on intergovernmental cooperation. The EPPO is capable of conducting investigations, initiating prosecutions and bringing cases before national courts, thereby overcoming some of the limitations associated with coordination-based mechanisms. In particular, it allows for a more integrated approach to cases involving multiple jurisdictions, reducing the need for complex mutual legal assistance procedures. However, the EPPO's role in mitigating fragmentation remains limited in scope. Its competence is confined to offences affecting the financial interests of the EU, leaving other forms of serious cross-border crime, including environmental crime, outside its jurisdiction.[23] Moreover, the EPPO itself operates within a decentralised framework, relying on national legal systems and authorities for the execution of its powers. At the same time, it should be recognised that the EPPO is not institutionally detached from national prosecution systems. Its operational model is largely based on European Delegated Prosecutors, who act within domestic legal frameworks while simultaneously exercising powers derived from Union law. This arrangement creates a significant degree of interaction between supranational and national levels of prosecution and represents one of the distinctive features of the EPPO system. The challenge therefore lies not in the absence of interaction, but rather in ensuring effective coordination and coherent allocation of competences in complex cross-border cases. This hybrid structure, while necessary from a political and legal perspective, means that fragmentation is not entirely eliminated but rather transformed into a more complex, multi-level system.

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[22] MITSILEGAS, Valsamis. European Prosecution between Cooperation and Integration: The European Public Prosecutor's Office and the Rule of Law. In: *Maastricht Journal of European and Comparative Law*, 2021, vol. 28, no. 2, s. 245 – 264. DOI 10.1177/1023263X211005933.

[23] KOŘÍNEK, Štěpán. Evropský veřejný žalobce. In: *Acta Universitatis Carolinae Iuridica*, 2019, vol. 65, no. 4, s. 9 – 25. DOI 10.14712/23366478.2019.36.

One of the most significant consequences of fragmented enforcement is the occurrence of jurisdictional conflicts and parallel proceedings. In cross-border cases, multiple Member States may assert jurisdiction based on territoriality, nationality or the location of harm, leading to overlapping or competing claims. Although mechanisms exist to address such conflicts, including coordination through Eurojust and, to a certain extent, decision-making within the EPPO framework, these solutions are not always sufficient. The absence of a fully centralised prosecutorial authority for all categories of serious cross-border crime increases the risk of inconsistent outcomes and inefficiencies. The situation is further complicated by the existence of both participating and non-participating Member States within the EPPO framework. The mechanism of enhanced cooperation, while enabling progress in integration, also creates additional layers of complexity in cases involving multiple jurisdictions. These challenges are particularly relevant for environmental crime, where the location of criminal conduct, environmental damage and financial consequences may span several countries, making the determination of jurisdiction especially difficult. It should be noted that the establishment of the EPPO also raises important questions regarding the choice of forum in cross-border cases, as the allocation of jurisdiction between Member States may significantly affect both procedural outcomes and the rights of the parties involved.[24]

3. Jurisdictional Challenges in Fragmented Enforcement

The fragmentation of enforcement mechanisms constitutes a major obstacle to the effective prosecution of environmental crime within the EU. The cross-border nature of such offences, combined with differences in national legal frameworks and enforcement capacities, creates significant gaps in the system. Environmental crime often involves multiple actors, jurisdictions and regulatory regimes, requiring a high level of coordination and specialised expertise. In the absence of a centralised prosecutorial authority, cases may be inadequately investigated, delayed or even abandoned due to procedural complexities. Furthermore, the lack of uniform enforcement standards may encourage forum shopping and regulatory arbitrage, whereby offenders exploit differences between national systems to minimise the risk of detection and punishment. In this context, the limitations of the current enforcement framework highlight the potential value of extending the competence of the EPPO or establishing alternative supranational mechanisms capable of addressing environmental crime in a more coherent and effective manner.

The ongoing development of EU criminal law suggests a gradual shift towards greater integration in the field of enforcement. The establishment of the EPPO can be seen as part of a broader trend aimed at strengthening the EU's capacity to respond to transnational criminal threats. Nevertheless, the question remains whether the current model, based on a combination of decentralised enforcement and limited supranational intervention, is sufficient to address emerging forms of cross-border criminality. The case of environmental crime illustrates the limitations of this approach and raises the issue of whether further integration is necessary. Any move towards a more centralised model must, however, carefully balance the objectives of effectiveness and respect for national sovereignty. This tension lies at the core of the debate on the future development of the EPPO and its potential expansion to new areas of criminal law.[25]

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[24] LIGETI, Katalin – SIMONATO, Michele. The European Public Prosecutor's Office: Towards a Truly European Prosecution Service? In: *New Journal of European Criminal Law*, 2013, vol. 4, no. 1–2, s. 7 – 21. DOI 10.1177/203228441300400102.

[25] BACHMAIER WINTER, Lorena (ed.). *The European Public Prosecutor's Office: The Challenges Ahead*. Cham : Springer, 2018, s. 117 a nasl. (289 s.). ISBN 978-3-319-93915-5.

V. COMPETENCE CHALLENGES IN EXTENDING THE EPPO'S MANDATE

1. Material Competence (*Ratione Materiae*) and the Limits of the Current Mandate

The primary competence-related challenge in extending the mandate of the EPPO lies in the definition of its material scope. Under the current legal framework, the EPPO is limited to offences affecting the financial interests of the EU, as defined by secondary legislation. This restrictive approach reflects the original purpose of the EPPO as a specialised body focused on protecting the EU budget. The inclusion of *environmental crime* within the EPPO's competence raises the question of whether such offences can be subsumed under the existing framework or whether a formal extension of competence is required. While certain environmental offences may have financial implications for the EU, these effects are often indirect or difficult to quantify, which complicates their legal qualification within the current system.

An expansive interpretation of material competence could potentially allow for the inclusion of environmental crime where a sufficiently close link to the EU's financial interests can be established. However, such an approach may conflict with the principle of legality and legal certainty, as it would stretch the existing legal framework beyond its intended scope. The concerns relating to the principle of legality and legal certainty arise primarily from the need to define with sufficient precision the scope of any newly conferred competence of the EPPO. Unlike offences affecting the financial interests of the European Union, environmental crime encompasses a broad and heterogeneous category of conduct, the precise criminalisation of which still differs to some extent among Member States despite ongoing harmonisation efforts. An extension of the EPPO's competence formulated in excessively broad or indeterminate terms could create uncertainty as to the allocation of prosecutorial authority between the EPPO and national prosecution services. Such uncertainty would not only affect institutional competences but could also have implications for individuals subject to criminal proceedings, who must be able to foresee which authority may exercise prosecutorial powers in a given case. Consequently, any future extension of the EPPO's mandate would require a clear and narrowly defined legal basis capable of ensuring compliance with the principles of legality and legal certainty. Consequently, any future extension of the EPPO's mandate would require a clear and narrowly defined legal basis, preferably through an express legislative intervention pursuant to Article 86(4) TFEU, capable of ensuring compliance with the principles of legality and legal certainty.

2. Territorial Competence (Ratione Loci) and Cross-border Complexity

The territorial dimension of EPPO competence presents another significant challenge. Environmental crime typically involves conduct and consequences that span multiple jurisdictions, including both participating and non-participating Member States. This raises complex questions regarding the allocation of jurisdiction and the coordination of investigative and prosecutorial activities. Although the EPPO's territorial competence is designed to address cross-border offences, its effectiveness is limited by the mechanism of enhanced cooperation, which restricts its jurisdiction to participating Member States. In cases involving third countries or non-participating EU states, the EPPO must rely on traditional instruments of judicial cooperation, thereby reintroducing elements of fragmentation. Furthermore, environmental harm often manifests in a geographically diffuse manner, making it difficult to determine the locus delicti and, consequently, the competent authority. This complexity increases the risk of jurisdictional conflicts and may hinder the efficient prosecution of offences. These challenges suggest that extending the EPPO's mandate to environmental crime would require not only an expansion of material competence but also a careful reconsideration of territorial jurisdiction rules to ensure coherence and effectiveness.

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3. Institutional Competence and the Relationship with National Authorities

The extension of the EPPO's mandate would also have significant implications for the distribution of competences between the EU and Member States. Criminal prosecution has traditionally been regarded as a core element of national sovereignty, and any transfer of powers to the supranational level must be carefully justified. The hybrid structure of the EPPO, which combines supranational and national elements, reflects an attempt to balance these competing considerations. However, extending its competence to new areas such as environmental crime may exacerbate existing tensions between EU institutions and national authorities. In particular, the role of European Delegated Prosecutors, who operate within national systems while acting on behalf of the EPPO, may become more complex in the context of environmental crime, which often involves specialised administrative and regulatory frameworks. This could lead to practical difficulties in coordination, as well as potential conflicts between national priorities and EU-level objectives. Moreover, the involvement of other national bodies, such as environmental agencies and inspection authorities, would necessitate the development of new forms of institutional cooperation, further complicating the existing framework.

VI. MODELS FOR EXTENDING THE EPPO'S COMPETENCE TO ENVIRONMENTAL CRIME

The question of extending the competence of the EPPO has become increasingly relevant in light of the evolving nature of cross-border criminality within the EU. Environmental crime, in particular, highlights the limitations of the current enforcement framework and calls for a reassessment of existing jurisdictional arrangements. In this context, several theoretical and practical models may be identified[26], each reflecting a different balance between effectiveness of enforcement and respect for the constitutional limits of EU competences. These models provide a structured basis for evaluating possible reforms of the EPPO's mandate and their implications for the future development of European criminal law.

The models presented in this section do not correspond to formally established categories recognised in EU legislation or uniformly accepted within legal doctrine. Rather, they represent an analytical typology developed for the purposes of this study on the basis of existing academic discussions concerning the future development of the EPPO, combined with the author's own assessment of possible legislative and institutional solutions. While individual elements of the proposed models can be identified in the broader literature on European criminal law and the evolution of the EPPO, their present classification into three distinct models serves as a conceptual framework intended to facilitate a systematic evaluation of alternative approaches to extending the EPPO's competence to environmental crime.

1. Full Extension Model

The full extension model presupposes a comprehensive expansion of the material competence of the EPPO to include environmental crime as an autonomous category of criminal offences falling within its jurisdiction. Such an approach would require a formal amendment of the existing legal framework based on Article 86(4) of the Treaty on the Functioning of the European Union, enabling the EPPO to prosecute serious environmental offences with a cross-border dimension irrespective of their direct impact on the financial interests of the EU. This model reflects the growing recognition of environmental protection as a fundamental value of the EU and aligns with the increasing harmonisation of environmental criminal law at the EU

[26] BACHMAIER WINTER, Lorena (ed.). *The European Public Prosecutor's Office: The Challenges Ahead*. Cham : Springer, 2018 (289 s.). ISBN 978-3-319-93915-5; MEIJ, A.W.H. – ERKELENS, L.H. – PAWLIK, M. *The European Public Prosecutor's Office: An Extended Arm Or a Two-Headed Dragon?* The Hague : T.M.C. Asser Press, 2014 (285 s.). ISBN 978-94-6265-035-0; KOŘÍNEK, Štěpán. Evropský veřejný žalobce. In: *Acta Universitatis Carolinae Iuridica*, 2019, vol. 65, no. 4, s. 9 – 25. DOI 10.14712/23366478.2019.36; KOŘÍNEK, Štěpán. Komplikace a perspektivy Ústavu evropského veřejného žalobce. In: *Jurisprudence*, 2020, vol. 29, no. 3, s. 21 – 29.

level. From a systemic perspective, it would significantly enhance the coherence and effectiveness of enforcement by centralising prosecutorial powers in cases characterised by transnational complexity. However, this model raises substantial concerns regarding the scope of EU competences and the potential overextension of supranational authority in the sensitive domain of criminal law. It may also lead to an increased administrative burden on the EPPO, requiring significant institutional reinforcement and the development of specialised expertise in environmental matters.

2. Functional (PIF-linked) Model

The functional or PIF-linked model represents a more conservative approach, based on the extension of the EPPO's competence only in cases where environmental crime is directly or indirectly connected to the financial interests of the EU. Under this model, environmental offences would fall within the EPPO's jurisdiction only if they involve elements such as fraud related to EU funds, misuse of environmental subsidies or financial damage resulting from unlawful environmental practices. This model differs from the current legal framework in an important respect. Under the existing regime, the EPPO may prosecute environmental misconduct only insofar as it constitutes, or is directly linked to, a PIF offence falling within its established competence. By contrast, the functional model would permit the EPPO to exercise jurisdiction over environmental offences themselves where a sufficiently close connection to the financial interests of the Union exists. Such connection could arise, for example, where environmental harm results from the fraudulent use of Union funds, the unlawful obtaining of environmental subsidies, the misuse of resources financed by the Union budget, or conduct generating substantial remediation costs ultimately borne by the European Union. The environmental offence would therefore fall within the EPPO's competence not because it constitutes a PIF offence in itself, but because of its sufficiently close functional connection to the financial interests of the Union.

This approach builds upon the existing legal framework and avoids the need for a fundamental revision of the EPPO's mandate, thereby ensuring greater compatibility with the principle of conferral. It also reflects the current rationale of the EPPO as a specialised body focused on protecting the EU budget. Nevertheless, the effectiveness of this model is limited by its narrow scope, as many environmentally harmful activities do not produce immediate or easily quantifiable financial consequences for the EU. At the same time, the introduction of this model would require clarification as to whether the existing financial thresholds applicable to certain PIF offences should remain relevant. If retained without modification, such thresholds could significantly restrict the practical usefulness of the model, as serious environmental harm may generate substantial ecological consequences without necessarily satisfying the financial criteria currently used for determining EPPO competence. Consequently, despite its greater compatibility with the existing legal framework, the PIF-linked model may fail to address the broader spectrum of environmental crime, particularly in cases where ecological damage does not directly translate into financial loss or does not satisfy the financial thresholds applicable to EPPO competence.

3. Hybrid Model of Specialised Competence

The hybrid model combines elements of both the full extension and functional approaches by introducing a specialised competence of the EPPO for selected categories of environmental crime with a significant cross-border dimension. This model would involve the establishment of a dedicated environmental crime unit within the EPPO or the creation of specific jurisdictional criteria enabling the Office to intervene in particularly serious or complex cases. Such an approach allows for a targeted expansion of competence while maintaining a balanced relationship between EU-level and national enforcement mechanisms. It also facilitates the gradual development of institutional capacity and expertise without imposing an immediate and comprehensive extension of the EPPO's mandate. From a legal perspective, the hybrid model may be more politically feasible, as it limits the transfer of competences to clearly defined areas and preserves a substantial role for national authorities. At the same time, it addresses the most pressing enforcement gaps by enabling coordinated prosecution of high-impact environmental offences. This model therefore represents a pragmatic compromise between effectiveness and respect for the constitutional limits of EU criminal law.

4. Institutional Adaptation and Specialisation

Regardless of the chosen model, the extension of the EPPO's competence to environmental crime would necessitate significant institutional adaptation. Environmental crime is characterised by a high degree of technical complexity, requiring specialised knowledge in fields such as environmental science, regulatory law and forensic investigation. The EPPO would therefore need to develop internal expertise, either through the recruitment of specialised prosecutors or through enhanced cooperation with external experts and agencies. Furthermore, the integration of environmental competence would require adjustments in the organisational structure of the EPPO, including the possible establishment of specialised units or chambers responsible for handling environmental cases. This process would also involve strengthening cooperation with existing EU bodies, such as Europol and Eurojust, as well as national environmental authorities and inspection bodies. The hybrid nature of the EPPO's structure, combining centralised decision-making with decentralised implementation, may facilitate such adaptation, but it also introduces additional coordination challenges. Ensuring the effective functioning of an expanded mandate would thus depend on the ability of the EPPO to integrate new competences without compromising its operational efficiency.

5. Comparative Evaluation of Models

A comparative assessment of the proposed models reveals a fundamental trade-off between effectiveness and legal feasibility. The full extension model offers the highest degree of enforcement integration but faces significant legal and political obstacles, particularly in relation to the principles of conferral and subsidiarity. The PIF-linked model, by contrast, is more consistent with the existing legal framework but provides only a limited solution to the problem of environmental crime. The hybrid model occupies an intermediate position, combining targeted effectiveness with a higher degree of political acceptability. In evaluating these options, it is essential to consider not only their legal compatibility but also their practical implications, including resource requirements, institutional capacity and the potential impact on national legal systems. The choice of model should ultimately reflect a balanced approach that takes into account the need for effective enforcement of environmental criminal law while respecting the constitutional structure of the EU. In this context, the hybrid model appears to offer the most viable path forward, providing a flexible framework for gradual integration and future development.

VII. NATIONAL PERSPECTIVE: IMPLICATIONS FOR THE SLOVAK REPUBLIC

The legal framework governing environmental crime in the Slovak Republic is primarily embedded within the *Criminal Code* No. 300/2005 Coll.[27], supplemented by a wide range of administrative and regulatory instruments[28] aimed at environmental protection. Environmental

[27] Zákon č. 300/2005 Z. z. Trestný zákon, v znení neskôrších predpisov. [online] [cit. 2025-10-09]. Dostupné online: https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2005/300/20251227.

[28] Napríklad: Zákon č. 79/2015 Z. z. o odpadoch a o zmene a doplnení niektorých zákonov, v znení neskôrších predpisov. [online] [cit. 2025-10-09]. Dostupné online: https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2015/79/; Zákon č. 364/2004 Z. z. o vodách a o zmene zákona Slovenskej národnej rady č. 372/1990 Zb. o priestupkoch v znení neskôrších predpisov (vodný zákon), v znení neskôrších predpisov. [online] [cit. 2025-10-09]. Dostupné online: https://www.slov-

offences are typically defined in relation to violations of specific statutory obligations concerning the protection of natural resources, waste management, water protection or air quality. This dual structure, combining criminal and administrative regulation, reflects the broader European model but also contributes to a certain degree of complexity in legal qualification and enforcement.[29] The coexistence of administrative and criminal enforcement mechanisms also raises questions concerning the principle *ne bis in idem*, particularly in cases where environmentally harmful conduct may give rise to both administrative sanctions and criminal liability. The parallel application of administrative and criminal measures pursuing complementary objectives, the distinction between permissible dual-track enforcement and prohibited double punishment remains sensitive in practice. In the field of environmental protection, where administrative enforcement frequently constitutes the primary response to regulatory breaches, careful assessment is required to ensure that subsequent criminal proceedings remain compatible with the requirements of legal certainty, proportionality and the principle *ne bis in idem*. From a practical perspective, the application of criminal law in environmental matters remains relatively limited, with a significant proportion of cases being resolved through administrative proceedings. This approach may reduce the deterrent effect of criminal sanctions and weaken the overall effectiveness of enforcement. The Slovak system thus exhibits characteristics common to many Member States, where environmental crime is formally criminalised but only selectively prosecuted, particularly in cases lacking clear economic or social impact.

The enforcement of environmental criminal law in Slovakia involves multiple institutional actors, including the Police Force, the Public Prosecution Service and specialised administrative bodies such as environmental inspectorates. This multi-layered structure reflects the complexity of environmental regulation but also creates challenges in terms of coordination and information sharing. In practice, the investigation of environmental offences often requires cooperation between criminal law enforcement authorities and technical experts, which may lead to delays and procedural complications. Furthermore, the limited degree of specialisation of prosecutorial units dedicated exclusively to environmental crime limits the development of expertise in this area. These challenges are consistent with broader observations in the literature, according to which national authorities frequently struggle to effectively address complex forms of cross-border criminality due to institutional fragmentation and limited resources. The Slovak experience thus illustrates the practical difficulties associated with enforcing environmental criminal law within a predominantly national framework.

The geographical position of the Slovak Republic, combined with its integration into the internal market and the Schengen area, creates favourable conditions for the occurrence of cross-border environmental crime. Activities such as illegal waste transport, transboundary pollution or unlawful exploitation of natural resources often involve actors and consequences extending beyond national borders. In such cases, the effectiveness of enforcement depends heavily on international cooperation, including mutual legal assistance and coordination through EU bodies. However, these mechanisms may be insufficient to address the complexity and scale of cross-border environmental offences, particularly where multiple jurisdictions are involved. The limitations of existing cooperation frameworks highlight the potential benefits of

lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2004/364/; Zákon č. 137/2010 Z. z. o ovzduší, v znení neskôrších predpisov. [online] [cit. 2025-10-09]. Dostupné online: https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2010/137/20131001.html; Zákon č. 24/2006 Z. z. o posudzovaní vplyvov na životné prostredie a o zmene a doplnení niektorých zákonov, v znení neskôrších predpisov. [online] [cit. 2025-10-09]. Dostupné online: https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2006/24/.

[29] In depth analysis: IVOR, Jaroslav – POLÁK, Peter – ZÁHORA, Jozef. *Trestné právo hmotné II. Osobitná časť*. 2nd ed. Bratislava : Wolters Kluwer, 2017 (646 s.). ISBN 978-80-8168-585-9; MENCEROVÁ, Ingrid et al. *Trestné právo hmotné. Osobitná časť*. 3rd ed. Bratislava : Heuréka, 2025 (472 s.). ISBN 978-80-570-6466-4; KLÁTIK, Jaroslav et al. *Trestné právo hmotné. Osobitná časť*. 3rd ed. Plzeň : Aleš Čeněk, 2025 (484 s.). ISBN 978-80-7380-968-3.

a more integrated approach, including the possible involvement of supranational prosecutorial bodies. At the same time, the Slovak Republic must navigate the challenges associated with differing legal standards and enforcement practices among neighbouring states, which may create opportunities for regulatory arbitrage and hinder effective prosecution.

The potential extension of the EPPO's competence to environmental crime could have significant implications for the Slovak Republic, particularly in enhancing the effectiveness of cross-border enforcement. The involvement of the EPPO would allow for a more coordinated and centralised approach to complex cases, reducing the reliance on fragmented cooperation mechanisms and facilitating the handling of multi-jurisdictional investigations. The decentralised structure of the EPPO, based on European Delegated Prosecutors operating within national systems, would enable the integration of EU-level competence into the Slovak legal environment without fundamentally disrupting existing institutional arrangements. However, this integration would also require adjustments in practice, including closer cooperation between national authorities and EPPO structures, as well as the development of specialised expertise in environmental criminal law. Moreover, the extension of EPPO competence may raise concerns regarding the balance between supranational intervention and national sovereignty, particularly in a domain traditionally reserved to domestic authorities.

Despite its potential benefits, the extension of the EPPO's competence to environmental crime also presents several challenges from the perspective of the Slovak Republic. One of the main concerns relates to the redistribution of prosecutorial powers, which may be perceived as a limitation of national autonomy in criminal matters. Additionally, the integration of environmental crime into the EPPO's mandate would require significant institutional and procedural adjustments, including the adaptation of national legislation and the allocation of additional resources. Practical challenges may also arise in relation to the coordination between EPPO and national authorities, particularly in cases involving overlapping competences or differing priorities. Furthermore, the effectiveness of such an extension would depend on the willingness of all relevant actors to engage in close cooperation and to adapt to the requirements of a multi-level enforcement system. These considerations highlight the need for a carefully calibrated approach that takes into account both the benefits and the potential risks associated with expanding the EPPO's mandate.

From a broader perspective, the Slovak experience reflects the general challenges faced by Member States in addressing environmental crime within a fragmented enforcement framework. The limitations of national systems, particularly in dealing with cross-border offences, support the argument for enhanced supranational intervention. At the same time, the sensitivity of criminal law as an area of national sovereignty necessitates a cautious and balanced approach to reform. In this context, the extension of the EPPO's competence to environmental crime may represent a viable solution, provided that it is implemented in a manner consistent with the principles of subsidiarity and proportionality. This position has also been advocated in recent scholarship, which emphasises the cross-border nature of environmental crime, the growing importance of environmental protection within the European Union and the potential institutional benefits of entrusting such cases to the EPPO.[30] The Slovak Republic, as a participating Member State in the EPPO framework, is well positioned to contribute to this development and to benefit from a more integrated system of criminal enforcement at the EU level. The national perspective thus underscores both the necessity and the complexity of potential reforms in this area. This issue is particularly relevant in the Slovak context, where environmental authorities and criminal justice bodies may address the same underlying conduct through different legal mechanisms.

[30] JIMENO BULNES, Mar. The European Public Prosecutor's Office and Environmental Crime: Further Competence in the Near Future? In: *Eucrim*, 2024, vol. 19, no. 2, s. 146 – 152. DOI 10.30709/eucrim-2024-010.

VIII. *DE LEGE FERENDA* PROPOSALS

The following *de lege ferenda* proposals build upon the models discussed in Section VI. Rather than introducing alternative models, they seek to translate the previously identified Full Extension Model, Functional (PIF-linked) Model and Hybrid Model of Specialised Competence into concrete legislative and institutional reform options.

1. Full Extension Model: Formal Extension of the EPPO's Material Competence

The first proposal concerns the formal extension of the EPPO's material competence to selected forms of serious environmental crime with a cross-border dimension. From the perspective of EU constitutional law, the present framework does not allow environmental criminality to be included in the EPPO's mandate merely by broad interpretation, except where a concrete and sufficiently close link to the financial interests of the EU can be demonstrated. Although such a link may exist in individual cases involving subsidies, public procurement, remediation costs or misuse of EU funds, it cannot serve as a stable legal basis for the systematic prosecution of environmental offences as such. For that reason, the legally sound solution is not interpretative expansion, but normative intervention based on Article 86(4) of the Treaty on the Functioning of the European Union. Such reform should expressly define which environmental offences qualify as serious crime for the purposes of EPPO jurisdiction, thereby preserving legal certainty, foreseeability and compliance with the principle of legality. A purely open-ended formula would be unsuitable, because it would generate uncertainty as to the relationship between EU and national prosecutorial powers and could trigger unnecessary competence disputes.

2. Hybrid Model: Selective Jurisdiction over Particularly Serious Environmental Offences

A second proposal is to avoid an overly broad transfer of powers and instead adopt a selective jurisdiction model limited to clearly identified categories of environmental crime. In legislative terms, this means that the EPPO should not receive a general mandate over all environmentally harmful conduct, but only over offences of heightened gravity, especially those involving organised criminal networks, unlawful transboundary waste shipment, large-scale pollution, illegal trafficking in protected species, or conduct producing extensive and difficult-to-reverse environmental damage in more than one Member State. This approach is preferable because it better respects the principles of subsidiarity and proportionality. It also acknowledges that not every environmental offence requires supranational prosecution, while recognising that certain categories plainly exceed the practical capacities of isolated national enforcement. A selective model would further reduce political resistance among Member States, since it would not amount to a blanket "Europeanisation" of environmental criminal justice, but rather to a targeted intervention where fragmentation demonstrably undermines effectiveness. In addition, precise threshold criteria would help prevent competence inflation and preserve the operational focus of the EPPO.

3. Hybrid Model: Establishment of a Specialised Environmental Crime Chamber within the EPPO

If the EPPO's competence is extended, the reform should be accompanied by the establishment of a specialised environmental crime chamber, or at least a functionally specialised internal structure, composed of prosecutors and delegated prosecutors trained in environmental criminal law, administrative regulation and cross-border evidentiary practice. Environmental crime differs from conventional fraud-based casework because it often depends on technical assessments, scientific evidence, long causal chains and interaction with administrative enforcement systems. Without internal specialisation, the mere extension of

https://doi.org/10.33542/SIC2026-2-04

formal competence would not produce a corresponding increase in effectiveness. A specialised structure would improve consistency in decision-making, strengthen expertise in case selection, and enable more coherent coordination with national inspectorates, customs bodies, environmental agencies and expert institutions. It would also reduce the risk that environmental cases remain marginal within an institution originally designed around PIF offences. From a practical perspective, such internal specialisation is more realistic than building a separate EU body from the ground up, while still delivering an identifiable institutional response to a specific criminological phenomenon.

4. Clear Rules on Coordination with Eurojust, Europol and National Authorities

The adoption of more explicit coordination rules governing the relationship between the EPPO, Eurojust, Europol and competent national authorities in environmental cases is required. One of the central weaknesses of the present enforcement landscape is not merely the absence of a single prosecutorial actor, but also the institutional overlap between bodies that gather intelligence, coordinate proceedings and exercise prosecution. If environmental crime is partially transferred into the EPPO sphere, the regulation should simultaneously define which authority has primacy at each stage of proceedings, how conflicts of competence are to be resolved, and under what conditions support bodies remain involved once the EPPO assumes control. This is particularly important in hybrid cases where environmental harm is linked to fraud, corruption, customs offences, organised crime or digital evidence located across several jurisdictions. Clear rules of vertical and horizontal coordination would reduce duplication, accelerate information flows and protect procedural economy. They would also enhance the legitimacy of supranational prosecution by making the distribution of functions transparent and normatively predictable for practitioners and national institutions alike.

5. Gradual Reform through a Pilot or Phased Competence Model

The final proposal is methodological rather than purely substantive: the extension of EPPO competence should proceed gradually through a pilot or phased model. Given the legal sensitivity of criminal jurisdiction and the political difficulty of unanimous agreement under Article 86(4) of the Treaty on the Functioning of the European Union, a step-by-step reform may be more feasible than an immediate and comprehensive transfer of competence. In practical terms, the first phase could cover only a narrow group of environmental offences that are clearly cross-border, highly organised and evidentially suitable for supranational prosecution. The second phase could evaluate operational outcomes, institutional capacity and interaction with national systems before considering broader extension. This model has several advantages. It lowers the political threshold for reform, allows empirical assessment of added value, and limits the systemic risk associated with major institutional change. At the same time, it remains faithful to the logic of EU integration, which has often advanced through differentiated and incremental mechanisms rather than through abrupt constitutional transformation. In the context of environmental crime, where the need for stronger enforcement is increasingly evident but the final institutional design remains contested, a phased model appears to be the most prudent and defensible legislative pathway.

IX. CONCLUSIONS

The current system of criminal law enforcement within the EU remains significantly affected by structural fragmentation, particularly in areas characterised by a strong cross-border dimension such as environmental crime. Despite the progressive development of instruments aimed at enhancing cooperation between Member States of the EU, including the establishment of agencies such as Europol and Eurojust, the overall framework continues to rely predominantly on decentralised mechanisms. These mechanisms, while valuable, are often insufficient to address complex transnational criminal activities in a coherent and effective manner. In this context, the creation of the EPPO represents a substantial step towards greater integration in the field of EU criminal justice. By introducing a supranational body with direct prosecutorial powers, the EU has moved beyond the traditional model of intergovernmental cooperation. The EPPO has the capacity to conduct investigations, coordinate actions across jurisdictions and bring cases before national courts, thereby mitigating some of the practical obstacles associated with cross-border enforcement. However, as the analysis in this article has shown, the potential of the EPPO to address fragmentation remains inherently limited by the scope of its material competence.

The restriction of the EPPO's jurisdiction to offences affecting the financial interests of the EU reflects both legal and political considerations, particularly the principle of conferral and the sensitivity of criminal law as a domain of national sovereignty. Nevertheless, this limitation creates a significant gap in the enforcement of other forms of serious cross-border criminality, including environmental crime. As demonstrated, environmental offences often exhibit a transnational character and may produce substantial economic consequences, including indirect impacts on the EU budget. Despite this, they remain largely outside the EPPO's mandate, resulting in a continued reliance on fragmented national responses. The examination of different models for extending the EPPO's competence indicates that there is no single solution capable of fully reconciling the objectives of effectiveness, legal certainty and respect for national sovereignty. The full extension model offers the highest degree of integration and coherence but raises concerns regarding the limits of EU competences and the potential overcentralisation of criminal law enforcement. The functional, or PIF-linked, model appears more compatible with the existing legal framework but suffers from a narrow scope that may fail to capture the broader reality of environmental crime. The hybrid model, combining elements of both approaches, emerges as a particularly promising option, as it allows for a targeted expansion of competence while preserving a significant role for national authorities.

From a national perspective, as illustrated by the example of the Slovak Republic, the challenges associated with environmental crime are further exacerbated by limited institutional capacity and the fragmentation of enforcement mechanisms at the domestic level. The coexistence of criminal and administrative instruments, coupled with a relatively low degree of specialisation, may hinder the effective prosecution of complex environmental offences. In this regard, enhanced involvement of EU-level institutions, including a potentially expanded EPPO, could contribute to improving coordination, expertise and overall enforcement outcomes.

At the normative level, the extension of the EPPO's competence would require careful consideration of the legal basis provided by the Treaty on the Functioning of the European Union. Any such development must be grounded in a clear and precise definition of competences, ensuring compliance with the principles of legality and legal certainty. At the same time, it is essential to maintain an appropriate balance between the need for effective supranational enforcement and the preservation of Member States' autonomy in criminal matters. This tension is likely to remain a defining feature of the future evolution of European criminal law.

Indeed, the current model of the EPPO, while representing a significant advancement in the integration of EU criminal justice, does not appear to be fully sufficient to address the challenges posed by environmental crime. The persistence of fragmentation, combined with the limited scope of the EPPO's mandate, suggests that further development of the existing framework is necessary. A gradual and carefully calibrated extension of competences, possibly in the form of a hybrid model, may offer a viable path forward. Such an approach would allow the EU to enhance the effectiveness of enforcement while respecting the constitutional and political constraints inherent in the field of criminal law.

KEY WORDS
European Public Prosecutor's Office, environmental crime, cross-border crime, fragmentation of law enforcement, EPPO competence

KĽÚČOVÉ SLOVÁ
Európska prokuratúra, environmentálna kriminalita, cezhraničná kriminalita, fragmentácia presadzovania práva, právomoc EPPO

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HUMAN DIGNITY IN THE SLOVAK CONSTITUTION AND THE CFREU: POTENTIAL AND LIMITS OF INTERACTION

ĽUDSKÁ DÔSTOJNOSŤ V SLOVENSKEJ ÚSTAVE A CFREU: POTENCIÁL A LIMITY INTERAKCIE

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ABSTRACT

The aim of this article is to assess the potential impact of the EU Charter of Fundamental Rights on the position of human dignity within the Constitution of the Slovak Republic. While it is indisputable that human dignity and its protection have a place in the Slovak Constitution, the wording of the provisions related to human dignity is ambiguous, and it is unclear which fundamental rights are connected to the value of human dignity. At the same time, it is common today to regard human dignity as the source of many fundamental rights. This situation is further complicated by the fact that human dignity also appears in the Constitution as an independent fundamental right, without any closer specification of its content. The author concludes that interpreting human dignity through the EU Charter of Fundamental Rights could significantly strengthen its constitutional status by the fact that certain fundamental rights in the Charter are directly linked to the value of human dignity, thereby conferring upon them an absolute character. The protection of human dignity in the Slovak Republic could therefore be understood as the result of the cooperation of three legal systems, and the absence of the Charter could substantially weaken this protection.

ABSTRAKT

Cieľom tohto článku je zhodnotiť potenciálny vplyv Charty základných práv EÚ na postavenie ľudskej dôstojnosti v Ústave SR. Zatiaľ čo je nespochybniteľné, že ľudská dôstojnosť a jej ochrana majú svoje miesto v Ústave SR, samotné znenie článkov, ktoré s ľudskou dôstojnosťou súvisia je nejednoznačné a nie je jasné, ktoré ľudské práva sú na hodnotu ľudskej dôstojnosti napojené. Je pritom bežné považovať v súčasnosti ľudskú dôstojnosť za zdroj mnohých ľudských práv. Tento fakt je ďalej skomplikovaný tým, že ľudská dôstojnosť vystupuje v Ústave aj ako samostatné ľudské právo bez bližšej špecifikácie, čo je jeho obsahom. Autor dospieva k záveru, že výklad ľudskej dôstojnosti prostredníctvom Charty základných práv EÚ by mohol výrazne posilniť jej ústavnoprávne postavenie tým, že niektoré ľudské práva sú v Charte priamo prepojené s hodnotou ľudskej dôstojnosti, čím im prepožičiava absolútny charakter. Ochranu ľudskej dôstojnosti v Slovenskej republike preto autor vníma ako výsledok súbežného pôsobenia troch právnych systémov, pričom absencia Charty by túto ochranu mohla výrazne oslabiť.

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I. INTRODUCTION

At present, the position of human dignity within the Constitution of the Slovak Republic is systematically ambiguous. Although there can be no doubt that the Constitution protects this value, the text itself does not express its status or the scope of its protection with enough explicit emphasis. This, however, does not mean that the position of human dignity within the Slovak constitutional order is weak. Constitutional Court of the Slovak Republic has made the position of human dignity in the Slovak Constitution more clear over time and to the extent that the Slovak constitutional framework exhibits normative uncertainty, the protection of human dignity is supplemented by European Union law, most notably through the EU Charter of Fundamental Rights. The purpose and objective of this article is therefore to assess the impact of this document on the constitutional reality of human dignity within the constitutional order of the Slovak Republic. The article focuses exclusively on the constitutional and trans-constitutional analysis of human dignity, rather than on its general position within general Slovak legislation. Some recourse to case law will be made, but it is not within the scope of the article to do a deep dive into how human dignity is being invoked and used in Slovak jurisprudence. More importantly the article contains both descriptive and normative content.

The article is divided into three parts. The first part provides a brief introduction to human dignity and its various forms that appear in constitutions, specifically as a value, a legal principle, and a specific human right. The second part represents the most substantial part of this article and focuses on the analysis of human dignity in the Constitution of the Slovak Republic and in the EU Charter of Fundamental Rights, with a small excursion into the European convention on human rights. The third and final part offers a synthesis of the findings and seeks to elaborate why the protection of human dignity within the EU Charter of Fundamental Rights could be used to strengthen the position of human dignity inside the Slovak constitution. It does so by connecting the insights to the theory of constitutional pluralism and more specifically multilevel constitutionalism. This last part is to be considered normative rather than descriptive, since it merely offers a new way of looking at human dignity, and not a description of how human dignity is, at this point in time, being approached.

II. HUMAN DIGNITY AS THE FOUNDATIONAL VALUE IN LAW

Human dignity emerged as a central legal value in the aftermath of the Second World War, most prominently through its recognition in the Universal Declaration of Human Rights as the “foundation of freedom, justice and peace in the world” and as the highest objective of humanity.[2] Its intellectual and moral roots, however, reach much further back. Several of its core elements are closely connected to Christian theology and the idea of the equal worth of all human beings before God[3], a connection that can also be observed, for example, in the Constitution of Ireland of 1937.[4] Nevertheless, it was the adoption of the Universal Declaration of Human Rights that marked a decisive shift in the legal significance of human dignity. The atrocities of the Second World War, including the system of concentration and POW camps, elevated human dignity above many other values and received a strengthened position in constitutional texts

[2] Preamble of the Universal Declaration of Human Rights: „Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,“

[3] Catechism of the Catholic Church: Respect for the Human Person (1929 – 1933). [online] [cit. 9. septembra 2026]. Dostupné online: https://www.vatican.va/archive/ENG0015/__P6O.HTM.

[4] Excerpt from the Preamble of the Constitution of Ireland from 1937: In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, ... so that the dignity and freedom of the individual may be assured, ...

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worldwide. Today, human dignity occupies a prominent place in the constitutions of numerous states and has also been enshrined in the EU Charter of Fundamental Rights. It has thus become a core concept of a shared constitutional vocabulary that transcends national boundaries.[5] It is likewise common to regard human dignity as the source or foundation of many fundamental rights.[6]

Values generally function as moral compasses within society and are inevitably shaped by historical, cultural, and social contexts, characteristics that also carry over into the legal sphere.[7] This feature unfortunately also explains why values often encounter difficulties when applied in law. Their broad scope and indeterminate content tend to complicate legal application, and their constitutional positioning often varies significantly across legal systems. This phenomenon is particularly true for human dignity. In some constitutions, the value is placed at the very apex of the legal order, as is the case in Germany or, in a different form, in the EU Charter of Fundamental Rights. In other constitutional systems, however, its position is systematically ambiguous and, to a certain extent, structurally weak.

Human dignity is frequently associated with a specific catalogue of fundamental rights that are inherently connected to it, both in national constitutions and in international human rights instruments. It is also closely linked to the principles of democracy. Catherine Dupré, for instance, characterizes human dignity as the objective of constitutional democracy and as a value that enables the continuous elevation of human rights protection standards.[8] Traditionally, human dignity is associated with two other foundational values of modern constitutionalism, equality and freedom. In continental European legal systems, particularly within the EU, the link to equality tends to prevail, whereas in the Anglo-Saxon legal tradition, most notably in the United States, human dignity is more commonly associated with freedom. Taken together, these observations confirm that human dignity is among the most important values protected by contemporary constitutional law. At the same time, despite its frequent invocation, it remains a concept that is difficult to handle in practice, primarily due to the persistent tension between its absolute and relative dimensions.

This article does not seek to resolve the broader theoretical debate between the absolute and relative character of human dignity. Nevertheless, it is necessary to briefly introduce its absolute dimension, as this aspect plays a crucial role in strengthening the protection of certain fundamental rights connected to human dignity. In legal discourse, describing a value as absolute typically signifies that it is inviolable, unquestionable, and of exceptional importance. Human dignity is often understood in precisely this manner. Article 1 of the German Constitution, for example, declares human dignity to be inviolable, thereby signaling that any interference with it is impermissible. This line represents the absolute dimension of human dignity. Such an understanding has significant implications for constitutional adjudication. Legal argumentation frequently requires the balancing of competing values and rights. Where a value is considered

[5] PAVLINSKÝ, R. Hodnota ľudskej dôstojnosti ako kolízne pravidlo pri strete právnych systémov. In: KŠENDŽIGHOVÁ, A. (ed.) Sekcia dejín štátu a práva, teórie štátu a práva a sekcia medzinárodného práva „Aktuálne otázky hodnôt v kontinentálnom právnom systéme“. Zborník zo VI. ročníka medzinárodnej vedeckej konferencie Banskobystrické zámocké dni práva 14. – 15. november 2023, zámocký hotel The Grand Vígľaš. Banská Bystrica : Belianum, 2025, p. 108. DOI 10.24040/2024.9788055721255.

[6] BOTHA, H. Human dignity in comparative perspective. In: Stellenbosch Law Review – Stellenbosch Regstydskrif, Vol. 20, no. 2 (2009), p. 171. Dostupné online: http://hdl.handle.net/10019.1/103998.

[7] CALLIESS, CH. Europe as Transnational Law – The Transnationalization of Values by European Law. In: German Law Journal, Vol. 10, Issue 10 (2009), p. 1368. DOI 10.1017/S2071832200018277.

[8] DUPRÉ, C. Dignity, Democracy, Civilisation. In: Liverpool Law Review, Vol. 33 (2012), pp. 264 – 265. DOI 10.1007/s10991-012-9123-7.

absolute, such balancing becomes highly problematic. In Germany, human dignity, as formulated, would theoretically prevail in every proportionality assessment, an outcome that is neither practically workable nor normatively intended. The difficulty becomes even more pronounced in cases involving a conflict between the dignity of two individuals, as no higher criterion exists by which such a collision could be resolved.[9]

More generally, in constitutional texts, human dignity assumes three fundamental legal forms. It functions not only as a foundational value, but also as a high-ranking legal principle and, in some cases, as a specific human right.[10] Its legal role therefore cannot be inferred solely from its presence in constitutional text, but rather from its position inside of it. Human dignity expressed in a preamble carries a different normative function than dignity embedded within provisions on specific rights. This distinction will serve as a guiding framework for the following analysis of human dignity within the Constitution of the Slovak Republic and the EU Charter of Fundamental Rights.

III. ANALYSIS OF THE POSITION OF THE VALUE OF HUMAN DIGNITY IN THE CONSTITUTION OF THE SLOVAK REPUBLIC

Human dignity is not explicitly mentioned in the preamble to the Constitution of the Slovak Republic. Instead, the preamble refers to the cultural heritage of our ancestors. One might argue that this implicitly includes respect for human dignity, as the concept, although not always articulated in its modern legal sense, has historically been closely linked to religious beliefs, which form an important component of cultural heritage. As we pointed out earlier, it is not unusual to have human dignity appear in the preamble, another example of which can be find in the 1997 Constitution of Poland.[11] However, as mentioned previously, this line of reasoning has very limited legal relevance, since constitutional preambles are generally not considered legally binding.

Moving on to the next part of the preamble, we arrive at democratic values. The Slovak Republic is a democratic state and seeks to protect this specific form of government. It could be argued that a system based on the will of the people must necessarily protect human dignity. Yet this argument is also problematic. Historically, human dignity has been invoked in political and legal systems that were not democratic. Moreover, democracy is only loosely connected to values. While values may be realized within a democratic framework, they do not arise automatically from democracy itself. In fact, democratic systems are fully capable of violating human dignity.[12]

Our tendency to associate democracy with human dignity is largely by design rather than lying in democracy itself. It is the material rule of law, not democracy alone, that prioritizes the protection of human dignity and rights or at least creates the conditions under which such protection is possible. Only through the combination of democracy and the material rule of law

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[9] NIDA-RÜMELIN, J. Why Human Dignity rests upon Freedom. In: KIRSTE, S., BRUGGER, W. (eds.) Human Dignity as a Foundation of Law. Proceedings of the Special Workshop held at the 24th World Congress of the International Association for Philosophy of Law and Social Philosophy in Beijing, 2009. Stuttgart : Franz Steiner Verlag, 2018, pp. 88 – 90. ISBN 9783515104838.

[10] STEINMANN, R. The Core Meaning of Human Dignity. In: Potchefstroom Electronic Law Journal, Vol. 19 (2016), p. 4. DOI 10.17159/1727-3781/2016/v19i0a1244.

[11] Excerpt from the Preamble of the Constitution of Poland of 1997: ... We call upon all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland ...

[12] Many human rights violations happened in African countries that were officially democracies: Cameroon (Paul Biya), Uganda (Yoweri Museveni), Equatorial Guinea (Teodoro Obiang Nguema Mbasogo).

can human dignity function as a genuine legal value within a constitutional system. However, being a necessary precondition for the protection of human dignity is not the same as explicitly enshrining human dignity within these concepts.

Not finding human dignity in the preamble, we can now turn to the legally binding text of our constitution itself. Article 1 of the Constitution refers to Slovak republic as a democratic state that adheres to the rule of law. However, just as the general reference to democracy in the preamble, this alone cannot convincingly be interpreted as expressing a constitutional commitment to the protection of human dignity as a foundational value. This is an interesting choice to be sure. Other constitutions do sometimes put the value of human dignity and its protection first, even before the democracy and rule of law. The most famous example of this is Article 1 of German Constitution (*Grudngesetz*): *"Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."* This clearly puts human dignity in the forefront of the constitution and makes protection of human dignity to be the biggest concern of the state.

This is not the case of the Constitution of the Slovak republic, where the first explicit reference to human dignity appears in Article 12 of the Constitution. It declares that people are free and equal in their dignity and rights. This is basically a copy paste of Article 1 of the Universal Declaration of Human Rights.[13] Two aspects of this formulation are noteworthy. First, dignity and rights are clearly separated. Second, people are described as "free and equal in dignity." This formulation is conceptually rich. It presents dignity as a broad concept that encompasses both freedom and equality, two notions traditionally and closely associated with human dignity. At the same time, the provision remains declaratory in nature. It does not prescribe conduct but rather states a foundational premise upon which constitutional interpretation is to be built.

The second sentence of Article 12 states that fundamental rights and freedoms are inalienable, non-transferable, imprescriptible, and irrevocable. This language resembles at least a bit Article 1 of the German Constitution, which proclaims the inviolability of human dignity. However, there is an important difference. In the Slovak Constitution, these characteristics are attributed to rights, not explicitly to dignity itself. This raises a theoretical difficulty. Article 12 appears to distinguish dignity from rights. Does this separation eliminates an interpretation according to which dignity serves as the basis of rights?

Here, systemic interpretation becomes crucial. Fundamental rights in the Constitution are themselves structured around freedom and equality categories that are intrinsically linked to both dignity and rights. One could argue that rights are grounded only in rights themselves, especially if Article 12 is read as establishing freedom and equality in rights rather than through dignity. Nevertheless, the use of the term "everyone" carries a strong implication of equality. Equality, in turn, is historically rooted in the Christian concept of human dignity, which was universalized in the aftermath of the Second World War.[14] Universality is frequently identified as the core of human dignity. As everyone possesses it, equal treatment by the state must be the norm. This logic can, beyond the state, also be extended to other forms of authority, such as the European Union or international organizations. If fundamental rights and freedoms are, for everybody, inalienable, non-transferable, imprescriptible, and irrevocable, and if these rights are indeed, as

[13] Article 1 of the Universal Declaration of Human Rights: „All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

[14] CALLIESS, CH. Europe as Transnational Law – The Transnationalization of Values by European Law. In: German Law Journal, Vol. 10, Issue 10 (2009), p. 1368. DOI 10.1017/S2071832200018277.

we assume, grounded in human dignity, then human dignity itself must share these same characteristics, even if not expressly described as such in Article 12.

An additional question concerns whether Article 12 expresses a value or a principle. As noted, the provision is declaratory. It does not command or prohibit; rather, it articulates a fact that must be presupposed in all interactions with other human beings. All people are free and equal in their dignity and rights. Yet despite its declaratory form, Article 12 functions as a principle, a highly general one. If it were framed as a command, it might read: “All people shall be considered free and equal in their dignity and rights.” Such wording would make the normative dimension more explicit, but the underlying function would remain similar. Moreover, as a general constitutional provision, Article 12 is not limited to the catalogue of specific fundamental rights. Its content, however, remains vague and, because dignity is distinguished from rights, somewhat indeterminate. If dignity is separated from rights, what remains of its normative substance? For this reason, it is difficult to speak meaningfully of human dignity without rights, just as it is problematic to speak of rights without human dignity. Treating each concept in isolation leads to an analytical dead end.

This brings us to the question of how human dignity might be made more operational as a general principle. The main difficulty lies in the breadth and vagueness of the concept. Narrowing and specifying its content could facilitate its legal application. In this regard, Article 14 of the Constitution is noteworthy: “Everyone has the capacity to have rights.” Stephan Kirste, in his influential work on human dignity, proposes defining human dignity as the “right to have rights.”[15] This approach is particularly intriguing. At first glance, it appears to abandon broader moral or philosophical understandings of dignity. Yet if dignity remains intrinsically linked to rights, few provisions express equality more clearly than Article 14. One could even argue that whenever the Constitution refers to “everyone,” this reference must be read in light of Article 12, where a general principle of human dignity can be identified.

Nevertheless, a close reading of the constitutional text suggests that Kirste’s conception of dignity is connected primarily to rights rather than to the broader goals or values of society. The declared premise, as expressed in Article 12, is to treat all people as free and equal in both their dignity and their rights. The difficulty once again lies in the wording. Dignity and rights are presented as distinct concepts, which weakens the interpretation of dignity as merely a right to have rights, unless we read Article 12 as treating dignity and rights as a unified whole rather than as separate elements.

From a strictly grammatical perspective, however, dignity is dignity, and rights are rights. On this basis, Article 12 does not support the conclusion that Article 14, understood as the capacity to have rights, constitutes the substantive core of human dignity itself. Systematically, no explicit connection to human dignity as a value can be made. This raises further difficulty. In international and European law, human dignity is commonly associated with the right to life and prohibition of cruel, inhuman, or degrading treatment and with the integrity of the person.[16] In the Slovak Constitution, however, corresponding Articles 15 and 16 contains no explicit reference to human dignity. The question therefore arises. How is the dimension of human dignity introduced into this provision?

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[15] KIRSTE, S. A Legal Concept of Dignity as a Foundation of Law. In: KIRSTE, S., BRUGGER, W. (eds.) Human Dignity as a Foundation of Law. Proceedings of the Special Workshop held at the 24th World Congress of the International Association for Philosophy of Law and Social Philosophy in Beijing, 2009. Stuttgart : Franz Steiner Verlag, 2018, pp. 63 – 82. ISBN 9783515104838.

[16] Charter of Fundamental Rights of the European Union, Article 4.

From a constitutional perspective, the only possible link is Article 12. This observation is equally relevant for Article 14. Kirste's conception of dignity as the right to have rights offers little guidance here, particularly when dignity is not expressly mentioned in Article 16. It is evident that cruel, inhuman, or degrading treatment violates human dignity. Yet without an explicit textual connection, and with Article 14 providing only a minimal, rights-focused understanding of dignity, such conduct would be classified merely as a violation of rights, rather than as a violation of human dignity itself.

This interpretation risks minimizing the normative force of Article 12, especially given that dignity and rights are presented side by side rather than hierarchically. If rights and dignity are violated simultaneously, the reference to dignity appears almost redundant. This raises a fundamental question. When, if ever, is human dignity violated in cases where no specific right has been infringed? To address this, it is essential to recognize that human dignity is a broader concept than individual rights. Article 12 does not refer solely to the specific fundamental rights enumerated in the constitutional catalogue, but also to rights in a more general sense, extending across the entire legal order. The normative impact of human dignity under Article 12 should therefore manifest precisely in situations where human dignity is violated without a direct infringement of a specific right. This, however, leads to an additional problem, which will be addressed below.

Article 19 is the only provision in which human dignity is explicitly mentioned as such in the Slovak constitution. This is, at first glance, deeply problematic. After extensive constitutional emphasis on human dignity as a foundational idea, linked to freedom and equality, we encounter the actual term "human dignity" embedded within a specific fundamental rights provision. How should this formulation be understood? Is human dignity here conceptually linked to personal honor, a largely subjective category, good reputation, and the protection of one's name? In effect, Article 19 appears to treat human dignity as a concrete, narrowly defined right, whose content is determined in close relation to other personality rights.

Under this reading, human dignity is no longer a foundational value or a general principle, but simply another right among others. The constitutional text thus seems internally inconsistent. On the one hand, Article 12 presupposes dignity as something universal and inherent, clearly separating it from rights. On the other hand, Article 19 treats dignity as a protected interest alongside personal honor and reputation. These two conceptions are difficult to align. It is implausible to argue that human dignity is exhausted by Article 19. Such an interpretation would be overly reductionist. Rather, what appears to be at play are two distinct conceptions of human dignity within the same constitutional framework.

Likewise, the Constitutional Court of the Slovak Republic understands human dignity as having a dual function within the legal order, both as an objective value and as a specific subjective right. Here, it is worth to mention its finding in the PL. ÚS 12/01 from 4th December 2007, in which Constitutional Court took it upon itself to approach human dignity in a more abstract and structural manner.[17] In many ways, it is one of the most important findings of the Constitutional Court regarding dignity, as it makes clear how to approach human dignity as a value and right in the Slovak Constitution. The courts states that as an objective value, human dignity forms part of the implicit constitutional principles that underpin the system of fundamental rights, expressing core goals of the legal order and serving as a foundational element

[17] Decision of the Constitutional Court of the Slovak Republic PL. ÚS 12/01 from 4th December 2007. For more detail on the position of human dignity in Slovak jurisprudence and legislation, see also: ĽALÍK, T. Ľudská dôstojnosť v právnom poriadku SR. In: Justičná revue, Vol. 69, no. 3 (2017), pp. 327 – 341. Dostupné online: https://www.academia.edu/32665880/%C4%BDudsk%C3%A1_d%C3%B4stojnos%C5%A5_v_pr%C3%A1vnom_poriadku_SR.

of the state's constitutional framework. In this sense, particularly under Article 12 of the Constitution, human dignity operates as a broader, structural concept closely linked to equality and freedom.[18] At the same time, human dignity is recognized as a concrete subjective right under Article 19(1) of the Constitution. In this dimension, the Constitutional Court primarily associates human dignity with the right to privacy, viewing it both as a negative right, protecting individuals from unjustified interference in their private sphere and as a source of positive obligations on the state to ensure conditions for a dignified life. Together with freedom, this protection of privacy forms the basis of an individual's autonomous self-determination.[19] More interestingly, it also connects the idea of human dignity to the physical and mental integrity, something that is not explicitly stated in the constitution.[20] Overall, the finding in question is a good example of why constitutional interpretation matters. Its argumentation in a large way diminishes the vague and unexplained formulation of human dignity inside the Slovak constitution.

Another important finding of the Constitutional Court of the Slovak Republic is decision I. ÚS 689/2014 of 9 November 2016. In this decision, the Court makes a somewhat puzzling statement with regard to human dignity. As outlined above, human dignity as a foundational constitutional value is primarily associated with Article 12. In the present case, however, the Court refers to human dignity alongside reputation, good name, and personal honour, which places it conceptually closer to Article 19. At the same time, the Court invokes the quintessential Kantian understanding of human dignity, grounded in the categorical imperative that a human being must never be treated merely as a means, but always as an end in themselves. It further characterizes human dignity as an absolute value that cannot be balanced against competing values.[21] This dual approach creates a doctrinal tension. On the one hand, the Court appears to situate human dignity within the framework of personality rights under Article 19. On the other hand, it attributes to it the qualities of a foundational and absolute constitutional value, traditionally associated with Article 12. Rather than clearly distinguishing between these two dimensions, the Court's reasoning tends to blur the line between them, thereby weakening the conceptual clarity of human dignity within the constitutional order.

One possible interpretation is that the dignity protected under Article 19 is derived from, or at least closely connected to, the more general principle of human dignity expressed in Article 12. However, its placement alongside rights such as personal honor, reputation, and protection of one's name does not align with such an interpretation. This raises concerns, as the normative force of human dignity in constitutional law depends on its objective and universal character, not on subjective perceptions of infringment usually associated with personal rights.[22] While rights protecting honor and reputation undoubtedly stem from human dignity, they represent specific manifestations rather than its core content. Still, by emphasizing that it cannot be weighed against other values, the Court appears to affirm its absolute dimension. However, this clarification comes at the cost of further obscuring the distinction between human dignity as a foundational

[18] Decision of the Constitutional Court of the Slovak Republic PL. ÚS 12/01 from 4th December 2007. There were also multiple dissenting opinions to the finding, many of which underscored the importance of human dignity and its role in protecting human life.

[19] Decision of the Constitutional Court of the Slovak Republic PL. ÚS 12/01 from 4th December 2007, point 12.

[20] Decision of the Constitutional Court of the Slovak Republic PL. ÚS 12/01 from 4th December 2007, point 13.

[21] Decision of the Constitutional Court of the Slovak Republic I. ÚS 689/2014 from 9th November 2016, point 9.

[22] NIDA-RÜMELIN, J. Why Human Dignity rests upon Freedom. In: KIRSTE, S., BRUGGER, W. (eds.) Human Dignity as a Foundation of Law. Proceedings of the Special Workshop held at the 24th World Congress of the International Association for Philosophy of Law and Social Philosophy in Beijing, 2009. Stuttgart : Franz Steiner Verlag, 2018, pp. 88 – 90. ISBN 9783515104838.

value and as a subjective right. The fact that the Court does not explicitly anchor its reasoning in either Article 12 or Article 19 leaves interpretative space open, but at the same time contributes to doctrinal uncertainty.

Overall, we can assume that human dignity is being taken seriously in Slovak Constitution, despite some doctrinal tension between its role as a value, legal principle and specific human right. However, there are more layers we need to take into account when talking about human dignity and its protection. Most importantly, it is necessary to consider the influence of external sources of law, in particular the Charter of Fundamental Rights of the European Union.

IV. CHARTER OF THE FUNDAMENTAL RIGHTS OF THE EU AND HUMAN DIGNITY

One important disclaimer at the start of this section of the article. There are important limitations for when and how Charter applies to the member states, such as Slovak Republic. This limitation is contained in Article 51 of the Charter, which states that Charter applies to member states only when they are implementing Union law. While these areas have become quite numerous, it is important to note that more than just Charter modifies the relationship between the EU law and the Slovak Constitution. The relationship is also defined from the side of the Slovak Constitution itself. Here, we need to talk a bit about the scope of Article 7(2) and the new constitutional amendment that deals with so-called national identity.

Article 7(2) of the Slovak Constitution deals with its relationship towards EU law and states, that legal acts of the EU enjoy primacy over the laws of the Slovak Republic. It says nothing about primacy over the constitutional law, and several positions could have been made in this regard. From the perspective of EU law and the jurisprudence of the Court of Justice of the European Union, the primacy of EU law extends to all national law, including constitutional provisions, whenever a matter falls within the scope of EU law.[23] From the point of the Slovak Constitution, the default is to interpret the article as is, with acknowledging the primacy over laws, but not the constitution.

Admittedly, the most recent constitutional amendment[24] adds a layer of complexity to the issue. The previously established primacy of EU law over laws, recognized since the Slovak Republic’s accession in 2004, is now limited even further. The amendment, among other changes, added a new section 6 to the Article 7 of the Slovak Constitution, which provides that, in cases of conflict in areas falling within national identity, explicitly including human dignity, the Slovak Republic retains primacy. The inclusion of human dignity within the concept of national identity raises questions. The Constitutional Court of the Slovak Republic has consistently emphasized the universal character of human dignity[25], suggesting that it is a value inherent to all individuals rather than one confined to a particular national framework. From this perspective, it may be difficult to reconcile its universality with its classification as a part of national identity. At the same time, it is not immediately clear how the notion of national identity could justify any limitation or differentiation in the protection of human dignity. Many fundamental rights are derived from this core value, and any level of protection exceeding that provided by EU law would, in principle, be consistent with its underlying purpose. The amendment was largely meant to represent, as prime minister put it, a “dam against

[23] Judgments of the Court of Justice of the EU C-11/70 Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel; C-6/64 Costa v ENEL; C-106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA.

[24] Ústavný zákon č. 255/2025 Z. z.

[25] Decision of the Constitutional Court of the Slovak Republic I. ÚS 689/2014 from 9th November 2016, point 9.

progressivism".[26] However, the provisions of Chapter I of the Charter of Fundamental Rights of the European Union do not, in themselves, prescribe any particular ideological direction, but rather establish general principles applicable across contexts. It is also worth noting that it is actually the Constitutional Court of the Slovak Republic that has previously linked human dignity to personal self-determination in Article 19 of the Slovak Constitution.[27] To the extent that self-determination includes decisions relating to personal identity, including perhaps gender, one could argue that certain aspects of these questions are already grounded in domestic constitutional jurisprudence, independently of the Charter. From this perspective, and without engaging in a detailed analysis of the amendment, the inclusion of human dignity within the concept of national identity does not appear, at least prima facie, to alter the level of protection afforded under the Charter. With these limitations in mind, we can return to the analysis of the Charter.

The Charter of fundamental rights of EU is relatively short, only 17 pages, some of which consist of the preamble. Although the preamble is not legally applicable in the strict sense, it remains worth examining, as it serves somewhat important function. The preamble indicates how the rights listed in the Charter are to be understood and applied. It speaks of the nations of Europe, recalling their spiritual and moral heritage, and states that the Union is founded on the indivisible and universal values of human dignity, freedom, equality, and solidarity. This is followed, after a semicolon, by a reference to the principles of democracy and the rule of law. Here, an interesting comparison with the Slovak Constitution emerges. The Union has no difficulty placing human dignity at the forefront. It is the first value mentioned and, notably, it is separated from freedom, equality, and solidarity. This separation implies that these concepts are not synonymous but distinct and autonomous values. Importantly, there is no direct mention of rights at this stage. They appear later in the preamble, where the importance of strengthening the protection of fundamental rights is emphasized.

In this context, human dignity in the preamble is clearly used as a value rather than as a concrete guiding principle or right. However, the statement that the Union is founded on the indivisible and universal value of human dignity can reasonably be interpreted to mean that everything that follows should be understood in light of this foundational value. In this sense, human dignity once again acquires the character of an interpretative guideline. While preamble is not legally enforceable, it should nevertheless influence the decision-making of the Court of Justice of the European Union.

Chapter I of the Charter is particularly significant. The very heading, *Dignity*, suggests that the articles contained therein are connected to, or derived from, human dignity. Article 1 is formulated in simple but absolute terms: *"Human dignity is inviolable. It must be respected and protected."* This wording implies the paramount position of human dignity within the Charter. If one were to attempt to weigh human dignity against other values or principles contained in the Charter, dignity would necessarily prevail. However, we need not speculate about what human dignity means in this context. The structure of Chapter I allows for systematic interpretation. All subsequent articles under this chapter are to be understood as concretizations or derivations of human dignity. In this way, the normative force of Article 1 extends to the rights listed below it.

These rights include:

– the right to life; Article 2 (1)

[26] LOPATKA, J. Slovak PM seeks control of 'national identity' issues in potential clash with EU law. [online]. June 10, 2025 [cit. 9. septembra 2026]. Dostupné online: https://www.reuters.com/world/slovak-pm-seeks-control-national-identity-issues-potential-clash-with-eu-law-2025-06-10/.

[27] Decision of the Constitutional Court of the Slovak Republic PL. ÚS 12/01 from 4th December 2007, point 13.

– the prohibition of the death penalty and executions; Article 2 (2)
– respect for physical and mental integrity; Article 3 (1)
provisions concerning biology and medicine (Article 3 (2)), including:
  – free and informed consent under conditions laid down by law;
  – the prohibition of eugenic practices, particularly those aimed at the selection of persons;
  – the prohibition of making the human body and its parts a source of financial gain;
  – the prohibition of the reproductive cloning of human beings;
– the prohibition of torture and inhuman or degrading treatment or punishment; Article 4
– the prohibition of slavery and servitude; Article 5 (1 and 2)
– the prohibition of trafficking in human beings. (Article 5 (3))

These are the rights explicitly connected to human dignity in the Charter. Notably, several of them are also present in the Slovak Constitution, most prominently the prohibition of torture and inhuman or degrading treatment or punishment, respect for physical and mental integrity, and the right to life. Paradoxically, however, these rights are not explicitly linked to human dignity in the Slovak constitutional text, whereas the Charter makes this connection explicit. This raises an important question. Does this explicit connection affect how we should interpret our own Constitution, particularly Articles 15 and 16? Are these rights strengthened by being directly tied to the value of human dignity under EU law?

The decision to connect specific rights to human dignity as a foundational value is a sophisticated legislative choice. It distinguishes dignity as a value from the rights derived from it, while simultaneously elevating those rights above others. The distinction lies in the absolute formulation of human dignity. Because these rights are derived from dignity, their relationship to other rights appears similarly absolute, significantly limiting the possibility of balancing or weighing them against competing interests.[28] This becomes particularly interesting when human dignity is compared with other values and rights, such as the freedoms listed under the next title of the Charter. Many of these freedoms, and indeed, the freedom as a value in itself, are traditionally associated with human dignity, yet the Charter deliberately differentiates them, both in the preamble and in its structure. This suggests that the drafters intended to confine the content of human dignity to the rights enumerated in Chapter I. Consequently, it becomes difficult to argue for a broader interpretation of dignity that extends beyond these explicitly listed rights.

The preamble itself reinforces this interpretation by distinguishing dignity from freedoms, equality, and solidarity. The only remaining interpretative option, therefore, is to treat human dignity as encompassing only those rights explicitly associated with it in Title I. Where does this leave us? Although the Charter represents a small improvement in its treatment of human dignity by clearly linking it to a specific set of rights, it simultaneously imposes structural limitations that hinder a broader use of dignity in legal interpretation and argumentation. By positioning human dignity as an absolute value, it renders the associated rights resistant to balancing and excludes other rights from being linked to dignity. This effectively prevents interpretations such as Kirste's conception of dignity as a "right to have rights," unless one were to reduce Article 1 to that meaning alone, an approach that would be both excessively restrictive and incompatible with the Charter's structure.

[28] TIEDEMANN, P. Human Dignity as an Absolute Value. In: KIRSTE, S., BRUGGER, W. (eds.) Human Dignity as a Foundation of Law. Proceedings of the Special Workshop held at the 24th World Congress of the International Association for Philosophy of Law and Social Philosophy in Beijing, 2009. Stuttgart : Franz Steiner Verlag, 2018, p. 26. ISBN 9783515104838.

Human dignity is explicitly mentioned primarily in the Charter, particularly in its preamble. Neither the Treaty on European Union nor the Treaty on the Functioning of the European Union originally enshrined human dignity in their preambles. However, through systematic interpretation, EU primary law must be understood as a coherent whole. This allows human dignity, as articulated in the Charter of Fundamental Rights, to be regarded as a central value of EU law, at least since 2009, when the Charter became legally binding. That said, the treaties do refer to principles such as freedom, democracy, respect for human rights and fundamental freedoms, and the rule of law, as well as to universal values and inalienable rights of human beings. Values and principles are carefully distinguished, yet human dignity is notably absent from these formulations and only make presence in the following articles of the Treaty on the European union.

Article 2 of the Treaty on European Union explicitly states that the Union is founded on values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. These values are described as common to all Member States, within societies characterized by pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men. Article 21 then further provides that the Union seeks to promote the protection of human dignity in its external action. Here again, human dignity is clearly distinguished from other values, confirming its autonomous and foundational status within EU law. Nevertheless, without Charter to lean on, position of human dignity inside the EU would be rather slim.

1. Convention on Human Rights

When one speaks of human rights protection in Europe, the mind naturally turns to the Council of Europe and its Convention on Human Rights. This instrument is often described, at least by its own court, as the constitutional foundation of Europe.[29] It is therefore reasonable to examine how the Convention influences the protection of human dignity within national constitutional orders, such as that of the Slovak Republic. Even a cursory reading of the Convention makes clear that it functions primarily as a catalogue of rights rather than of values. The preamble contains no explicit reference to human dignity, although it does refer to the Universal Declaration of Human Rights.[30] Consequently, the preamble cannot be interpreted as directly grounding the Convention in human dignity, at least not expressly. Moreover, the preamble is not legally binding, which further limits its normative significance in this respect.

Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment or punishment), and 4 (prohibition of slavery and forced labour) correspond to rights that, in the Charter of Fundamental Rights of the European Union, are explicitly linked to human dignity under Title I. In the Convention, however, these provisions exist as autonomous rights, without any explicit conceptual connection to human dignity as a foundational value. Article 8 of the Convention, which guarantees the right to respect for private and family life, corresponds to Article 19 of the Slovak Constitution, where the protection of human dignity is expressly mentioned as a guiding principle. By contrast, the Convention does not anchor Article 8 in human dignity, framing it solely as an independent right.

[29] GREER, S. The European Convention on Human Rights: Achievements, Problems and Prospects. Cambridge : Cambridge University Press, 2009, p. 7. ISBN 9780511494963. DOI 10.1017/CBO9780511494963.

[30] This is important, as the Universal Declaration of Human Rights does actually center all human rights around the value of human dignity. Preamble of the Universal Declaration of Human Rights: „Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,“

The remainder of the Convention likewise contains no explicit reference to human dignity, with one notable exception. Protocol No. 13 provides the only direct point of connection between the Convention system and the concept of human dignity. By abolishing the death penalty in all circumstances, it implicitly affirms the intrinsic worth of human life and, by extension, human dignity, linking dignity to the right to life without expressly naming it.

It may therefore be concluded that the Convention makes only minimal reference to human dignity, which is somewhat surprising given the central role that dignity plays in many national constitutional orders. Rather than treating dignity as a foundational or interpretative value, the Convention relies predominantly on a catalogue of individual rights that operate independently of any explicit dignity-based framework. That said, this structure is consistent with the nature of the Convention itself: human dignity functions primarily as a value, rather than as a distinct human right, and the Convention is designed as a catalogue of rights rather than of the values from which those rights are derived. This of course does not mean that the Convention does not protect human dignity. European Court of Human Rights does lean on human dignity in its jurisprudence.[31] But as stated in the introduction to this article, case law is not the primary objective of the analysis in this article, the textual analysis is.

V. THE IMPORTANCE OF THE CHARTER OF THE FUNDAMENTAL RIGHTS OF THE EU IN CONSTITUTIONAL STRUCTURE OF EUROPE AND ITS STATES

The following is primarily a normative theoretical framework of how the Charter of the fundamental rights of the EU could be used to strengthen the position of human dignity. It does not seek to describe an established line of constitutional practice or to suggest that such interaction has already fully materialized in the jurisprudence of the Slovak Constitutional Court. The focus is on the Slovak constitution, since that is the one that had been analyzed. It is possible, however, to do the same analysis with other constitutions and see where the Charter might be of help. This of course, is once again, very much limited to the times that Charter applies to member states, meaning, when EU law is being implemented. Moreover, the theoretical framework is built upon the theory of multilevel constitutionalism, which treats the EU law and national legal systems as distinct parts (layers) of the common constitutional framework, where the ties between the legal systems are more extensive.[32]

In terms of what we discussed till now, it may be a good time to make a comparison of what the explicit textual protection of human dignity in Slovak constitutional system looks like with and without Charter in effect. Each part of the joint list will be prefaced with either SC for Slovak Constitution or CH for Charter. In regard to the Convention, we excluded it from comparisons as it serves more as a catalogue of rights, rather than leaning into the protection of values outright. Here is the list of rights and/or principles directly connected to the value of human dignity in either Slovak constitution or through the effects of the Charter:

- (SC) Freedom and equality in dignity (Article 12(1) of the Slovak Constitution)
  - formulated as a guiding principle of the human rights that follow
- (CH) The right to life
  - explicitly connected to dignity in the Charter, thereby strengthening its position in both constitutional and Convention contexts (Article 15(1) of the Slovak Constitution)

[31] Judgments of the European Court of Human Rights Svinarenko and Slyadnev v. Russia App. No. 32541/08 and 43441/08 from 17th July 2014; Pretty v. The United Kingdom App. No. 2346/02 from 29th April 2002.

[32] The author of the theory is Ingolf Pernice; for more detail see: PERNICE, I. Multilevel Constitutionalism in the European Union. WHI – Paper 5/02 (2001), 16 p. Dostupné online: https://www.rewi.hu-berlin.de/de/lf/oe/whi/publikationen/whi-papers/2002/whi-paper0502.pdf.

– (CH) Prohibition of the death penalty and executions
  – linked to dignity through the Charter and reinforced by the Convention (Article 15(3) of the Slovak Constitution)
– (CH) Respect for physical and mental integrity
  – connected to dignity via the Charter (Article 16(1) of the Slovak Constitution)
– (CH) Biology and medicine (connected to dignity exclusively by the Charter)
  – free and informed consent under conditions laid down by law;
  – prohibition of eugenic practices, particularly those aimed at the selection of persons;
  – prohibition of making the human body and its parts a source of financial gain;
  – prohibition of reproductive cloning of human beings.
– (CH) Prohibition of torture and inhuman or degrading treatment or punishment
  – linked to dignity through the Charter (Article 16(2) of the Slovak Constitution)
– (CH) Prohibition of slavery and servitude
  – connected to dignity by the Charter (Article 18(1) of the Slovak Constitution)
– (CH) Prohibition of trafficking in human beings
  – connected to dignity exclusively by the Charter
– (SC+CH) Protection of human dignity as such
  – Article 19(1) of the Slovak Constitution, whose substantive meaning remains unclear: *“Everyone has the right to maintain their human dignity, personal honor, good reputation and to the protection of their name.”*
  – Article 1 of the Charter: *Human dignity is inviolable. It must be respected and protected.*

We made sure to highlight that most of the rights that are connected to human dignity in Charter do exist in Slovak Constitution. The importance of the Charter here is not in mere supplementation of the catalogue with new rights. It is primarily the connection to human dignity that does the heavy lifting. Although human dignity is present in the Slovak Constitution, its position appears more like an afterthought than the result of a systematic effort to integrate the value into the constitutional order. Human dignity is presented as an important value, yet it is not clearly associated with any specific set of rights, at least not in the text of the constitution itself.[33] At the same time, dignity is also framed as a specific personal right, primarily linked to the protection of personal honor and good reputation. This narrows its substantive scope and substantially limits its usefulness as a broader constitutional concept. The Charter of Fundamental Rights of the EU also differentiates between dignity and rights. However, unlike the Slovak Constitution, it explicitly connects a defined group of rights to human dignity and places them, together with dignity itself, at the very beginning of the Charter. This structural choice elevates both dignity and the associated rights within the hierarchy of fundamental rights. Through the Charter, it becomes possible to interpret certain rights contained in the Slovak Constitution as based and structured around human dignity, even where such a connection is not made explicitly in the constitutional text. This is obviously important for the level of protection these rights enjoy. Their importance is sky-rocketed due to their direct connection to human dignity, the most important value protected in the EU.

This effect may not be exclusive to the Slovak constitutional system and could also be observed in, for example, Croatia. Their Constitutional Court cited Article 1 of the Charter to strengthen the protection afforded by Article 35 of the Croatian Constitution. The case concerned

[33] As previously mentioned during the analysis of human dignity in the Slovak Constitution, the Constitutional Court of the Slovak Republic did connect the value of human dignity with at least certain rights.

a situation in which a local court found that a twelve year old child had not yet formed a perception of his personal reputation and dignity and therefore did not have a right to compensation for damages on that basis. By relying on Article 1 of the Charter, the Constitutional Court declared human dignity to be inviolable and further explained that the Charter's understanding of dignity had become a component of the human rights catalogue of the Croatian Constitution.[34] It can therefore be observed that the Charter may strengthen the position of human dignity within the Member States. Interestingly, as Gabriel N. Toggenburg notes, the right to dignity is invoked relatively rarely by the Court of Justice of the European Union itself, approximately once or twice per year, whereas other Charter rights are relied upon, on average, five times as often.[35] Toggenburg suggests that this can be explained by the existence of other dignity-based rights within the "Dignity" chapter of the Charter.

Overall, these effects can be traced to the various theories of constitutional pluralism, in this case particularly to multilevel constitutionalism. Of the three normative dimensions associated with this theory, all three can be identified here, albeit in a more subtle manner. First, we can observe what Marta Breichová Lapčáková describes as *international verticality*.[36] Multilevel constitutionalism recognizes the binding nature of European law within the framework of national law. In doing so, it acknowledges a vertical normative relationship characteristic of monism, in this case with the primacy of European law. It is precisely this international verticality that enables the strengthened protection of human dignity within the Slovak constitutional system and in constitutional systems of other member states of the EU.

The second relevant dimension is *national verticality*.[37] This can be illustrated by Article 1 of the Charter of Fundamental Rights of the European Union, which constitutes the foundational provision of the document and the principal reason why human dignity now enjoys enhanced protection across the European Union. This development is hardly surprising, as the provision draws clear inspiration from the German Constitution, whose Article 1 similarly proclaims that *"Human dignity is inviolable."* The Charter reflects the influence of the German constitutional tradition in the wording of its Article 1 and represents a clear example of constitutional dialogue typical of international and transnational legal orders, where transnational documents often draw inspiration from the constitutional traditions and judicial practices of their member states.[38]

Finally, this interaction reveals a form of *normative horizontal overlap*[39] between the German and Slovak constitutional orders. The absolute conception of human dignity embedded in

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[34] Decision of the Constitutional Court of Croatia U-III-1095/2014, 21.09.2017.

[35] TOGGENBURG, G.N. The 1st of all EU-r rights: dignity and how the Charter contributes. [online]. December 17, 2019 [cit. 9. septembra 2026]. Dostupné online: https://www.eurac.edu/en/blogs/eureka/the-1st-of-all-eu-r-rights-dignity-and-how-the-charter-contributes.

[36] BREICHOVÁ LAPČÁKOVÁ, M., PAVLINSKÝ, R. Multilevel Constitutionalism and other „ISMS" in South America – Testing the Theory of Multilevel Constitutionalism on the Example of the Regime under American Conventions on Human Rights. In: The Lawyer Quarterly, Vol. 15, No. 3 (2025), p. 348. Dostupné online: https://tlq.ilaw.cas.cz/index.php/tlq/article/view/657.

[37] BREICHOVÁ LAPČÁKOVÁ, M., PAVLINSKÝ, R. Multilevel Constitutionalism and other „ISMS" in South America – Testing the Theory of Multilevel Constitutionalism on the Example of the Regime under American Conventions on Human Rights. In: The Lawyer Quarterly, Vol. 15, No. 3 (2025), p. 348. Dostupné online: https://tlq.ilaw.cas.cz/index.php/tlq/article/view/657.

[38] BREICHOVÁ LAPČÁKOVÁ, M., PAVLINSKÝ, R. Multilevel Constitutionalism and other „ISMS" in South America – Testing the Theory of Multilevel Constitutionalism on the Example of the Regime under American Conventions on Human Rights. In: The Lawyer Quarterly, Vol. 15, No. 3 (2025), p. 348. Dostupné online: https://tlq.ilaw.cas.cz/index.php/tlq/article/view/657.

[39] BREICHOVÁ LAPČÁKOVÁ, M., PAVLINSKÝ, R. Multilevel Constitutionalism and other „ISMS" in South America – Testing the Theory of Multilevel Constitutionalism on the Example of the Regime under American Conventions on Human

the German Constitution, transmitted through the Charter of Fundamental Rights of the EU, which adopted the wording in Article 1, and reinforced through the primacy of EU law and the dimension of international verticality, has ultimately found its way into the Slovak constitutional system. What might initially appear as a simple consequence of the primacy of European law is therefore considerably more complex. It reflects a dynamic constitutional interplay between two domestic legal systems and the supranational legal order of the European Union, characteristic of the common constitutional framework that lies at the heart of multilevel constitutionalism.

Article 1 of the Charter gives rise to another important discussion, one concerning the absolute dimension of human dignity under the Charter and its effects on the constitutional orders of the Member States, as well as on the EU itself. Many scholars, such as Sandra Mantu and Jackie Jones, regard Article 1 of the Charter as expressing an absolute value. Furthermore, Jackie Jones[40] argues that the strength of Article 1 lies in the fact that even where no other specific right has been violated, it may still be possible for human dignity to have been infringed. In this sense, human dignity functions as a last line of defense for human rights. Standing on its own, it separates dignity from other rights and ensures that the scope of human dignity is not exhaustively determined or limited by them. At the same time however, it connects other rights to the value of human dignity. Again, the importance of seeing human dignity as a value and as a specific right cannot be understated.

For Sandra Mantu[41], the significance of human dignity lies primarily in inclusion. She proposes the use of Article 1 of the Charter as a kind of bridge across EU Member States in order to strengthen the social rights of migrant EU citizens in jurisdictions that do not traditionally link human dignity to such rights. The Charter's role as a bridge between European constitutional systems lies in its ability to lend the absolute character of human dignity, as articulated in the Charter, to provisions of national constitutions, thereby reinforcing human rights protection and centering it more firmly on dignity. In this way, it also compels states to ensure equal treatment, as required by the effective realization of the free movement of persons.[42]

One of the prevailing issues however, at least in regard to its ability to bridge legal cultures, is that the meaning and scope of dignity may vary depending on jurisdiction and cultural context.[43] This could cause issues when trying to ascertain more uniform interpretation of human dignity, particularly, as Jackie Jones also states, when it is ultimately the constitutional courts of the Member States that apply and develop this concept.[44] Moreover, attempting to assert human dignity as an absolute value across the spectrum may be a mistake. Indeed, there is an argument to be made for dignity as a relative value. As Jackie Jones observes[45], the central question is not whether dignity is inviolable in principle, but rather how far its protection should extend in

Rights. In: The Lawyer Quarterly, Vol. 15, No. 3 (2025), p. 348. Dostupné online: https://tlq.ilaw.cas.cz/index.php/tlq/article/view/657.

[40] JONES, J. Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice. In: Liverpool Law Review, Vol. 33 (2012), p. 287. DOI 10.1007/s10991-012-9121-9.

[41] MANTU, S. When Equal Treatment is Not Enough: Human Dignity for Migrant EU Citizens. In: European Papers – A Journal on Law and Integration, Vol. 10, No. 1 (2025), p. 137. DOI 10.15166/2499-8249/828.

[42] MANTU, S. When Equal Treatment is Not Enough: Human Dignity for Migrant EU Citizens. In: European Papers – A Journal on Law and Integration, Vol. 10, No. 1 (2025), pp. 138 – 139. DOI 10.15166/2499-8249/828.

[43] BURGUEÑO, B.F. The Usefulness of the Legal Concept of Human Dignity in the Human Rights Discourse: Literature Review. In: Oxímora: revista internacional d'Ètica i Política, no. 8 (2016), p. 11. Dostupné online: https://raco.cat/index.php/Oximora/article/view/309200/399181.

[44] JONES, J. Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice. In: Liverpool Law Review, Vol. 33 (2012), p. 281. DOI 10.1007/s10991-012-9121-9.

[45] JONES, J. Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice. In: Liverpool Law Review, Vol. 33 (2012), p. 299. DOI 10.1007/s10991-012-9121-9.

concrete cases and whether one person's dignity should give way to another's autonomy or security, and whether minor interferences with dignity should carry decisive weight when set against serious incursions into other fundamental interests.

There is yet another possible way of looking at the absolute dimension of human dignity in the Charter. Since the Article 1 of the Charter took an inspiration from German Grundgesetz, we might actually look at how they deal with this question. Enter the German Federal Constitutional Court's judgment on the German Aviation Security Act.[46] The Act authorized the German armed forces to shoot down a hijacked passenger aircraft if it was going to be used as a weapon. The Court held that shooting down an aircraft carrying innocent passengers and crew would violate human dignity under Article 1(1) of the German Basic Law. By intentionally killing the innocent people on board to save others on the ground, the state would treat them as mere objects to the rescue operation rather than as autonomous subjects possessing inherent dignity, as per points 120 through 124 of the judgment. This interpretation sparked a new renewal in a debate between absolute and relative dimensions of human dignity. Robert Alexy[47] keeps the position that the relative conception is correct, although there exist some features of human dignity that move in the direction of absoluteness. The basis of his argument is his principles theory. Matthias Klatt[48] point to the weighing formula and considers human dignity to still be possible to be weighed against other principles, although he does acknowledge that human dignity has its own specifics and that here in this decision, the weights treated human dignity in the highest normative weight. He leans heavily on principles theory as well. Oliver Lepsius[49] on the other hand used the case to defend a stronger conception of human dignity as a constitutional limit that resists consequentialist trade-offs. Overall, he agrees with the judgment fully and praised the court's decision to strike down the Act.

Aside from these approaches, we may not venture far from the Charter itself. Article 52 of the Charter says that all the rights are subject to the principle of proportionality, while limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others. The Charter itself does then seem to make weighing and balancing possible. Taken together, the debate over the absolute versus relative character of human dignity shows itself as less of a doctrinal contradiction than a reflection of its complex constitutional function. From this perspective, an overly rigid, positivistic reading of human dignity would miss its point. Dignity was never meant to paralyze constitutional reasoning by standing above all other values in every conceivable situation. Its inviolability instead signals its foundational role in human rights protection and in equal treatment of all people. In this sense, human dignity does not belong to states or constitutions, but to individuals themselves. It is a value that transcends borders and, in appropriate contexts, lends its absolute character, most clearly articulated in Article 1 of the Charter, to other rights that require enhanced normative weight in the balancing process. By its very nature, dignity resists the construction of rigid hierarchies among rights, which is precisely its biggest strength. Ultimately, the supposed battle between absolute and relative character of human dignity is in large part unnecessary. Human dignity must sometimes operate as an

[46] Judgment of the Federal Constitutional Court of Germany BVerfG, 1 BvR 357/05, 115 BVerfGE 118 (2006).

[47] ALEXY, R. Menschenwürde und Verhältnismäßigkeit. In: Archiv des öffentlichen Rechts (AöR), Vol. 140, Issue 4 (2015), pp. 497 – 513. DOI 10.1628/000389116X14525976022207.

[48] KLATT, M., SCHMIDT, J. Epistemic discretion in constitutional law. In: International Journal of Constitutional Law, Vol. 10, Issue 1 (2012), pp. 69 – 105. DOI 10.1093/icon/mor056.

[49] LEPSIUS, O. Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act. In: German Law Journal, Vol. 7, Issue 9 (2006), pp. 761 – 776. DOI 10.1017/S2071832200005071.

absolute value and, at other times, as a relative one, depending on the constitutional context in which it is invoked.

VI. CONCLUSION

Throughout this article, we have examined the protection of human dignity within the constitutional framework of the Slovak Republic and the extent to which this protection is strengthened by the Charter of Fundamental Rights of the European Union. The analysis leads to several conclusions. While Slovak Constitution does protect human dignity as a value, it only explicitly works as legal principle or a specific right. Overall, human dignity as a value is conceptually separated from rights, apart from article 19, where it makes an appearance as a specific human right, closely connected to rights such as personal honor or protection of a good name. Such limited and fragmented treatment raises legitimate doubts as to whether human dignity enjoys sufficiently robust protection within the constitutional order of the Slovak Republic. The Constitutional Court of the Slovak Republic, however, has made it clear that human dignity is a very important and protected legal value connected to numerous other rights and even went as far as proclaiming it to be absolute in character.

The role of the Charter of Fundamental Rights of the European Union in protection of human dignity is equally significant. The Charter strengthens the constitutional protection of human dignity in two essential ways. First, it proclaims the inviolability of human dignity in Article 1, affirming its absolute dimension in a more explicit manner. Second, it structurally connects a wide range of fundamental rights to the underlying value of human dignity. This dual effect has important consequences. On the one hand, rights already enshrined in the Slovak Constitution may be interpreted in light of human dignity as a foundational value. On the other hand, the inviolability of dignity enhances the normative force of those rights, particularly in situations involving balancing or conflicts between competing rights. In this sense, the Charter operates as an amplifier, reinforcing the constitutional protection of dignity without formally altering the text of the Slovak Constitution. Comparable effects can be observed in other Member States, suggesting that this strengthening is a product of intra-systemic cooperation between the Charter and constitutions of the EU member states.

Human dignity remains an open and abstract concept. Yet this indeterminacy should not be viewed as a weakness, but rather as a source of its enduring normative strength. As the analysis demonstrated, human dignity operates effectively despite the vagueness of its substance. Its open-ended character enables protection even in situations where no specific fundamental right has been found to be violated, and it can function as a unifying bridge among Member States by reinforcing the equal treatment of all individuals. Our analysis has also shown that human dignity frequently operates in its absolute dimension, particularly as a means of strengthening other rights through conceptual linkage. Yet it is undoubtably true that there may be cases where this is not preferrable and where we might need to treat human dignity as a relative value. Entrusting courts with this determination does not amount to judicial activism, but it reflects the nature of constitutional adjudication itself and preserves the protective function of fundamental values.

KEY WORDS

Constitution of the SR, Human dignity, Charter of the fundamental rights of the EU, Constitutional pluralism, Human rights

KĽÚČOVÉ SLOVÁ
Ústava SR, Ľudská dôstojnosť, Charta základných práv EÚ, ústavný pluralizmus. Ľudské práva

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PUBLIC INTEREST IN THE CONTEXT OF EXPROPRIATION IN THE CZECH REPUBLIC AND POLAND[1]

VEREJNÝ ZÁUJEM V KONTEXTE VYVLASTNENIA V ČESKEJ REPUBLIKE A POĽSKU

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ABSTRACT

The article addresses public interest as a key constitutional condition for expropriation in the Czech and Polish legal systems. Its aim is to analyse the normative framework, interpretative approaches, and practical application of this concept, particularly in relation to the decision-making of administrative authorities and courts. The text is based on legal analysis and comparative methods, drawing on legislation, case law, and legal doctrine of both countries, complemented by relevant case law of the European Court of Human Rights. The article highlights the indeterminate nature of public interest and the interpretative difficulties associated with it, including its relationship to similar concepts. Special attention is paid to the question of which authority is competent to determine public interest and how its existence should be demonstrated. The comparative approach makes it possible to systematically identify similarities and differences between the Czech and Polish legal frameworks and their application in practice, thereby contributing to a deeper understanding of the functioning of public interest in the context of expropriation. This comparison also reveals the strengths and weaknesses of both approaches and offers inspiration for potential improvements in legislation and decision-making practice.

ABSTRAKT

Článek se zabývá veřejným zájmem jako klíčovou ústavní podmínkou vyvlastnění v českém a polském právním řádu. Cílem je analyzovat jeho normativní zakotvení, interpretační přístupy a praktickou aplikaci, zejména ve vztahu k rozhodovací činnosti správních orgánů a soudů. Text vychází z právně-analytické a komparativní metody a opírá se o právní úpravu, judikaturu i právní doktrínu obou zemí, doplněnou o relevantní judikaturu Evropského soudu pro lidská práva. Článek poukazuje na neurčitost pojmu veřejného zájmu a s tím spojené interpretační obtíže, včetně jeho vztahu k obdobným pojmům. Zvláštní pozornost je věnována otázce, který orgán je oprávněn veřejný zájem určovat a jakým způsobem má být jeho existence prokazována. Komparativní přístup umožňuje systematicky identifikovat shody a rozdíly mezi českou a polskou právní úpravou i aplikační praxí, a tím přispívá k hlubšímu pochopení fungování institutu veřejného zájmu v kontextu vyvlastnění. Toto srovnání zároveň odhaluje silné a slabé stránky obou přístupů a nabízí podněty pro případné zlepšení právní úpravy i rozhodovací praxe.

I. INTRODUCTION

Expropriation is one of the most intense interventions by public authorities into an individual's right to property. In a democratic state governed by the rule of law, its admissibility is therefore subject to strict constitutional and legal conditions, among which the existence of

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public interest plays a key role. This requirement is enshrined both in the national constitutional systems of European states and in international documents on the protection of fundamental rights, and its significance lies in legitimising interference with one of the most important fundamental rights of the individual. Although a public interest is generally understood in democratic states governed by the rule of law as a fundamental prerequisite for expropriation, its specific definition, interpretation and application in practice raise long-standing theoretical and practical problems.

The primary aim of this article is to examine and comparatively assess the legal construction, interpretation and practical application of public interest as a constitutional condition for expropriation in the Czech and Polish legal systems. The article seeks to determine how the requirement of public interest or public purpose is defined at the constitutional and statutory levels, how its content is subsequently specified through legal interpretation and judicial decision-making, and how responsibility for its identification and assessment is distributed among the legislature, administrative authorities and courts.

A further aim is to assess whether and to what extent the different normative and institutional approaches adopted in the Czech Republic and Poland affect the protection of property rights and the legal position of persons subject to expropriation. Particular attention is therefore paid to the mechanisms through which the public interest is established, demonstrated or presumed in expropriation proceedings and to the scope of judicial review of its existence. The comparative analysis is intended not merely to identify formal similarities and differences, but to explain their substantive significance for the balance between the public objectives pursued through expropriation and the protection of individual property rights. On this basis, the article also aims to identify the principal strengths and potential weaknesses of the Czech and Polish approaches and to formulate conclusions concerning the further development of legal regulation and decision-making practice in this area.

The analysis is guided by the following research questions: RQ1: How is public interest as a constitutional condition for expropriation normatively constructed in the Czech and Polish legal systems, and what role do constitutional and statutory provisions play in determining its content? RQ2: How is the content of public interest or public purpose specified and applied in the decision-making practice of administrative authorities and courts, and what criteria are used to determine whether an expropriation pursues a legitimate public interest? RQ3: How is the responsibility for defining, establishing and reviewing the existence of public interest distributed among the legislature, administrative authorities and courts in the Czech and Polish legal systems? RQ4: What are the principal similarities and differences between the Czech and Polish approaches, and what are their implications for the protection of property rights, legal certainty and the judicial review of expropriation?

Methodologically, the article is based primarily on a legal-dogmatic analysis combined with a comparative method. The research proceeds from the assumption that the concept of public interest in the context of expropriation cannot be examined solely through the wording of statutory provisions. Its actual legal meaning and practical significance emerge from the interaction of constitutional principles, statutory regulation, administrative decision-making, judicial review and legal doctrine. The analysis therefore combines several mutually complementary methods in order to address the research questions comprehensively.

First, the legal-dogmatic method is used to identify and analyse the relevant legal framework governing expropriation and the requirement of public interest in the Czech and Polish legal systems. Particular attention is paid to the constitutional provisions establishing the conditions for expropriation, the statutory regulation of expropriation and the relevant provisions defining public interest or public purposes for which expropriation may be undertaken. The analysis focuses not only on the wording of individual provisions, but also on their systematic and purposive meaning and on their position within the respective legal orders.

This approach makes it possible to determine how the requirement of public interest is normatively constructed and how it relates to the other legal conditions governing the admissibility of expropriation.

Second, an interpretative analysis is employed to examine the legal meaning and scope of the concept of public interest as a vague legal concept. The analysis focuses in particular on the relationship between public interest and related concepts used in the relevant legislation and legal discourse, such as general interest, public purpose, public benefit or general welfare. Rather than attempting to establish an abstract and universally applicable definition of public interest, the article examines how its content is constructed and specified through legislation, legal doctrine and judicial decision-making.

Third, the article applies a case-law analysis to examine how the relevant legal requirements are interpreted and applied in practice. The analysis covers, in particular, the decisions of the Czech Constitutional Court, the Czech Supreme Administrative Court and the Czech Supreme Court, as well as the relevant case law of the Polish constitutional and administrative courts. The selected case law is used not merely illustratively, but as a source for identifying the development of legal interpretation, the competing approaches to the determination and proof of public interest, and the respective roles of the legislature, administrative authorities and courts. Particular attention is consequently paid to cases concerning the question whether public interest may be determined by the legislature in advance, whether it must be established in an individual expropriation proceeding, and to what extent its existence is subsequently subject to judicial review. The analysis thus also takes into account the temporal development of the relevant case law where changes in judicial interpretation are material to understanding the present legal position.

Fourth, a comparative method is applied to identify similarities and differences between the Czech and Polish approaches. The comparison is not limited to a juxtaposition of statutory provisions. It is conducted functionally, focusing on how both legal systems address the same fundamental problem: how to reconcile the constitutional protection of property with the possibility of expropriation in pursuit of a public interest or public purpose. The comparison therefore examines, in particular, (i) the normative construction of public interest or public purpose, (ii) the role of the legislature in defining or presuming its existence, (iii) the role of administrative authorities in individual expropriation proceedings, (iv) the scope of judicial review, and (v) the mechanisms used to balance public and private interests. This approach makes it possible to distinguish differences in terminology from differences that have genuine legal and practical consequences.

The analysis is further supplemented by the examination of relevant legal doctrine in both countries. Scholarly literature is used to identify the principal theoretical approaches to the concept of public interest, to map doctrinal disagreements concerning its interpretation and to provide the analytical context for the assessment of legislation and case law. Particular attention is paid to doctrinal views concerning the nature of public interest as a vague legal concept, its relationship to private interests and related legal concepts, and the constitutional limits on its determination in the context of expropriation.

II. PUBLIC INTEREST – A CONSTITUTIONAL CONDITION FOR EXPROPRIATION

Expropriation represents the most serious interference with the right to property. Although the necessity of guarantees and the need to protect the right to property are reflected in both international law standards[3] and national legal systems (typically at the constitutional level), it should be noted that the right to property cannot currently be understood as

[3] See Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, or Article 17 of the Charter of Fundamental Rights of the European Union.

"unrestricted legal dominion over property".[4] It is necessary to respect the needs of society as a whole, or public interests, as well as the exercise of the rights and freedoms of other entities that may conflict with the property rights of a specific owner. Historically, expropriation has been understood in various ways, particularly in relation to the legal grounds for expropriation and the subject of expropriation.[5] Typically, however, this involved the expropriation of rights to real estate on the basis of an act of law. Even today, expropriation is generally understood as a forced transfer or forced restriction of ownership rights on the basis of an administrative decision.[6]

Polish legal doctrine defines expropriation in a similar manner. Parchomiuk states,[7] that it involves a compulsory transfer of ownership, based on an individual legal act, for the public good and in return for compensation.[8] Similarly, case law states[9] that it involves the restriction or complete deprivation of the right of ownership of a specific property for public purposes in favour of a specific entity (the state treasury or a specific local authority), carried out by an individual act, specifically an administrative decision. At the same time, however, there are also concepts of a 'broader' understanding of expropriation (both in Polish case law and legal scholarship), which interpret expropriation as any deprivation of ownership for public purposes, regardless of its form (not only on the basis of an administrative decision), and fair compensation.[10]

Given the seriousness and legal consequences of expropriation, national legal systems and European documents set out the conditions and limits under which this institution can be implemented. At least some of these conditions are typically enshrined directly at the constitutional level. This applies both to the present, if we look at the current regulations of European countries, and historically, if we look at the regulations that preceded them.[11] This fact is also confirmed by the current Czech legal system, where the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the "Charter"), as part of the constitutional order of the Czech Republic, stipulates that expropriation is only possible: in the public interest, on the basis of law and with compensation. One of the three constitutional conditions for expropriation is thus the clearly and explicitly formulated requirement of the existence of public interest. The legal regulation in the form of the Expropriation Act[12] adds to this condition that expropriation is permissible only for the purpose of expropriation specified by a special law and only if the public interest in achieving this purpose outweighs the preservation of the existing rights of the expropriated party (Section 3), and the public interest in expropriation must be proven in expropriation proceedings (Section 4). Similarly, Article 21 of the Polish

[4] GRYGAR., T., FRUMAROVÁ, K., HORÁK, O., MASARIK, M. *Vyvlastnění a vyvlastňovací řízení*. Praha: Wolters Kluwer, 2020, p. XVII. ISBN 978-80-7598-968-0.
[5] KRČMÁŘ, J. *Práva věcná.* Praha: Všehrd, 1925, p. 59.
[6] STAŠA, J. in HENDRYCH, D. et alii. *Správní právo. Obecná část*. Praha: C. H. Beck, 2019, pp. 229-230. ISBN 978-80-7400-624-1.
[7] PARCHOMIUK, J. *Konstytucyjnoprawne pojęcie wywłaszczenia*. In Roczniki Wydzialu Nauk Prawnych I Ekonomicznych Kul, 2005, 1(1), pp. 77. ISSN 1896-6365.
[8] CZUBA, S. *Cywilnoprawna problematyka wywłaszczenia*. Warszawa 1980, pp. 19-20. See also WIERZBOWSKI, B. *Gospodarka nieruchomościami*, Warszawa 2008, pp. 183–185.
[9] Judgment of the Constitutional Tribunal of Poland of 28 May 1991, ref. no. K. 1/91, OTK 1991, nr 1.
[10] JAROSZ-ZUKOWSKA, S. *Konstytucyjna zasada ochrony własnosci*, Kraków, 2003, p. 233; KOSIKOWSKI, C. *Zasada ochrony własnośći*. In: *Konstytucyjne podstawy systemu prawa*, red. M. Wyrzykowski, Warszawa, 2001, p. 237; SZALEWSKA, M. *Wywłaszczenie nieruchomośći*, Toruń, 2005, p. 52; SZEWCZYK, M. *Konstytucyjna zasada słusznego odszkodowania i jej realizacja w ustawodawstwie zwykłym*. In: *Prawo administracyjne w okresie transformacji ustrojowej*, Kraków, 1999, p. 432.
[11] Article XVII of the Declaration of the Rights of Man and of the Citizen of August 1789 described property as "an *inviolable and sacred right. No one may be deprived of it except in cases where it is clearly required by a legally established public necessity and on condition that he is fairly and adequately compensated in advance*". Similarly, Article 5 of the Austrian Constitution of December 1867 declared property to be "inviolable" and expropriation possible only on the basis of law.
[12] Act No. 184/2006 Coll., on the Expropriation or Restriction of Ownership Rights to Land or Buildings (Expropriation Act).

Constitution stipulates that expropriation is permissible only for public purposes and for fair compensation.[13]

Other European countries also reflect public interest as a constitutional condition for expropriation. The Constitution of the Slovak Republic stipulates that "expropriation or compulsory restriction of ownership rights is possible only to the extent necessary and in the public interest, on the basis of law and for adequate compensation" (Article 20).[14] Similarly, the German Constitution (Das Grundgesetz of 1949) links expropriation to the existence of public good (Article 14: "Eine Enteignung ist nur zum Wohle der Allgemeinheit zulässig.").[15]

The constitutional recognition of public interest, public purpose or a closely related concept as a condition for expropriation is not limited to the Czech, Polish, Slovak and German legal orders. A comparative examination of European constitutional traditions reveals that the requirement underlying the permissibility of expropriation is expressed through a variety of concepts. Constitutions refer to "public interest" (e.g. Czechia, Slovakia, Estonia or Hungary[16]), "public purposes" (Poland and Latvia[17]), "public benefit" (Greece[18]), "public utility" (Luxembourg and Romania[19]), "needs of society" (Lithuania[20]), "public good" (Germany), "public weal" (Denmark[21]), "general interest" (Italy[22]), or "social necessity" (Ukraine[23]). Despite these terminological differences, the provisions perform a broadly comparable constitutional function: they make the deprivation of private property conditional upon the pursuit of a legally relevant collective objective and thereby exclude expropriation based solely on the interests of the expropriating authority or another individual beneficiary.

Similarly, the condition of public interest for expropriation is formulated in European documents, in particular in Article 17 of the Charter of Fundamental Rights of the European Union and Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Although public interest is a fundamental and mandatory condition for expropriation across European legal systems, the interpretation of this concept and its application in

[13] Konstytucja Rzeczypospolitej Polskiej z dni 2 kwietnia 1997. For more details see PARCHOMIUK, J. *Konstytucyjnoprawne pojęcie wywłaszczenia*. In Roczniki Wydzialu Nauk Prawnych I Ekonomicznych Kul, 2005, 1(1), pp. 75-108. ISSN 1896-6365.

[14] Constitutional Act No. 460/1992 Coll., Constitution of the Slovak Republic.

[15] Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949 (BGBl. S. 1).

[16] Article XIII(2) of the Hungarian Constitution: Property may only be expropriated exceptionally, in the public interest and in the cases and ways provided for by an Act, subject to full, unconditional and immediate compensation. Article 32 of the Constitution of the Republic of Estonia: Property may be expropriated without the consent of the owner only in the public interest, in the cases and pursuant to a procedure provided by a law, and for fair and immediate compensation. Everyone whose property is expropriated without his or her consent has the right of recourse to the courts and to contest the expropriation, the compensation or the amount thereof.

[17] Article 105 of the Constitution of the Republic of Latvia: Expropriation of property for public purposes shall beallowed only in exceptional cases on the basis of a specific law and in return for fair compensation.

[18] Article 17(2) of the Constitution of Greece: No one shall be deprived of his property except for public benefit which must be duly proven, when and as specified by statute and always following full compensation corresponding to the value of the expropriated property at the time of the court hearing on the provisional determination of compensation. In cases in which a request for the final determination of compensation is made, the value at the time of the court hearing of the request shall be considered.

[19] Article 44(3) of the Constitution of Romania: No one may be expropriated, except on grounds of public utility, established according to the law, against just compensation paid in advance. Article 16 of the Constitution of Luxembourg: One may only be deprived of his property for a reason of public utility and with consideration of a just indemnity, in the case and in the manner established by the law.

[20] Article 23 of the Constitution of the Republic of Lithuania: Property may be taken only for the needs of the society according to the procedure established by law and shall be justly compensated for.

[21] Article 73(1) of Constitution of Denmark: No person shall be ordered to cede his property except where required by the public weal. It can be done only as provided by Statute and against full compensation.

[22] Article 42 of the Constitution of the Italian Republic: In the cases provided for by the law and with provisions for compensation, private property may be expropriated for reasons of general interest.

[23] Article 41 of the Constitution of Ukraine: The expropriation of objects of the right of private property may be applied only as an exception for reasons of social necessity, on the grounds of and by the procedure established by law, and on the condition of advance and complete compensation of their value. The expropriation of such objects with subsequent complete compensation of their value is permitted only under conditions of martial law or a state of emergency.

expropriation proceedings is difficult,[24] with both legislation and judicial practice are undergoing continuous and interesting developments and changes in this regard, and even the opinions and conclusions of legal doctrine on solving problems relating to public interest in the context of expropriation are not uniform and unambiguous. The public interest, its establishment and interpretation in the area of (not only) expropriation has thus been a legal challenge for decades,[25] both for legislators and for the authorities applying it in practice (in particular public authorities and courts).

III. "PUBLIC INTEREST" – CAN WE REACH A CONSENSUS ON ITS DEFINITION?

The very nature of the term "public interest" is highly complex, as it is a vague legal concept,[26] a typical and frequently occurring phenomenon (not only) in the field of administrative law. Hácha already considered vague legal concepts to be "*a necessary means of expression in legislative technique, which does not want to take the casuistry of abstract norms to extremes*,"[27] and this statement can still be unequivocally agreed with today. There are rational reasons for using vague legal concepts in legislation. On the other hand, it leads to inconsistency in the interpretation of a given term and causes problems in distinguishing it from or, conversely, identifying it with similar terms (such as general interest, general welfare, etc.).[28] The term public interest is primarily interpreted by public authorities applying the law (i.e. administrative authorities and courts) as well as by legal doctrine. At the same time, however, the legislative power has also taken up its definition, albeit somewhat problematically (see below).

There are many definitions and interpretations of the term "public interest"; here are just a few examples. According to the Supreme Administrative Court of the First Czechoslovak Republic*, "public interest is given if work is undertaken for the purpose of meeting the needs of a broader entity, whether state, territorial, social, etc."*[29] If we look at administrative doctrine, Vopálka, for example, defined public interest as *"the general interest of the community, based on the common will to resolve certain issues."*[30] According to Borkowski, public interest is "*the potential realisation of certain objective collective needs which are considered optimal and necessary in a given organised society at a given time and under certain conditions and which cannot be satisfied (achieved) at the level of individual freedom (liberty) due to an imbalance between the interests of the individual (or group) and the interests of the community*."[31] Another representative of Polish doctrine, Wyrzykowski, points out that the public interest is "*the interest of all people living in a politically organised community, where the realisation of certain legitimate public interests is ensured, organised in a specific form with respect for individual freedom as an inalienable part of public welfare. The realisation and protection of such general interests should be unconditionally required in order to ensure the existence of a common,*

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[24] MODLINSKI, E. *Pojęcie interesu publicznego w prawie administracyjnym,* Varšava 1932, p. 16.

[25] For a critical analysis of the interpretation and application of this concept, see UERPMANN-WITTZACK, R., TICHÝ, L., TROUP, T. *Veřejný zájem jako klíčový pojem či prázdná floskule*. In Správní právo, 2020, no. 3, pp. 176-188. ISSN 2788-2241.

[26] Vague legal terms "*are terms used in legal norms without their scope and/or content being precisely defined by law (i.e., neither in the norm in which they appear nor in any other legal norm), nor are they defined by their linguistic meaning alone*. SKULOVÁ, S. *Správní uvážení – základní charakteristika a souvislosti pojmu*. Brno: MU, 2003, p. 20. ISBN 80-210-3237-5.

[27] HÁCHA, E. *Slovník veřejného práva československého: I až O*. Svazek II. 2. díl. Brno: Polygrafia, 1932, p. 843.

[28] Mates also points to the potential disruption of legal certainty and the unambiguity of the wording of legal norms. MATES, P. *K problematice neurčitých právních pojmů ve správním právu.* In Právní rozhledy, 2007, no. 9, pp. 326-329. ISSN 1210-6410.

[29] Ruling of the Czechoslovak Supreme Administrative Court Boh. A. 14.224.

[30] VOPÁLKA, V. *Ve veřejném zájmu*. In VANDUCHOVÁ, M., HOŘÁK, J. (eds.). *Na křižovatkách práva. Pocta Janu Musilovi k 70. narozeninám*. Praha: C. H. Beck, 2011, p. 385. ISBN 978-80-7400-388-2.

[31] BORKOWSKI, A. *Interes publiczny a partnerstwo publiczno-prywatne*. In Blicharz J.(ed.), *Prawne aspekty prywatyzacji, Prace Naukowe Wydziału Prawa, Administracji i Ekonomii UWr*, Wrocław 2012, pp. 443-459. Accessible at: https://bibliotekacyfrowa.pl/Content/40022/26_Andrzej_Borkowski.pdf.

peaceful life of a society composed of groups, components and individuals with diverse interests and needs."[32]

When defining the concept of public interest, it is tempting to contrast it with private interest, but such a conception cannot be considered entirely accurate.[33] In practice, there may be situations where these interests are in harmony (or where the public interest subsumes the private interest),[34] as well as situations where they are in conflict,[35] particularly in relation to expropriation. Both of these scenarios may arise in the area of expropriation, and if there is a conflict between the public interest and private interests, it is necessary to proceed and make decisions primarily on the basis of the principle of proportionality (see below).[36]

Another problem related to the definition of public interest is the fact that legislators do not work solely with this term but also use very similar expressions. The question is therefore what similar terms used in legislation (and often relating to the issue of expropriation) can be considered synonymous with public interest? Mlsna points out that "*from a historical perspective*, *the concept of public interest is not identical to state, economic, social or ethical interests*".[37] It is true that, especially before 1989, these interests were interpreted in the Czechoslovak Socialist Republic in accordance with the interests of the Communist Party and its ideology (and the same was true in Poland). Mlsna further adds that the public interest is a set of all interests that merge and converge in the concept of the "common good".[38] Grygar, however, argues that this identification of public and general interest (common good) cannot be fully agreed with, as, for example, the Czech distinguishes between the concepts of "public interest" and "general interest".[39] Article 11(3) of the Charter stipulates, among other things, that property "may not be abused in contravention of the general interests protected by law". In contrast, Article 11(4) of the Charter, which regulates the constitutional conditions for expropriation, refers not to the general interest but to the public interest. Koudelka adds that "*the general interest is a broader concept than the public interest, and its fulfilment is primarily the mission of the application of law*", while "*the public interest is a subset of the general interest*".[40] At the same time, he states that what distinguishes the general interest from the public interest is the presence of a public law element of the interest in question, which is represented by a public law corporation to which the public interest is linked.[41]

However, such a conclusion about the necessity of a public law element must be understood with great caution.[42] With regard to expropriation, this opinion cannot be interpreted to mean that only public law corporations (i.e. the state or local government entities, such as municipalities) can be expropriators. Therefore, Koudelka's opinion cannot be endorsed. There

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[32] WYRZYKOWSKI, M. *Pojęcie interesu społecznego w prawie administracyjnym*. Warszawa 1986, p. 36.

[33] ELIÁŠ, Karel. *Veřejný zájem (Malá glosa k velkému tématu).* Ad Notam, 1998, č. 5, p. 103. ISSN 1211-0558.

[34] For example, the interests of a businessperson engaged in public utility projects may align with the public interest (e.g., in the energy sector).

[35] As Tomoszek and Vomáčka state, in such a case, "*private interest gives way to measures taken in the public interest, provided that the conditions of legality, non-discrimination and proportionality of such measures are met*". TOMOSZEK, Maxim, VOMÁČKA, Vojtěch. *Article 11 [Protection of property]*. In: HUSSEINI, F., BARTOŇ, M., KOKEŠ, M., KOPA, M., CAMRDA, J., HEJČ, D., HLOUCH, L., MATOUŠ, M. MORAVEC, O., NECHVÁTALOVÁ, L., NOVÁK, J., PEKAŘOVÁ, L., RIGEL, F., TOMOSZEK, M., TOMOSZKOVÁ, V., VOMÁČKA, V., VÝBORNÝ, Š. *Listina základních práv a svobod: komentář*. Praha: C. H. Beck, 2020, p. 362. ISBN 978-80-7400-812-2.

[36] For details, see, for example, STAWECKI, M. *Konflikt interesu publicznego z prywatnym na tle instytucji wywłaszczenia nieruchomości.* In Annales Etyka w zyciu gospodarczym, 2012, no. 15, pp. 221-229. DOI: 10-18778/1899-2226.15.19.

[37] [37] MLSNA, P. In RYCHETSKÝ, P. et alii. *Ústava České republiky. Ústavní zákon o bezpečnosti ČR. Komentář*. Praha: Wolters Kluwer, 2015, p. 317. ISBN 978-80-7478-809-3.

[38] MLSNA, P. In RYCHETSKÝ, P. et alii. *Ústava České republiky. Ústavní zákon o bezpečnosti ČR. Komentář*. Praha: Wolters Kluwer, 2015, p. 317. ISBN 978-80-7478-809-3.

[39] GRYGAR., T., FRUMAROVÁ, K., HORÁK, O., MASARIK, M. *Vyvlastnění a vyvlastňovací řízení.* Praha: Wolters Kluwer, 2020, pp. 44-46. ISBN 978-80-7598-968-0.

[40] KOUDELKA, Z. *Správní žaloba ve veřejném zájmu.* In Trestní právo, 2013, no. 7-8, p. 18. ISSN 1211-2860.

[41] KOUDELKA, Z. *Správní žaloba ve veřejném zájmu*. In Trestní právo, 2013, no. 7-8, p. 18. ISSN 1211-2860.

[42] GRYGAR., T., FRUMAROVÁ, K., HORÁK, O., MASARIK, M. *Vyvlastnění a vyvlastňovací řízení*. Praha: Wolters Kluwer, 2020, pp. 44-46. ISBN 978-80-7598-968-0.

are a number of private law entities[43] that are bearers of the public interest in the implementation of certain activities, a typical example being entrepreneurs of so-called public utility works[44] (e.g. entrepreneurs under the Energy Act). This was very aptly summed up by the Czech Constitutional Court, according to which the criterion of personifying the public interest with a public law entity is not entirely wrong, as it is a regular feature of expropriation, but it is not a necessary feature.[45] The Constitutional Court further added that the idea of a single public interest in a democratic state governed by the rule of law is laughable, as the term "public interest" referred to in Article 11 of the Charter is "*merely a certain abstraction of a set of specific public interests that may, and often do, clash as universal and particular or local public interests (environmental protection vs. expansion of mining areas, state revenues vs. the negative consequences of mineral extraction), just as private and public interests may conflict with each other*."[46]

A contrario, we can therefore conclude that the terms should be identical. Similar views are also held by case law. The Supreme Court of the Czech Republic states that the public interest in expropriation "*cannot be seen solely in the interest of the state or state institutions; it may also exist when it is necessary to enable the use of privately owned property.*"[47] Therefore, it is in the public interest, for example, to establish necessary access to a private person's building, as it is undoubtedly in the interest of society to create conditions for property owners to exercise their rights and obligations. Similarly, Polish authors state that the entity entitled to expropriation may be the state or a public association, generally a public law entity, or even a private entity, provided that the purpose of the enterprise is of public benefit.[48] The ECHR shares this view: "Neither can it be read into the English expression 'in the public interest' that the transferred property should be put into use for the general public or that the community generally, or even a substantial proportion of it, should directly benefit from the taking."[49]

In the context of the above considerations on what constitutes public interest and which concepts can be considered identical and which cannot, the ECHR's approach to this interpretative issue appears to be very rational and inspiring. If we look at Article 1 of Protocol 1 to the Convention, which regulates the protection of property, it uses both the concept of public interest and the concept of general interest. This is therefore a completely identical situation to the Czech regulation in the Charter. However, this terminological issue does not cause any problems in the ECHR's application practice. As Bobek and Hubková point out, the reason for this is that the ECHR does not insist on the semantic scope of the terms,[50] and in the ECHR's decision-making practice, both categories are often merged under one category of "legitimate aim" (or legitimate interest) if any aspect of the protection of property is to be restricted. The ECHR therefore makes no distinction between "public" and "general" interest and at the same time leaves ample room for the state's own discretion.[51] As stated in the decision

[43] For more details, see: HANDRLICA, J. *Vyvlastňovací tituly podnikatelů všeužitečných děl*. In Právní rozhledy. 2018, no. 2, pp. 44-50. ISSN 1210-6410, or HANDRLICA, J. *Expropriační tituly subjektů soukromého práva*. In Právník, 2016, no. 10, pp. 818-828. ISSN 0231-6625.

[44] HANDRLICA, J. *Vyvlastňovací tituly podnikatelů všeužitečných děl*. In Právní rozhledy. 2018, no. 2, pp. 44-50. ISSN 1210-6410.

[45] Decision of the Constitutional Court of the Czech Republic, no. Pl. ÚS 27/16, dated December 18, 2018.

[46] Decision of the Constitutional Court of the Czech Republic, no. Pl. ÚS 27/16, dated December 18, 2018. Similarly see ZDYB, M. *Prawny interes jednostki w sferze materialnego prawa administracyjnego. Studium teoretyczno-prawne*. Lublin, 1991, pp. 219–223.

[47] Judgment of the Supreme Court of the Czech Republic of 16 May 2012, no. 28 Cdo 1857/2011.

[48] BLAZEWSKI M. *Prawo wywłaszczeniowew świetle poglądów Tadeusza Bigi*, pp. 136-137. In KOCOWSKI, T., LISOWSKI, P., PAPLICKI, M. (eds) Tadeusz Bigo o administracji i prawie administracyjnym – refleksje wrocławskiej szkoły administratywistycznej. Wroclaw, 2020. DOI: 10.34616/23.20.062.

[49] ECHR Judgment in the case of James and Others v. The United Kingdom, 21 February 1986, no. 8793/79.

[50] KMEC, J., KOSAŘ, D., KRATOCHVÍL, J., BOBEK, M. et alii. *Evropská úmluva o lidských právech. Komentář.* Praha: C. H. Beck, 2025, s. 1602-1609. ISBN 978-80-7699-033-3.

[51] KMEC, J., KOSAŘ, D., KRATOCHVÍL, J., BOBEK, M. et alii. *Evropská úmluva o lidských právech. Komentář*. Praha: C. H. Beck, 2025, s. 1602-1609. ISBN 978-80-7699-033-3.

in *Hutten-Czapska v. Poland, "any interference with the exercise of a right or freedom recognised by the Convention must pursue a legitimate aim. The very principle of "fair balance" contained in Article 1 of Protocol No. 1 presupposes the existence of a general interest of society. […] Thanks to their direct knowledge of the society in question and its needs, national authorities are generally better placed than judges of an international court to assess what is in the 'general' or 'public' interest. In the system of protection established by the Convention, it is therefore primarily for the domestic authorities to be the first to rule on the existence of a public interest issue that would justify the adoption of measures in the field of the exercise of property rights.* In its decisions, the ECHR expressly states that the concepts of "public interest" or "general interest" are inherently quite broad. It therefore considers it natural that (national) legislators have broad discretion in introducing social and economic measures and has repeatedly stated that it respects the national legislature's understanding of the requirements of the "public" or "general" interest, unless its judgment is manifestly lacking in "rational basis".[52]

We consider this approach to be suitable for practical application as well. Legislators use very similar-sounding terms in various laws – public interest, public benefit, general interest, general welfare, etc. – and it is not possible to identify the reasons for these linguistic differences from explanatory reports or historical and social context. This situation leads to both practice (especially the courts) and doctrine identifying these terms in some cases and not in others. This artificially creates ambiguities and problems, especially in relation to the addressees of legal norms (and there is a risk of undermining the principles of legal certainty and legitimate expectations). At the same time, it should be noted that even the examples mentioned above of the various formulations and expressions of the 'public interest' in European constitutions demonstrate that, despite the different linguistic formulations, the concept should still be one and the same in terms of its content and, in particular, the functions it is intended to fulfil in the context of expropriation.

The solution is therefore to view these "different" concepts from the perspective of "legitimacy", i.e. whether the interest pursued by the expropriation is legitimate from the point of view of the will of the state and the legislator, as expressed both in the specific legal norm and in the context of the entire legal regulation in question and its purpose. If expropriation is carried out, for example, for the purpose of constructing energy infrastructure or preserving endangered cultural monuments, this is undoubtedly a "legitimate interest" of society and the state, regardless of whether it is referred to in the law as a public or general interest, public purpose, public benefit, the common good and so on. This allows us to overcome the above-mentioned interpretative problems associated with the application of public interest (not only) in expropriation proceedings.

IV. FINDING AND PROVING PUBLIC INTEREST IN EXPROPRIATION PROCEEDINGS IN THE CZECH REPUBLIC

Another key and, at the same time, very complex issue in practice is who should interpret the vague legal concept of "public interest" in relation to expropriation, i.e. 1) which authority should interpret whether expropriation is in the public interest, and 2) whether it should do so in general, by type (for certain similar cases and specific addressees) or individually (in relation to a specific matter/activity and a specific person). As mentioned above, the Charter stipulates that expropriation is only possible in the public interest, while the Expropriation Act adds that expropriation is only permissible for the purpose of expropriation specified by a special law (the so-called expropriation title) and only if the public interest in achieving this purpose outweighs the preservation of the existing rights of the expropriated

[52] ECHR Judgment in the case of Zich and Others v. the Czech Republic, 18 July 2006, no. 48548/99, similarly ECHR Judgment in the Case of Pincová and Pinc v. the Czech Republic, 5 November 2002, no. 36548/97.

party. Furthermore, the Expropriation Act stipulates that the public interest in expropriation must be proven in expropriation proceedings.

It can therefore be stated that the constitutionality and legality of expropriation in Czech law requires that there be a public interest in expropriation (for the purpose of preserving cultural monuments, ensuring transport services, protecting a spa source, etc.), and at the same time that this public interest, or rather its implementation, outweighs the preservation of the property rights of the person whose property is to be expropriated (because otherwise the public interest cannot be fulfilled). For example, the interest in building a motorway and fulfilling the public interest in ensuring transport services must outweigh the preservation of the property rights of the person whose land is necessary for the construction of the motorway and is therefore to be expropriated.

It is therefore first necessary to interpret what constitutes the public interest and whether this interest is fulfilled in a given situation (modelled in various degrees of generality or specificity) and then whether its fulfilment justifies interference with the property rights of the current owner (whether in the form of complete deprivation of property rights or restriction of some of its components). The legal requirement that the public interest in expropriation be proven in expropriation proceedings cannot be overlooked. In this regard, the question arises as to whether, in expropriation proceedings, the existence of public interest and its primacy over the property rights of the current owner must be proven, or only one of these conditions. In Czech legislation and application practice, there has been a dispute, in particular, as to the demonstration of the existence of public interest, and decision-making practice in this regard has evolved considerably and continues to evolve.

The key question in this context is which public authority should determine or interpret what purposes (i.e. activities, constructions or other measures) are in the public interest, and how this should be determined in general or in specific terms. Tension in this area exists mainly between the legislative and executive powers. The question is whether the public interest (e.g. in the implementation of a particular construction project or the performance of a particular activity) should be declared by the legislator within the framework of an (abstract) legal norm, or whether it should be determined by the competent administrative authority within the framework of specific expropriation proceedings. The role of arbitrator in this matter is primarily performed by the Constitutional Court of the Czech Republic, whose positions have evolved considerably over time, and there has been no consensus within the doctrine either.

In the past, Czech lawmakers have repeatedly attempted to stipulate directly in the law (i.e., an abstract normative act) that a specific structure, measure, or activity is in the public interest. The public interest in achieving the purpose of expropriation thus flowed directly from the law (*ex lege*), thereby precluding any interpretation of the term by administrative authorities. The Constitutional Court took a very critical view of this. It stated that the public interest in each specific case, i.e. also in specific expropriation proceedings, must always be determined during the proceedings by the competent administrative authority on the basis of weighing up various particular interests, after considering all contradictions, comments, etc.[53] The public interest must be determined in the process of deciding on a specific issue and cannot be determined *a priori* by law in a specific case. Determining the public interest is therefore typically a power of the executive, not the legislature.[54] The Constitutional Court therefore considered the declaration of public interest in a specific matter by law (i.e. directly by the legislator itself) to be unconstitutional.[55] In one of the most famous cases, the Constitutional

[53] Decision of the Constitutional Court of the Czech Republic, no. Pl. ÚS 24/04, dated June 28, 2005.
[54] Decision of the Constitutional Court of the Czech Republic, no. Pl. ÚS 24/04, dated June 28, 2005.
[55] Similarly, such procedures by the legislator are also considered unlawful by the Supreme Administrative Court, cf. e.g. judgment of the Supreme Administrative Court of the Czech Republic of 8 February 2011, no. 1 Ao 7/2010.

Court repealed Section 3a of the Inland Waterways Act for this reason,[56] stating that the contested provision precludes the administrative authority from determining the public interest in the development and modernisation of a specific waterway in administrative proceedings, as this is already determined by the law itself.[57] [58] This essentially deprived the executive power (the administrative authority) of the possibility to assess all the necessary facts and determine whether or not there is a public interest in a specific matter. According to the Constitutional Court, this constitutes an inadmissible interference by the legislative power in the exercise of executive power. The violation of the principle of separation of powers is unconstitutional (in view of this, the relevant provision was repealed). Moreover, such an approach by the legislature also violates another fundamental principle of a substantive rule of law, namely the requirement of (universal) generality of legal regulation.[59]

At the same time, this approach by the legislature limits the scope of judicial review. The interpretation of vague legal concepts by administrative authorities is subject to full review by administrative courts. As stated by the Supreme Administrative Court of the Czech Republic*, "the interpretation of an indefinite legal term by an administrative authority is subject to review by an administrative court, and it is not sufficient for an administrative authority to classify an activity under an indefinite legal term without clarifying its meaning and merely stating that the activity in question corresponds to the term in question."*[60] In the context of judicial review of expropriation decisions, this would essentially mean that the courts would review expropriation decisions, but the question of the existence of public interest would be excluded from their review, as this is determined by law, to which the courts are bound under Article 95(1) of the Czech Constitution.[61]

Legislators have therefore begun to take a different approach quite often, declaring by law that the implementation of certain types (rather than individual) activities and structures is in the public interest, or that they are beneficial to the public. For example, the Road Act expressly stipulates that motorways, roads and local roads and related structures are in the public interest, and similarly, according to the Railways Act, the construction of national and regional railways, tramways, trolleybus lines and other structures is in the public interest.[62] The Spa Act expressly declares that public interest for the purposes of expropriation means the interest in searching for and using resources for therapeutic purposes and the interest in protecting resources.[63] The Energy Act also stipulates that the transmission of electricity, the transport of gas, their production and distribution are carried out in the public interest.[64] Although specific laws refer to either public interest or public benefit, it can be assumed that

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[56] This provision stated that "the development and modernisation of the waterway defined by the Elbe river from river km 129.1 (Pardubice) at the state border with the Federal Republic of Germany and the Vltava watercourse from river km 91.5 (Třebenice), including the Vraňany – Hořín navigation canal, to the confluence with the Labe watercourse, including the mouth of the Berounka watercourse to the port of Radotín, is in the public interest."

[57] Decision of the Constitutional Court of the Czech Republic, no. Pl. ÚS 24/04, dated June 28, 2005.

[58] The Constitutional Court ruled similarly in another decision – cf. judgment of 17 March 2009, no. Pl. ÚS 24/08 – in relation to Section 1 of the repealed Act No. 544/2005 Coll., on the construction of runway 06R - 24L, runway at Prague Ruzyně Airport, which stated that "runway 06R – 24L, runway at Prague Ruzyně Airport, corresponding in its location to the valid zoning plan of the capital city of Prague and the valid zoning plan of the town of Hostivice, as well as all structures that will ensure its operation in the area of technical infrastructure, are in the public interest."

[59] See, for example, Decision of the Constitutional Court of the Czech Republic no. Pl. ÚS 55/2000, dated April 18, 2001, or Decision of the Constitutional Court of the Czech Republic no. Pl. ÚS 12/02, dated February 19, 2003.

[60] Judgment of the Supreme Administrative Court of the Czech Republic of 21 July 2009, no. 8 Afs 85/2007, similarly judgment of the Supreme Administrative Court of the Czech Republic of 27 September 2007, no. 5 As 32/2007, and others.

[61] See Decision of the Constitutional Court of the Czech Republic no. Pl. ÚS 40/02, dated June 11, 2003.

[62] Act No. 13/1997 Coll., on Roads (§ 17); Act No. 266/1994 Coll., on Railways (§ 5).

[63] Section 35 of Act no. 164/2001 Coll., on Natural Medicinal Resources, Natural Mineral Water Sources, Natural Medicinal Spas, and Spa Locations (Spa Act).

[64] Section 3 of Act no. 458/2000 Coll., on Business Conditions and the Exercise of State Administration in the Energy Sectors and on Amendments to Certain Acts (Energy Act).

both terms express the same thing, i.e. a legitimate interest in the implementation of the activities, constructions and other measures in question (see above).[65]

The Constitutional Court of the Czech Republic has not long addressed the issue of whether the generic definition of what is and is not in the public interest constitutes a problematic aspect of the legal regulation and a violation of the principle of separation of powers. At least the professional literature has offered several possible views in this regard. One view was that the legislator thereby constructs a legal fiction, or an irrefutable legal presumption, which administrative authorities must follow regardless of the circumstances of the specific case. In other words, the legislator establishes a priority of a certain public interest, which the administrative authority deciding on expropriation is bound by.[66] The second possible interpretation was that this was merely a declaration by the legislator that had no legal consequences, i.e. despite this declaration, the administrative authority was obliged to assess in each individual case whether there was a public interest or not.[67] Finally, there were also opinions that this was a rebuttable presumption, whereby it is presumed that there is a public interest unless the contrary is proven.[68]

The case law of administrative courts (including the Supreme Administrative Court of the Czech Republic) has not been entirely consistent in this regard. Some decisions emphasised the importance of declarations of public interest in special laws for proceedings preceding expropriation proceedings, such as proceedings concerning the location of a structure, but not for the expropriation proceedings themselves.[69] Other decisions (the majority opinion), on the contrary, stated that a generic declaration of public interest is binding on administrative authorities: "*Within the expropriation proceedings, public interest was therefore established, but it was not the subject of further evidence precisely because it is explicitly expressed by law*."[70] Although the Expropriation Act stipulates that public interest must be proven in expropriation proceedings, this general rule does not apply if a specific public interest arises directly from a special law (e.g. the Energy Act), as such a provision takes precedence over the general provision in the Expropriation Act. Civil courts have ruled similarly; for example, the Czech Supreme Court stated: "*It follows from the provisions of the Energy Act that the establishment and operation of the transmission system is in the public interest. The public interest of the operator arises from the licence granted under the Energy Act. In expropriation proceedings, therefore, the question of public interest is not a matter of evidence; the expropriation authority only decides whether the public interest in achieving the purpose outweighs the preservation of the existing rights of the expropriated party*."[71] Handrlica therefore stated that, even with regard to the above-mentioned case law, an explicit declaration

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[65] FRUMAROVÁ, K. *Expropriační titul jako jedna ze zákonných podmínek vyvlastnění*. In Acta Iuridica Olomucensia, 2020, č. 1, pp. 8 až 21. ISSN 1801-0288.

[66] HANÁK, J., ŽIDEK, D., ČERNOCKÝ, R. *Zákon o vyvlastnění. Praktický komentář*. 1st ed. Prague: Wolters Kluwer ČR, 2020, p. 22. ISBN 978-80-7598-634-4. Or HANDRLICA, J. In EICHLEROVÁ, K., HANDRLICA, J., JASENSKÝ, M., KOŘÁN, J., KOŠŤÁL, V., PLÁŠILOVÁ, D., ZÁKOUCKÝ, P. *Energetický zákon. Komentář*. Prague: Wolters Kluwer ČR, 2016, p. 33. ISBN 978-80-7552-412-6.

[67] FRUMAROVÁ, K. *Expropriační titul jako jedna ze zákonných podmínek vyvlastnění*. In Acta Iuridica Olomucensia, 2020, no. 1, pp. 8-21. ISSN 1801-0288. „*The enshrinement of public benefit in law also provides a basis for demonstrating public interest in specific proceedings (especially expropriation proceedings), but in itself does not constitute a statement of public interest in specific cases*. According to the Explanatory memorandum to Act No. 268/2015 Coll.

[68] EICHLEROVÁ, K. In EICHLEROVÁ, K., HANDRLICA, J., JASENSKÝ, M., KOŘÁN, J., KOŠŤÁL, V., PLÁŠILOVÁ, D., ZÁKOUCKÝ, P. *Energetický zákon. Komentář*. Prague: Wolters Kluwer ČR, 2016, p. 67. ISBN 978-80-7552-412-6.

[69] Resolution of the Extended Chamber of the Supreme Administrative Court of the Czech Republic of 20 March 2007, no. 7 As 67/2005–43.

[70] Supreme Administrative Court of the Czech Republic in its judgment of 29 August 2017, no. 8 As 187/2016-51.

[71] Judgment of the Supreme Court of the Czech Republic of 26 January 2017, no. 21 Cdo 799/2016.

of public interest in relation to species-defined works of general utility can be understood as an irrefutable legal presumption.[72]

The situation was not clarified until 2022, when in its ruling ref. no. IV. ÚS 2763/21, the Constitutional Court stated that it is within the competence of the legislature to determine, in general terms, what is in the public interest and thus to define the legal framework for the decisions of expropriation authorities in specific cases,[73] in which, however, it is necessary to weigh the public interest declared *ex lege* against the individual interests of the expropriated party. Therefore, legislation that establishes an irrefutable presumption of public interest in the expropriation of land and buildings for the implementation of activities and measures defined in special laws (Energy Act, Spa Act, etc.) is not contrary to the constitutional provisions of Article 11 of the Charter.[74] For Czechia, this decision means that expropriation authorities and subsequently administrative courts do not prove the existence of public interest in proceedings in these cases, as it is irrefutably presumed by law.

It is possible to agree with these conclusions of the Constitutional Court, as the public interest plays a key role in the development of the state and society, and the right to property must be viewed not only as an individual right, but also in the context of the needs of society and with regard to the environment in which it is exercised and enforced, i.e. in the environment of spatial and construction planning, environmental protection, etc.[75] Even in countries where the constitution expressly requires the generality of the law as a guarantee of freedom, equality and democracy (typically Germany), it is not impossible for a law stipulating that a particular construction project is in the public interest to be adopted and constitutionally acceptable on the basis of an important national interest or general interest (welfare).[76]

V. PUBLIC INTEREST AS A CONDITION FOR THE ADMISSIBILITY OF EXPROPRIATION IN THE POLISH LEGAL SYSTEM

As mentioned above, not only Czech but also Polish legislation sets out the basic conditions for the admissibility of expropriation at the constitutional level. Article 21(2) of the Constitution of the Republic of Poland stipulates that expropriation is only permissible if it is carried out for public purposes and for fair compensation. Public purpose,[77] together with fair compensation, determines the limits of admissibility and, at the same time, the legality of expropriation. The permissibility of expropriation exclusively for public purposes in light of the above provision constitutes a constitutional principle.[78] Another common feature of both legal regulations is the fact that the Constitution of the Republic of Poland does not define the concept of public purpose. As Szalewska points out, public purpose is a general clause that has not yet been specified and systematised in the form of a uniform definition.[79] "*It can be said*

[72] HANDRLICA, J. *Vyvlastňovací tituly podnikatelů všeužitečných děl*. In Právní rozhledy, 2018, no. 2, pp. 44-50. ISSN 1210-6410. See also HANDRLICA, J. *Soukromoprávní subjekty nadané expropriačním titulem a jejich oprávnění v předpisech veřejného práva*. In Právní rozhledy, 2014, no. 13-14, pp. 44-50. ISSN 1210-6410.

[73] Similarly, PETRŮV, H. *Ústavně právní aspekty posuzování existence veřejného zájmu*. In Acta Universitatis Carolinae – Iuridica, 2010, no. 2, pp. 97-107. Accessible at: https://karolinum.cz/en/journal/auc-iuridica/year-56/issue-2/issue-year-2010/article-849.

[74] Ruling of the Constitutional Court of the Czech Republic of 30 August 2022, no. IV. ÚS 2763/21.

[75] See KIRCHHOF, G. *Die Allgemeinheit des Gesetzes. Über einen notwendigen Garanten der Freiheit, der Gleichheit und der Demokratie.* Mohr Siebeck. Tübingen 2009, p. 7.

[76] M. SACHS in SACHS, M. et al. *Grundgesetz. Kommentar*. 9th ed. C. H. Beck. Munich 2021, pp. 676-678.

[77] BIENEK, G., HOPFER, A., MARMAJ Z., MZYK, E., ŹRÓBEL, R. *Komentarz do ustawy o gospodarce nieruchomościami.* Warszawa–Zielona Góra, 1998, p. 86.

[78] MUZYCZKA, K. *Ochrona interesu prywatnego w procesie wywłaszczania nieruchomości*. Starogard Gdański, 2023, pp. 108-109. ISBN 978-83-965575-0-6.

[79] SZALEWSKA, M. *Wywłaszczenie nieruchomości*. Toruń 2005, p. 105.

that the content of this concept has been left to the *ordinary* legislator," adds Szewcyk.[80] What does this mean in Polish practice?

The conditions for expropriation in Poland are currently set out in the 1997 Real Estate Management Act.[81] However, the legislator does not define public purpose in general terms in this Act, nor does it establish criteria or a method for recognising public purpose, but in Article 6 it introduces a closed catalogue of investments, facilities and activities that it considers to be of such purpose, while at the same time admitting and referring to public purposes specified in other acts. The public purpose must therefore be specified directly in the law (either in the Real Estate Administration Act or in another specific law). Simply put, anything that is not specified in any law is not a public purpose.[82] As Zimmermann, who has studied the issue of expropriation in detail, states, expropriation cannot take place without a clearly defined public interest.[83]

If we look at Article 6 of the Real Estate Administration Act, we find an exhaustive list of public purposes for which expropriation is possible. These purposes include the use of land for public roads, cycle paths and waterways, both for their construction and maintenance, and the same applies to railway lines, airports and ports. Public purposes also include the construction and maintenance of drainage systems, pipelines and facilities used to transport or distribute liquids, steam, gases and electricity, as well as the construction and maintenance of public facilities used to supply the population with water, to treat and drain waste water, and to recycle and dispose of waste. The construction and maintenance of buildings and facilities used for environmental protection or cultural monuments are also considered public purposes. Public purposes in the form of the construction and maintenance of premises for state administration authorities, courts and public prosecutors' offices, public universities, state or local cultural institutions, as well as healthcare facilities, nurseries, social care homes, care and educational facilities, and sports facilities are also included. Other public purposes under the law include the construction and maintenance of facilities necessary for national defence or public safety (e.g. prisons), the establishment and maintenance of cemeteries, memorial sites, but also public spaces such as squares, parks, promenades, and the extraction of mineral resources. The last point of Article 6 of the Real Estate Administration Act is very important, as it stipulates that public purposes also include other public purposes specified in separate (special) laws. Case law on Article 6 clearly states that this is a closed list of public objectives that cannot be expanded by interpretation and, furthermore, that it is necessary to interpret, in particular the provisions of special laws, in a restrictive manner in accordance with *the ratio legis*.[84]

To summarise the above, the term "public purpose" is defined in two ways in the Real Estate Administration Act. Firstly, the Act contains a fairly extensive exhaustive list of these purposes,[85] , classified by type. Secondly, this Act refers to the regulation of public purposes in other Acts,[86] i.e. it allows the legislator to expand the list provided here, but only in the form of an Act. This is undoubtedly a more successful regulation than the previous one, where the 1985 Act on Land Consolidation and Expropriation of Real Estate contained the term "other obvious public purposes". This created a certain degree of freedom in assessing whether a given objective was considered an obvious public purpose. This freedom has been removed in the

[80] SZEWCZYK, M., *Ingerencja publicznoprawna w prawa własności jednostki w demokratycznym państwie prawnym*. In Filipek, J. (ed.) Jednostka w demokratycznym państwie prawa, Bielsko-Biała 2003, p. 655.
[81] Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami.
[82] MUZYCZKA, K. *Konflikt interesów przy realizacji celu publicznego w instytucji wywłaszczenia nieruchomości*. In Progress: Journal of Young Researches, 2021, no. 9-10, pp. 23–24. ISSN 2543-8638. DOI 10.26881/prog.2021.9.03.
[83] ZIMMERMANN, M. *Wywłaszczenie. Studium z dziedziny prawa publicznego.* Lwów: 1939, pp. 90–101.
[84] Judgment of the Supreme Administrative Court in Warsaw of 19 June 2013, ref. no. II OSK 3101/12, lex no. 1559695.
[85] Judgment of the Supreme Court of Poland of 16 March 2005, ref. no. II CK 522/04, lex no. 2339801.
[86] E.g. Article 37 of the Act of 28 September 1991 on forests.

current legislation on the disposal of real estate.[87] In this context, Polish doctrine points out that the statutory catalogue of public purposes may be amended by setting new objectives or modifying existing public objectives, shaping them in a manner consistent with the interpretation of constitutional concepts and the principles derived therefrom.[88] The concept of a public objective is therefore dynamic in Polish law and may change depending on the needs of the state and society.[89]

As in Czech legislation and practice, the fundamental principles of subsidiarity[90] and proportionality also apply in Poland. Regarding the principle of proportionality, the Polish Constitutional Court stated in its ruling of 17 October 1995 that this principle implies that "the adoption of a given regulation is only possible if it is necessary to protect the public interest with which it is associated, the regulation should be formulated in such a way as to ensure that the intended effects are achieved, and, in addition, the legislator is obliged to maintain proportionality between the effects of the regulation being introduced and the burden or inconvenience it causes to citizens. This principle requires choosing between measures that are as effective as possible and at the same time as least burdensome as possible for the entities to which they are to be applied, or painful to no greater extent than is necessary to achieve the intended objective.[91] The Czech Constitutional Court has a very similar understanding of proportionality, stating that "state intervention must respect a reasonable (fair) balance between the requirements of the general interest of society and the requirement to protect the fundamental rights of the individual. This means that there must be a reasonable (justified) relationship of proportionality between the means used and the objectives pursued."[92] The Supreme Administrative Court of the Czech Republic similarly states that the principle of proportionality can be understood "*as a general prohibition on excessive interference with rights and freedoms, which comprises three sub-principles: 1. the suitability and appropriateness of achieving the intended objective, which is the protection of another fundamental right or public good; 2. the principle of necessity, according to which only the least intrusive of several possible means may be used, and 3. the principle of proportionality in the narrower sense, which means that the infringement of a fundamental right must not be disproportionate to the intended objective.*"[93]

The main reason for this situation is the fear of any interpretation of this concept in a situation where the state is prevented from achieving its objectives by an entity and its interests, especially property interests.[94] Despite the generic definition of public objectives, it is not possible to abandon the assessment of the circumstances of each individual case. *"Whether an investment will pursue public objectives cannot be decided in isolation from the circumstances of the case*."[95] The value of the concept of public purpose is based on a teleological interpretation in the context of the investment in question, rather than on the abstract meaning

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[87] MUZYCZKA, K. *Ochrona interesu prywatnego w procesie wywłaszczania nieruchomości*. Starogard Gdański, 2023, pp. 122-124. ISBN 978-83-965575-0-6.

[88] WOŚ, T. *Wywłaszczenie i zwrot nieruchomości*. Warszawa, 1998, p. 22.

[89] WOLANIN, M. *Cel publiczny, jako normatywne kryterium oddziaływania na stosunki cywilnoprawne w gospodarowaniu nieruchomościami, cz. 1, Nieruchomości*. 2009, no, 9, p. 6.

[90] In both Czech and Polish law, expropriation means that rights to land or buildings necessary for the realisation of a public purpose cannot be acquired in any other way, in particular by contract. G. BIENIEK, S. RUDNICKI, *Nieruchomości. Problematyka prawna*. Warsaw, 2011, p. 998-999.

[91] Judgment of the Constitutional Tribunal of Poland of 17 October 1995, ref. no. K10/95, OTKZU 1995, No. 2, item 10.

[92] Judgment of the Constitutional Court of the Czech Republic of 16 October 2001, no. Pl. ÚS 5/01.

[93] Judgment of the Supreme Administrative Court of the Czech Republic of 8 August 2007, no. 4 As 71/2006-83. On the principle of proportionality in relation to expropriation, see, for example: HOETZEL, J. *Československé správní právo. Část všeobecná.* Praha: Melantrich, 1937, p. 308 ff., or HOETZEL, J. Vyvlastnění. In HÁCHA, E. (ed.) *Slovník veřejného práva československého.* Svazek V. Praha: Eurolex Bohemia, 2000, p. 496 ff., or HANÁK, J. *Vyvlastnění z environmentálních důvodů. Současný stav a perspektivy.* Brno: Masarykova Univerzita, 2015, p. 129 et seq.

[94] MUZYCZKA, K. *Ochrona interesu prywatnego w procesie wywłaszczania nieruchomości*. Starogard Gdański, 2023, pp. 90-91.

[95] Judgment of the Supreme Administrative Court in Warsaw of 28 November 2007, ref. no. II OSK 1583/06, lex no. 416607.

of the concept.[96] After all, even the legislator is limited in determining what is in the public interest. Firstly, only that which serves the public and is generally accessible, representing the public good, i.e. the good of the whole society or regional community, can be considered a public purpose.[97] The second criterion defining the limits of the legal definition of public interest for the purposes of expropriation is the principle of proportionality arising from Article 2 of the Constitution of the Republic of Poland. On this issue, the Polish Constitutional Court stated that "legislative intervention must not conflict with the axiological assumptions on which constitutional provisions and principles are based."[98]

The comparison of the Czech and Polish approaches shows that, despite some differences in the way public interest (or public purpose) is defined and applied, the two legal systems share a number of fundamental features. In both systems, the pursuit of a public interest constitutes a constitutionally relevant condition for expropriation, while neither the Czech nor the Polish Constitution provides an exhaustive definition of its content. The concept therefore retains the character of a vague legal concept whose meaning is further specified through legislation, legal doctrine and judicial practice. At the same time, both systems recognise the legislature as having an important role in determining, at least in general terms, the purposes capable of justifying expropriation, while the application of the relevant rules remains subject to judicial review. The principal difference lies in the degree and form of legislative determination: Polish law relies predominantly on an exhaustive statutory catalogue of public purposes, primarily contained in the Real Estate Management Act, whereas Czech law combines the general constitutional and statutory requirement of public interest with specific statutory definitions or presumptions contained predominantly in special legislation. The recent development of Czech constitutional case law has brought the Czech approach closer to the Polish model by accepting that the legislature may, for constitutionally defined types of activities or measures, establish a conclusive presumption of public interest. The comparison thus suggests that the differences between the two systems concern primarily the institutional and legislative technique used to determine public interest rather than its fundamental constitutional function as a safeguard against arbitrary interference with property rights.

VI. BRIEF INSIGHT: SPECIAL REGULATION OF ROAD INFRASTRUCTURE AND THE ACCELERATION OF EXPROPRIATION

A particularly important area in which the relationship between public interest and expropriation becomes apparent is the construction and development of transport infrastructure, especially motorways and other public roads. The Czech and Polish legal systems have both introduced special legislation intended to facilitate and accelerate the preparation and implementation of such projects. These special regimes reflect the recognition that the timely construction of major transport infrastructure constitutes an important public objective, while at the same time creating specific mechanisms for overcoming obstacles arising from the need to acquire privately owned land. Their significance for the concept of public interest lies in the fact that the legislature does not merely establish general conditions for expropriation but creates a specific institutional and procedural framework for projects which it considers to be of particular public importance.

In the Czech Republic, this function is performed in particular by Act No. 416/2009 Coll., on the acceleration of the construction of strategic infrastructure.[99] This Act has gradually evolved from a regulation primarily focused on accelerating transport infrastructure to a broader

[96] MUZYCZKA, K. *Ochrona interesu prywatnego w procesie wywłaszczania nieruchomości*. Starogard Gdański, 2023, pp. 90-91.
[97] DYBOWSKI, T. *Ochrona własności w polskim prawie cywilnym*. Warszawa, 1969, p. 326.
[98] Judgment of the Constitutional Court of Poland of 12 April 2000, K. 8/98, OTK 2000, No. 3, item 87.
[99] For more details see VLACHOVÁ, B. *Zákon o vyvlastnění. Liniový zákon*. Praha: Ch. H. Beck, 2023, pp. 119-189. ISBN 978-80-7400-926-6.

framework covering selected transport, water, energy, electronic communications and other strategically significant infrastructure. Its current structure combines accelerated procedures for the preparation and permitting of selected projects with specific rules concerning expropriation and judicial review. The special regime is therefore not limited to shortening individual procedural periods; it also modifies the sequence and legal effects of certain decisions relevant to the acquisition of land necessary for infrastructure projects.[100] The Act contains several schedules which exhaustively define very specific infrastructure projects (not only transport-related) to which the Act applies directly (*ex lege*) to varying degrees. The Constitutional Court of the Czech Republic found neither the Act nor these schedules to be unconstitutional.[101]

Poland does not have a single comprehensive law like the Czech Republic, but instead uses a set of special laws for individual sectors (known as "specustawy").The Polish Act of 10 April 2003 on special rules for the preparation and implementation of investments in the field of public roads (*Ustawa o szczególnych zasadach przygotowania i realizacji inwestycji w zakresie dróg publicznych*), commonly known as the *specustawa drogowa*,[102] establishes a special regime for the preparation and implementation of public road investments. Its scope extends to the preparation of road investments, their location, the acquisition of real estate required for their implementation and the subsequent construction process. The Polish regime was introduced precisely against the background of the considerable delays associated with acquiring land and preparing road investments under the ordinary legal framework. The special legislation consequently represents a deliberate shift towards a more integrated and accelerated model of infrastructure development.[103]

The Polish model is particularly relevant to the present analysis because the decision establishing the location of a road investment (*decyzja o zezwoleniu na realizację inwestycji drogowej*, ZRID) has significant consequences for the acquisition of land necessary for the project. The special regime combines elements which, under an ordinary model, would be distributed among several separate procedures: the determination of the location of the investment, the acquisition of the necessary property and the authorisation to proceed with its implementation.[104] The special nature of the Polish model thus lies in the integration of planning, acquisition and implementation effects within a single special administrative framework.

It should also be noted that specific infrastructure projects are defined in government policy documents, to which these accelerated approval processes under the relevant legislation then automatically apply. These government policy decisions (resolutions of the Council of Ministers) explicitly classify specific motorway or road investments as state-planned and priority investments. For example, on 13 December 2022, the Council of Ministers adopted Resolution No. 253/2022, establishing the Government Programme for the Construction of National Roads until 2030. This is not merely a general political declaration. The programme contains a specific list of investments to be carried out by 2033. It should be emphasised, however, that the Polish Resolution of the Council of Ministers does not in itself constitute expropriation or a ZRID. Its function is primarily programmatic, planning and financial. It determines which specific investments the state considers to be priorities, and which are to be carried out. Only subsequently, through the mechanism of the specustawa drogowa, is a specific

[100] For a critical view of the introduction of an interim ruling in the context of expropriation, see FRUMAROVÁ, K. *(Ne)způsobilost vyvlastnění být předmětem mezitímního rozhodnutí*. In Správní právo, 2019, no. 3, pp. 134-138. ISSN 2788-2241.

[101] For further details, see the judgment of the Constitutional Court of the Czech Republic, no. Pl. ÚS 39/18, dated 22 March 2022.

[102] Similarly, for the rail transport and energy sectors, there are the *Specustawa kolejowa* and the *Specustawa przesyłowa*.

[103] MUZYCZKA, K. *Ochrona interesu prywatnego w procesie wywłaszczania nieruchomości*. Starogard Gdański, 2023, pp. 57-58.

[104] TREMBECKA, A. *The Benefit Principle in Determining Compensation for Real Estate Expropriation*. In Geomatics and Environmental Engineering, 2023, no. 2, p. 90.

decision on the implementation of the investment – the ZRID – adopted. It is precisely this decision that has fundamental property-law implications for the properties affected by the construction. Several levels can therefore be distinguished: the Constitution – which stipulates the public purpose (cel publiczny) as a condition for expropriation. Furthermore, the Act (specustawa drogowa) specifies which types of transport infrastructure projects may be carried out under a special regime and under what conditions. Finally, the government identifies and classifies specific infrastructure investments (Uchwała Rady Ministrów) and subsequently the competent authority issues a ZRID, which has specific legal effects on the properties concerned.

The Polish specustawa drogowa creates a particularly integrated model in which the decision authorising the implementation of a road investment has direct consequences for the acquisition of the properties necessary for the project. The Czech legislation, by contrast, only supplements the general expropriation framework with accelerated procedures and specific legal mechanisms applicable to defined categories of infrastructure. In both cases, however, the special legislation reduces the extent to which the public interest in the individual project has to be reconstructed from the outset through an entirely separate expropriation assessment. The legislative determination of the importance of the relevant infrastructure consequently performs a significant legitimising function.

VII. CONCLUSIONS

The analysis conducted in this article shows that public interest, or public purpose in the Polish constitutional terminology, constitutes a fundamental constitutional condition for expropriation in both the Czech and Polish legal systems. At the same time, neither legal order provides an exhaustive or generally applicable definition of this concept. Public interest therefore retains, at least at the general level, the character of a vague legal concept. This characteristic is not necessarily a deficiency. On the contrary, the relative openness of the concept enables it to respond to changing social, economic and value conditions without requiring continuous legislative intervention. At the same time, however, the openness of the concept creates a fundamental question concerning who is competent to determine its content in the context of a particular interference with property rights. The analysis further demonstrates that the terminological differences between the concepts used in legislation should not be overestimated. Where the relevant concept serves as the legal justification for an interference with property rights and fulfils the same legitimising function, there is no compelling reason to attach different legal consequences to the terminology alone.

The answer to the first research question therefore lies primarily in the different normative techniques through which the two legal systems construct the public interest. In both countries, the Constitution establishes the requirement at the highest normative level, while ordinary legislation specifies the purposes for which expropriation may take place. The crucial difference concerns the extent to which the legislature itself determines that a particular type of activity, construction or measure is in the public interest. Both systems establish a presumption of public interest for various types of construction, activities and measures (although this development has been longer and more cautious in the Czech Republic). In Poland, the relevant determination is primarily contained in a general statutory framework, while in the Czech Republic it is found predominantly in individual special laws. Moreover, the Czech system does not provide for such a statutory presumption in all areas in which expropriation is legally possible(!). This results in different requirements concerning the establishment and proof of public interest depending on the applicable expropriation title. From the perspective of equal protection of property owners, this differentiation raises questions of justification and suggests that greater consistency in the legislative treatment of comparable expropriation situations may be desirable.

The answer to the second research question shows that the practical application of public interest depends substantially on whether its existence has already been determined by the legislature. Where the law establishes an irrefutable presumption of public interest for a defined category of activities or constructions, the expropriation authority does not establish its existence as a separate matter of evidence. Its task is instead to apply the statutory framework to the individual case and, where required, to balance the legislatively recognised public interest against the interests of the affected owner. Where no such statutory determination exists (some situations in the Czech reublic), however, the competent administrative authority must itself interpret the relevant vague legal concept and establish whether the particular expropriation serves a legitimate public interest. The requirement of public interest therefore operates differently depending on the degree of its prior legislative specification. The analysis also confirms that public interest cannot be reduced to the interests of the State or of public-law entities. Both Czech and Polish approaches recognise that a public interest may exist even where the immediate beneficiary of the relevant activity is a private entity, provided that the activity itself serves a legitimate public purpose. Conversely, public interest cannot be understood as a single, homogeneous interest that necessarily prevails over all competing interests.

The answer to the third research question consequently reveals a multi-level distribution of responsibility**.** The legislature plays the primary role by determining the legal framework and, increasingly, by identifying categories of activities and structures regarded as serving public purposes. Administrative authorities retain responsibility for applying this framework to individual cases and, where no conclusive statutory determination exists, for establishing the existence of public interest. Courts subsequently review the legality of the administrative decision and, in appropriate cases, the interpretation and application of the relevant vague legal concept. The extent of judicial review therefore depends directly on whether the existence of public interest has been left to the administrative authority or has been conclusively determined by the legislature. Where public interest follows irrebuttably from legislation, the courts cannot review its existence as an individual factual or legal issue in the same way as they can where the concept is interpreted and applied by an administrative authority. This institutional division thus illustrates the close relationship between the determination of the public interest and the separation of powers.

From the perspective of property-right protection, legal certainty and judicial review, neither model is without difficulties. The Polish model provides a higher degree of predictability because the categories of public purposes are defined in advance. The Czech model may provide greater room for consideration of the circumstances of an individual case where no statutory presumption applies, but it also creates differences in the evidentiary requirements applicable to otherwise comparable expropriation situations. The Czech system therefore appears to contain a certain asymmetry which may be difficult to reconcile with the principle of equality of property owners. At the same time, the Polish approach raises the more general question whether a legislative determination of public purpose is capable of adequately capturing the circumstances of every individual project and whether every activity falling within a statutory category necessarily justifies the most serious interference with property rights.[105]

The findings therefore do not support a conclusion that public interest should always be determined either exclusively by the legislature or exclusively in individual administrative proceedings. Rather, the comparison suggests that a combined model may provide the most appropriate balance. The legislature should be able to identify, in general terms, activities and categories of projects which ordinarily pursue important public objectives and thereby provide

[105] ZDVIHAL, Z. et alii. *Energetický zákon. Komentář*. Praha: C. H. Beck., 2019, p. 44.

legal certainty and a predictable framework for expropriation. At the same time, the legal system should preserve sufficient institutional space for the competent authority, and ultimately the courts, to assess the individual circumstances of the interference, particularly the relationship between the recognised public objective and the concrete impact on the affected property owner. The more far-reaching the statutory presumption of public interest, the greater importance should consequently be attached to the remaining requirements governing the proportionality and legitimacy of the individual expropriation.

Finally, the analysis raises a more fundamental question concerning the very nature of public interest as a vague legal concept. If the legislature progressively defines its content through general statutory categories, and in some cases establishes an irrebuttable presumption that particular activities or structures are in the public interest, it becomes questionable to what extent the concept continues to possess the characteristics traditionally associated with a vague legal concept(!). This does not necessarily mean that the concept loses its significance. Rather, its function changes: from a concept whose content is primarily constructed by the administration and courts in individual cases, it increasingly becomes a constitutional and legislative instrument for allocating decision-making responsibility between the branches of public power**.** The Czech and Polish experience demonstrates that the central issue is therefore not whether public interest can be defined once and for all, but how its content should be determined, at which level of public authority, and with what safeguards against arbitrary interference with property rights.

In this respect, the comparative analysis confirms that public interest in expropriation performs a dual function. It is both a substantive justification for depriving an individual of property and an institutional mechanism through which the legal order determines who is authorised to define and assess the legitimacy of such an interference. The Czech and Polish models have developed different techniques for fulfilling these functions, but recent developments in Czech constitutional case law have brought the two approaches significantly closer. The decisive challenge for both systems remains to ensure that the pursuit of important public objectives does not transform the statutory determination of public interest into an automatic justification for every individual interference with property rights. Public interest must therefore remain connected to the legitimacy of the objective pursued, the constitutional protection of property and the requirement of a fair balance between collective and individual interests.

KEY WORDS
public interest, property rights, expropriation, expropriation proceedings

KĽÚČOVÉ SLOVÁ
verejný záujem, vlastnícke právo, vyvlastnenie, vyvlastňovacie konanie

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ON THE PREVENTIVE REVIEW OF THE SUBJECT OF LOCAL REFERENDUMS IN THE SLOVAK REPUBLIC[1]

O PREVENTÍVNEJ KONTROLE PREDMETU MIESTNEHO REFERENDA V PODMIENKACH SLOVENSKEJ REPUBLIKY

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ABSTRACT
The article examines the issue of preventive review of the subject matter of local referendums in the Slovak Republic. It identifies gaps and deficiencies in the statutory regulation of local referendums under the Local Government Act, in particular with respect to the definition of their subject matter and the availability of ex ante review of their legality and constitutionality. The authors analyse potential review mechanisms and the entities that may participate in this process, including the municipal council, the referendum commission, the mayor, the public prosecutor's office, and the administrative courts. Consideration is also given to the jurisdictional limits of the Constitutional Court of the Slovak Republic. The aim of the article is to identify and systematise the existing possibilities of preventive control of the subject matter of local referendums, for which no explicit and precise legal regulation exists, with particular regard to the nature of the prerogatives of the entities involved.

ABSTRAKT
Článok sa zaoberá problematikou preventívnej kontroly predmetu miestneho referenda v podmienkach Slovenskej republiky. Poukazuje na medzery a nedostatočnosť právnej úpravy miestneho referenda v zákone o obecnom zriadení, najmä pokiaľ ide o vymedzenie jeho predmetu a možnosti ex ante kontroly jeho zákonnosti a ústavnosti. Autori analyzujú potenciálne kontrolné mechanizmy a subjekty, ktoré môžu do tohto procesu vstupovať, vrátane možností obecného zastupiteľstva, referendovej komisie, starostu obce, prokuratúry a správnych súdov. Pozornosť je venovaná aj limitom pôsobenia Ústavného súdu Slovenskej republiky. Cieľom článku je identifikovať a systematizovať existujúce možnosti preventívnej kontroly predmetu miestneho referenda, ktorej výslovná a exaktná úprava absentuje, s osobitným zreteľom na charakter prerogatív jednotlivých do úvahy prichádzajúcich subjektov.

I. INTRODUCTION

In Slovak time-space relations, it is widely recognised that the legal-normative regulation of local referendums[4] contained in the Act on Municipalities[5] is relatively

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[1] This article presents the results of the VEGA project No. 1/0474/25 - Referendum and the material core of the constitution in the context of the case law of the Constitutional Court of the Slovak Republic - evaluation, critical reflections and proposals *de constitutione ferenda*.
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[4] The term "local referendum" can be used in both a broader and a narrower sense. While in the broader sense it includes both referendums at the municipal level and referendums at the level of the self-governing region (higher territorial unit), in the narrower sense it refers to referendums under the Municipalities Act. In this article, we use the term "local referendum" and its variations in a restrictive sense, i.e. only in relation to referendums at the municipal level. However, given the many similarities between the regulation of referendums at the municipal and regional levels, this does not change the fact that the considerations presented in this article can also be applied *mutatis mutandis* to referendums as a form of self-government at the higher territorial level. For the outlined terminological differentiation, see in particular KRUNKOVÁ, A. Development stages of local referendums in the Slovak Republic. In TRELLOVÁ, L. – MÁČAJ, Ľ. (eds.) *International and domestic legal*

insufficient and incomplete. Although the given deficit provides a relatively fertile ground for scholarly reflection and stimulating discussions (amicable transfer of knowledge and opinions) at various academic conferences, its more consequential effect is that it substantially limits the practical application of this instrument of local direct democracy. This is particularly regrettable, as M. Vernarský observes, "*the orientation of the addressees of local government, who are also the recipients of public administration, in the meaningful essence of participation in the management of public affairs is not reinforced and remains confined to rigidly separated spheres of authority on the one hand and the entities subject to that authority on the other*."[6] It is not without reason that local government is regarded as a veritable "laboratory" of democracy, given the close proximity of its members to their elected representatives and the immediate relevance of both groups to matters of local administration. Local referendums, in particular, can underscore the significance of this characterisation, as they provide a forum for residents to express their views—for instance, on issues where they question whether their elected representatives (representatives of local self-government) genuinely advance their interests.[7] Local referendums therefore have the potential to effectively enhance citizen participation in governance, but their success depends on several conditions. In particular, two elements are decisive: (i) the citizens' attitudes toward the issue submitted to the referendum, and (ii) their perceptions of the process itself, that is, their attitudes toward the use of referendums as a mechanism for decision-making,[8] this undoubtedly also includes the appropriate establishment of legislative conditions for the conduct of local referendums. Best practices from various countries indicate that the effectiveness and credibility of this institution can be enhanced by reducing administrative barriers, ensuring adequate participation in local referendums, and reinforcing the binding nature of referendum outcomes.[9] As regards the situation in the Slovak Republic, the legally unregulated or inadequately regulated aspects of referendums as a form of local self-government include, for example (i) the definition of the subject matter of the referendum,[10] (ii) the specification of substantive (content-related) and formal (structural) requirements for referendum questions,[11] (iii) a substitute procedure in the event of the unlawful failure of the municipal council to announce a local referendum, if the prescribed conditions are met,[12] or

aspects of direct participation of residents in local self-government. Bratislava: Comenius University in Bratislava, Faculty of Law, 2020. p. 29, and also TRELLOVÁ, L. In TRELLOVÁ, L. – VRABKO, M. *Direct expressions of the right to municipal self-government in the context of public administration.* Prague: Leges, 2022. p. 146.

[5] Act of the Slovak National Council No. 369/1990 Coll. on municipal administration, as amended.

[6] VERNARSKÝ, M. Alternative dispute resolution methods and public authority. In ADAMOV KRÁĽOVÁ, V. – VERNARSKÝ, M. – KRÁL, R. (eds.) *Possibilities for the use of alternative dispute resolution (ADR) methods in public administration. Peer-reviewed collection of papers from an international scientific conference, 16–17 October 2025.* Košice: Pavol Jozef Šafárik University in Košice, ŠafárikPress Publishing House, 2025. p. 13.

[7] Compare KUDRNA, J. The Primacy of a Decision Taken in a Local Referendum over a Contract Concluded by Local Self-Government Bodies: the Example of the Czech Republic. In: *Prawo i Więź*, Vol. 55, No. 2, 2025. pp. 93–94.

[8] KARV, T. – BACKSTRÖM, K. – STRANDBERG, K. Consultative Referendums and Democracy: Assessing the Short-Term Effects on Political Support of a Referendum on a Municipal Merger. In: *Local Government Studies, Taylor & Francis Journals*, vol. 49, No. 1, 2023. p. 154.

[9] KOPÚNEK, G. – ŠVIKRUHA, M. – MIKUŠ, D. Local Referendums in the Czech Republic, Hungary and Poland as Starting Points for Legislative Changes to Local Referendums in Slovakia. In: *Croatian and Comparative Public Administration*, vol. 15, No. 1, 2025. p. 104.

[10] See TOMAŠ, L. Reflections on the wording of Section 15 of the Act on Self-Governing Regions (or what can be improved in the legal regulation of regional referendums). In TRELLOVÁ, L. – MÁČAJ, Ľ. (eds.) *How to make the direct participation of residents in local self-government more effective in the context of smart cities and municipalities.* Bratislava: Comenius University in Bratislava, Faculty of Law, 2021. p. 86 et seq.

[11] See TOMAŠ, L. The construction of questions in local referendums in light of the decision-making practice of the Supreme Administrative Court of the Czech Republic. In TRELLOVÁ, L. – MÁČAJ, Ľ. (eds.) *International and domestic legal aspects of direct participation of residents in local government.* Bratislava: Comenius University in Bratislava, Faculty of Law, 2020. p. 72 et seq.

[12] See TOMAŠ, L. Replacement of the expression of will of the municipal council on the declaration of a local referendum by the administrative court. In MOLNÁR, P. – MACKO, L. – ROMANOVÁ, R. – KEREKEŠOVÁ, M. (eds.) *Košice Days*

the determination of the protective period of the results of a local referendum within the general regulation of the given institution in the Act on Municipal Establishment.[13]

In addition to the aforementioned deficiencies, another aspect warrants consideration, which has not yet received systematic attention in the literature, despite its potentially significant impact on the implementation and success of local referendums. This concerns the so-called preventive (preliminary) review of the legality and constitutionality of the subject matter of a local referendum, which, to some extent, is closely linked to the previously noted inadequacy in the regulation of the subject matter—particularly the optional issues—of a local referendum. In Under Section 11a(4) of the Act on Municipal Establishment, the legislator provides only a very general stipulation that a local referendum may be held "*prior to a decision on other important matters of local government*," with a subsequent reference to the competencies of the local government under Section 4 of the Act on Municipal Establishment. In the case of an optional local referendum, the condition that the matter must be of common significance for the local government must always be satisfied. By applying the converse of this principle, it is not permissible to call an optional local referendum (i) on an issue of merely marginal importance to the specific municipality or (ii) on an issue that would interfere with the exercise of state administration delegated to the municipality. Theoretical approaches further indicate that matters reserved for specific administrative or tax proceedings, or for the resolution of complaints under the Complaints Act, cannot constitute the subject matter of an optional local referendum.[14] The results of an optional local referendum cannot substitute for the decision-making functions of municipal authorities,[15] as follows from an adequate interpretation of Section 11a (4) of the Act on Municipal Establishment. Finally, particularly in the case of a referendum initiated by petition, its interpretation may also be guided by the generally recognised limitations on the exercise of the right of petition under Article 27 of the Constitution of the Slovak Republic[16] and also on Section 1(3) and (4) of the Act on the Right of Petition,[17] , according to which a petition may not interfere with the independence of the courts and may not call for the violation of the Constitution of the Slovak Republic, laws and legally binding acts of the European Union, or the denial or restriction of personal, political or other rights.[18] However, even the negative definition of the subject matter, derived through methods of legal interpretation and legal theory, does not alter the fact that a local referendum may address a relatively wide spectrum of issues with varying forms and content. According to L. Trellová, this contributes little to legal certainty regarding the referendum agenda,[19] which is also reflected by J. Drgonec, who draws attention on the potential for disputes arising from unnecessarily conducted local referendums, in which municipal residents would decide on issues that are not legally subject to referendum.[20]

of Private Law III. Peer-reviewed collection of scientific papers. Košice: Pavol Jozef Šafárik University in Košice, 2021. p. 334.

[13] See TOMAŠ, L. Comparative context of local referendums and regional referendums (problematic aspects). In BREZINA, P. – CVRČEK, F. (eds.) *Alfeus and Augean Stables. Collection of contributions from the conference Metamorphoses of Law in Central Europe VIII.* Plzeň: University of West Bohemia in Plzeň, 2024. pp. 338 – 339.

[14] Act No. 9/2010 Coll. on complaints, as amended.

[15] For more details, see TOMAŠ, L. In TEKELI, J. – TOMAŠ, L. – HOFFMANN, M. *Act on Municipalities. Commentary.* 2nd edition. Bratislava: Wolters Kluwer, 2021. p. 488.

[16] Constitution of the Slovak Republic No. 460/1992 Coll. as amended by subsequent constitutional laws.

[17] Act No. 85/1990 Coll. on the Right of Petition, as amended.

[18] TRELLOVÁ, L. *Constitutional Aspects of Local Government.* Bratislava: Wolters Kluwer, 2018. p. 141.

[19] TRELLOVÁ, L. Local referendums and their legislative potential in smart cities and municipalities. In TRELLOVÁ, L. – MÁČAJ, Ľ. (eds.) *How to make direct participation of residents in local government more effective in smart cities and municipalities.* Bratislava: Comenius University in Bratislava, Faculty of Law, 2021. p. 8.

[20] DRGONEC, J. *Constitution of the Slovak Republic. Theory and practice.* 2nd revised and expanded edition. Bratislava: C. H. Beck, 2019. p. 1124.

The explicit possibilities for *ex ante* oversight of the legality of a local referendum remain fairly vague and lacking clear definition. This ambiguity pertains both to the identification of the entity authorised to seek control over the subject matter of a referendum, the body competent to decide on such a proposal, and, finally, the procedural rules governing the control process and its potential outcomes. In this regard, the objective of this article is to identify and examine the possibilities offered by the existing legal regulation (*de lege lata*). To this end, a range of methodologies commonly employed in social, humanities, and legal research are applied. In particular, analytical and synthetic methods are utilised, through the examination of findings issued by law enforcement authorities, which are then generalised in a broader context using the method of abstraction. In addition to these approaches, both inductive and deductive methods are employed, alongside descriptive methods to a limited but necessary extent, appropriate to the objectives of the study.

II. PREVENTIVE CONTROL OF THE SUBJECT OF A LOCAL REFERENDUM (CONSIDERATIONS AND POSSIBILITIES)

With respect to the range of entities involved, in various capacities, in the preparation and announcement of a local referendum, several institutional bodies may be vested with powers of control over its subject matter.

First and foremost, there is the commission vested with responsibilities related to the preparation of voting in local referendums, which may be established by the municipal council through a generally binding regulation on the details of organising local referendums. Such a regulation must be issued pursuant to the authorisation provided in Section 4(5)(a), point 4, of the Act on Municipal Establishment.[21] Such commissions, composed of several—or even all—members of the relevant municipal council, or in some cases the mayor of the municipality, exist in practice. The prerogative powers of these commissions are grounded in the Act on Municipal Establishment and the Act on the Right of Petition. When a local referendum is initiated by a petition of the municipality's residents, the commission may be authorised to disregard incomplete, false, or illegible information provided by persons supporting the petition [Section 4a(7) of the Act on the Right of Petition]; to manage the publication of a mass petition in periodical press or other mass media [Section 5b of the Act on the Right of Petition]; to decide whether the petition should be discussed at a council meeting, provided it fully complies with formal requirements [Section 5d(4) of the Act on the Right of Petition]; to call upon representatives of the petition committee for necessary cooperation in processing the petition, as well as to require similar cooperation from other public authorities and organisations [Section 6a of the Act on the Right of Petition]; and to postpone consideration of a petition if the deadline for remedying deficiencies in the mandatory formal requirements expires without result [Section 5(4) of the Act on the Right of Petition]. The commission's responsibilities typically include the obligation to receive a petition (or to assign it in the event of not being competent to act), to invite the representative of the petition committee or the petitioner to remedy any deficiencies in the formal requirements within 10 working days of receipt where such deficiencies are identified [Section 5(1) of the Act on the Right of Petition], and to examine and process the petition with a view to establishing the factual circumstances and assessing its conformity or non-conformity with applicable legal regulations and with the public or other common interest [Section 5(5) of the Act on the Right of Petition]. Moreover, the commission is required to process the petition within 30 working days from its service or from the removal of identified deficiencies, or, in particularly complex cases, within 60 working days, with a written

[21] In the case in question, this is a commission different from the commission for voting and counting votes in a local referendum, which is a mandatory collective body with a legal basis objectified in Section 11a(6) of the Act on Municipalities.

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notification of this fact to be provided to the representative of the petition committee [Section 5(5) of the Act on the Right of Petition]. It is further obliged to publish the outcome of the petition on the authority's website and on the electronic official notice board, where technically feasible, within 10 working days of its processing [Section 5(7) of the Act on the Right of Petition]. Where a petition is addressed to the municipal (city) council and has been supported by at least 1,000 persons or at least 8% of persons entitled to vote in municipal elections, the commission must ensure that the petition is placed on the agenda of a council meeting and that the representative and members of the petition committee are granted the right to be heard during its consideration. The powers and responsibilities of the commission to be established should appropriately be regulated by an internal regulation governing the handling of petitions (including those directed, *inter alia*, toward the calling of a local referendum). Although this requirement is not expressly provided for in the Act on the Right of Petition, Section 7(2) thereof refers to the analogous application of the legislation on complaints, which stipulates in Section 11(1) that the handling of complaints by a public authority must be regulated by an internal regulation.

However, it appears more pertinent to address the question of whether the municipal council committee involved in the preparation of a local referendum may also conduct a preliminary assessment of the (non-)compliance of the proposed referendum's subject matter with the law. In other words, it is necessary to consider (i) whether the commission responsible for preparing the local referendum is confined exclusively to a formal review of the petition, or (ii) whether the commission is additionally obliged to examine the wording of the referendum questions themselves—for instance, to determine whether they are discriminatory, whether they infringe upon the rights of municipal council members or third parties, and the like. The latter interpretation appears to be the correct one. Early in its history, the Constitutional Court of the Slovak Republic stated that *"Every decision adopted in proceedings concerning the exercise or protection of any fundamental rights or freedoms of citizens before any authority—be it state, local government, or otherwise—**must therefore be preceded by a procedural process in which all material facts necessary for the decision are objectively established and evaluated, to the extent and in the manner specified above**. A decision by the competent authority that is not preceded by such proceedings constitutes a violation of the fundamental right or freedom of the citizen that is the subject of the proceedings, irrespective of whether the authority directly and substantively adjudicates the exercise or protection of a fundamental right or freedom (as in proceedings before courts or state administration authorities) **or merely decides on the fulfilment of conditions relevant to a subsequent substantive decision regarding the exercise of a citizen's fundamental right or freedom (as is the case with a decision of a municipal council under Section 11a(3) of the Act on Municipal Establishment)."*** [22] The cited opinion is intrinsically linked to the obligation of the public authority (commission) to examine and process the petition in order to establish the factual circumstances, as well as its compliance or non-compliance with applicable legal provisions and the public or other common interest. Given that the Constitution of the Slovak Republic and the Act on the Right of Petition delineate the matters that cannot constitute the subject of a petition, the public authority (commission) is required to systematically verify whether the relevant provisions have been observed. Accordingly, it must also examine the petition in terms of its content and substantive scope. This requirement is underscored by the directive already expressed in Section 5(5) of the Act on the Right of Petition, which obliges the public authority to ascertain the actual state of affairs, including any potential conflict with legal regulations and the public or other common interest. The commission is therefore obliged to assess the wording of the petition itself with respect to

[22] Ruling of the Constitutional Court of the Slovak Republic, ref. no. II. ÚS 9/00 of 27 April 2000.

both the permissible and prohibited scope of the petition, which is naturally closely linked to the legality or illegality of the subject matter of the local referendum itself.

If the members of the commission responsible for verifying the validity of the petition are also members of the municipal council, they are required to discharge their duties with particular diligence and full accountability. Criminal procedural practice has already encountered cases in which liability was imposed for the negligent criminal offence of obstruction of the duties of a public official under Section 327 of the Criminal Code.[23] A pertinent case involved a petition submitted by persons entitled to vote in a local referendum regarding the dismissal of the mayor. Members of a commission appointed by the mayor, in violation of Section 11a of the Act on Municipal Establishment, failed to properly examine the petition in accordance with the requirements set forth in the Act on the Right of Petition and the Act on Municipal Establishment. In their opinion, they asserted that the petition committee had breached the Act on the Right of Petition by failing to allow citizens to familiarise themselves with the content and purpose of the petition prior to signing it, **as the petition allegedly did not clearly indicate its nature or the grounds for the mayor's dismissal**—assertions that did not correspond to the facts—and they additionally identified other unspecified deficiencies. The commission subsequently recommended that the municipal council declare the petition invalid, and during the council meeting, they obstructed the adoption of a resolution that would have validated the petition. Consequently, individuals entitled to vote in the local referendum on the mayor's dismissal were deprived of their constitutional right to participate directly in local governance. By their actions, the aforementioned councillors—acting as members of the referendum commission and thus as public officials pursuant to Section 128(1) of the Criminal Code—negligently impeded the fulfilment of a key function within the exercise of their powers, causing a particularly serious consequence and thereby committing the criminal offence of obstruction of the duties of a public official through culpable conduct.[24]

The final determination of the referendum commission regarding the legality of the petition's subject matter—and, by extension, the subject of the local referendum—may be reflected in the actions of the municipal council as the body responsible for initiating the local referendum. Consequently, the municipal council constitutes another authority with both the capacity and the obligation to assess whether the subject matter of the local referendum complies with legal and constitutional requirements and, in the event of a negative assessment, to refrain from announcing the referendum. Should the municipality unlawfully fail to act on a valid petition and not announce a local referendum, the residents of the municipality would have several remedies available, ranging from filing a complaint with the public prosecutor's office to initiating proceedings before the administrative courts or submitting a constitutional complaint. This raises the question of delineating the legal powers of other entities involved in the preliminary review of the subject matter of a local referendum.

Conversely, if the municipal council unlawfully proceeded to hold a local referendum, the referendum would take place and be considered valid, with minimal legal consequences. The give scenario underscores a further deficiency in the normative regulation of local referendums, namely the absence of *ex post* review of the constitutionality and legality of their results. For example, the Constitution of the Slovak Republic and ordinary legislation do not allow the Constitutional Court of the Slovak Republic to examine the constitutionality of the conclusion of a local referendum. Neither the Act on the Public Prosecutor's Office,[25] , nor

[23] Act No. 300/2005 Coll. Criminal Code, as amended.
[24] See the judgment of the Regional Court in Banská Bystrica, ref. no. 5To/52/2014 of 31 March 2015.
[25] Act No. 153/2001 Coll. on the Public Prosecutor's Office, as amended.

the Code of Administrative Court Procedure[26], provide for a process for reviewing the legality of the results of a local referendum.

The prerogatives of other entities potentially involved in the process of preventive control over the subject matter of a local referendum are linked to the interim period between the announcement of the local referendum and its actual conduct.

The mayor of the municipality may intervene in the matter by exercising the right, pursuant to Section 13(6) of the Act on Municipal Establishment, to suspend the implementation of a municipal council resolution announcing a local referendum if he or she considers it to be unlawful or clearly detrimental to the municipality. Undoubtedly, the assessment that the resolution is unlawful may be based precisely on the problematic nature of the questions submitted by the residents for consideration in the local referendum. Should the mayor suspend the implementation of the resolution, the municipal council may override the mayor's objection and confirm the resolution by a three-fifths majority of all council members, thereby effectively overruling the mayor's opinion regarding the deficiencies in the subject matter of the local referendum. An important exception to the mayor's preventive control power is a resolution to hold a local referendum on the dismissal of the mayor. Pursuant to Section 13(7) of the Act on Municipal Establishment, the mayor is not authorised to suspend the implementation of such a resolution, which can be regarded as positive and consistent with the principle of separation of powers in local government. Otherwise, the mayor would, in effect, be adjudicating on his or her own status.

Conversely, the mayor may not, on the basis of a subjective belief that the municipal council's resolution announcing a local referendum is invalid, fail to ensure that a notice of the referendum is sent to all residents entitled to vote. Nor is it permissible for the mayor to take any actions aimed at preventing residents from becoming aware of the announcement of the referendum—for example, by refusing to publish the notice on the official municipal notice board. Such "pseudo-control" effectively deprives the municipality's residents of their constitutional right to freely participate and vote in the local referendum, because, until an administrative court issues a ruling under Sections 348 et seq. of the Code of Administrative Court Procedure declaring the municipal council's resolution unlawful, the resolution remains valid and effective - in accordance with the presumption of correctness of public law acts. Accordingly, the mayor, as the statutory representative of the municipality, is obliged to respect the relevant resolution and to perform all acts required by law to enable the holding of the local referendum. Should the mayor demonstrably fail to fulfil this obligation, they expose themselves to a serious risk of committing the criminal offence of obstruction of a public official under Section 327(1) of the Criminal Code.[27] There has already been a case in municipal practice involving the lawful conviction of a mayor in criminal proceedings.[28]

As regards other supervisory bodies that may be considered, the public prosecutor's office in particular has supervisory powers in relation to the activities and results of the municipal council, including in relation to the municipal council's resolution on the declaration of a local referendum. Should the supervising prosecutor consider that the subject matter of the announced local referendum is unlawful, they may file a protest against the resolution in accordance with the procedure set out in the Act on the Public Prosecutor's Office. This may be done *ex officio (ex offo -sua sponte*) or on the basis of a complaint. The prosecutor, however, does not possess decision-making authority over the formulation of referendum questions and cannot issue a final or binding determination that would prevent the local referendum from being held. Moreover, a prosecutor's protest does not have suspensive

[26] Act No. 162/2015 Coll. Administrative Court Procedure, as amended.

[27] According to this provision: *"A public official who, in the exercise of his or her authority, through negligence, frustrates or substantially impedes the fulfilment of an important task shall be punished by imprisonment for up to two years."*

[28] See the resolution of the Regional Court in Trnava, file no. 3To/61/2017 of 6 February 2018.

effect on the conduct of the referendum. The prosecutor's prerogatives in this non-criminal supervisory context are therefore purely auxiliary and advisory in nature.[29] Provided the municipal council deems the prosecutor's protest to be well-founded, it may repeal the contested resolution or amend it in accordance with the nature of the matter. In so doing, the council essentially concurs with the prosecutor's assessment regarding the problematic nature of the subject matter of the local referendum—which it itself had announced—thereby creating an immediate impediment to its implementation.

If the municipal council considers that the protest is not justified and that the subject matter of the local referendum fully complies with legal and regulatory requirements, it will reject the protest by resolution. In such a situation, the prosecutor may turn to the administrative court and file a lawsuit against the relevant resolution in a special type of proceedings pursuant to Section 348 et seq. of the Code of Administrative Court Procedure. Preventive control of the subject matter of a local referendum is transferred to the jurisdiction of the public judiciary at the announced moment, as the legality—and, in effect, the constitutionality[30] —of the subject matter will be assessed by the administrative court through a review of the initiating act. An action brought under Section 348 of the Code of Administrative Court Procedure does not, by operation of law, have *ex lege* suspensive effect, pursuant to Section 184 of Code of Administrative Court Procedure. However, this does not preclude the prosecutor from requesting suspensive effect either at the time of filing the action or at any subsequent stage of the proceedings, up until the administrative court issues its final decision regarding the request for suspensive effect. If the administrative court grants the request, the effect of suspending the execution of the contested resolution of the municipal council will be achieved,[31] thereby creating a temporary impediment to the implementation of the local referendum. Should the administrative court, after hearing the case and reviewing the file, find the action to be well-founded, it may annul the contested resolution in its entirety pursuant to Section 356(3) of the Code of Administrative Court Procedure, or alternatively, annul only the portion of the referendum question that contravenes generally binding legal provisions.[32] The consequence of the court's decision will be the removal of the legal basis for holding the local referendum, either in whole or in part, thereby bringing the preventive control process of the local referendum to a definitive conclusion and rendering the holding of the referendum impossible.

Finally, at least at the theoretical level and in preliminary indications, there are considerations that the Constitutional Court of the Slovak Republic could be the body entrusted with the competence to conduct a preliminary review of the constitutionality, or possibly also the legality, of the subject matter of a local referendum. However, unlike the preventive review of the subject matter of a national referendum under Article 125b of the

[29] For example, I. Palúš and Ľ. Somorová state that a prosecutor may under no circumstances *"change or revoke unlawful acts on his own, or otherwise interfere in the activities of public authorities or replace them."* See PALÚŠ, I. – SOMOROVÁ, Ľ. *State Law of the Slovak Republic*. 2nd edition. Košice: Pavol Jozef Šafárik University in Košice, 2002. p. 331.J. Mihálik and B. Šramel also characterise the powers of the public prosecutor's office in the non-criminal, non-judicial sphere in a similar vein in MIHÁLIK, J. – ŠRAMEL, B. Supervision of Public Prosecution Service over Public Administration: The Case Study of Slovakia. In: *Public Policy and Administration,* vol. 17, No. 2, 2018. p. 196.

[30] It should be borne in mind that the relationship between constitutionality and legality is hierarchical. Legality is derived from the principles of constitutionality and must be consistent with them (see, for example, the ruling of the Constitutional Court of the Slovak Republic, ref. no. II. ÚS 58/98 of 13 January 1999). I. Kanárik takes a similar view when he states that legality is not only synonymous with lawfulness, but also, in a broader sense, with constitutionality [KANÁRIK, I. *The Supremacy of Law (Current Issues in the Slovak Legal System).* Košice: Pavol Jozef Šafárik University in Košice, 2003. pp. 6–7]. At the same time, it is precisely the courts and other "sub-constitutional" public authorities that fulfil the role not only of protectors of legality, but also of primary protectors of constitutionality (*mutatis mutandis,* see, for example, the resolution of the Constitutional Court of the Slovak Republic, ref. no. IV. ÚS 40/2020 of 4 February 2020).

[31] For more details, see KRÁL, R. Suspension of the execution of a municipal council resolution. In: *Public Administration and Society*, vol. 21, 2020, no. 2, 2020. p. 118.

[32] See the resolution of the Regional Court in Bratislava, ref. no. 2S/107/2016 of 10 April 2018.

Constitution of the Slovak Republic,[33] the Constitutional Court of the Slovak Republic does not have explicit competence or procedural rules on the basis of which it could decide whether the subject matter of a local referendum is contrary to legal regulations. It is therefore logical that there is no actively legitimised applicant who could refer the matter to the Constitutional Court of the Slovak Republic.[34] According to J. Drgonec, the Constitutional Court of the Slovak Republic could act in this matter if, *"with great difficulty and through an extensive interpretation of the law"*, a legitimate petitioner could be found (unfortunately, Drgonec no longer provides even an example of who this might be), relying on the Court's powers derived from Article 124 of the Constitution of the Slovak Republic,[35] n proceedings whose rules and conditions, according to the cited author, the Court would "*also have to derive*" itself.*"*[36] In conclusion, it appears that this matter is surrounded by considerable uncertainty and ambiguity. From the perspective of legal knowledge de lege lata, considerations of the Constitutional Court of the Slovak Republic as the body responsible for controlling the subject matter of a local referendum prior to its implementation remain largely in the realm of ideal or aspirational notions rather than realistically feasible procedural options. This assessment is further corroborated in practice by the Constitutional Court itself, which does not conduct a preliminary review of the subject matter of a local referendum, even with reference to Article 124 of the Constitution of the Slovak Republic, as noted by J. Drgonec. In constitutional procedural practice, there was a submission by a municipal mayor to the Constitutional Court of the Slovak Republic requesting a decision on the subject matter of a local referendum before it was held. The Constitutional Court, in accordance with Section 53 of the Act on the Constitutional Court of the Slovak Republic, postponed consideration of the submitted request,[37][38] stating that it was not a motion to initiate proceedings.[39] In its response, it essentially replied to the petitioner that the Constitutional Court of the Slovak Republic, as an independent judicial body for the protection of constitutionality pursuant to Article 124 of the Constitution of the Slovak Republic, provides such protection to the extent resulting from Article 124 – 140 of the Constitution of the Slovak Republic, under precisely defined procedural conditions, including a qualified submission – a motion to initiate proceedings, the requirements of which are specified in more detail in the Act on the Constitutional Court of the Slovak Republic. The Constitutional Court of the Slovak Republic, referring to the structure of the constitutional regulation of a nationwide referendum and the procedure for preventive review of its subject matter [Articles 125b(1), (2) and 95(1) of the Constitution of the Slovak Republic], as well as the detailed provisions contained in Sections 102, 103, and 104 of the Act on the Constitutional Court of the Slovak Republic, emphasised that the term "referendum," with respect to which the Constitutional Court may exercise jurisdiction, is understood to apply exclusively to a referendum concerning the entire Slovak Republic. Such referendums are regulated by Articles 93 to 100 of the Constitution of the Slovak Republic and may be initiated either by a petition signed by at least 350,000

[33] For a broader context, see TRELLOVÁ, L. – BALOG, B. The Material Core of the Slovak Constitution and Its Perspectives. In: *Balkan Social Science Review*, vol. 19, 2022. p. 143.

[34] Similarly, TRELLOVÁ, L. In TRELLOVÁ, L. – VRABKO, M. *Direct Manifestations of the Right to Municipal Self-Government in the Context of Public Administration.* Prague: Leges, 2022. p. 155.

[35] According to this provision: *"The Constitutional Court of the Slovak Republic is an independent judicial body for the protection of constitutionality."*

[36] DRGONEC, J. *Constitution of the Slovak Republic. Theory and practice.* 2nd revised and supplemented edition. Bratislava: C. H. Beck, 2019. p. 1124.

[37] Act No. 314/2018 Coll. on the Constitutional Court of the Slovak Republic and on amendments to certain acts, as amended.

[38] According to this provision: *"If the reporting judge finds from the content of the submission that it is not a motion to initiate proceedings, he or she shall postpone the submission. He or she shall notify the person who submitted the submission to the Constitutional Court in writing of the postponement."*

[39] Notification of the Constitutional Court of the Slovak Republic on the postponement of the submission of 10 April 2019 (Rvp 597/2019).

citizens of the Slovak Republic or by a resolution of the National Council of the Slovak Republic. The subject matter of a nationwide referendum, within the meaning of Article 93(1) of the Constitution, concerns the ratification of a constitutional law regarding the accession of the Slovak Republic to a union with other states or its withdrawal from such a union, or, pursuant to Article 93(2), other important matters of public interest. By contrast, the subject matter of a local referendum, as provided for in Section 11a of the Act on Municipal Establishment and declared by the municipal council, does not fall within the scope of proceedings before the Constitutional Court of the Slovak Republic (pursuant to Article 125b of the Constitution).[40]

On the other hand, it cannot be denied that the Constitutional Court of the Slovak Republic may indirectly express its opinion on the preventive review of the subject matter of a local referendum, that is, within the framework of one of the procedurally regulated types of proceedings. For example, if an administrative court, acting on the basis of a prosecutor's action, annuls a municipal council resolution declaring a local referendum, it is not precluded that the municipality concerned could file a so-called municipal constitutional complaint under Article 127a of the Constitution of the Slovak Republic. Through this mechanism, the municipality may seek constitutional protection against an unconstitutional or unlawful decision of the administrative court that interferes with matters of local self-government, given that a local referendum constitutes an (immediate) form of municipal self-government and its subject matter is limited exclusively to issues reserved for municipal self-governance. It is also possible for petitioners dissatisfied with the refusal to declare a local referendum initiated by a petition to submit a constitutional complaint under Article 127 of the Constitution of the Slovak Republic, requesting protection of the fundamental right to participate in the administration of public affairs as guaranteed by Article 30(1) of the Constitution of the Slovak Republic.[41] The Constitutional Court of the Slovak Republic would apparently not be able to reach a final decision on the matter other than by materially assessing the conformity of the subject matter of the local referendum, which would give it the procedural possibility of interfering in the process of implementing the local referendum.

III. CONCLUSION

Although *ex ante* control over the content of local referendums is not regulated as precisely, explicitly, or in as much detail as that of national referendums, the appropriate application of several methodological and interpretative approaches allows for the identification of a number of bodies vested with control powers of diverse character. These include entities originating within local government, as well as transcendent entities external to the administration, that is, the organisational structures of municipalities and towns.[42]

The first body to come into play is the *ad hoc* referendum commission of the municipal council, which may be authorised to exercise control over the content of a petition for the declaration of a local referendum. Another relevant structure is the municipal council itself, whose members may refuse to declare a local referendum if its subject matter is unlawful or unconstitutional. This constitutes a categorical power, as the municipality acts independently in matters concerning the declaration of a local referendum; however, this authority cannot be exercised arbitrarily or in a manner that is manifestly unjustified in failing to declare a local referendum.[43] The mayor of the municipality may challenge the declaration of a local referendum by exercising the so-called right of veto against the municipal council's

[40] Notification of the Constitutional Court of the Slovak Republic on the postponement of the submission of 10 April 2019 (Rvp 597/2019).
[41] See the resolution of the Constitutional Court of the Slovak Republic, ref. no. III. ÚS 94/03 of 2 April 2003.
[42] See NOVÁK, J. *Administrative Procedural Law.* Bratislava: Právnická jednota v Bratislave, 1943. p. 226.
[43] See the resolution of the Constitutional Court of the Slovak Republic, ref. no. III. ÚS 94/03 of 2 April 2003.

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resolution declaring the referendum. The mayor's powers may, in principle, be final, but only conditionally, insofar as the veto is not overridden by the subsequent re-approval of the resolution by the municipal council. It should be noted that the mayor is not permitted to veto a resolution concerning a local recall, that is, a referendum on his or her own dismissal from office.

Subsequently, entities external to local government may also exercise influence. Foremost among these is the public prosecutor, who may apply a measure of prosecutorial supervision—a protest—against a municipal council resolution declaring a locally problematic referendum. However, the prosecutor does not possess categorical authority, as he or she cannot unilaterally annul an allegedly unlawful resolution. The prosecutor's role in relation to the municipal council is thus primarily advisory or signalling in nature, albeit with a relatively strong prospect of initiating a subsequent so-called prosecutorial lawsuit.As an independent, transcendent controller of public administration, the administrative court wields effective decision-making power, as it may revoke a resolution declaring a local referendum, thereby preventing the referendum from being held. It is precisely this derogatory competence of the administrative judiciary in relation to the preliminary assessment of the subject matter of a local referendum that appears both key and appropriate, in accordance with the principle of subsidiarity, and without departing from the prevailing philosophy of standards governing judicial control of local government. Indeed, the administrative judiciary, as a form of public-law adjudication, is entrusted by the legislature with analogous powers in other areas, including proceedings concerning the legality of local law, specifically generally binding regulations (Sections 357 et seq. of the Code of Administrative Court Procedure),[44] or proceedings on the constitutionality and legality of elections to local government bodies (Section 312a et seq. Code of Administrative Court Procedure).[45] Finally, the possibilities for the Constitutional Court of the Slovak Republic to directly influence the subject matter of a local referendum prior to its implementation are, at present, rather limited and relatively difficult to effect in practice. Although the implicit authority referred to in Article 124 of the Constitution of the Slovak Republic may be invoked in *hard cases*, it cannot, under any circumstances, be treated as a "blank cheque" to be exercised by anyone, at any time, and for any reason. Otherwise, the procedural framework would be disproportionately undermined or lose its justification entirely, as the derived powers of constitutional justice could be positioned as a panacea aimed at remedying every anomaly, deficiency, or unintended lacuna in constitutional procedural regulation. Nonetheless, this observation need not be regarded as a lamentable limitation, particularly in light of the correctly increasing tendency to exclude from the Constitutional Court's jurisdiction those proceedings that can be adequately addressed by lower public authorities.[46] This corresponds to the aforementioned principle of subsidiarity, according to which, in order to protect higher-level authorities from being

[44] See TOMAŠ, L. *Proceedings on the conformity of legal regulations in administrative justice*. Prague: C. H. Beck, 2024. 218 pp.

[45] See SUDZINA, M. Proceedings on the constitutionality and legality of elections to local government bodies. In ŠTENPIEN, E. – PIŠTEJOVÁ, L. – SVATUŠKA, I. (eds.) *World War I and its consequences in terms of constitutional law. Collection of scientific contributions from the international scientific conference Košice, 29–30 September 2022.* Košice: Pavol Jozef Šafárik University in Košice, ŠafárikPress Publishing House, 2022. p. 289 et seq.

[46] It is no secret that, in terms of the scope of its powers, the Constitutional Court of the Slovak Republic is one of the "busiest" constitutional courts in Europe and probably in the world. This is *unnatural*, but unfortunately, in its *unnaturalness*, it has the *natural* potential to have a negative impact on the results of its decision-making practice. For more details, see GAJDOŠÍKOVÁ, L. – LUBY, J. – MOCHNÁČOVÁ, M. – OROSZ, L. – MACKO, R. Expansion of the powers of the Constitutional Court of the Slovak Republic and current problems in decision-making practice. In OROSZ, L. – DOBROVIČOVÁ, G. (eds.) *15 Years of the Constitution of the Slovak Republic. Collection of contributions from the scientific conference, Košice, 6–7 September 2007.* Košice: Faculty of Law, UPJŠ in Košice, Košice Self-Governing Region, 2008. p. 272, resp. OROSZ, L. Effective constitutional justice as a constitutionally protected value. In: *Studia Iuridica Cassoviensia*, vol. 7, no. 1, 2019. pp. 10–11.

overburdened, all competences that can be effectively exercised by lower public authorities using their own resources and capacities should be entrusted to them.[47]

KEY WORDS
local referendum, subject of the referendum, preventive control, municipality, local government

KĽÚČOVÉ SLOVÁ
miestne referendum, predmet miestneho referenda, preventívna kontrola, obec, územná samospráva

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[47] The content of the principle of subsidiarity, whose modern perception is based on papal social teaching (the "constitutional charter" or "*Magna Charta*" of the aforementioned principle is the first social encyclical *Rerum novarum* from 1891, written by Pope Leo XIII), is, simply put – the right of a lower unit (e.g. an administrative court) to do everything within its power, while the transfer of activities to a higher entity (e.g. to the jurisdiction of the constitutional court) should only take place if the "smaller" entity is no longer capable and competent to act as necessary. For more details, see JABLOŃSKI, J. A brief history of the principle of subsidiarity as a constitutional principle. An attempt at conceptualisation. In: *Prawo i Więż*, Vol. 46, No. 3, 2023. p. 77 et seq., or KUKLIŠ, P. On the principle of subsidiarity in public administration. In: *Právny obzor*, vol. 86, no. 6, 2003. p. 636 et seq.

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SELECTED ASPECTS OF ENTREPRENEUR BANKRUPTCY IN THE ITALIAN AND SLOVAK LEGAL ORDER[1]

VYBRANÉ ASPEKTY KONKURZU PODNIKATEĽOV V TALIANSKOM A SLOVENSKOM PRÁVNOM PORIADKU

Lucián Török[2]

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ABSTRACT
Bankruptcy as a part of insolvency law is generally an institution present in the legislation of countries governed by a market economy. The territory of today's Italy is the cradle of the foundations of the current legal systems, and Slovakia is the country where the author lives and works mainly in the field of insolvency law. The legal systems of both countries are undergoing constant and rapid change, and are also being partially harmonised under the influence of EU law. The author's article attempts to present the current Italian insolvency law, to compare it in certain contexts with the Slovak insolvency law and, on the basis of the results obtained, to provide some reflections on how the Slovak insolvency law might develop in the future. The foundations of the current Slovak insolvency law are historically significantly influenced by Austrian and Belgian insolvency law, and currently also by US law. Therefore, the author wonders why some elements of the Slovak legal system could not be inspired by the Italian insolvency law in the future.

ABSTRAKT
Konkurz ako súčasť insolvenčného práva je spravidla inštitútom prítomným v právnych úpravách krajín, ktoré sa riadia trhovou ekonomikou. Územie dnešného Talianska je kolískou základu súčasných právnych systémov a Slovensko krajinou, v ktorej autor žije a pôsobí predovšetkým v oblasti insolvenčného práva. Právne poriadky oboch spomenutých krajín sa priebežne a rýchlo pretvárajú; čiastočne sa vplyvom práva EÚ aj navzájom harmonizujú. Autor sa svojím príspevkom pokúša priblížiť súčasné talianske insolvenčné právo, v istých súvislostiach ho porovnať so slovenským insolvenčným právom a na podklade získaných výsledkov tak priniesť niektoré úvahy o tom, ako by sa slovenské insolvenčné právo mohlo pro futuro ďalej vyvíjať. Základy súčasného slovenského insolvenčného práva sú historicky významným spôsobom ovplyvnené rakúskym a belgickým konkurzným právom, v súčasnosti aj právom USA. Preto sa autor zamýšľa nad tým, prečo by niektoré prvky slovenského právneho poriadku nemohli byť v budúcnosti inšpirované práve aj talianskym insolvenčným právom.

I. INTRODUCTION

The institution of insolvency law in Italy has undergone fundamental changes in the recent past, with the adoption in 2019 of new legislation concerning crisis and insolvency. The Italian Crisis and Insolvency Code of 12 January 2019 (hereinafter "CCII") completely replaced the previous Royal Decree No. 267 of 16 March 1942, which constituted the bankruptcy law (hereinafter also "the Italian Bankruptcy Act"). By contrast, the legal system of the Slovak Republic underwent a significant reform of bankruptcy law with the adoption of Act No. 7/2005

[1] This paper was prepared as part of the APVV-23-0331 project „*Integrácia únie kapitálových trhov: zmena korporačného financovania a záchrana obchodných spoločností vo finančných ťažkostiach*".
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Coll. on Bankruptcy and Restructuring (hereinafter "ZKR") as early as 2004. Subsequently, insolvency law in Slovakia underwent further significant reform as a result of the transposition of Directive 2019/1023 of the European Parliament and of the Council of 20 June 2019 on restructuring and insolvency,[3] through the adoption of a separate Act No. 111/2022 Z. z. on the resolution of imminent insolvency; which continues to co-exist alongside the ZKR.

Our aim in selecting the topic of this paper and in its preparation is to identify the key differences between the legal regimes governing the insolvency of businesses in Italy and Slovakia. Our motivation for choosing a specific foreign legal system stems from a number of differing aspects, such as the size of both countries, their population, the size of both economies, the historical period of market economy development in both countries, the timing of the adoption of new insolvency regulations, and others. The relative availability of specialist Italian legal literature played an important role in the choice of topic. Our specific aim is to ascertain what selected instruments for regulating legal relationships in insolvency proceedings are available under both legal systems, including any preventive and repressive measures. It should be emphasised, however, that this paper does not set out to compare and analyse the entirety of insolvency law in Italy and Slovakia, i.e. crisis and pre-insolvency regimes, as well as any reorganisation regimes or special insolvency regimes, such as small-scale bankruptcy, bankruptcy of financial institutions, debt relief for natural persons, and so on. In this paper, we focus on identifying, defining and comparing the institution of "standard" bankruptcy in both countries; that is, an institution resulting in the "liquidation" of insolvent debtors – business owners. On the basis of the research carried out and in accordance with the sub-objective of this paper, we subsequently set out our reflections on the future development of insolvency law in Slovakia in relation to specific aspects of these institutions.

The following hypotheses assist us in achieving the main objective:

1. Current modern insolvency law in Italy contains legal provisions which serve as a source of inspiration for the future development of insolvency law in Slovakia.
2. Italian insolvency legislation contains legal institutions that are comparable to those in Slovak insolvency legislation.

A content analysis of the legislation of both countries and their selected legal institutions and instruments significantly assists us in achieving the specified sub-objective and main objective of the research. Using this scientific method, we examine in particular the content, meaning, structure and individual relationships between the relevant statutory provisions, so that we may subsequently proceed to compare the legislative texts of both countries with one another. We carry out the comparison using the scientific method of comparison. For the purposes of comparison, we select the legal framework governing the so-called "negative status" of the debtor, as well as the subjective aspect of the selected insolvency proceedings in both countries, as well as institutions typical of insolvency law, such as the effects of the relevant insolvency proceedings in both countries on the debtor's assets and correspondence, the prohibition on individual enforcement of judgments and the prohibition on the application of protective measures, the satisfaction of secured creditors, and the debtor's void legal acts. The reason for selecting these specific legal institutions for the purposes of comparison lies in the fact that the definition of the debtor's so-called "negative status" and the identification of the parties to whom the specific insolvency proceedings are directed form the basis of insolvency law in every legal system. Consequently, the selection of effects that primarily affect assets, correspondence, the prohibition on individual enforcement of judgments, secured creditors and, finally, void legal acts is made in view of the fact that these are typical institutions upon which insolvency proceedings in the legal systems of individual countries are usually

[3] HRABÁNKOVÁ, K. *Verejná preventívna reštrukturalizácia ako sanačný proces podnikateľa v komparácii s českou právnou úpravou*. In: STUDIA IURIDICA Cassoviensia [online]. 2024, vol. 12, č. 2. [cit. 2025-10-14]. Available online: https://sic.pravo.upjs.sk/ecasopis/122024-2/04_Hrabankova.pdf. pp. 52–53.

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based. On the basis of the analysis carried out on selected legal institutions, the determining criteria for comparison are the systematic classification of a given legal institution within both legal systems, as well as its teleological and functional aspects. In drafting this paper, we subsequently employ the scientific method of synthesis to summarise and integrate the results of the analysis and comparison into a single coherent section, thereby fulfilling the main objective of the paper. For the purposes of this paper, we also draw upon various methods of legal interpretation, in particular the grammatical, systematic, logical and teleological approaches. In drafting this article, the author has used an artificial intelligence tool, namely DeepL Translator, to assist with the translation from Slovak into English. We would also like to add that the author is not aware of any previous research in this field – that is, the comparative analysis of selected aspects of the institution of business insolvency in Italy and Slovakia – either in Slovakia or abroad.

II. INTRODUCTION TO CURRENT ITALIAN INSOLVENCY LAW

At present, the CCII forms the basis of Italian insolvency law, the legislative preparations for which began in 2017 with the aim of achieving a comprehensive reform of the issues surrounding so-called commercial crises and insolvency. In undertaking this work, the Italian legislature envisaged the complete replacement of the Italian Bankruptcy Act of 1942, whilst the drafting of the legislation was also influenced by European Union law, such as Commission Recommendation 2014/135/EU of 12 March 2014 on a new approach to business failure and insolvency, and Regulation (EU) No 2015/848 of the European Parliament and of the Council on insolvency proceedings.[4] Subsequently, following the adoption of the CCII, Directive 2019/1023 of the European Parliament and of the Council of 20 June 2019 on restructuring and insolvency was also transposed, as a result of which the CCII was amended. Following several postponements, the CCII came into force on 15 July 2022. The reasons for the various postponements of its entry into force included, for example, measures relating to the COVID-19 pandemic and, subsequently, the need to transpose the aforementioned European Directive.[5]

By adopting the new legislation, the Italian legislature has decided to remove the term “bankruptcy” from the legal system entirely and replace it with the term “judicial liquidation”. Through an implementing provision – Article 349 of the CCII – the term “bankruptcy” has even been replaced in all applicable legislation; consequently, this change also affected existing proceedings that had commenced under the previous Italian Bankruptcy Code and had not yet been concluded following the adoption of the CCII. The author, Giacomo D’Attorre, states that replacing the term “bankruptcy” with “judicial liquidation” is intended to highlight this procedure as a phase of an entrepreneur’s business activity rather than as a procedure of a punitive nature.[6] According to the author Fabio Marelli, this is merely a change in the name of this institution, whilst retaining the characteristics of Italian insolvency proceedings.[7] Furthermore, according to the author Giulia Basile, with the adoption of the CCII, insolvency—renamed judicial liquidation—has lost its central role in resolving an entrepreneur’s insolvency.[8]

[4] BATTILORO, V., BASILE, G. *Compendio di Diritto Commerciale e della Crisi di Impresa*. 1st ed. Molfetta : Neldiritto Editore, 2023. p. 497.
[5] MARELLI, F. *The new Italian Insolvency Code entered into force on 15 July 2022*. In: Advant Nctm [online]. 2022. [cit. 2025-10-14]. Available online: https://www.advant-nctm.com/en/news/il-nuovo-codice-della-crisi-dimpresa-e-dellinsolvenza-in-vigore-dal-15-luglio-2022.
[6] D'ATTORRE, G. *Manuale di diritto della crisi e dell'insolvenza*. 3rd ed. Turin : Giappichelli Editore, 2024. p. 18.
[7] MARELLI, F. *The new Italian Insolvency Code entered into force on 15 July 2022*. In: Advant Nctm [online]. 2022. [cit. 2025-10-14]. Available online: https://www.advant-nctm.com/en/news/il-nuovo-codice-della-crisi-dimpresa-e-dellinsolvenza-in-vigore-dal-15-luglio-2022.
[8] BATTILORO, V., BASILE, G. *Compendio di Diritto Commerciale e della Crisi di Impresa*. 1st ed. Molfetta : Neldiritto Editore, 2023. p. 497.

The fundamental concepts on which the CCII is based are: “crisis” and “insolvency”. With regard to these concepts, the Italian legislature subsequently introduced new institutions, or adopted previously known ones, when drafting the Code, and organised them as follows: i) agreed crisis resolution/agreed settlement; ii) crisis and insolvency management tools, comprising certified restructuring plans, debt restructuring agreements, restructuring plans subject to approval, consumer debt restructuring, small-scale settlements with creditors and agreements with creditors; iii) judicial liquidation; iv) liquidation of over-indebted individuals; and v) compulsory administrative liquidation. This classification thus corresponds to the framework of modern insolvency law in Italy, which is significantly influenced by EU law; primarily in the institutions and processes aimed at overcoming a crisis or insolvency with a view to achieving, for example, business continuity and the protection of employment and employees’ incomes.[9] These are the mechanisms referred to above under (i) and (ii), and they comprise a diverse range of tools that differ from one another in the procedures used to achieve their objectives, and possibly also in the entities for which they are intended; for example, consumers constitute a separate category. Another category comprises the typical mechanism for resolving insolvency, i.e. judicial liquidation, which represents the final stage in resolving the financial difficulties of a debtor who is an entrepreneur, when it is no longer possible to resolve the situation using the mechanisms referred to above under i) or ii). The institution for over-indebted individuals constitutes a special category of bankruptcy proceedings, intended for entities such as so-called “small business owners”, farmers and consumers.[10] Finally, the institution of compulsory administrative liquidation represents another specific category of insolvency proceedings intended for entities subject to supervision by state authorities, such as banks, insurance companies, and so on[11].[12]

In light of the above, it appears that the Italian legislature seeks, through instruments designed to resolve and, where possible, overcome crises and insolvency, to prioritise encouraging debtors and creditors, where possible, to undergo a process of restructuring and “reorganisation” rather than a liquidation process, unless this is unavoidable. From the perspective of , for example, the Slovak legal system, the Bankruptcy Act (ZKR) primarily regulates the institution of bankruptcy, followed by the institution of restructuring; other crisis-related measures are regulated in a separate Act No. 111/2022 Z. z. on the resolution of impending insolvency,[13] which may lead those subject to these legal provisions to believe that if a debtor is, for example, experiencing financial difficulties, the solution is “first and foremost” bankruptcy, and thus any “reorganisation” measures may remain unused in Slovakia without serious justification.

[9] BATTILORO, V., BASILE, G. *Compendio di Diritto Commerciale e della Crisi di Impresa*. 1st ed. Molfetta : Neldiritto Editore, 2023, p. 498.

[10] MARELLI, F. *The new Italian Insolvency Code entered into force on 15 July 2022*. In: Advant Nctm [online]. 2022. [cit. 2025-10-14]. Available online: https://www.advant-nctm.com/en/news/il-nuovo-codice-della-crisi-dimpresa-e-dellinsolvenza-in-vigore-dal-15-luglio-2022.

[11] TONUS, F., TRAMBAIOLO, F. *Procedure concorsuali nel Registro delle Imprese: Codice della Crisi e dell'Insolvenza*. In: Camera di commercio di Venezia e Rovigo [online]. 2023. [cit. 2025-10-16]. Available online: https://www.dl.camcom.it/FocusOn/conoscere-il-registro-imprese-rea/procedure-concorsuali-nel-registro-delle-imprese-codice-della-crisi-e-dell-insolvenza.

[12] By way of comparison, under the legal system of the Slovak Republic, the key concepts of insolvency law are “impending insolvency” and “insolvency”, and the legal mechanisms used to address them are bankruptcy, restructuring, small-scale bankruptcy, bankruptcy of financial institutions, debt relief for natural persons through bankruptcy or a repayment schedule, and public and non-public preventive restructuring.

[13] DOLNÝ, J. *Testovanie úpadku a hroziaceho úpadku dlžníka z pohľadu slovenského právneho poriadku*. In: STUDIA IURIDICA Cassoviensia [online]. 2023, vol. 11, č. 2. [cit. 2025-10-16]. Available online: https://sic.pravo.upjs.sk/ecasopis/112023-2/01_dolny.pdf. p. 4.

III. JUDICIAL LIQUIDATION VS. BANKRUPTCY

In view of the topic of this paper, we shall now focus on a comparison of "liquidation" insolvency procedures intended for debtor-entrepreneurs. To clarify, where we use the term "judicial liquidation" in this paper, we are referring to an insolvency procedure under Italian law, set out primarily in Articles 121–267 of the CCII; and where we use the term "bankruptcy", or "standard bankruptcy", this refers to an insolvency institution under Slovak law, set out primarily in Sections 11–105 of the ZKR.

1. Insolvency in Italy and bankruptcy in Slovakia

The institution of judicial liquidation is closely linked to the concept of "insolvency". Article 121 of the CCII specifies that judicial liquidation applies only to entrepreneurs who do not meet the conditions set out in Article 2(1)(d) of the CCII[14] and who are, at the same time, in a state of insolvency.

The term "insolvency" is defined in Article 2(1)(b) of the CCII as follows: "a state of the debtor characterised by default or other external circumstances demonstrating that the debtor is no longer able to meet its obligations on a regular basis". In accordance with the established case law of the insolvency courts in Italy, the following factors are examined, for example: the length of the period during which the debtor has failed to settle their due obligations; whether ongoing enforcement proceedings against the debtor have proved fruitless; whether the debtor has sufficient liquid assets to settle current liabilities; whether there have been unsuccessful attempts to restructure the debtor's debt; whether there have been delays in meeting tax and social security obligations; whether there is a lack of financial statements; and other factors.[15]

Unlike under Italian law, the Slovak concept of bankruptcy is linked to the term "insolvency". Under Section 3(1), a debtor is in insolvency if they are insolvent or over-indebted. Consequently, the concept of "insolvency" is defined separately in the Slovak legal system for legal persons and for natural persons. As a general rule, a legal person is deemed insolvent if, 90 days after the due date, it is unable to fulfil at least two monetary obligations to more than one creditor, whilst a natural person is deemed insolvent if, 180 days after the due date, they are unable to fulfil at least one monetary obligation. The ZKR also contains a definition of the so-called "presumption" of a legal entity's solvency, which is linked to a reasonable expectation that the management of its assets or the operation of its business will continue, and the determination of the value of the so-called "coverage gap"; this therefore constitutes a negative definition of the concept of "insolvency" in relation to a legal entity. The ZKR subsequently also contains a definition of over-indebtedness. A person is deemed to be over-indebted if they are required to keep accounts in accordance with a specific regulation, have more than one creditor, and the value of their liabilities exceeds the value of their assets; the ZKR also contains a negative definition of the term "liability" for the purposes of determining over-indebtedness, as well as further conditions for determining the value of liabilities and assets.[16] The Slovak legal system further regulates, in an implementing regulation – Decree No. 197/2022 Z. z. – amongst other things, the details of how insolvency is determined and the details of the coverage gap. According to the author Jaroslav Dolný, insolvency, which

[14] article 2(1)(d) of the CCII defines a so-called "small entrepreneur" as an entrepreneur who cumulatively meets three statutory requirements, namely the requirements relating to the specified thresholds for the total value of assets, the value of income and the value of debts.

[15] for further details, see, for example, the Judgment of the District Court of Milan dated 16 July 2026, case no. P.U. n. 321-1/2026 R.G.

[16] for further details, see Section 3(2) and (3) of the Insolvency Act.

the ZKR defines as "over-indebtedness", is generally assessed using the so-called balance sheet test, whilst insolvency is assessed using the so-called liquidity test.[17]

On the basis of the above, we can observe that the definition of a "negative state", which constitutes the so-called objective requirement for judicial liquidation in Italy or bankruptcy in Slovakia, differs significantly. It can be deduced from the above that the Italian court plays a key role in determining insolvency as part of its decision-making process, in which it is not strictly bound by complex statutory definitions and determining criteria, or by exceptions and negative definitions, but the decisive factors for the court's decision are apparently a factual, fair and highly nuanced assessment of the specific case. In contrast, in Slovakia, the assessment of insolvency tends to be characterised by excessive formalism, primarily due to the detailed legislative formulation of the relevant legal concepts; this may, in certain situations, prevent the adjudicating court from assessing this negative state with regard to any specific circumstances, whether in a positive or negative sense. When assessing insolvency, a court in Slovakia tends to focus on strict mathematical calculations using a balance sheet test or a liquidity test,[18] whereas a court in Italy has the option to assess the debtor's state of insolvency freely, broadly and taking into account any variables,[19] so that the purpose and spirit of the insolvency regulations can be fulfilled as fully as possible.

2. The subjective aspect of judicial liquidation and bankruptcy

Under the CCII, the Italian judicial liquidation procedure is designed to resolve the insolvency of entrepreneurs, regardless of whether they are legal or natural persons. However, Article 121 of the CCII excludes the aforementioned "small entrepreneurs" from this procedure. However, the following entities are not included in the positive definition of entrepreneurs under the CCII and other Italian regulations: the State and so-called public bodies,[20] so-called public companies, farmers, consumers, so-called large enterprises and so-called innovative start-ups. Farmers, consumers, large enterprises and innovative start-ups, within the meaning of the CCII or other regulations, are subject to crisis and insolvency resolution mechanisms other than judicial liquidation.[21]

Under the Bankruptcy Act (ZKR), the Slovak bankruptcy regime applies to legal entities (in general) and natural persons – entrepreneurs. From the perspective of the negative definition of entities contained in the ZKR, the state, state budgetary organisations, state-subsidised organisations, state funds, municipalities, higher territorial units and other entities specified in Section 2 of the ZKR are not subject to the institution of bankruptcy.[22] As regards so-called financial institutions, such as banks, insurance companies, reinsurance companies and others, under the ZKR, the bankruptcy of these entities is governed by specific provisions of the ZKR which modify the standard bankruptcy procedure.[23]

In view of the above, it may be concluded that both the legal framework of the CCII and that of the ZKR contain a legislative definition of the so-called "subjective aspect", i.e. the entities for which the institution of judicial liquidation or bankruptcy is intended to resolve their financial difficulties. Both sets of legislation contain both positive and negative definitions of

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[17] for further details on the balance sheet test and the liquidity test, see DOLNÝ, J. *Testovanie úpadku a hroziaceho úpadku dlžníka z pohľadu slovenského právneho poriadku*. In: STUDIA IURIDICA Cassoviensia [online]. 2023, vol. 11, č. 2. [cit. 2025-10-16]. Available online: https://sic.pravo.upjs.sk/ecasopis/112023-2/01_dolny.pdf. ISSN 1339-3995. DOI 10.33542/sic2023-2-01, pp. 5-8.
[18] for further details, see, for example, the resolution of the Košice Municipal Court of 14 November 2023, ref. no. 26K/14/2021.
[19] FORTUNATO, S. *Insolvenza, crisi e continuità aziendale nella riforma delle procedure concorsuali: ovvero la commedia degli equivoci*. In: Il diritto fallimentare e delle società commerciali. Turin : Giappichelli Editore, 2021, No. 1. p. 24.
[20] for further details, see Article 1(1) of the CCII.
[21] BATTILORO, V., BASILE, G. *Compendio di Diritto Commerciale e della Crisi di Impresa*. 1st ed. Molfetta : Neldiritto Editore, 2023. p. 504.
[22] POSPÍŠIL, B. *Zákon o konkurze a reštrukturalizácii s komentárom*. Žilina : Poradca podnikateľa, 2005. p. 12.
[23] for further details, see Part Six of the ZKR.

such entities; ultimately, it can be stated that judicial liquidation and bankruptcy are intended primarily for "ordinary" entrepreneurs, namely legal and natural persons. However, both sets of legislation contain certain exceptions and restrictions. From the perspective of the ZKR, however, it is irrelevant whether a legal person is an entrepreneur or not;[24] therefore, this category of entities also includes, for example, civic associations, foundations and others. Furthermore, under Slovak law, it is not decisive whether the entity in question carries out agricultural activities; with the exception of debtors farming on agricultural land,[25] to whom the ZKR does not apply during the period from 1 April to 30 September of any given calendar year.[26] For the purposes of the subjective criterion regarding the applicability of standard insolvency proceedings, the Slovak legal system does not distinguish between businesses on the basis of their size. Although the Slovak legal system recognises the definition of a so-called "small" debtor,[27] or a "large" debtor;[28] the aforementioned definitional criteria do not exclude the entities concerned on the debtor's side from the standard insolvency proceedings.

Differences in the approach of various types of entities to the institution of judicial liquidation or bankruptcy on the debtor's side are, however, influenced by the overall concept of insolvency law in both countries, in particular by the existence of other specific institutions designed to address crises and insolvency, as well as the overall view of "liquidation" proceedings; which, in the spirit of Italian legislation, is intended to be the last resort in a state of insolvency, and even then only for selected entities.

3. Certain effects of the commencement of judicial liquidation and the declaration of bankruptcy

The CCII divides the effects of the commencement of judicial liquidation into four categories, namely: (i) effects on the debtor, (ii) effects on creditors, (iii) effects on acts detrimental to creditors, and (iv) effects on existing/uncompleted legal relationships.[29]

The equivalent of the effects of the commencement of judicial liquidation in Italy is, in Slovakia, the legal provisions contained in Title V of Part Two of the Insolvency Act (ZKR), entitled "Effects of the declaration of bankruptcy and voidable legal acts". Although the legislative classification in Slovakia is not organised into individual categories as is the case with the Italian legislation, we can nevertheless identify similar categories based on the content of the relevant Chapter Five of Part Two of the ZKR. In this section of the article, we shall examine certain selected effects of the commencement of judicial liquidation in Italy, analyse them, and subsequently compare them with Slovak insolvency law.

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[24] POSPÍŠIL, B. *Zákon o konkurze a reštrukturalizácii. Komentár*. Bratislava : Iura Edition, 2012. p. 49.

[25] POSPÍŠIL, B. *Zákon o konkurze a reštrukturalizácii s komentárom*. Žilina : Poradca podnikateľa, 2005. p. 12.

[26] For further details, see Section 205 of the Bankruptcy and Restructuring Act. According to the author Milan Ďurica, this is a restriction whereby, during the specified period of the year, bankruptcy proceedings cannot be commenced against debtors farming agricultural land (ĎURICA, M. *Zákon o konkurze a reštrukturalizácii. Komentár*. 4th ed. Praha : C. H. Beck, 2021. p. 1416). However, the provision in question does not prevent bankruptcy proceedings that have already been declared from continuing and being concluded.

[27] For further details, see Section 106c(1)(f) and (g) of the Bankruptcy and Restructuring Act. This concerns debtors in so-called "small-scale bankruptcy", which represents an alternative to standard bankruptcy. According to the author Milan Ďurica, small-scale insolvency is a legal mechanism intended for entities with a lower level of economic activity (ĎURICA, M. *Zákon o konkurze a reštrukturalizácii. Komentár*. 4th ed. Praha : C. H. Beck, 2021. p. 838).

[28] For further details, see Section 20a(c)(2) and (3) of Act No. 8/2005 Coll. on Administrators and on Amendments to Certain Acts. These are the defining criteria used to determine the random selection of an administrator, inter alia, in standard insolvency proceedings, specifically from the register of so-called special administrators. The specialist literature refers to these "large" debtors, together with other specific entities, as "special" entities for the purposes of random selection from the section of special administrators (DOLNÝ, J., MACHATOVÁ, L., MALIAR, M. *Zákon o správcoch. Komentár*. 1st ed. Praha : Wolters Kluwer ČR, 2024. p. 69).

[29] BATTILORO, V., BASILE, G. *Compendio di Diritto Commerciale e della Crisi di Impresa*. 1st ed. Molfetta : Neldiritto Editore, 2023. p. 510.

3.1. The debtor's assets

The category of effects on the debtor under Italian law primarily includes the definition of the debtor's assets that form part of judicial liquidation. Article 142 of the CCII stipulates, amongst other things, that upon the commencement of judicial liquidation, the debtor loses the right to administer and dispose of their assets existing at the time of the commencement of judicial liquidation. At the same time, this right passes to the liquidator, who is responsible for the administration and liquidation/realisation of the assets and the subsequent distribution of the proceeds amongst the creditors, in accordance with the principle of *par conditio creditorum;*[30] for which the term *"pari passu* principle" is more commonly used in Slovakia.[31]

The equivalent of Article 142 of the CCII in the Slovak legal system is Section 44(1) of the ZKR, which has the same meaning and effect. The purpose of the provisions in both legal systems is thus to clearly set out the conditions ensuring the proper conduct of proceedings, whilst eliminating any adverse effects that might be caused by the debtor themselves during judicial liquidation or bankruptcy. Under Article 142 of the CCII, assets acquired by the debtor during judicial liquidation are also subject to judicial liquidation; the situation is similar under Slovak law.[32]

Article 146 of the CCII contains a definition of assets that are not included in judicial liquidation; these include, for example, assets and rights of an exclusively personal nature, as well as maintenance payments, wages or pensions, to the extent necessary to ensure the livelihood of the debtor and members of their family, and other items. The aforementioned article further regulates the procedure for determining the maximum amount necessary to ensure the livelihood of the debtor and members of their family, based on a court decision following a hearing of the administrator and the creditors' committee, and taking into account the personal circumstances of the debtor and members of their family. In view of the wording and content of the aforementioned provision of CCII, it is clear that the negative definition of the debtor's assets relates primarily to natural persons.

For the purposes of insolvency proceedings in Slovakia, Section 72 contains a definition of assets not subject to insolvency proceedings. This includes, for example, assets that cannot be seized through the enforcement of a court decision or through execution proceedings, a customs security up to the amount of the customs debt, a tax security, and the bankrupt's income to the extent that it is not subject to the enforcement of a court decision or execution proceedings. As regards assets that cannot be seized for the purposes of bankruptcy proceedings, these will primarily consist of assets owned by natural persons who are entrepreneurs. Typically, this will include assets such as essential household equipment,[33] pets, the debtor's belongings used for work purposes (up to a limit of €331.94), medical supplies, study materials, and other items. The debtor's income, to the extent that it is subject to bankruptcy proceedings in Slovakia, is strictly linked to the statutory definition of the scope of deductions from wages and other income, as set out in the Enforcement Code.

On the basis of the above, it can be concluded that the circumstances governing the negative definition of the debtor's assets are similar in both legal frameworks. Their purpose is to provide a certain degree of protection for important values protected by law, such as the maintenance of the debtor and members of their family, or essential assets relating to public resources, such as customs and tax security deposits in Slovakia. However, the approach taken by the legislators differs, particularly with regard to determining the scope of the income of a debtor who is a natural person – an entrepreneur – not subject to judicial liquidation or

[30] D'ATTORRE, G. *Manuale di diritto della crisi e dell'insolvenza*. 3rd ed. Turin : Giappichelli Editore, 2024, p. 240.
[31] for further details on the *pari passu* principle, see: TÖRÖK, L. *Spriaznené pohľadávky v malom konkurze*. In: SUCHOŽA, J., HUSÁR, J., HUČKOVÁ, R. (eds.): Právo, obchod, ekonomika XII. Košice : Univerzita P. J. Šafárika v Košiciach, 2023. p.356.
[32] for further details, see Section 67(1) of the Insolvency Act.
[33] ĎURICA, M. *Zákon o konkurze a reštrukturalizácii. Komentár*. 4th ed. Praha : C. H. Beck, 2021. p. 590.

bankruptcy. Whilst the legislation in Slovakia is linked to a statutory scope applied uniformly in every case concerned,[34] Italian legislation allows the court to assess this scope on a case-by-case basis, taking into account the established facts, as fairly as possible and to the extent necessary, in the interests of both debtors and creditors.

3.2. Correspondence addressed to the debtor

Further effects of the commencement of judicial liquidation include, for example, the service of the debtor's correspondence on the liquidator. Article 148 of the CCII stipulates that where the debtor in judicial liquidation is a natural person, that person is obliged to forward any correspondence, including electronic correspondence, relating to the so-called relationships covered by the judicial liquidation, to the liquidator.[35] In the case of entities other than natural persons, the CCII stipulates that all correspondence addressed to such a debtor must be served directly on the liquidator.[36] With regard to these effects of the commencement of judicial liquidation, the author Giacomo D'Attorre emphasises that these are not provisions of a punitive nature, but rather an effort to remove any obstacles preventing the proceedings from proceeding as smoothly as possible and to prevent the debtor from assuming or retaining roles incompatible with the loss of the power to administer and dispose of their assets.[37] A breach by the debtor of the obligation laid down in Article 148 of the CCII may result in the debtor no longer meeting the conditions for debt relief under Article 280 of the CCII.

As regards the legal framework governing insolvency proceedings in Slovakia, no similar provisions can be found in the section of the Insolvency Act (ZKR) directly entitled "Effects of the declaration of insolvency". However, the ZKR, in Title VI of Part Two, entitled "Asset Identification and Inventory", in Section 2, entitled "Asset Identification", in Section 75, contains a definition of the obligations of third parties to cooperate with the administrator. At this point, it may be concluded that the provisions governing the obligation of individual entities to cooperate with the administrator during bankruptcy proceedings may also be regarded as "effects of the declaration of bankruptcy". Section 75(7) of the Insolvency Act subsequently sets out the obligation of the universal postal service provider to provide the insolvency practitioner, at the latter's request, with the information necessary for the performance of his duties under the Insolvency Act. This includes, for example, notifying the administrator whether the debtor has any post office boxes, the number of items received there and their senders, and the amounts received by the debtor by post.

Although the provision of Section 75(7) of the ZKR relates to correspondence addressed to the debtor, the scope of this provision differs significantly from that under Italian law. Whilst, under Italian law, interference with the confidentiality of correspondence is unavoidable to the extent necessary to achieve the objective of judicial liquidation, Slovak insolvency law does not permit such interference. It is true that, in accordance with Section 75(4) of the Bankruptcy Act, third parties – described, for example, as *"any person in possession of records or documents relating to assets subject to* bankruptcy" – are obliged to cooperate with the administrator; i.e. this category of entities could also include specific entities such as[38] – universal postal service providers; in practice, however, the aforementioned provision of paragraph 4 of the Insolvency Act would be inapplicable, as a postal service provider does not know the contents of a postal item and is not entitled to ascertain them. The only permissible

[34] for further details, see Section 72(2) of the Bankruptcy and Restructuring Act in conjunction with Sections 68–71 of the Enforcement Code.

[35] D'ALONZO, R. *La liquidazione giudiziale vista dal curatore*. In: Il diritto fallimentare e delle società commerciali. Turin : Giappichelli Editore, 2023, No. 6. p. 1106.

[36] BROCARDI.IT. *Spiegazione dell'art. 148 Codice della crisi d'impresa e dell'insolvenza*. [online]. 2024. [cit. 2025-10-17]. Available online: https://www.brocardi.it/codice-crisi-impresa/parte-prima/titolo-v/capo-i/sezione-ii/art148.html.

[37] D'ATTORRE, G. *Manuale di diritto della crisi e dell'insolvenza*. 3rd ed. Turin : Giappichelli Editore, 2024, p. 246.

[38] POSPÍŠIL, B. a kol. *Zákon o konkurze a reštrukturalizácii. Komentár*. 2nd ed. Bratislava : Wolters Kluwer, 2016. p. 429.

way in which the administrator could legally ascertain the contents of postal items is if the debtor discloses to the administrator the information subject to postal secrecy, in accordance with the duty to cooperate with the administrator under Section 74 of the Insolvency Act, specifically insofar as it is relevant to fulfilling the purpose of the insolvency proceedings. Failure to fulfil the obligation, on behalf of the debtor, to cooperate with the administrator could, under Slovak insolvency regulations, be subject to sanctions, for example, the imposition of a fine and a decision on exclusion to the extent provided for in Section 74(5) and (6) of the Insolvency Act.

3.3. Prohibition on individual enforcement of a decision and prohibition on the application of protective measures

The category of effects vis-à-vis creditors under Italian law also includes, for example, a basic definition ensuring the principle *of par conditio creditorum.* This is the legal provision set out in Article 150 of the CCII, the content of which is a general prohibition addressed to the debtor's creditors, who, from the moment judicial liquidation commences, may neither initiate nor continue individual enforcement proceedings, nor initiate or continue proceedings aimed at obtaining a protective measure. This therefore constitutes the effect of the so-called inadmissibility of enforcement and protective measures.[39] The prohibition in question also applies to creditors' claims arising during judicial liquidation. However, the prohibition contained in CCII applies only to the extent of the assets subject to judicial liquidation. Exceptions to the prohibition on the enforcement of a decision or on interim measures may, however, be provided for by law.

In this context, the author Giulia Basile states that the objective pursued by the legislator here is to secure all the debtor's assets concerned so that they can subsequently be distributed equitably; this objective would be irreparably thwarted if each creditor were able to proceed with individual enforcement.[40] According to the author Giacomo D'Attorre, the relevant statutory provision sets out rules for the so-called collective protection of creditors, whereby their individual protection is superseded when they compete for the debtor's assets. Collective protection is ensured by the liquidator, who proceeds to liquidate all of the debtor's assets and distribute the proceeds amongst the creditors. Individual creditors cannot initiate or continue individual proceedings, but may seek to participate in the distribution of the debtor's assets alongside other creditors, in accordance with the principle of *par conditio creditorum.*[41]

As regards insolvency proceedings under Slovak law, a similar legal provision can be found in Section 44(4) of the Insolvency Act (ZKR); however, for the purposes of a comprehensive comparison with Italian law, it must be considered in conjunction with Sections 47 and 48 of the ZKR. Section 44(4) of the ZKR stipulates that, unless the ZKR provides otherwise, a claim lodged in bankruptcy proceedings may not be satisfied during the proceedings from the assets subject to bankruptcy other than through the distribution of the proceeds from the realisation of those assets. In this context, the author Milan Ďurica states that, in principle, individual satisfaction of creditors is precluded during bankruptcy proceedings unless the Bankruptcy Act provides otherwise; typically, for example, in the case of claims against the estate. The Bankruptcy Act addresses the issue of competing creditors on the principle of their proportional satisfaction, namely through the distribution of proceeds.[42] Section 48 of the ZKR subsequently addresses the issue of enforcement of judgments and

[39] BROCARDI.IT. *Spiegazione dell'art. 150 Codice della crisi d'impresa e dell'insolvenza*. [online]. 2024. [cit. 2025-10-17]. Available online: https://www.brocardi.it/codice-crisi-impresa/parte-prima/titolo-v/capo-i/sezione-iii/art150.html?utm_source=internal&utm_medium=link&utm_campaign=articolo&utm_content=nav_art_succ_top.

[40] BATTILORO, V., BASILE, G. *Compendio di Diritto Commerciale e della Crisi di Impresa*. 1st ed. Molfetta : Neldiritto Editore, 2023. p. 511.

[41] D'ATTORRE, G. *Manuale di diritto della crisi e dell'insolvenza*. 3rd ed. Turin : Giappichelli Editore, 2024. p. 247.

[42] ĎURICA, M. *Zákon o konkurze a reštrukturalizácii. Komentár*. 4th ed. Praha : C. H. Beck, 2021. p. 434.

execution proceedings, stipulating that no enforcement or execution proceedings may be commenced against assets subject to bankruptcy during the bankruptcy proceedings, whilst any such proceedings already commenced are stayed *ex lege* upon the declaration of bankruptcy. When considering the procedure to be followed by creditors regarding the application of protective measures under Slovak law during bankruptcy proceedings and in relation to assets subject to bankruptcy, the answer can be derived from Section 47 of the Bankruptcy Act, which relates, amongst other things, to court proceedings. Where the enforcement of protective measures relating to assets subject to bankruptcy is concerned, which the creditor in question has individually pursued in court proceedings under the Civil Procedure Code prior to the declaration of bankruptcy, and where, following the declaration of bankruptcy, the relevant court proceedings have not been legally concluded, in such a case, the declaration of bankruptcy will, *by operation of law,* suspend those court proceedings.[43] Should a creditor consider applying a protective measure in relation to assets subject to bankruptcy after the declaration of bankruptcy, pursuant to Section 47(5) of the Bankruptcy Act, they could initiate legal proceedings, but only by filing a claim against the administrator. It follows from the above that the legal provisions governing the effects of the declaration of insolvency do not expressly prohibit a creditor from commencing such proceedings in relation to the assets concerned after the declaration of insolvency; however, having regard to the purpose of the institution of protective measures under the Civil Procedure Code, we consider that a creditor would probably not even be able to demonstrate, in litigation, that the conditions for ordering a protective measure have been met.[44]

When comparing the relevant provisions of the Italian and Slovak legal systems, we can conclude that the effects of the commencement of judicial liquidation and the declaration of bankruptcy are the same in relation to the individual enforcement of creditors' judgments against the assets in question. Both sets of legislation and both legal systems, in respect of the institutions under comparison, are strictly based on the principle *of "par conditio creditorum"*. What is worth noting in this context, however, is the simplicity, brevity and conciseness of the wording of the legal provision enacted by the Italian legislature, as compared with the wording of the legal provision contained in the Slovak insolvency legislation. What is contained in a concise provision in the Italian legislation must, in the Slovak legislation, be interpreted in conjunction with several statutory provisions; thus, under the ZKR, a certain fragmentation of the legal framework can be observed.

3.4. Satisfaction of secured creditors

Among the further effects of the commencement of judicial liquidation that apply to creditors is the prescribed method of satisfying secured creditors. In accordance with Article 152 of the CCII, a secured creditor is entitled to be satisfied separately from the debtor's assets on which a security interest in their favour is attached; however, a secured creditor may only exercise their right to satisfaction at the stage following the verification of their claim. Under Italian law, both secured and unsecured creditors apply for what is known as "recognition of claims",[45] with their claims being verified by the appointed judge; in the event of disputes, by the insolvency court.[46] Once a secured creditor's claim has been established in judicial liquidation, it may subsequently be satisfied in three alternative ways. In the first instance, this involves the direct sale of the secured assets, carried out by the secured creditor itself. In such a case, the secured creditor must first apply to the appointed judge for authorisation to proceed

[43] MACEK, J. *Konkurz, reštrukturalizácia a oddlženie s poznámkami*. 1st ed. Bratislava : IURIS LIBRI, 2015. p. 194.
[44] for further details, see Section 324 et seq. of the Civil Procedure Code.
[45] under Slovak law, this concerns the filing and verification of claims.
[46] BATTILORO, V., BASILE, G. *Compendio di Diritto Commerciale e della Crisi di Impresa*. 1st ed. Molfetta : Neldiritto Editore, 2023. pp. 511-512.

with the sale. Before granting authorisation to the secured creditor, the designated judge shall hear the administrator and the creditors' committee and shall subsequently, by order, set the date of the sale and its terms and conditions. In the course of this procedure, the designated judge may also transfer the assets in question to the secured creditor in return for consideration, provided that the secured creditor has expressed an interest in the assets. If the proceeds from the sale of the assets, after deduction of the costs of realisation, are sufficient to satisfy the secured creditor and any surplus remains, the secured creditor must pay this surplus to the administrator. Should a situation arise in which the secured creditor is not satisfied in full from the proceeds of the sale of the secured assets to the extent of the established secured claim, the secured creditor shall be satisfied in the remaining amount on a pro rata basis with the unsecured creditors. In the second scenario, the secured asset may be repurchased by the administrator;[47] however, in such a case, the consent of the appointed judge is required. The secured creditor will thus be satisfied to the extent of the estimated value of the asset in question. The third method is the sale of the secured assets by the administrator, again subject only to the consent of the appointed judge.[48]

When considering the satisfaction of secured creditors in "standard" insolvency proceedings under the Insolvency Act, Section 50(4) of the Insolvency Act stipulates that a security interest relating to assets subject to insolvency proceedings may not be enforced during those proceedings other than in accordance with the Insolvency Act. A security interest may be enforced during the insolvency proceedings only if the secured creditor duly and timely lodges a claim in the insolvency proceedings and, in doing so, also asserts their security interest; otherwise, their security interest shall not be taken into account during the insolvency proceedings.[49] Following the proper and timely filing of the claim in the insolvency proceedings together with the security interest, the administrator shall subsequently establish a separate, so-called "segregated estate" for the secured creditor concerned.[50] As regards the subsequent realisation of this secured asset, the administrator carries out the realisation in accordance with the procedures laid down in the Insolvency Act (ZKR) and in conjunction with the binding instruction which, in matters concerning the secured asset, the secured creditor in question is, in principle, entitled to issue to the administrator.[51] Following the realisation of the secured assets, the administrator then carries out the so-called distribution of proceeds from the separate estate, through which the secured creditor is paid the proceeds less the so-called claims against the separate estate, i.e. in particular the costs of realising these assets and the administrator's fees. If, after the secured creditor has been satisfied, there is a surplus of proceeds, the administrator will, as a rule, transfer this to the general estate, from which unsecured creditors will subsequently be satisfied. However, if the proceeds from the realisation of the separate estate are insufficient to fully satisfy the secured creditor, the secured creditor will, to the extent that they are not satisfied from the separate estate, subsequently be satisfied together with the other unsecured creditors from the general estate.

Provisions of the Insolvency Act (ZKR) relating to other insolvency proceedings, such as the discharge of natural persons' debts through bankruptcy or small-scale bankruptcy, may constitute an exception to the realisation of secured assets. In other words, the Slovak legal system also recognises the realisation of secured assets "outside bankruptcy",[52] similar to the case of Italian judicial liquidation. We emphasise, however, that this is not a feature of "standard" bankruptcy proceedings. In the discharge of natural persons' debts through

[47] The process of the administrator redeeming secured assets may be important, for example, in order to ensure the continued operation of the business and its subsequent sale.
[48] D'ATTORRE, G. *Manuale di diritto della crisi e dell'insolvenza*. 3rd ed. Turin : Giappichelli Editore, 2024. p. 250.
[49] for further details, see Section 28(4) of the Insolvency Act.
[50] ĎURICA, M. *Konkurzné právo na Slovensku a v Európskej únii*. Žilina : Poradca podnikateľa, 2006. p. 270.
[51] ĎURICA, M. *Konkurzné právo na Slovensku a v Európskej únii*. Žilina : Poradca podnikateľa, 2006, p. 303.
[52] DZIMKO, J. *Oddlženie fyzickej osoby*. 1st ed. Bratislava : C. H. Beck, 2024. p. 93.

bankruptcy or small-scale bankruptcy, the method of realising secured assets is generally left to the discretion of the secured creditor, who decides for themselves whether to enforce their security interest in bankruptcy proceedings or to realise it outside bankruptcy in the manner provided for by the Civil Code and, where applicable, Act No. 527/2002 Coll. on Voluntary Auctions.[53]

In view of the above, it can be concluded that a secured creditor has the right to be satisfied separately from the debtor's secured assets both in the case of judicial liquidation in Italy and in bankruptcy proceedings in Slovakia. However, Italian law provides for several methods by which the proceeds and the satisfaction of the secured creditor may be achieved. The entire procedure is, however, managed in each individual case by the appointed judge, in particular with the participation of the liquidator and the creditors' committee, whilst the judge, based on the specific circumstances of the case in question, has the option to determine which method of realising the secured assets is the most appropriate, or the most effective, the quickest, and so on. By contrast, under Slovak law, secured assets in "standard" insolvency proceedings may only be realised within the proceedings themselves, and by the administrator; however, the secured creditor exercises its rights during the realisation process and issues the necessary binding instructions to the administrator regarding the realisation of the assets in question, such as the choice of method for realising the assets, the rules for realisation, and so on. In the event of inaction on the part of the secured creditor regarding the necessary binding instruction, or if such an instruction were to conflict with the Insolvency Act, the insolvency court shall decide on the binding instruction. In the case of special insolvency procedures under Slovak law,[54] which are more modern than "standard" bankruptcy, the secured creditor has the right to choose; in such cases, however, there is no procedure for the bankruptcy court to guide the process of realising the secured assets in any way. Further discussion is needed on which method of legal regulation is most appropriate for the realisation and satisfaction of a secured creditor, particularly in light of actual practice. The legal framework governing the realisation and satisfaction of secured creditors in judicial liquidation in Italy, as well as in "standard" insolvency proceedings in Slovakia, appears to us to be sufficient in terms of the the ability to exercise the rights of secured creditors and, to the extent necessary, the possibility of judicial regulation.

4. Ineffective legal acts of the debtor

Under Italian law, the category of legal acts prejudicial to creditors comprises "prejudicial" legal acts carried out by the debtor which result in the frustration or hindrance of creditors' satisfaction in judicial liquidation, in particular through the disposal of the debtor's assets. The Italian legislature classifies these prejudicial legal acts into three categories, based on the so-called risk of potential harm to creditors, ranging from the greatest to the least risk; this is then matched by a legal remedy which is either strict or less strict in relation to third parties, and which makes it easier or more difficult for the liquidator to obtain redress.[55]

Those legal acts which pose the greatest risk are rendered ineffective vis-à-vis creditors upon the commencement of judicial liquidation *ex lege*; this group includes, in particular, legal acts performed by the debtor without consideration.[56] Consequently, upon the commencement

[53] For further details, see Section 167k of the Insolvency Act and Section 106h of the Insolvency Act. In this context, the author Jakub Dzimko states, for example: "*Encumbered assets cease to form part of the insolvency estate if any secured creditor, whose claim can reasonably be expected to be satisfied from the encumbered assets, proceeds to enforce their security interest; the secured creditor may proceed to enforce their security interest at any time, up until such time as it is realised by the administrator in the course of the bankruptcy proceedings*" (DZIMKO, J. *Oddlženie fyzickej osoby*. 1st ed. Bratislava : C. H. Beck, 2024. p. 94).

[54] debt relief for natural persons through bankruptcy and small-scale bankruptcy.

[55] D'ATTORRE, G. *Manuale di diritto della crisi e dell'insolvenza*. 3rd ed. Turin : Giappichelli Editore, 2024. pp. 259-260.

[56] COSTA, C. *Le principali novità in materia di revocatoria fallimentare nel Codice della Crisi e dell'Insolvenza*. In: Il diritto fallimentare e delle società commerciali. Turin : Giappichelli Editore, 2021, No. 6. p. 1273.

of judicial liquidation, the assets of third parties in question will be subject to judicial liquidation. However, the third parties concerned have a legal remedy through which they may seek judicial review to determine whether the administrator's conduct in securing the third party's assets in question for judicial liquidation is or is not in accordance with the CCII.[57] An exception to gratuitous legal acts under Article 163(1) of the CCII is, for example, property donated by a debtor to a third party, provided that the value of the gift is proportionate to the donor's assets. The specialist literature cites as an example the donation of jewellery of negligible value by a debtor to a child, in which case the legal act would not be void *ex lege*. However, if that child were to be gifted a substantial part of the debtor's assets, the legal act would then be void *ex lege*.[58] For the aforementioned group of legal acts, the decisive factor is the time of their performance by the debtor, namely during the period from the filing of the petition for judicial liquidation until the commencement of judicial liquidation, and the two-year period prior to the filing of that petition for judicial liquidation.[59]

The second group, the so-called "lower-risk" group, comprises unusual legal acts, provided that these were carried out whilst the debtor was insolvent. The CCII classifies as unusual legal acts, for example, legal acts without adequate consideration, the creation of a charge after the debtor's obligation arose, and others.[60] The invalidity of legal acts in this second group can only be determined by a court decision. Court proceedings are initiated exclusively at the administrator's request; the competent court is the insolvency court; and the burden of proof regarding knowledge of the debtor's state of insolvency at the time the legal act was performed rests with the person who entered into the unusual legal act with the debtor. As a court decision is required to declare unusual legal acts void, this legal mechanism is less stringent than in the case of gratuitous legal acts, where invalidity arises *ex lege*. For this group of legal acts, the decisive factor is the time of their performance by the debtor, namely during the period from the filing of the petition for judicial liquidation until the commencement of judicial liquidation, and the period of, as a rule, one year prior to the filing of this petition for judicial liquidation.[61]

The third group, classified as the so-called "lowest-risk" group, comprises ordinary/routine legal acts carried out by the debtor with a third party during the specified period when the debtor was insolvent. This group includes, for example, legal acts by which payments of due liabilities were made, comprising both voluntary payments and payments obtained by the creditor through enforcement proceedings at the time of the debtor's insolvency.[62] The invalidity of legal acts in this third group may also be declared only by a court decision. Court proceedings are again initiated exclusively at the administrator's request; the competent court is the insolvency court; however, the burden of proof regarding knowledge of the debtor's state of insolvency at the time the legal act was performed rests with the administrator. Since the burden of proof regarding knowledge of the debtor's state of insolvency at the time the legal act was performed rests with the administrator, not the third party, this provision is the least onerous for the third party. The invalidity may relate only to those ordinary legal acts performed by the debtor during the period from the filing of the application for judicial liquidation until its commencement, and those performed during the period of up to six months prior to the filing of that application.[63]

[57] for further details, see Article 133 and Article 163(2) of the CCII.
[58] D'ATTORRE, G. *Manuale di diritto della crisi e dell'insolvenza*. 3rd ed. Turin : Giappichelli Editore, 2024. p. 261.
[59] BATTILORO, V., BASILE, G. *Compendio di Diritto Commerciale e della Crisi di Impresa*. 1st ed. Molfetta : Neldiritto Editore, 2023. p. 513.
[60] D'ATTORRE, G. *Manuale di diritto della crisi e dell'insolvenza*. 3rd ed. Turin : Giappichelli Editore, 2024. p. 263.
[61] for further details, see Article 166(1) of the CCII.
[62] D'ATTORRE, G. *Manuale di diritto della crisi e dell'insolvenza*. 3rd ed. Turin : Giappichelli Editore, 2024. p. 264.
[63] for further details, see Article 166(2) of the CCII.

However, the Italian legal system also provides for a definition of legal acts performed by the debtor during their insolvency which cannot be declared ineffective by a court decision. According to the author Giacomo D'Attorre, this definition applies only to legal acts that are unusual and ordinary, not to those performed gratuitously.[64] These are legal acts defined in Article 166(3) of the CCII and other specific regulations; they include, for example, the following legal acts of the debtor: payments for goods and services made in the ordinary course of business under customary terms; routine transfers to a bank account which do not result, for example, in a significant reduction in the bank's claim at the time of insolvency, such as by settling an overdraft; legal acts carried out by the debtor on the basis of a restructuring plan; payments intended to facilitate access to crisis and insolvency resolution tools, such as payments to lawyers, accountants, financial advisers, etc.[65] The purpose of these exceptions is to ensure, to the extent necessary, that even during insolvency it is possible to maintain the business's operations, preserve employment, and gain access to other crisis and insolvency management tools, etc.

Alongside the concept of the ineffectiveness of legal acts in the Italian legal system in the context of judicial liquidation, a similar institution can also be identified in the Slovak legal system, including in "standard" bankruptcy proceedings. This concerns the so-called legal framework for voidable legal acts, which is set out in Section 2 of Chapter 5 of Part II of the Bankruptcy Act.

Legal acts which, under the Insolvency Act (ZKR), may be challenged in "standard" insolvency proceedings are linked to the commencement of the insolvency proceedings,[66] rather than to the declaration of insolvency. However, under the ZKR, once bankruptcy proceedings have commenced, the debtor is only authorised to carry out routine legal acts; any breach of this obligation may result in a legal act other than a routine one, carried out after the commencement of bankruptcy proceedings, being challenged.[67] Section 10 of the ZKR contains a positive definition of routine legal acts performed by entrepreneurs, persons carrying out activities other than business, and natural persons; as well as a negative, exhaustive definition of routine legal acts. According to the author Jaroslav Dolný, with regard to Section 14(5)(a) of the ZKR, the following applies: *"A challenge must be brought in the manner prescribed by law in accordance with the rules of Section 57 of the KR et seq*.";[68] thus, even in the period following the commencement of insolvency proceedings up to the declaration of insolvency, where the debtor's affected (non-routine) legal acts are invalid, the procedure will be the same as for affected legal acts carried out prior to the commencement of insolvency proceedings.

Slovak bankruptcy law does not recognise the invalidity of a legal act performed by the debtor prior to the commencement of bankruptcy proceedings, or prior to the declaration of bankruptcy, which would be invalid *ex lege*. Invalidity *ex lege* is governed solely by Section 44(2) of the Bankruptcy Act (ZKR) and concerns legal acts performed by the debtor only after the declaration of bankruptcy. In this context, these are legal acts that diminish the assets subject to bankruptcy.

Under the Slovak legal system governing insolvency, the invalidity of a legal act does not affect its validity; such invalidity applies only in relation to the debtor's creditors, specifically for the purposes of the insolvency proceedings.

In "standard" bankruptcy proceedings, the ineffectiveness of a legal act performed by the debtor prior to the commencement of bankruptcy proceedings, or prior to the declaration of bankruptcy, can only be achieved if the administrator or a creditor with a registered claim

[64] D'ATTORRE, G. *Manuale di diritto della crisi e dell'insolvenza*. 3rd ed. Turin : Giappichelli Editore, 2024. p. 266.
[65] D'ATTORRE, G. *Manuale di diritto della crisi e dell'insolvenza*. 3rd ed. Turin : Giappichelli Editore, 2024, pp. 267–268.
[66] for further details, see, for example, Section 58(3) of the ZKR, Section 59(4) of the ZKR.
[67] for further details, see Section 14(5)(a) of the ZKR.
[68] DOLNÝ, J. *Odporovateľnosť právnych úkonov v konkurznom práve*. Bratislava : C. H. Beck, 2021. p. 49.

objects to the legal act in question in good time. The right to challenge a legal act is exercised either by notifying the obligated party or by bringing an action before the competent court. The invalidity of a legal act for the purposes of insolvency proceedings may thus be achieved in Slovakia not only on the basis of a court decision, but alternatively also by written acknowledgement of the right[69] to challenge a specific legal act by the so-called obligated party. However, in the situations provided for by law, the right to challenge a legal act may also be exercised, to the extent necessary, by the administrator or a creditor of a filed claim disputing another creditor's filed claim or a security interest filed by that creditor and acquired on the basis of a challengeable legal act.[70]

In "standard" insolvency proceedings, a legal act of the debtor may only be challenged if it impairs the satisfaction of a claim filed by one of the creditors.

Slovak insolvency law generally recognises the following categories of legal acts which may be challenged in insolvency proceedings with a view to having them declared void: (i) legal acts without adequate consideration, (ii) preferential legal acts, (iii) legal acts that deprive creditors of their rights.

The ZKR classifies within the first category a gratuitous legal act by the debtor and a legal act by the debtor for consideration, on the basis of which the debtor has provided or undertaken to provide performance whose usual price is substantially higher than the usual price of the performance which the debtor has received or is to receive in return.[71] Such legal acts may be challenged if they caused the debtor's insolvency or were carried out during the debtor's insolvency. In the case of a legal act carried out with a related party, a presumption of insolvency applies unless the contrary is proven; depending on the nature of the legal provision, the burden of proof lies with the party subject to the obligation, i.e. the defendant. This category concerns legal acts carried out no more than one year, and in the case of acts carried out with a related party, no more than three years prior to the commencement of insolvency proceedings.

The second category under the Bankruptcy Act (ZKR) includes, for example, a legal act by which the debtor has settled, in whole or in part, a monetary claim that would otherwise have been due only upon the declaration of bankruptcy; secured their obligation at a later date than when the obligation arose; waived their right, in whole or in part; or waived their debtor's debt, in whole or in part, and so on.[72] Such legal acts may also be challenged if they caused the debtor's insolvency or were carried out during the debtor's insolvency. As regards a legal act carried out with an affiliated person, the presumption of insolvency also applies here, unless the contrary is proven. This category concerns legal acts carried out no more than one year, and in the case of acts carried out with an affiliated person, no more than three years prior to the commencement of bankruptcy proceedings.

The third category under the Bankruptcy Act (ZKR) covers a legal transaction by which the debtor has defrauded his creditors, provided that it was carried out with the debtor's intention to defraud his creditors and that this intention was, or ought to have been, known to the other party.[73] In the case of a legal act carried out with an affiliated person or so-called "squandering of assets", there is a presumption that the debtor's intention to defraud their creditors, as well as the other party's knowledge of this intention, is presumed unless the contrary is proven. In such cases, legal acts carried out within a period of up to five years prior to the commencement of bankruptcy proceedings may be challenged. According to the author Jaroslav Dolný, in the case of contestable legal acts constituting "deprivation of creditors", an entitled person may contest such acts regardless of whether the debtor was insolvent at the time

[69] ĎURICA, M. *Zákon o konkurze a reštrukturalizácii. Komentár*. 4th ed. Praha : C. H. Beck, 2021. pp. 514–515.
[70] for further details, see Section 62(6) of the Insolvency Act.
[71] ĎURICA, M. *Zákon o konkurze a reštrukturalizácii. Komentár*. 4th ed. Praha : C. H. Beck, 2021. p. 528.
[72] DOLNÝ, J. *Odporovateľnosť právnych úkonov v konkurznom práve*. Bratislava : C. H. Beck, 2021. p. 17.
[73] ĎURICA, M. *Zákon o konkurze a reštrukturalizácii. Komentár*. 4th ed. Praha : C. H. Beck, 2021. p. 539.

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the transaction took place (or became insolvent as a result of the transaction). The purpose of this type of voidability is to protect creditors from any acts by the debtor that objectively "deprive" his creditors, even in situations where the debtor is not in insolvency.[74]

In light of the above, it can be concluded that the legal systems in both Slovakia and Italy recognise the principle that legal acts performed by a debtor are ineffective vis-à-vis creditors in judicial liquidation or bankruptcy proceedings. Both principles quite clearly pursue the same objective, namely to regulate, as a preventive measure, legal relationships that may lead to insolvency, or bankruptcy, or legal relationships that might be entered into during such a period, thereby potentially hindering or preventing at least the proportional satisfaction of creditors in judicial liquidation or bankruptcy proceedings. Both legal systems also address any subsequent procedures should such legal acts by the debtor occur, typically through separate court proceedings. However, a number of exceptions or differences can be found in both legal systems. From the perspective of the speed and efficiency of judicial liquidation, it is worth noting the legal acts that are void *ex lege* under Italian law, where a state of insolvency need not even be present; but, with regard to the period under consideration, the law creates a kind of fiction of insolvency arising as a consequence of the transfer, without consideration, of a substantial part of the debtor's assets. On the other hand, the Italian legal system addresses the issue of determining the invalidity of legal acts, other than those made without consideration, exclusively through court proceedings and only upon application by the liquidator. This indicates that higher demands are placed on the liquidator in Italy, and this is apparently reflected in their liability, particularly when compared to the administrator in Slovakia, where, for example, if the administrator fails to exercise the right to challenge legal acts, any creditor who has lodged a claim may reverse this adverse outcome in favour of the other creditors. The categorisation of individual legal acts appears to us to be clearer in the Italian legal system, where the period under scrutiny is shorter than in Slovakia, which implies a higher degree of legal certainty for third parties; furthermore, it may be inferred from this that the judicial system in Italy is more flexible and/or that the regulation of legal relationships in Slovakia is overly strict. A reversal of the burden of proof can be identified in both legal systems; however, in Italy it is linked to the knowledge of any third party who has entered into an unusual legal transaction with the debtor, that the debtor is insolvent, whereas in Slovakia such a burden of proof applies, in principle, to related parties with regard to knowledge of the debtor's insolvency or knowledge of the debtor's intention to defraud their creditors.

IV. CONCLUSION

In this paper, we have succeeded in identifying the equivalent of "standard" bankruptcy proceedings in Slovakia, namely judicial liquidation in Italy. Through a subsequent examination of selected provisions of the relevant legislation in both countries, we were able to compare them and draw the partial conclusions set out in the individual chapters. Summarising these partial conclusions, we can state the following findings:

The basic definitions of the terms expressing the "negative state" which constitutes the so-called objective requirement for judicial liquidation in Italy and bankruptcy in Slovakia differ in both countries. We consider that the definitions in question are unnecessarily complicated and verbose in the legal system of the Slovak Republic; this may, in practice, cause problems of application and a state of legal uncertainty. By contrast, the simple and concise definition contained in the Italian legal system gives the law enforcement authorities greater scope to assess the adverse financial situation of a particular entity on a case-by-case basis.

From the perspective of the entities subject to liquidation proceedings, we believe that Slovak legislation could, in future, reflect a classification more similar to that in Italy. We take

[74] DOLNÝ, J. *Odporovateľnosť právnych úkonov v konkurznom práve*. Bratislava : C. H. Beck, 2021. p. 42.

the view that the choice between alternative "winding-up" procedures[75] - in Slovakia, given their fundamentally different content and impact on creditors' rights, is not an ideal solution; and therefore a more appropriate approach would be legal regulation allowing specific entities, in the event of a "negative situation", to utilise only one liquidation mechanism, in order to guarantee equal rights for specific categories of debtors and their creditors.

The categorisation of the effects of the commencement of judicial liquidation in Italy is defined clearly and transparently in law, whereas the effects of a declaration of bankruptcy in Slovakia are not even explicitly categorised. From the perspective of the addressee of the legal norm, the legal framework in Slovakia may therefore appear unclear or even confusing, which in turn may have a negative impact on legal certainty and on the fulfilment of the purpose and spirit of the law. We take the view that a categorisation of the effects of the commencement of judicial liquidation similar to that in Italy could eliminate the negative aspects described in the Slovak legal system.

With regard to assets that are subject to seizure and realisation in both of the institutions under consideration, it is necessary to highlight their negative definition. Under Italian law, the scope of assets not included in judicial liquidation is assessed and determined by the court on a case-by-case basis; by contrast, in Slovakia, the definition of assets not subject to bankruptcy is laid down uniformly for every case by statute. In this context, we therefore reasonably assume that, given the purpose of the negative definition of assets, the Italian legal framework represents a fairer approach to the rights of both debtors and their creditors; this should serve as an inspiration for the Slovak legislature in future.

With regard to the service or handover of correspondence addressed to the debtor to the appointed administrator in Italy, and in the context of Slovak legislation, we take the view that such regulation – or the absence thereof – does not constitute a fundamental issue in the identification, securing and realisation of assets. However, we consider this to be an issue that would require further discussion within professional circles in Slovakia.

In relation to the issue under examination concerning the prohibition on individual enforcement of decisions and the prohibition on the application of protective measures, we have found that the legal framework in Slovakia is complicated and unnecessarily fragmented, whilst the legal framework in Italy is simple, concise and to the point in this area as well. In the case of the Slovak legal framework, this may result in difficulties in the application, interpretation and compliance with the relevant legal provisions. In this respect, too, Italian legislation could serve as a source of inspiration for Slovak lawmakers.

Under Italian legislation, the sale of assets that are simultaneously subject to a security interest is only possible under the supervision of and with the consent of the court. Under Slovak law, such a sale depends primarily on the decision of the secured creditor concerned, whilst the court has review powers only where the creditor's binding instruction conflicts with the law, or, where the secured creditor remains passive, the court has the power to decide on the procedure for realising the secured assets. In the area under consideration, the legal frameworks of both countries appear to us to be adequate and to fully reflect the rights of both secured and unsecured creditors. It is therefore worth considering and discussing further which legal framework would be more effective within the context of the Slovak judicial system.

In the event of the invalidity of legal acts, and in view of the need to ensure effective protection of creditors' rights, the Italian legal system provides for the *ex lege* invalidity of gratuitous legal acts by the debtor, as well as a reversal of the burden of proof in the case of unusual legal acts, which always falls on the defendant. However, compared with the Slovak legal system, the period under consideration for the debtor's legal act in question is shorter than

[75] E.g. the choice between "standard" bankruptcy and small-scale bankruptcy, or the choice between "standard" bankruptcy and debt relief through bankruptcy in the case of sole traders.

is the case in Slovakia. From an overall perspective on the structure of invalid legal acts, the Italian legal framework appears to us to be clearer than the Slovak one.

To begin with, we formulated hypotheses which, throughout the course of our research, provided the basis for our considerations and further steps in achieving the objectives set out for this paper.

First hypothesis: “Current modern insolvency law in Italy contains legal provisions which serve as a source of inspiration for the future development of insolvency law in Slovakia” – we were able to verify this in its entirety. Italian insolvency law has recently undergone a fundamental reform, which incorporates a modern approach to the issues under consideration, whilst also thoroughly integrating existing European legislation without the need for its partial transposition into the legislation already in force. The influence of European legislation is thus particularly evident, for example, in the very structure of the Italian insolvency legislation and in the classification of the various insolvency proceedings within it. The area under examination also provided, for example, an insight into the importance of the decision-making role of insolvency courts in Italy, rather than its elimination from several aspects of insolvency proceedings, as is the trend in Slovakia. In many respects, the Italian legislative text is straightforward and thus more effectively applicable in practice.

We were also able to verify the second hypothesis in its entirety: “Italian insolvency legislation contains legal institutions that are comparable to those in Slovak insolvency legislation”. As explained in the introduction, the selection of specific legal institutions for comparison these were those which, by the very nature of insolvency law, must in principle be present therein; that is to say, on the one hand, they were aspects forming the basis of the selected insolvency proceedings, or they were typical insolvency institutions (effects relating to assets, secured creditors, the invalidity of legal acts, and others).

In view of the partial conclusions of this paper summarised above, as well as the overall framework of insolvency law in Italy, it must be concluded that the legislation in Italy, in the areas under comparison, constitutes a more concise and, above all, clearer legal framework than is the case in Slovakia. The reason for this may lie in the Italian legislature’s long-standing efforts to carry out a comprehensive reform of insolvency law, as well as in the role and activities of the judiciary in this area and the structure of the Italian judicial system. Whilst in the Slovak Republic the current legislative trend is towards “relieving the burden” on Slovak insolvency courts as much as possible, primarily by transferring duties and responsibilities to other bodies, in the Italian legal system insolvency courts clearly play an important and irreplaceable role.

We believe that, in light of some of the illustrative examples presented in this paper, it would be appropriate – and, looking ahead, absolutely necessary – for an academic debate to take place in the Slovak Republic on how Slovak insolvency law could and should continue to develop in the modern world. Italian legislation could serve as one source of inspiration regarding the future development of legislation in Slovakia; ideally, however, not the only one. In our view, the current Slovak Act on Bankruptcy and Restructuring is already outdated in many respects, confusing given the ongoing reshaping of alternative liquidation mechanisms, and even difficult to apply; last but not least, we do not consider the gradual transfer of jurisdiction from insolvency courts to other bodies to be an appropriate solution. In our view, the overall structure of the insolvency law system in Slovakia is also a suitable subject for academic discussion, specifically through the formulation of preventive and reorganisation proceedings for various entities and on a broader scale than is currently the case. It might also be beneficial to consider the “psychological” repositioning of the institution of bankruptcy as the last resort for resolving a “negative situation”; and, where appropriate, its renaming, as has occurred, for example, in Italy.

Given the scope of this paper, we have only been able to undertake a partial comparative examination of the chosen topic; therefore we will continue our subsequent research by conducting a comprehensive analysis of the institution of judicial liquidation in Italy and, where necessary, a comprehensive analysis of the entire Italian insolvency law, so that we may be prepared for an academic debate which could result in the drafting and adoption of new insolvency legislation in Slovakia.

KEY WORDS
bankruptcy, judicial liquidation, Slovak insolvency law, Italian insolvency law, insolvency

KĽÚČOVÉ SLOVÁ
konkurz, súdna likvidácia, slovenské insolvenčné právo, talianske insolvenčné právo, platobná neschopnosť

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LIMITS OF EVIDENCE AND PROHIBITION OF SELF-INCRIMINATION IN TAX ADMINISTRATION THROUGH THE LENS OF JUDICIAL AUTHORITIES

LIMITY DOKAZOVANIA A ZÁKAZU SEBAOBVIŇOVANIA PRI SPRÁVE DANÍ OPTIKOU SÚDNYCH AUTORÍT

Michal Úradník[1]

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ABSTRACT
Taking of evidence is an essential institute in any procedure for conferring rights or imposing obligations. Tax administration and tax proceedings are no exception, which, unlike other proceedings, are characterized by the so-called reversal of the burden of proof. This means that the primary task of the taxpayer is to prove almost all the facts relating to its tax liability. This is further reinforced by the right and at the same time the obligation of taxpayers to provide cooperation to tax administrators. The presented scientific article deals with the general definition of the term proof and points out in particular the statutory and jurisprudential limits of the burden of proof of the taxpayer. Particular emphasis is placed on the possibility for a taxpayer to refuse to provide cooperation, with reference to the exercise of the right not to incriminate himself.

ABSTRAKT
Dokazovanie predstavuje nevyhnutný inštitút, a to v rámci akéhokoľvek konania, ktorým sa priznávajú práva, alebo ukladajú povinnosti. Výnimkou nie je ani správa daní a daňové konanie, ktoré sa však na rozdiel od iných konaní vyznačuje tzv. obráteným dôkazným bremenom. To znamená, že je primárnou úlohou daňového subjektu preukazovať takmer všetky skutočnosti, ktoré sa týkajú jeho daňovej povinnosti. To sa umocňuje ešte viac právom a zároveň aj povinnosťou daňových subjektov poskytovať správcom dane súčinnosť. Predkladaný vedecký článok sa zaoberá práve všeobecným vymedzením pojmu dôkaz a poukazuje najmä na zákonné a judikatúrou vyprofilované mantinely dôkazného bremena daňového subjektu. Osobitne sa akcentuje možnosť daňového subjektu odoprieť poskytnúť súčinnosť, a to s odvolaním sa na uplatnenie práva neobviňovať sebe samého.

I. INTRODUCTION

Taking of evidence is an important procedural institute of the tax administrator, which clarifies essential facts in order to establish the facts decisive for the correct determination of the tax. Within legal theory, but especially in application practice, it is required to point out certain limits of evidence. For example, in terms of the time of submission of evidence, the Constitutional Court of the Slovak Republic, in its resolution no. II. ÚS 218/2024 of 24 April 2024, agreed with the opinion of the Supreme Administrative Court of the Slovak Republic, which stated that the applicant's passivity in the context of a tax audit cannot be validated by submitting this type of evidence only during the assessment procedure, as this would deny the purpose of the tax audit and the concentration principle when presenting evidence in the

[1] JUDr. Michal Úradník, PhD., Assistant Professor, Department of Financial Law and Administrative Law, Faculty of Law, Matej Bel University in Banská Bystrica, Slovak Republic.

context of a tax audit. Ipso facto, by initiating the assessment procedure, the taking of evidence does not start anew, but continues, on the basis of evidence already obtained during the tax audit.

However, the issue of evidence is primarily important from the point of view of the legality of the procedure for obtaining evidence. The procedural procedure of evidence in tax administration is also dealt with in legal theory, to which there are also relevant references in this article. However, according to the author, only marginal attention is paid to the taxpayer's obligation to provide cooperation to the tax administrator and, on the other hand, to the consideration of the possibility of exercising the right to refuse to testify (cooperation) due to the prohibition of self-incrimination, [2] as the answers are provided by judicial practice.[3] This creates a research gap, which the author will try to answer in the following text. On the basis of the description of the legislation, therefore, the general postulates on the content of the concept of evidence are abstracted, which are followed by comparative legal studies with the intention of resulting in an almost identical definition of the term evidence in the legal order of the Slovak Republic. The method of legal analysis of court decisions is also essential, because it is the developmental tendencies of the decision-making activities of judicial authorities that create the application practice and make it possible to answer the questions posed. At this point, it should be borne in mind that case-law should also be drafted in the light of a legitimate expectation, the purpose of which is to protect private individuals from an unforeseeable interference of power in their legal situation, on the result of which they have relied.[4]

The scientific questions are: What is the content of the term proof? Is the taxpayer obliged to cooperate with the tax administrator and can he exercise his right not to incriminate himself? Are there limits on the tax administrator and his authority to enforce evidence by imposing civil fines? The questions asked are answered continuously, in the above chronology.

The indicated questions of evidence will also be perceived from the point of view of the fiscal, regulatory and repressive function of tax law,[5] as well as in connection with the

[2] In the alternative, reference can be made to previously published articles, such as: LICHNOVSKÝ, O. Dokazování daňových trestných činů v trestním řízení. In: *Trestněprávní revue*. 2018, roč. 17, č. 11 – 12, s. 253 – 256, in which the author explains the issue of the burden of proof in the field of taxes borne by the taxpayer and the burden of proof of law enforcement authorities. In doing so, he also points to a frequent case where failure to bear the burden of proof by the taxpayer may lead to a certain "repression" on the part of the tax administrator, but its decision is not a binding basis for law enforcement authorities and the court. SREBALOVÁ, M. Limity aplikácie zásad správneho trestania v praxi. In: *Přestupky a řízení o nich z pohledu teorie a praxe, sborník z mezinárodní vědecké konference konané dne 4. října 2013*. Praha : Policejní akademie České republiky v Praze, 2014, s. 235 – 244, in which the author points out the issues of administrative punishment. It is also worth mentioning a series of articles by the authors mentioned in footnote no. 56, GALANDOVÁ, M., KAČALJAK, M., ŠAMKO, P., who are leading a polemic about the admissibility of taxation of income from criminal activities, also with regard to the possible aspect of self-incrimination by declaring and taxing this income.

[3] With regard to finding solutions in court decisions, it is possible to point out in particular: judgment of the European Court of Human Rights in the case of Funke v. France, application no. 10588/83, of 25.2.1993; judgment of the European Court of Human Rights in the case of Chambaz v. Switzerland, application no. 11663/04, of 5.4.2012; judgment of the European Court of Human Rights in the case of De Legé v. the Netherlands, application no. 58342/15, of 4.10.2022; judgment of the European Court of Human Rights in the case of Allen v. the United Kingdom, application no. 76574/01, of 10.9.2002; judgment of the European Court of Human Rights in the case of Savic v. Austria, applications no. 10487/16 and 10502/16, of 15.9.2020, and others, periodically referred to in this article.

[4] MAĎAR, M. Predvídateľnosť súdnych rozhodnutí ako súčasť práva na spravodlivý proces. In: *Banskobystrické dni práva : zborník z 2. ročníka medzinárodnej vedeckej konferencie na tému „Kvalita normotvornej a aplikačnej stránky zákonnosti ako determinant právneho štátu", 23. – 24. november 2016. Sekcia verejného práva*. 1. vyd. [online]. Banská Bystrica : Vydavateľstvo Univerzity Mateja Bela – Belianum, 2017, s. 138. [cit. 28.12.2025]. Dostupné na: https://www.prf.umb.sk/veda-a-vyskum/konferencie-a-konferencne-on-line-vystupy/ii-banskobystricke-zamocke-dni-prava/; BRZEZIŃSKI, B., FRANCZAK, A. In Search of a Strategy for the Interpretation of Tax Law by Courts. In: *Krytyka Prawa. Niezależne Studia nad Prawem*, tom 16, nr 4/2024. [online]. Warszawa : Kozmiński University, 2024, s. 57. [cit. 28.12.2025]. DOI 10.7206/kp.2080-1084.720.

[5] BABČÁK, V. a kol. *Daňové právo na Slovensku a v EÚ*. Bratislava : Epos, 2019, s. 62 – 63.

principle of legality of tax administration and the principle of uniformity of decision-making of the competent authority in tax administration.[6] On the basis of a legal analysis and mutual comparison of factual cases, general postulates will be induced regarding the limits of the burden of proof and the possibilities of enforcing evidence by the tax administrator. This formulates a scientific hypothesis: The burden of proof in tax administration lies with the taxpayer, allowing the tax administrator to enforce any evidence from the taxpayer.

II. EVIDENCE AND MEANS OF PROOF – IN ABSTRACTO

In the context of evidence, it is necessary to point out the absence of an exhaustively defined concept of evidence in the legal order of the Slovak Republic. Exempli causa, pursuant to Section 24 (4) of Act No. 563/2009 Coll. on Tax Administration (Tax Code) and on Amendments to Certain Acts, as amended (hereinafter referred to as the "Tax Code"), anything that may contribute to the establishment and clarification of facts decisive for the correct determination of the tax and that is not obtained in violation of generally binding legal regulations may be used as evidence. These are mainly various submissions of taxpayers, witness statements, expert opinions, public documents, protocols on tax audits,[7] protocols on tax determination according to aids, minutes of local surveys and inspections, mandatory records and records kept by taxpayers and documents related to them. Similarly, pursuant to Section 34(1) and (2) of Act No 71/1967 Coll. on Administrative Procedure (the Code of Administrative Procedure), as amended (hereinafter referred to as the "Code of Administrative Procedure"), all means by which the actual state of the case can be established and clarified and which are in accordance with the law may be used for evidence, the evidence being in particular the examination of witnesses, expert opinions, documents and inspection. Similarly, the wording of Section 19 (3) of Act No. 301/2005 Coll. of the Code of Criminal Procedure, as amended (hereinafter referred to as the "Code of Criminal Procedure"), specifies that evidence may be used for anything that may contribute to the proper clarification of the case and that has been obtained from evidence under this Act or under a special law. Comparatively, also in accordance with Section 187 of Act No. 160/2015 Coll. of the Code of Civil Procedure, as amended (hereinafter referred to as the "Code of Civil Procedure"), anything that may contribute to the proper clarification of the case and that has been obtained lawfully from the means of evidence may serve as evidence.

A comparison of procedural laws leads to several basic results. The first is that, in principle, evidence may be anything that may contribute to the clarification of the case under examination, but it is essential that such evidence be obtained lawfully. The second essence is therefore the lawful process of providing, taking and using evidence. In the context of evidence, the doctrine based on the accumulation of three conditions applies, namely that evidence can only be a means by which the state of the case can be ascertained and clarified, is provided for by the relevant procedural regulation and is also carried out in accordance with this regulation. The requirements of certainty and predictability of procedural rules, as well as their reflection in the taking of evidence, must be subsumed under the safeguards required by Article 36(1) of the Charter of Fundamental Rights and Freedoms.[8]This fulfils the principle of

[6] BABČÁK, V. a kol. *Daňové právo na Slovensku a v EÚ*. Bratislava : Epos, 2019, s. 448.

[7] The tax audit report with a summons serves as evidence in the assessment proceedings, while the date of its delivery is decisive for the initiation of the assessment proceedings. – KUBINCOVÁ, S., JAMRICHOVÁ, T. Daňová kontrola a daňové konanie v kontexte teórie a praxe. In: *STUDIA IURIDICA Cassoviensia*. [online]. Vol. 13.2025, no. 2, s. 103. ISSN 1339-3995. [cit. 26.12.2025]. Dostupné na: https://sic.pravo.upjs.sk/ecasopis/132025-2/6_Kubincova_Jamrichova_Danova_kontrola.pdf. DOI 10.33542/SIC2025-2-06.

[8] The Ruling of the Constitutional Court of the Czech Republic, Case no. III. ÚS 190/01 of 1.11.2001, N 167/24 SbNU 237; the Ruling of the Constitutional Court of the Czech Republic, Case no. III. ÚS 451/04 of 23.3.2006, N 68/40 SbNU 677.

legality, because only evidence presumed and taken by law can be considered legally approved.

The third postulate is the requirement to distinguish between evidence and means of proof, since they are not synonymous with each other, but two separate categories. Specifically, evidence is understood as a certain fact proving the monitored or ascertained circumstances of the legal case under consideration, which is obtained from the evidence provided for by the legislation.[9] With a certain degree of legal abstraction, it can therefore be considered that the means of proof is a broader concept, since it contains evidence. More precisely, evidence is the knowledge that has been obtained from the means of evidence in the course of evidence, when, for example, the means of evidence is the questioning of a person and the evidence is the content of his or her testimony.[10]

Evidence and similarly means of proof are usually divided into direct and indirect, or in relation to the factual hypothesis, there is also a division of evidence into: direct, indirect and supportive. Direct evidence is considered to be that for which the veracity of the evidentiary information is sufficient in itself to establish a factual hypothesis. Circumstantial evidence is one that is not sufficient in itself to prove the final factual hypothesis, but it supports the truth of the factual hypothesis. Supporting evidence can be described as a subset of circumstantial evidence, the evidentiary force of which, rather than a factual hypothesis, supports or weakens the belief in the relationship of inference between factual hypotheses.[11]

III. THE QUESTION OF THE LAWFULNESS OF THE TAKING AND TAKING OF EVIDENCE

One of the essential features of evidence is the aforementioned legality. A strict grammatical interpretation of the relevant provisions on the taking of evidence cannot even classify illegal evidence as evidence. In order for a certain piece of information clarifying the legal matter under consideration to become evidence, it is essential that it was obtained in a lawful manner, because otherwise it is only illegal information that cannot be used in the proceedings and is simply called illegal evidence, even if it is a certain linguistic inaccuracy.

The criteria of legality include the assessment of (1) whether the evidence was obtained and taken at the procedural stage at which the relevant procedural entity is entitled to obtain and take evidence under the law, and (2) whether the evidence was obtained and taken in a manner provided for or permitted by law.[12] It is therefore fundamental to obtain and take evidence in a lawful manner and by the competent authority. The presented theory can be supplemented by examining: 1) *whether the evidence was obtained from a source that is stipulated by law, or which is permitted by law, 2) whether the evidence was obtained and taken by a procedural subject authorized to do so by law, 3) whether the evidence was obtained and taken at the procedural stage at which the relevant procedural subject is authorized by law to seek and take evidence in the procedural sense, 4) whether the evidence obtained and taken relates to the subject of evidence in the given process, i.e. whether it relates to the act on which the proceedings are conducted, or issues that must be decided on*

[9] ÚRADNÍK, M. *Zásady deliktuálneho trestania vo vybraných oblastiach finančného práva s akcentom na otázku ne bis in idem*. Banská Bystrica : Vydavateľstvo Univerzity Mateja Bela – Belianum, 2023, s. 104.

[10] ŠAMKO, P. Nezákonné a nepoužiteľné dôkazy. In: *Právne listy*. [online]. Publikované: 6.12.2014. [cit. 25.12.2025]. Dostupné na: https://www.pravnelisty.sk/clanky/a321-nezakonne-a-nepouzitelne-dokazy.

[11] SÁBO, J. *Hodnotenie dôkazov v daňovom práve*. [online]. Košice : ŠafárikPress, 2020, s. 111 – 113. Dostupné na: https://unibook.upjs.sk/sk/. DOI 10.33542/HDD2020-881-1.

[12] Opinion of the Criminal Chamber of the Supreme Court of the Czech Republic, Case no. Tpjn 300/2019 of 18.9.2019; compare also: REPÍK, B. Procesní důsledky porušení předpisů o dokazování v trestním řízení. In: *Bulletin advokacie*. Červen – září 1982, s. 125 – 126; MUSIL, J., KRATOCHVÍL, V., ŠÁMAL, P. a kol. *Kurs trestního práva. Trestní právo procesní*. Praha : C. H. Beck, 2003, s. 408.

in connection with this act under the law, and 5) whether the evidence was obtained and taken in a manner stipulated or permitted by law.[13]

As far as the assessment of the ineffectiveness of the evidence obtained is concerned, evidence obtained illegally is either absolutely or relatively ineffective, depending on the nature and seriousness of the violation of the law. In the event of absolute ineffectiveness, the illegality cannot be validated and such evidence must be excluded from the assessment when establishing the facts of the case under consideration. Relatively ineffective evidence can be used, but only after the defect that has occurred has been rectified.[14] When taking evidence, it will be necessary to examine the procedural conditions for obtaining and taking evidence in order to ensure legality, which also applies to the area of tax administration.[15] Therefore, the question of legal assessment remains the procedure for obtaining evidence, whether within the framework of the tax administrator's own activity or in cooperation with the taxpayer, including the visibility of possible enforcement of evidence and the reversal of the burden of proof.

Pursuant to Section 24 of the Tax Code and the General Principles of Tax Administration, the tax administrator takes evidence, while ensuring that the facts necessary for the purposes of tax administration are established as completely as possible and is not bound only by the proposals of taxpayers.[16] At the same time, the tax administrator is obliged to take evidence in a way that guarantees its objectivity, and therefore must take into account evidence both against and in favour of the taxpayer. The tax administrator evaluates the evidence at its discretion, namely each piece of evidence individually and all evidence in its mutual connection, taking into account everything that[17] has come to light during the tax administration. In the event that the tax administrator has established factual circumstances capable of substantially influencing the decision in the case, but has not obtained such information in the evidentiary process through a legally compliant procedure, then the above cannot be taken into account.[18]

In this context, it is necessary to take special account of the linguistic aspect of the legislation, because according to Article 24(2) of the Tax Code, the tax administrator '*only*' takes evidence, which justifies the question of who takes the individual evidence. At first glance, the question posed is illogical, as it is clear from application practice that individual evidence is carried out by tax administrators. However, the literal wording of Article 24(2) of the Code of Tax Procedure does not grant them such power. An exception is paragraph 6 of the aforementioned provision, according to which, for the purposes of evidence, the tax administrator may also perform acts, such as oral hearings, examination of witnesses, examination of experts and familiarization with evidence, jointly. Similarly, the literal wording of the wording of Section 3(3) of the Tax Code does not imply the fact that the evidence is taken, but only the tax administrator's right to evaluate the evidence, at its own discretion, each piece of evidence individually and all evidence in their mutual connection,

[13] ŠAMKO, P. Nezákonné a nepoužiteľné dôkazy. In: *Právne listy*. [online]. Publikované: 6.12.2014. [cit. 25.12.2025]. Dostupné na: https://www.pravnelisty.sk/clanky/a321-nezakonne-a-nepouzitelne-dokazy.

[14] Resolution of the Regional Court in Banská Bystrica, Case no. 4 Tos 91/2021 of 30.9.2021.

[15] CAKOCI, K., POPOVIČ, A. Dôkazy získané v rámci miestneho zisťovania a limity ich využitia v daňovej kontrole. In: *I. Slovensko-české dni daňového práva. Daňové úniky a vyhýbanie sa daňovým povinnostiam*. Recenzovaný zborník vedeckých prác. Košice : Univerzita Pavla Jozefa Šafárika v Košiciach, 2017, s. 92.

[16] On obtaining information by the tax administrator, see also: BETHMANN, D., KVASNIČKA, M. International tax evasion, state purchases of confidential bank data and voluntary disclosures. In: *Journal of Comparative Economics*. [online]. 2025. ISSN 0147-5967. [cit. 20.12.2025]. Dostupné na: https://www.sciencedirect.com/science/article/abs/pii/S0147596725000873?via%3Dihub. DOI 10.1016/j.jce.2025.11.005.

[17] On tax administration, see: VARTAŠOVÁ, A., ČERVENÁ, K. Vývoj právnej úpravy správy daní na území SR v moderných dejinách. In: *100 rokov Česko-Slovenskej štátnosti, právnictva a bezpečnosti*. Bratislava : Akadémia Policajného zboru v Bratislave, 2019, s. 445 – 454.

[18] The Ruling of the Constitutional Court of the Slovak Republic, Case no. I. ÚS 314/2015 of 16.12.2015.

taking into account everything that has come to light during the tax administration. Therefore, a proposal that would, for example, explicitly grant tax administrators the power to take evidence, following the example of Section 34(4) of the Code of Administrative Procedure, is justified.

On the other hand, however, it is indisputable that it is the tax administrators who take and evaluate the evidence in real life. The principle of free evaluation of evidence must be seen in a broader dimension, namely that the tax administrator should evaluate not only the evidence submitted by taxpayers, but in order to determine the correct determination of the tax, it should try to obtain and subsequently evaluate all evidence that could have an impact on the clarification of the facts decisive for the correct determination of the tax. However, the aforementioned principle does not impose an obligation on the tax administrator to ascertain the actual state of the case. The tax administrator only takes into account what has come to light during the tax administration, i.e. it only ascertains the facts of the case.[19] Therefore, the principle of objective truth does not apply to the administration of taxes.

The principle of free evaluation of evidence contains perhaps the most important fact, when no evidence is assigned more or less weight within the meaning of the Tax Code. On the contrary, all evidence has the same probative value and depends on the specific factual circumstances which of the evidence presented "turns out" to be more important for a given case. Therefore, there is no doubt that the principle of free evaluation of evidence is based on maximizing the objectification of subjectively perceived (evaluated) facts, namely by taking evidence and evaluating it separately as well as in mutual contexts. The specification of the evidence taken and the method of its evaluation should therefore be an appropriate part of the justification of the tax administrator's decision.

However, in accordance with the principle of free evaluation of evidence, it must be emphasized that the evaluation of evidence by the tax administrator cannot be arbitrary.[20] The scope of the requirements for the evaluation of evidence by the tax administrator must be subject to the limits of legality and objectivity, which, however, emphasizes the complexity and high degree of erudition of these activities.[21] An adequately explained conclusion of a public authority on the greater credibility of some of the evidence, unless it is the culmination of an obvious error or extreme excess in the process of concluding factual conclusions, is a natural result of the process of free evaluation of evidence and does not in itself indicate the possibility of pronouncing a violation of constitutional guarantees of judicial protection within the meaning of Articles 46 to 50 of the Constitution of the Slovak Republic.[22]

IV. POWERS TO PROPOSE AND ENFORCE EVIDENCE

The provision of Section 24 of the Tax Code also formulates one of the fundamental rights of taxpayers, namely to propose evidence. This is also related to the need for the tax administrator to properly deal with the evidence proposed by the taxpayer, which also means justifying the procedure for not taking the proposed evidence.

In this consideration, it is justified by analogy to refer to the so-called Perna test, which is based on the assessment of three basic criteria: 1) whether the request for additional

[19] KUBINCOVÁ, S. *Daňový poriadok. Komentár*. 1. vydanie. Bratislava : C. H. Beck, 2015, s. 32; KUBINCOVÁ, S. Komparácia procesných zásad, vybraných inštitútov a postupov podľa Daňového poriadku a Správneho poriadku. In: *Finančné právo, daňové právo a správne právo v európskom priestore : recenzovaný zborník vedeckých štúdií*. Banská Bystrica : Vydavateľstvo Univerzity Mateja Bela – Belianum, 2019, s. 23.

[20] Judgment of the Supreme Court of the Slovak Republic, Case no. 10 Šzfk 44/2019 of 24.11.2020; judgment of the Supreme Court of the Slovak Republic, Case no. 1 Sžfk 22/2019 of 26.5.2020.

[21] RAKOVSKÝ, P. K pojmu daňové konanie a daňová kontrola v intenciách vybraných rozhodnutí súdov Slovenskej republiky. In: *Acta Facultatis Iuridicae Universitatis Comenianae*. [online]. Tomus XXXIX, 2/2020, s. 285. [cit. 27.12.2025]. Dostupné na: https://afi.flaw.uniba.sk/index.php/AFI/article/view/630/464.

[22] Resolution of the Constitutional Court of the Slovak Republic, Case no. I. ÚS 200/2023 of 5.4.2023, ZNaU No. 5/2023.

evidence was sufficiently justified and whether it related to the substance of the accusation, 2) whether the significance of certain evidence was assessed and whether the courts were provided with sufficient reasons in this regard why the evidence was not taken during the court proceedings, and finally 3) whether this decision did not undermine the overall fairness of the proceedings.[23] The conclusions of the European Court of Human Rights (hereinafter referred to as the "ECtHR") emphasizing the need to deal with proposed and unproduced evidence in criminal proceedings are by analogy also applicable in the field of taxes, since not only decisions on an administrative offence under Section 154 of the Tax Code, but also decisions of the tax administrator on tax assessment, or its difference, materially[24] imply a certain declaration of guilt of the taxpayer.[25] When assessing the evidence proposed by the taxpayer, it is therefore crucial that the tax administrator also takes into account the degree of justification for both the evidence taken and the evidence not taken, thus explaining the facts for which he did not consider the proposal for evidence to be justified. This also pursues overall fairness, the essence of which is already contained in the basic principles of tax administration, when the tax administrator is obliged to take care of the preservation of the rights and legally protected interests of taxpayers and other persons.

The rights of the taxpayer in the taking of evidence are therefore extremely important, and in addition to proposing evidence, the taxpayer also has the right to be present at the hearing of the witness and to ask him questions, while the tax administrator is obliged, according to Section 25 (4) of the Tax Code, to notify the taxpayer in writing of the hearing of the witness in a timely manner. The importance of the taxpayer's participation in the hearing of a witness lies in the fact that the taxpayer has the opportunity to directly confront, object to asking suggestive and capricious questions, the tax administrator does not have to ask questions about all relevant facts in favor of the taxpayer, and thus the risk of unilaterally targeted questions is eliminated.[26] This implements the adversarial principle as part of overall justice.

1. Limits of the reversal of the burden of proof

Despite the fact that the Tax Code regulates the obligation of the tax administrator to ensure that the facts necessary for the purposes of tax administration are established as fully as possible, according to the Constitutional Court of the Slovak Republic, the tax administrator does not have to produce such *"evidentiary ferocity*" in favour of the taxpayer as would be initiated and exerted by the taxpayer itself, which is essentially affected by the tax case. According to the Constitutional Court, the tax administrator primarily defends the fiscal interests of the state and, moreover, may not have enough information to properly protect the interests of the taxpayer concerned.[27]

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[23] Judgment of the Grand Chamber of the European Court of Human Rights in the case of Perna v. Italy, application no. 48898/99, of 6.5.2003, supplemented conceptually in accordance with the judgment of the Grand Chamber of the European Court of Human Rights in the case of Murtazaliyeva v. Russia, application no. 36658/05, of 18.12.2018.

[24] For a comparison of substantive and formal interpretation, see: BRZEZIŃSKI, B., FRANCZAK, A. In Search of a Strategy for the Interpretation of Tax Law by Courts. In: *Krytyka Prawa. Niezależne Studia nad Prawem*, tom 16, nr 4/2024. [online]. Warszawa : Kozmiński University, 2024, s. 62. [cit. 28.12.2025]. DOI 10.7206/kp.2080-1084.720.

[25] Decision of the Supreme Court of the Slovak Socialist Republic, Case no. 4 Tz 62/78 of 14.9.1978; judgment of the Supreme Court of the Czech Republic, Case no. 5 Tz 101/2001 of 18.7.2001, published in the Collection of Court Decisions and Opinions of the Supreme Court of the Czech Republic under No. 20/2002.

[26] Judgment of the Supreme Administrative Court of the Slovak Republic, Case no. 5Sfk/32/2021 of 27.10.2023. In this regard, see also the possibility of using witness testimony from a local investigation in the context of a tax audit. – CAKOCI, K., POPOVIČ, A. Dôkazy získané v rámci miestneho zisťovania a limity ich využitia v daňovej kontrole. In: *I. Slovensko-české dni daňového práva. Daňové úniky a vyhýbanie sa daňovým povinnostiam*. Recenzovaný zborník vedeckých prác. Košice : Univerzita Pavla Jozefa Šafárika v Košiciach, 2017, s. 94 a nasl.

[27] Resolution of the Constitutional Court of the Slovak Republic no. IV. ÚS 607/2021 of 30.11.2021, Collection of Judgments and Resolutions of the Constitutional Court of the Slovak Republic No. 109/2021.

In reflecting on the course of evidence in tax proceedings, it is justified to point out its immanent characteristic, consisting in the so-called reversal of the burden of proof. This burdens the taxpayer, such as the taxpayer, taxpayer, etc. This distinguishes tax proceedings from criminal proceedings, which are based on the principle of the presumption of innocence, and therefore all evidence of the commission of a crime is obtained by the law enforcement authorities and the court. According to the general principles of criminal procedure, the prosecuting authorities clarify with equal care the circumstances against the accused as well as the circumstances in their favour, and take evidence in both directions in such a way as to enable the court to reach a fair decision. Thus, criminal proceedings and tax proceedings can even be perceived as opposites.[28]

More precisely, while the tax administrator only proves the facts about the acts performed against the taxpayer that are decisive for the correct determination of the tax,[29] the taxpayer must bear the burden of proof for all the facts that he is obliged to prove in accordance with the relevant legal regulations. The burden of proof to prove and explain "everything" is regulated by the legislator in the wording of Section 24 (1) of the Tax Code. The institute of the so-called shifted burden of proof also has its legal basis in the basic principles of tax administration, more precisely in the provision of Section 3 (8) of the Tax Code, which contains a certain legal oxymoron, when it formulates both the right and the obligation of taxpayers to closely cooperate with the tax administrator in tax administration. Thus, the taxpayer is not only entitled but primarily obliged to prove facts within the tax administration, all of which are decisive for the correct determination of its tax liability. From the point of view of application practice, however, the question of the extent to which the taxpayer is obliged to "cooperate", i.e. to what extent it bears the burden of proof, is justified.

The Constitutional Court of the Slovak Republic, in its ruling no. I. ÚS 259/2022 of 12 October 2022, ruled on the gradual shifting of the burden of proof in tax proceedings between the taxpayer and the tax administrator, which is first borne by the taxpayer and only then by the tax administrator, and at a certain stage of the proceedings it can always be borne by only one of them. According to the Constitutional Court, the disproportionate[30] burden of proof may manifest itself on two levels, namely 1) the burden on the taxpayer by presenting evidence beyond the extent strictly sufficient to prove the decisive facts, or 2) the requirement to prove such a range of facts that do not constitute the burden of proof on the taxpayer. Therefore, this results in an obligation for tax administrators, who, on the basis of the above, may only require evidence that relates to the case under review and is sufficient to prove the decisive facts, while securing them must be within the taxpayer's real possibility.

The Federal Finance Court of the Federal Republic of Germany presented a legal opinion that the taxpayer must, as part of its obligation to cooperate with the tax administrator, prove the credibility of the evidence submitted. Consequently, a trader who applies for deduction of input tax bears the burden of proving that the statutory (in particular substantive) requirements for the application of that deduction are satisfied. In any event, the burden of determination can only be borne by the person who relies on the absence of facts or

[28] ÚRADNÍK, M. *Zásady deliktuálneho trestania vo vybraných oblastiach finančného práva s akcentom na otázku ne bis in idem*. Banská Bystrica : Vydavateľstvo Univerzity Mateja Bela – Belianum, 2023, s. 110.
[29] See: Section 24(3) of the Tax Code.
[30] The question of adequacy must also be examined in the context of an ongoing tax audit. – For more details: VERNARSKÝ, M. Daňová kontrola a dokazovanie v daňovom konaní. In: *Zborník z medzinárodnej vedeckej konferencie Bratislavské právnické fórum 2015*. [online]. Bratislava : Univerzita Komenského v Bratislave, Právnická fakulta, 2015, s. 444. [cit. 28.12.2025]. Dostupné na: https://www.flaw.uniba.sk/fileadmin/praf/Veda/Konferencie_a_podujatia/4th_Session.pdf.

circumstances if the opponent, in this case the tax authority, has substantiated evidence in favour of the existence of certain facts.[31]

However, the taxpayer cannot be required to submit such evidence, the submission of which is objectively impossible from its point of view (the so-called probatio diabolica). The scope of the evidentiary obligation can logically apply only to the evidence that the taxpayer can actually have at its disposal. The burden of proof cannot therefore be taken broadly and extended to prove all, or any, facts, that is to say, including those which another entity is required to adduce.[32] For tax purposes, a taxpayer may be required to provide standard and customary evidence in business practice, for which it is reasonable to assume that the taxpayer will keep it, with the cumulation that it must be evidence that is sufficient to prove a certain fact, such as the supply of goods. When assessing the level of the burden of proof on the taxpayer, it must be assumed that the burden of proof borne by the taxpayer does not meet the obligation to prove the alleged facts with absolute certainty, but it is sufficient to prove a sufficient degree of probability. If the taxpayer has proved the existence of material performance and has submitted all the documents required by law relating to it, then it has exhausted its own burden of proof.[33] The tax administrator cannot attribute to the taxpayer the existence of a need for evidence relating to facts that did not constitute its burden of proof. Regardless of the nature of the evidence submitted by the taxpayer, it is up to the tax administrator to establish the facts accurately and completely, and it depends on him what evidence he will take for this purpose.[34]

For example, according to the judgment of the Supreme Administrative Court of the Slovak Republic, no. 1 Sfk 68/2022 of 30 September 2024, [35] if the person of the supplier relied on the validity of the customer's VAT identification number resulting from the customer's entry in the relevant public register, which is evidence of the customer's status as a taxable person or a person identified for tax purposes in accordance with the decision-making activity of the Court of Justice of the European Union, The supplier cannot reasonably be required to obtain, in addition to the documents required by the provision of Section 43 (5) of Act No. 222/2004 Coll. on Value Added Tax, as amended, at the time of the transactions other evidence proving the performance of an economic activity by the customer in the event that the customer's VAT registration is cancelled.

In another case, the taxpayer may not rely on the fulfilment of its evidentiary obligation in tax proceedings if the tax administrator has demonstrably challenged the credibility, truthfulness or completeness of the documents (evidence) submitted by the taxpayer and the taxpayer has subsequently failed to refute the tax administrator's challenge with other evidence.[36] More precisely, the burden of proof arises again on the taxpayer at the moment when the tax administrator lawfully and clearly expresses doubts about the taxpayer's claim. It should be emphasized that the tax administrator is obliged to substantiate its doubts with evidence that unequivocally refutes the taxpayer's claims, and the tax administrator's evidence must have at least the same explanatory power, seriousness and credibility as the evidence submitted by the taxpayer.[37]

[31] Judgment of the Federal Finance Court of the Federal Republic of Germany, Case no. V R 48/04 of 19.4.2007, paragraph 63.
[32] Resolution of the Constitutional Court of the Slovak Republic, Case no. I. ÚS 420/2025 of 6.8.2025.
[33] The Ruling of the Constitutional Court of the Slovak Republic, Case no. IV. ÚS 569/2022 of 7.2.2023.
[34] The Ruling of the Constitutional Court of the Slovak Republic, Case no. I. ÚS 259/2022 of 12.10.2022.
[35] Published in the Collection of Opinions and Decisions of the Supreme Administrative Court of the Slovak Republic 2/2025, volume IV, under No. 99/2025 ZNSS.
[36] Resolution of the Constitutional Court of the Slovak Republic, Case no. I. ÚS 103/2024 of 21.2.2024.
[37] The Ruling of the Constitutional Court of the Slovak Republic, Case no. I. ÚS 259/2022 of 12.10.2022.

Despite the fact that breaking the burden of proof is associated with claims in the field of value added tax with a certain degree of generalization,[38] its application applies to all taxes. As part of the taking of evidence in the administration of road tax, the Supreme Administrative Court of the Czech Republic in its judgment no. 8 Afs 23/2018 of 16 January 2020 emphasized that the time that has elapsed since the time when the proven facts occurred must also be taken into account in the taking of evidence. Simply put, memory traces are subject to natural time selection, when they are gradually weakened by the passage of time, and therefore "*not remembering*" certain facts does not automatically mean purposeful action of the interrogated person.

2. The degree of cooperation of the taxpayer in the visibility of the right to refuse to testify against him

However, the burden of proof has its limits, and not only in the context of its transfer between the taxpayer and the tax administrator. The primary question is also to what extent the taxpayer is obliged to prove the required facts to the tax administrator, as it is clear from the above-mentioned case law that the taxpayer cannot be required to provide facts that he cannot ascertain. On the other hand, however, there is the principle of close cooperation when, according to Section 3 (2) and in conjunction with Section 3 (8) of the Tax Code, the tax administrator proceeds in close cooperation with the taxpayer in tax administration, while it is the right and obligation of taxpayers to cooperate closely with the tax administrator. Therefore, regardless of the state of its will, the taxpayer is[39] entitled and at the same time obliged to provide cooperation to the tax administrator, and thus also to submit evidence, either to meet its legal obligations or required by the tax administrator.

According to the Court of Justice of the European Union, national authorities cannot apply only pre-established general criteria in order to determine whether an operation has as its object tax evasion or abuse, but must carry out an overall examination of the '*suspected*' transaction on a case-by-case basis. The adoption of a tax measure of a general nature which automatically excludes certain categories of taxpayers from benefiting from a tax advantage, without requiring the tax authorities to provide at least initial proof or proof of the existence of tax evasion and abuse, goes beyond what is necessary to prevent tax evasion and abuse.[40]Thus, the Court of Justice of the European Union not only shifted the burden of proving tax evasion or abuse of rights[41] to the tax administrator, but to a certain extent set limits on the taxpayer's burden of proof, because the facts leading to the unlawful conduct must be proved by the tax administrator, but without requiring them from the taxpayer himself. Ipso facto, the content of the tax burden and the provision of cooperation of the

[38] In particular, in connection with the burden of proof on the part of the tax administrator to prove tax fraud – see the Order of the Court of Justice of the European Union in the case of Crewprint Kft. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, C-611/19, of 3.9.2020.

[39] On the actions of the taxpayer before and after the tax audit, see: KASPER, M., ALM, J. Audits, audit effectiveness, and post-audit tax compliance. In: *Journal of Economic Behavior & Organization*. [online]. Vol. 195, 2022, s. 87 – 102. [cit. 28.12.2025]. Dostupné na: https://www.sciencedirect.com/science/article/pii/S0167268122000099?via%3Dihub. DOI 10.1016/j.jebo.2022.01.003.

[40] Judgment of the Court of Justice of the European Union in Case C-6/16 Eqiom SAS and Enka SA v. Ministre des Finances et des Comptes publics, of 7.9.2017, paragraph 32; judgment of the Court of Justice of the European Union (CJEU) in Joined Cases C-504/16 and C-613/16 Deister Holding AG and Juhler Holding A/S v. Bundeszentralamt für Steuern, of 20.12.2017, paragraph 62.

[41] On tax evasion and the gradual efforts of countries to expand the prosecution and abuse of tax regimes, see: BLAUFUS, K., HUNDSDOERFER, J., JACOB, M., SÜNWOLDT, M. Does legality matter? The case of tax avoidance and evasion. In: *Journal of Economic Behavior & Organization*. [online]. Vol. 127, 2016, s. 182 – 206. [cit. 28.12.2025]. Dostupné na: https://www.sciencedirect.com/science/article/abs/pii/S0167268116300427. DOI 10.1016/j.jebo.2016.04.002. ŠTRKOLEC, M. Boj proti zneužívaniu daňového systému de lege ferenda. In: BABČÁK, V. a kol. *Daňové úniky a daňové podvody a právne možnosti ich predchádzania (inštitútmi daňového, obchodného a trestného práva)*. [online]. Košice : UPJŠ, 2018, s. 135 a nasl. [cit. 30.12.2025]. Dostupné na: https://www.upjs.sk/app/uploads/sites/11/2022/09/zbornik_62.pdf.

taxpayer does not consist in the obligation to prove his or her possible legally reparated conduct in the field of taxation, precisely with regard to the criminal law principle of the prohibition of self-incrimination.

The prohibition of compelling confession includes not only the right not to testify, but also the right not to contribute in any active way, either directly or indirectly, to one's accusation. This means not only the prohibition of forcing a suspect or accused person to testify, but also the prohibition of forcing such a person to cooperate or to actively act that is necessary for his conviction, for example, by forcing the submission of matters that connect him or may be connected with the criminal activity under investigation.[42] In the case of Heaney and McGuinness v. Ireland, the European Court of Human Rights ruled that even the public interest in detecting, prosecuting[43] and punishing the offender cannot justify the action of public authorities interfering with the very essence of the defendant's right of defence, including the right not to be forced to incriminate himself.[44]

Similarly, in Funke v. France, the European Court of Human Rights found an infringement of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'), in so far as the customs authorities[45] attempted to compel the applicant to provide evidence of his criminal activity by imposing civil fines for failure to issue the bank statements requested, merely assuming the existence of those documents; since they could not or did not want to obtain them by other means.[46]

Although the right to refuse to testify and the right not to testify against oneself are not explicitly mentioned in Article 6 of the Convention, these are rights generally recognized by international norms, which are at the heart of the concept of fair trial. Their purpose is, among other things, to protect the accused from undue pressure from public authorities, which was confirmed by the European Court of Human Rights in the case of Murray v. the United Kingdom.[47] According to the ECtHR, in particular, the right not to testify against oneself presupposes the activity of the prosecution which seeks to prove the guilt of the accused without resorting to evidence obtained by coercive means or coercion contrary to the will of the accused. In that sense, the right at issue is closely linked to the presumption of innocence laid down in Article 6(2) of the Convention.[48]

In the indicated context, it is necessary to point out the jurisprudential starting points, because the right of a person not to testify against himself has its limits. According to the European Court of Human Rights, in order to assess protection against self-incrimination, it is necessary to primarily assess whether the person must have first been subjected to some form

[42] Resolution of the Regional Court in Banská Bystrica, Case no. 4 Tos 91/2021 of 30.9.2021. For comparison: the Ruling of the Constitutional Court of the Slovak Republic, Case no. PL. ÚS 17/2023 of 27.11.2024.

[43] On the features of a criminal offence, see: BURDA, E., BELEŠ, A., ĽORKO, A., MIHÁLIK, S. *Trestná zodpovednosť*. 1. vyd. [online]. Bratislava : Univerzita Komenského v Bratislave, Právnická fakulta, 2022, s. 69. [cit. 26.12.2025]. Dostupné na: https://www.flaw.uniba.sk/fileadmin/praf/Pracoviska/Katedry/KTPKK/VU_Trestna_zodpovednost_KTPKK.pdf.

[44] Judgment of the European Court of Human Rights in the case of Heaney and McGuinness v. Ireland, application no. 34720/97, of 21.12.2000.

[45] On the development of customs duties, see: CAKOCI, K., HRABČÁK, L. EU customs union yesterday, today and (possibly) tomorrow in e-commerce interaction. In: *STUDIA IURIDICA Cassoviensia*. [online]. Vol. 13.2025, no. 2, s. 4 – 18. [cit. 26.12.2025]. Dostupné na: https://sic.pravo.upjs.sk/ecasopis/132025-2/1_Cakoci_Hrabcak_Colna_unia_EU.pdf. DOI 10.33542/SIC2025-2-01.

[46] Judgment of the European Court of Human Rights in the case of Funke v. France, application no. 10588/83, of 25.2.1993, paragraph 44.

[47] Judgment of the European Court of Human Rights in the case of John Murray v. the United Kingdom, application no. 18731/91, of 8.2.1996, paragraphs 44 – 47.

[48] Judgment of the European Court of Human Rights in the case of Saunders v. the United Kingdom, application no. 19187/91, of 17.12.1996, paragraph 68.

of pressure or coercion by public authorities.[49] Second, that pressure must be applied either in order to obtain information that could incriminate the person concerned in ongoing or anticipated criminal proceedings, or the case must concern the use of incriminating information forcibly obtained outside the context of the criminal proceedings only in the subsequent criminal prosecution.[50]

The two cases indicated are considered to be prerequisites for the application of the principle of non-self-incrimination.[51] If these prerequisites are met, it is necessary to proceed to further examination, since the right not to testify against oneself primarily concerns respect for the will of the accused to remain silent. However, the volitional component of the proceedings is disturbed precisely by the methods of pressure aimed at obtaining certain information from the accused. Here, however, it is necessary to distinguish whether certain evidence exists regardless of the will of the accused. According to the case-law of the European Court of Human Rights[52] , the principle of non-self-incrimination does not apply to the use of materials obtained from an accused by coercive methods, provided that these materials exist independently of his will.

The right not to incriminate oneself is therefore not absolute,[53] and the degree of pressure exerted will be incompatible with Article 6 of the Convention if it destroys the very essence of that privilege,[54] and it is therefore necessary to assess, in particular, the nature and degree of pressure, the existence of any relevant safeguards in the proceedings and, in particular, the extent to which the evidence thus obtained is used.[55]

In the context of the prohibition of self-incrimination, the idea of taxation of criminal income can only be briefly outlined. In principle, two lines of opinion can be presented on the admissibility of taxation of income from illegal activities, on the contrary that the state should not be satisfied only with income as a tax paid, but in the sense of imposing penalties, it should draw off all the income (property) thus obtained.[56] Without further ado, the author only allows himself to note that the declaration of income from criminal activity for the

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[49] Judgment of the European Court of Human Rights in the case of Serves v. France, application no. 20225/92, of 20.10.1997, paragraph 47; judgment of the European Court of Human Rights in the case of Bykov v. Russia, application no. 4378/02, of 10.3.2009, paragraph 102.

[50] Judgment of the European Court of Human Rights in the case of Weh v. Austria, application no. 38544/97, of 8.4.2004, paragraphs 42 – 43; judgment of the European Court of Human Rights in the case of Wanner v. Germany, application no. 26892/12, of 23.10.2018, paragraph 24.

[51] Judgment of the European Court of Human Rights in the case of Eklund v. Finland, application no. 56936/13, of 8.12.2015, paragraph 51.

[52] The right not to incriminate oneself does not apply to the use in criminal proceedings of materials that can be obtained from the accused by coercive means, if these exist independently of the suspect's will and can be secured on the basis of an arrest warrant, breath, blood and urine samples, or DNA testing. – Judgment of the European Court of Human Rights in the case of Saunders v. the United Kingdom, application no. 19187/91, of 17.12.1996, paragraph 69; judgment of the European Court of Human Rights in the case of Kalnėnienė v. Belgium, application no. 40233/07, of 31.1.2017, paragraph 52; decision of the European Court of Human Rights in the case of Sršen v. Croatia, application no. 30305/13, of 22.1.2019, paragraph 44; decision of the European Court of Human Rights in the case of El Khalloufi v. the Netherlands, application no. 37164/17, of 26.11.2019, paragraphs 38 – 40. However, if such evidence has been obtained through a procedure that violates Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the principle of the prohibition of self-incrimination remains applicable according to the judgment of the European Court of Human Rights in the case of Jalloh v. Germany, application no. 54810/00, of 11.7.2006.

[53] For example, judgment of the European Court of Human Rights in the case of Heaney and McGuinness v. Ireland, application no. 34720/97, of 21.12.2000, paragraph 47.

[54] Judgment of the European Court of Human Rights in the case of John Murray v. the United Kingdom, application no. 18731/91, of 8.2.1996.

[55] Judgment of the European Court of Human Rights in the case of Allan v. the United Kingdom, application no. 48539/99, of 5.11.2002, paragraph 44; judgment of the European Court of Human Rights in the case of Jalloh v. Germany, application no. 54810/00, of 11.7.2006.

[56] GALANDOVÁ, M., KAČALJAK, M. Zdaňovanie príjmov z trestnej činnosti. In: *Trestněprávní revue*. 2016, roč. 15, č. 10, s. 234; ŠAMKO, P. Ešte raz k posúdeniu otázky, či príjem z trestnej činnosti podlieha dani z príjmu. In: *Trestněprávní revue*. 2017, roč. 16, č. 2, s. 46; GALANDOVÁ, M., KAČALJAK, M. Do tretice k zdaňovaniu príjmov z trestnej činnosti. In: *Trestněprávní revue*. 2017, roč. 16, č. 9, s. 214 – 218.

purpose of its taxation may lead to the violation of the prohibition of self-incrimination, on the other hand, the question remains when the law enforcement authorities learned about the crime and what to do with the property, which may have decreased in the meantime or even completely disappeared and at the end of the day the state will not receive any income.

In developing its own decision-making activity of the[57] principle of the prohibition of self-incrimination in financial matters falling under the criminal category of Article 6(1) of the Convention, the European Court of Human Rights distinguishes between factual situations whether *such materials existed before the application of "coercive means*" to obtain certain means of evidence, and whether the public authorities themselves were aware of their existence.

In the case of J.B. v. Switzerland, the European Court of Human Rights declared a violation of the right not to incriminate under Article 6(1) of the Convention because, after detecting the applicant's investments, the tax authorities tried to force him to produce all documents relating to the companies in which he had invested money by imposing fines. More specifically, according to the judgment of the Federal Court of 7 July 1995, it was particularly important for the authorities to know whether the complainant had received any income that was not taxed, and therefore the tax authorities asked the complainant to provide the relevant information between 1987 and 1990 and, when he refused, successively imposed four fines on him. The European Court of Human Rights was also not convinced by the government's argument that at the time of imposing the fines, the tax authorities had information about the knowledge of the documents in question, as this was not clear in the circumstances of the case.[58]

In the Chambaz case, two fines were imposed on the complainant for refusing a request from the Swiss tax authorities to produce all documents relating to his business relations with the company and with the banks. According to the ECtHR, by imposing a fine on the applicant, the authorities exerted pressure on him to produce documents which would provide information on his income and assets, which were capable of exposing him to charges of tax evasion and thus liable to jeopardise his position in the investigation. The ECtHR therefore concluded that there had been a violation of Article 6(1) of the Convention in the specific circumstances of the case.[59]

Furthermore, it can be inferred from the case-law of the European Court of Human Rights that the use of documentary evidence obtained on pain of penalties in the context of financial law matters does not fall within the scope of the protection of the privilege of non-self-incrimination if the authorities are able to demonstrate that the purpose of the pressure is to obtain specific pre-existing documents.[60]

V. CONCLUSION

For the assessment of the refusal to provide cooperation to the tax administrator, in the context of its possible enforcement by imposing civil fines, with the taxpayer's argumentation about the use of its right not to blame itself, it is therefore decisive what facts the tax

[57] MAĎAR, M. Predvídateľnosť súdnych rozhodnutí ako súčasť práva na spravodlivý proces. In: *Banskobystrické dni práva : zborník z 2. ročníka medzinárodnej vedeckej konferencie na tému „Kvalita normotvornej a aplikačnej stránky zákonnosti ako determinant právneho štátu", 23. – 24. november 2016. Sekcia verejného práva*. 1. vyd. [online]. Banská Bystrica : Vydavateľstvo Univerzity Mateja Bela – Belianum, 2017, s. 134 – 145. [cit. 28.12.2025]. Dostupné na: https://www.prf.umb.sk/veda-a-vyskum/konferencie-a-konferencne-on-line-vystupy/ii-banskobystricke-zamocke-dni-prava/.

[58] Judgment of the European Court of Human Rights in the case of J.B. v. Switzerland, application no. 31827/96, of 3.5.2001, paragraphs 65 – 71.

[59] Judgment of the European Court of Human Rights in the case of Chambaz v. Switzerland, application no. 11663/04, of 5.4.2012.

[60] Judgment of the European Court of Human Rights in the case of De Legé v. the Netherlands, application no. 58342/15, of 4.10.2022.

administrator requires. Assuming that it requires the submission of general or unspecified evidence, then the application of the right to prohibit self-incrimination and, therefore, to refuse to cooperate is legitimate. On the other hand, if the tax administrator requests specific means of evidence, the taxpayer is obliged to provide them, while the prohibition of self-incrimination cannot be invoked, or only to a limited extent, depending on the specifics of the case. The scientific hypothesis must be falsified.

At the same time, the right to prohibit self-incrimination cannot be exercised without restriction even in the event of a refusal to submit certain '*essential documents*' relating to tax administration. In the case of Allen v. the United Kingdom, the European Court of Human Rights concluded that the tax administrator's requirement that the complainant file a tax return on his assets is not contrary to Article 6 of the Convention, even though a penalty was imposed for failure to file it.[61]

The right not to testify or the prohibition of self-incrimination cannot be interpreted in such a maximum that they mean absolute immunity for the taxpayer not to submit a tax return or other documents important for the correct determination of the tax to the tax administrator. Thus, the European Court of Human Rights distinguished Allen v. the United Kingdom from J.B. v. Switzerland on the ground that the applicant in the Allen case was not prosecuted for failing to provide information that could incriminate him in ongoing or anticipated criminal proceedings, but for the act of falsely declaring his assets, which is a criminal offence in itself. The ECtHR held that that privilege did not constitute a prohibition on the use of coercive powers to require taxpayers to provide information on their financial affairs in order to ensure an accurate tax assessment, noting that the obligation to disclose income and capital for the purposes of calculating and assessing tax is a common feature of the tax systems of the Member States and that it would therefore be difficult to imagine their effective functioning without it.

The question also remains as to the possible procedure of the tax administrator, who should refuse to instruct the taxpayer about the right to testify, even though such an obligation does not arise from the Tax Code. The controversy about the duty to provide information can be deduced taking into account a broader concept based on the different perception of the suspect by the European Court of Human Rights, which grants him the same range of rights as if he were an accused person who has the right to refuse to testify. The second reason is the procedure for applying the basic principles of criminal proceedings and imposing penalties, in particular with regard to the procedure for imposing a sanction for an administrative offence under Section 154 et seq. of the Tax Code,[62] in reflection on administrative punishment[63] and the procedure of the administrative court under Section 195 (c) and (d) of Act No. 162/2015 Coll. of the Code of Administrative Procedure, as amended. Within the application of

[61] Judgment of the European Court of Human Rights in the case of Allen v. the United Kingdom, application no. 76574/01, of 10.9.2002. For comparison: judgment of the European Court of Human Rights in the case of Savic v. Austria, applications no. 10487/16 and 10502/16, of 15.9.2020.

[62] In the context of prosecution for so-called tax offences, it is also necessary to take into account the liberation clause which, according to Section 154(2) of the Tax Code, allows a natural person who is not an entrepreneur to be relieved of liability for a breach of obligation, but only such a person. – KUBINCOVÁ, T. Vybrané otázky ukladania sankcií pri správe daní. In: *Banskobystrické zámocké dni práva : zborník z 3. ročníka medzinárodnej vedeckej konferencie na tému „Identifikácia únosnej miery autonómie právnych odvetví a súčasnej potreby ich synergie", 23. – 24. november 2017, Vígľaš. Sekcia verejného práva*. 1. vyd. [online]. Banská Bystrica : Vydavateľstvo Univerzity Mateja Bela – Belianum, 2018, s. 134 – 135. [cit. 29.12.2025]. Dostupné na: https://www.prf.umb.sk/veda-a-vyskum/konferencie-a-konferencne-on-line-vystupy/iii-banskobystricke-zamocke-dni-prava/.

[63] See: PEKÁR, B. Efektivita sankcií pri správnom trestaní. In: *Banskobystrické zámocké dni práva : zborník z 3. ročníka medzinárodnej vedeckej konferencie na tému „Identifikácia únosnej miery autonómie právnych odvetví a súčasnej potreby ich synergie", 23. – 24. november 2017, Vígľaš. Sekcia verejného práva*. 1. vyd. [online]. Banská Bystrica : Vydavateľstvo Univerzity Mateja Bela – Belianum, 2018, s. 148 a nasl. [cit. 29.12.2025]. Dostupné na: https://www.prf.umb.sk/veda-a-vyskum/konferencie-a-konferencne-on-line-vystupy/iii-banskobystricke-zamocke-dni-prava/.

criminal law principles to the area of administrative punishment, and thus also to the so-called tax offences, it is necessary to add that the application of the analogy cannot be to the detriment of the rights of the person concerned and will not apply even in cases of special legislation.[64] It is also necessary to point out the characteristics of the sanctions imposed, because the sanctioning legal norms in the field of public law apply primary punitive sanctions,[65] i.e. coercive sanctions, the imposition and fulfilment of which does not affect the primary obligation to perform a certain act for the non-execution of which the sanction was imposed. Therefore, the correlate of the above facts leads to the justification of the conclusion that the obligation to provide information has arisen, namely at the moment when the taxpayer becomes suspected of unlawful conduct.

KEY WORDS
tax, tax proceedings, evidence, proof, burden of proof, cooperation, prohibition of self-incrimination

KĽÚČOVÉ SLOVÁ
daň, daňové konanie, dôkaz, dokazovanie, dôkazné bremeno, súčinnosť, zákaz sebaobviňovania

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ON THE FUTURE OF FREE ASSESSMENT OF EVIDENCE STATISTICAL AND PROBABILISTIC EVIDENCE IN THE ERA OF ARTIFICIAL INTELLIGENCE[1]

O BUDÚCNOSTI ZÁSADY VOĽNÉHO HODNOTENIA DÔKAZOV - ŠTATISTICKÉ A PRAVDEPODOBNOSTNÉ DÔKAZY V ÉRE UMELEJ INTELIGENCIE

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ABSTRACT

This paper addresses the research question of: 'How should the institute of free assessment of evidence in Slovak civil contentious proceedings be transformed in the event of integrating artificial intelligence into the decision-making process?'. In the introductory parts, the reader is presented with the practical dimension of the problem in the Slovak Republic and the Czech Republic on specific decisions of the highest judicial authorities. In these chapters, the author processes, analyses, and compares relevant academic writings concerning the issues and approaches to the evaluation of probabilistic and statistical evidence. The article smoothly transitions into a juxtaposition of the Anglo-American and European approaches to the assessment and evaluation of evidence in civil proceedings, which concludes with a summary of the comprehensive ideological basis on which the subsequent parts of the article are built. In the following chapter, the reader is offered a mathematical approach to the evaluation of probability. This is accompanied by several notes by the author about the (un)readability of said evaluation for artificial intelligence – for the sake of straightforwardness of the narrative, the author's demonstrative comments with specific practical examples are given for each mathematical formula. The author then applies the aforementioned ideas to the Czecho-Slovak legal context and concludes the paper with de lege ferenda considerations, keeping this expected development in mind.

ABSTRAKT

Článok sa zaoberá výskumnou otázkou: 'Ako by sa mal transformovať inštitút voľného hodnotenia dôkazov v slovenskom civilnom sporovom konaní pre prípad integrácie umelej inteligencie do rozhodovacieho procesu?' V úvodných častiach je prezentovaný praktický rozmer problému v Slovenskej a Českej republike na konkrétnych rozhodnutiach najvyšších súdnych autorít. Autor v nich spracúva, analyzuje a komparuje relevantnú svetovú akademickú spisbu týkajúcu sa problematiky a prístupov k hodnoteniu pravdepodobnostných a štatistických dôkazov. Článok plynulo prechádza do juxtapozície anglo-amerického a európskeho prístupu k vyhodnocovaniu dôkazov v civilnom konaní, čo završuje zhrnutím ucelenej myšlienkovej základne, na ktorej sú vybudované nadväzné časti článku. Nasledujúca kapitola prezentuje matematický prístup k vyhodnocovaniu pravdepodobnosti. Tento sprevádza niekoľko poznámok autora o jeho (ne)čitateľnosti pre umelú inteligenciu – pre priamočiarosť výkladu je pri

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jednotlivých vzorcoch uvedený demonštratívny výklad autora vo vzťahu ku konkrétnemu príkladu z praxe. Autor následne rozpracované myšlienky podrobne aplikuje na česko-slovenský kontext a článok završuje úvahami de lege ferenda, ktoré majú tento predpokladaný vývoj na pamäti.

I. INTRODUCTION

This article delves into an examination of the research question *'How should the institute of free assessment of evidence in Slovak civil contentious proceedings be transformed in the event of integrating artificial intelligence into the decision-making process?'*. This question was formulated in response to the fact that although the Slovak *(and Czech)* legal order in civil proceedings *(in contentious sense)* prefers the principle of formal truth[3] and free assessment of evidence, these will probably soon encounter their practical limits, in the form of the rapid emergence of artificial intelligence as a data-processing tool in civil proceedings *(among others)*. The research aims to identify 'blind spots' in the procedural-legal framework, taking into account the approach of artificial intelligence to evaluating the probability of claims, and through de lege ferenda considerations to outline possible legislative 'patches' for these spots, so that AI may also 'freely assess' evidence.

The question of the objective versus subjective evidentiary standards has been and remains the subject of intensive academic discussion. A significant part of this discussion took place in the second half of the 20th century in the German-speaking legal context (*Prütting*[4], *Musielak*[5], *Rosenberg*[6]*)*. This discussion was also followed up by the Czech and Slovak academy, dominated in particular by the Brno proceduralist Macur[7]. This discussion concluded in the sense that the European concept of evidence assessment is fundamentally subjectivist in nature *(i.e., assessment based on the subjective conviction of the individual judge, not an externally quantified standard – e.g., 80% persuasiveness*[8]*)*. We maintain, however, that current developments in procedural law indicate a specific problem in this regard that could not have been foreseen in the 1960s, namely, the integration of AI into decision-making. Indeed, the question of integrating AI into decision-making in our context is currently discussed primarily in the role of a 'supporting assistant', rather than a 'judge'[9]. On the other hand, global developments indicate that AI is already subsidiarily taking on the role of a judge *(e.g., Estonia, China, USA, Canada)*. This naturally gives rise to the question of how AI judges perceive the taking of evidence. This article addresses the legal regulation of their approach to evidence through mathematical probability. Mathematical theories on probabilistic evidence *(Bayes' theorem, Dempster-Shafer theory)* have been known and academically developed since the end

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[*] *The translation of this paper from Slovak into English was performed with aid of artificial intelligence (Claude Sonnet 4.6) with subsequent review and corrections done by the author. The author takes full responsibility for the final translation.*

[3] 'Prefers', because the so-called principle of formal truth does not apply one hundred percent even in civil contentious proceedings *[for exceptions see e.g. proceedings in matters concerning the protection of the weaker party – see the second title of the third part of Act No. 160/2015 Coll. Civil Contentious Procedure Code as amended (hereinafter '**CCP**')].*

[4] PRÜTTING, Hanns. Gegenwartsprobleme der Beweislast: Eine Untersuchung moderner Beweislasttheorien und ihrer Anwendung insbesondere im Arbeitsrecht. München: C.H. Beck, 1983. 388 pp.

[5] MUSIELAK, Hans-Joachim. Die Grundlagen der Beweislast im Zivilprozeß. Berlin; New York: Walter de Gruyter, 1975. 445 pp.

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ROSENBERG, Leo; SCHWAB, Karl Heinz; GOTTWALD, Peter. Zivilprozessrecht. 18. Aufl. München: C.H.Beck, 2019. 1240 pp.

[7] MACUR, Josef. Důkazní břemeno v civilním soudním řízení. Brno: Masarykova univerzita, 1995. 172 pp.

MACUR, Josef. Zásada projednací v civilním soudním řízení. Brno: Masarykova univerzita, 1997. 233 pp.

[8] For further context, cf. Chapter II of this article.

[9] Cf. e.g. CHESTERMAN, Simon. All Rise for the Honourable Robot Judge? Using Artificial Intelligence to Regulate AI. Technology and Regulation, 2023, Vol. 2023, pp. 45–57. or SUSSKIND, Richard. Online Courts and the Future of Justice. Oxford: Oxford University Press, 2019. 336 pp.

of the last century[10]. Their application in practice, however, predominantly remains at the level of mathematical-theoretical research. The state of knowledge lacks an analysis of how current European evidentiary standards should be transformed so as to be readable by AI and controllable by legislators and software engineers. This article attempts to fill this gap by researching the compatibility of the European concept of free assessment of evidence with AI decision-making, concluding with de lege ferenda considerations from the perspective of the Slovak legal environment.

II. METHODOLOGY, OBJECTIVES, AND CONTRIBUTIONS OF THE RESEARCH

The specific subject of the research is a particular part of civil trial evidence-taking – namely, the so-called statistical and probabilistic evidence[11]. The entry of artificial intelligence into judicial decision-making has the potential to drastically change the institute of evidence-taking in civil proceedings, precisely in relation to this type of evidence. Statistical evidence is most traditionally dealt with by criminal courts[12] however, in academia, these conclusions are sometimes further elaborated with remarks on their applicability to civil courts[13]. Civil courts also have a docket with a statistical element, in cases where evidence-taking depends on the findings of exact sciences *(e.g., DNA testing in family law matters[14]).* Every court in every branch of law works with probabilistic conclusions[15]. The subject of further examination will be statistical and probabilistic evidence in civil *(contentious)* trials, which, in specific cases[16] is even characterized by probabilistic conclusions. The main contribution of the article is the elaboration of the established research question in the Czech and Slovak context, which has traditionally been neglected by legal scholars in domestic legal academia. In the introductory parts of the paper, we analyse the current state of the decision-making activity of the highest judicial authorities of the Slovak Republic (hereinafter '***SR***') and the Czech Republic (hereinafter '***CR***'), and we identify the forms this issue takes in our context. We then use the method of legal comparison to compare two global concepts of evidentiary standards in civil proceedings, with the aim of providing a comprehensive academic perspective on the limits of persuasiveness that form the conceptual basis of the subsequent analyses. We follow this with an analysis of two fundamental mathematical evidentiary theories applied directly to a specific case from Slovak practice, for the purpose of concluding the article with an analysis of the legal framework *de lege lata* from the perspective of the anticipated future involvement of artificial intelligence in civil decision-making. The article concludes with several authorial reflections *de lege ferenda* on the optimization of the legal framework for the purposes of the anticipated development of evidence-taking in civil proceedings.

For the sake of clarifying the intent of this article, we consider it appropriate to emphasize that our aim is not to build upon the 1960s proceduralist academic debate on the subjectivization and objectivization of evidentiary standards. This discussion was primarily

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[10] E.g. FINKELSTEIN, Michael O. and William B. FAIRLEY. A Bayesian Approach to Identification Evidence. Harvard Law Review, 1970, Vol. 83, No. 3, pp. 489–517.
[11] Various cross-translations of 'Statistical evidence'
[12] See e.g.
LITTLEJOHN, Clayton. Truth, knowledge, and the standard of proof in criminal law. *Synthese*. 2020, Vol. 197, No. 12, p. 5253–5286.
GLESS, Sabine. AI in the Courtroom: A Comparative Analysis of Machine Evidence in Criminal Trials. In Georgetown Journal of International Law, 2020, Vol. 51, No. 2, p. 195
or
ROSS, L. Rehabilitating statistical evidence. Philosophy and Phenomenological Research. 2021, Vol. 102, No. 1, p. 3–23.
[13] Cf.: DI BELLO, Marcello. Trial by Statistics: Is a High Probability of Guilt Enough to Convict? Mind. 2019, Vol. 128, No. 512, p. 1045.
[14] CHENG, Edward K. – NUNN, G. Alexander. DNA, Blue Bus, and phase changes. The International Journal of Evidence & Proof. 2016, Vol. 20, No. 2, pp. 112–120.
[15] *See the entire following chapter.*
[16] E.g. the so-called payment order (§265 et seq.CCP), interim and protective measures (§324 et seq.CCP).

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focused on the question of whether the evidentiary standard *(the degree of required persuasiveness of evidence)* should be derived from the internal *(subjective)* conviction of the judge or should be an externally defined *(objective)* standard. Our research consciously departs from this topic and focuses on a different issue, namely, the expected development of the institute of free assessment of evidence as a result of the gradual integration of artificial intelligence into civil judicial decision-making over the next 5 to 10 years. The paper thus focuses on the question of how evidentiary standards must be reformulated so as to be 'readable' to artificial intelligence.

At present, artificial intelligence is in the early stages of integration into the judicial process as a supporting tool; however, there are already successful international projects that replace the judge with artificial intelligence entirely. For example:

1) Smartsettle ONE *(Canada)* – an AI mediator based on artificial intelligence. It uses the 'blind-bidding' principle (bids by the parties are hidden). A dispute that previously took three months is intended to be resolved in one hour.[17]
2) AI judge in Estonia (*disputes up to EUR 7,000)*. An appeal against its decision may be filed, which is then reviewed by a human judge.[18]
3) Chinese internet courts – Hangzhou Court *(Alibaba).* In operation since 2017, the process takes place entirely online *(from the initiation of proceedings to the decision).* In the course of two years, it judged over almost 20,000 cases. In June 2024, a comprehensive AI system was introduced in China for decision-making in these courts.[19]
4) Arbitrus.ai *(Harvard, USA)* – launched in February 2025 and described as 'the first true AI judge' *(it is a private arbitration service*). The authors promise to reduce costs from ~$100,000/case *(when a human judge decides)* to ~$10,000/case *(when Arbitrus.ai decides).* The decision is to be delivered within 72 hours *(compared to 60–90 days for human arbiters)* with extensive support for various types of evidence *(including video evidence).*[20]
5) eBay and PayPal ODR system *(60+ million disputes per year – automated resolution of simple disputes in specific categories: 'item not received', 'item not as described', 'unpaid item'*)[21].

[17] Cf. websites:
Legal blog LawSites. Available from: https://www.lawnext.com/2025/02/on-lawnext-is-arbitrus-ai-the-first-true-ai-judge-the-future-of-dispute-resolution.html [Accessed 2026-04-23].
Website of Smartsettle. Available from: https://www.smartsettle.com/smartsettle-one [Accessed 2026-05-11].
Website of mediator Bruce Greig. Available from: https://www.brucegreigmediator.com/post/robot-mediators-a-short-review-of-smartsettle-one [Accessed 2026-04-07].
Leaflet from a conference presentation. Smartsettle. Available from: https://info.smartsettle.com/wp-content/uploads/2019/11/1911-rewarding-good-negotiating-behaviour.pdf [Accessed 2026-05-28].
Smartsettleresolutions.com. Available from: https://www.smartsettleresolutions.com/post/negotiating-online-with-smartsettle-one [Accessed 2026-04-16].
[18]Russian business portal TAdviser. Website. Available from: https://tadviser.com/index.php/Project:In_Estonia_was_provided_the_robot_judge_considering_claims_for_the_amount_to_7_thousand_euros [Accessed 2026-05-03].
Legal newspaper Law360 Canada. Available from: https://www.law360.ca/ca/articles/1747943 [Accessed 2026-04-30].
Website of Harvard International Review (HIR). Available from: https://hir.harvard.edu/your-honor-ai/ [Accessed 2026-04-12].
[19] Portal Lexis Nexis. Originally published in Law360 Canada Available from: https://www.lexisnexis.com/en-ca/ihc/robots-justice-chinas-use-of-internet-courts [Accessed 2026-05-19].
[20]Legal newspaper Legal Futures. Available from: https://www.legalfutures.co.uk/latest-news/robot-mediator-settles-first-ever-court-case [Accessed 2026-04-25].
Also see KIEFFABER, Jack; GANDALL, Kimo; McLAREN, Kenny. We Built Judge.ai. And You Should Buy It. SSRN Electronic Journal, 2025. 88 pp.
Portal Chinadaily.com.cn Available from: https://www.chinadaily.com.cn/a/202501/02/WS6775eb0aa310f1265a1d8810.html [Accessed 2026-05-06].
Or the Law360 portal. Available from: https://www.law360.com/pulse/articles/2293413 [Accessed 2026-04-21].
[21] News portal Pew. Available from: https://www.pew.org/en/research-and-analysis/articles/2019/06/04/online-dispute-resolution-moves-from-e-commerce-to-the-courts [Accessed 2026-05-24].

6) *(Further mentions: e.g. DoNotPay (UK/USA) – AI chatbot focused on parking fines*[22] *and Dyspute.ai – AI mediator for commercial and consumer disputes*[23]*)*

In view of the above-mentioned, the topic of this paper may be considered extremely important in relation to the question of how legislation could and should respond to this 'New Age of Judicial Decision-Making'. For this reason, particular emphasis is placed on the citation index more recent than the year 2019.

The trend of gradually introducing AI into legal reasoning can also be observed in the legal conditions of the SR, for example in the form of educational activities focused on the use of AI by practising lawyers, although currently in a less developed form *(e.g. a workshop, organized on 10.06.2026 by the legal publisher C.H.Beck, of which a 'Practical demonstration of various AI tools' is a part*[24]*, the new AI assistant of the judikáty.info portal, the so-called 'AI – Judikátor', or the recent success of UPJŠ students in designing an AI agent for the special needs of lawyers and legal professionals*[25]*).* With a high degree of probability, however, the future integration of AI into legal reasoning cycles can also be expected in our conditions – and perhaps the above-mentioned examples of foreign AI 'judges' may be the first indicators of what is to come.

III. INTERDISCIPLINARY FINDINGS AND POINTS OF VIEW

1. Probability in civil courts

The following references to 'probability' in civil proceedings refer to any most probable conclusion of a civil court *(on questions of both fact and law).* Based on a quantitative analysis of the decision-making activity of the highest judicial authorities of the SR and the CR, it can be argued that in civil proceedings, courts at every level form probabilistic conclusions of various kinds *(and not only in connection with evidence-taking).* In some cases, the law even requires the court to make such a conclusion[26]. The analysis of available case law suggests probabilistic conclusions:

1) In questions of law interpretation (*illustratively*[27] *see:*

***resolution of the Supreme Court of SR** (hereinafter '**SC SR**') **No. 1CdoGp/1/2023** 'Either the legislator simply forgot about the situation of a petition aimed*

Output from the University of Missouri library. Available from: https://libraryguides.missouri.edu/c.php?g=557240&p=3832247 [Accessed 2026-04-03].

Interview with Colin Rule, one of the founders of the first ODR platforms. Available from: https://www.adr.org/news-and-insights/nerding-out-on-dispute-resolution-an-interview-with-odrcom-s-colin-rule/ [Accessed 2026-05-15].

[22] Website of DoNotPay. Available from: https://donotpay.com/learn/parking-tickets/ [Accessed 2025-1-31].

[23] Website of Dyspute.ai. Available from: https://dyspute.ai/ [Accessed 2025-1-31].

[24] Website of the publisher C.H. Beck Available from: https://www.beck-konferencia.sk/2025/konference/pravo-vo-svetle-umelej-inteligencie-zmluvne-vztahy-ai-incidenty-a-nastroje-5?xnpe_tifc=bI1j4dnXOFQ_xDVXxDoj4MpZhfEWVjQsVuU_O.oZx.HJxIE1EMB5VZ8DRjpL4fx7bDesxIs_4.1lh.YX&utm_source=exponea&utm_campaign=seminare_260326&utm_medium=e-mail [Accessed 2025-05-18].

[25] Website ofof the Faculty of Law of UPJŠ. Available from: https://www.upjs.sk/aktuality/studenti-upjs-uspeli-vo-finale-yeslab-2-0/ [Accessed 2025-05-18].

[26] E.g. under § 75 of Act No. 36/5005 Coll. on the Family, when determining alimony the court also takes into account the income that the obliged party could hypothetically have earned.

See also CSACH, Kristián. Preukazovanie (vybraných) hypotetických okolností v súkromnom práve. In: Dokazovanie v civilnom a trestnom konaní. Kolektív autorov. Pezinok: Justičná akadémia, 2012, p. 71.

[27] Illustratively see also:

resolution of the SC SR No. 2Obdo/10/2018 *'The concept of 'ordinarily achieved profit' cannot, in the defendant's view, be understood as 'average profit' ascertainable from historical statistical data, but rather as the profit that the injured party would have achieved with a probability approaching certainty, because it is a standard profit that regular business partners had been achieving over a long period of time in their mutual business relations with a certain regularity.',*

resolution of the SC SR No. 2Obdo/48/2020 *'...which is, according to the appellant, contrary to § 16 para. 2 letter c/ of Act No. 382/2004 Coll. (the defendant probably had in mind § 16 para. 2 letter d/ of Act No. 382/2004 Coll. – the expert is obliged to perform expert activities impartially'.*

at establishing paternity after the death of the putative father, or by its concept of party standing wished to indicate that it does not intend to regard the guardian as an independent party, and thus wishes to depart from historical case law. We consider the second variant to be more probable.'),

resolution of the SC SR No. 4Cdo/316/2020 *'it is hardly probable that the legislator intended to express, by means of identical wording within one and the same part of the Civil Code, something different for co-ownership in shares and something different for joint marital property.'*

resolution of the SC SR No. 4Obdo/85/2021*'In this regard, it is more than probable that the adoption of all these changes within a single amendment (substantive-law changes in the Commercial Code, as well as procedural-law changes in the Civil Non-contentious Procedure Code), which concern the commencement of liquidation and additional liquidation of a business company, the transitional provision applies not only to the liquidation of a business company, but must simultaneously be applied also to proceedings for ordering the additional liquidation of a business company'.*

2) In procedural questions *(illustratively[28] see:*

resolution of the SC SR No. obdo/51/2022 *'beyond what has been stated, the court of first instance noted that in the event that it had not dismissed the action on grounds of the limitation of the plaintiff's claim, it would probably have dismissed it on grounds of a disputed legal title to the amount claimed',*

resolution of the SC SR No. 4xeobd/6/2023 *'...it is more than probable (based on hundreds to thousands of cases in similar matters), that in such a case the entitled party would have filed an appeal against the decision of the appellate court and the Supreme Court would have had to discontinue the proceedings on this ordinary remedy,',*

resolution of the Supreme Court of CR *(hereinafter* ***'SC CR') No. 26 Cdo 1607/2024*** *'...the suspension of enforceability or legal effect of the contested decision under Section 243 of the Civil Procedure Code may only be considered once the conditions for appellate review proceedings have been met, the appeal is free of defects, and, at least on the basis of a preliminary assessment, the appeal appears likely to succeed. (cf. e.g. resolution of the SC CR of 14 September 2017, No. 30 Cdo 865/2016, or of 3 October 2017, No. 20 Cdo 4097/2017),',*

3) and in factual questions *(illustratively[29] see:*

[28] For the SC CR see also e.g.
resolution of the SC CR No. 21Cdo 2245/2024 *'the inadmissibility of the appeal on points of law is not established by Section 238(1)(i) of the Code of Civil Procedure, as the appellate court (presumably) assumed....',*
resolution of the SC CR No. 20Cdo 2879/2024 *'...the debtor would, even in the event of a favorable decision of the Supreme Court on his appeal on points of law, most likely not be able to recover this amount back.',*
resolution of the SC CR No. 23Cdo 2255/2024 *'... that it provided the first two advance payments toward the purchase price and that proving this fact will likely be difficult.'.*
For the SC SR see also e.g.
resolution of the SC SR No. 1Cdo/44/2020 *'Since the appellate court at the time of deciding on the appeal probably did not have available the 'confirmation of submission of a filing' (which at that time had not yet been displayed to them – at the time before the deployment of version APV SM 5.0.1.0), it relied only on the delivery receipt.',*
judgment of the SC SR No. 2Obo/14/2019 *'The appellate court can only assume that the appellate court probably in its ruling, No.2Obo/255/2006, proceeded from the enforcement immunity of the state, which legal opinion has been overcome as of yet.'*
[29] For the SC CR see also e.g.
resolution of the SC CR No. 33Cdo 3489/2023 *' If, according to the expert report, the disputed receipt was likely altered, specifically by changing the amount of CZK 85,000 to CZK 850,000. ',*
resolution of the SC CR No. 24Cdo 1297/2024 *' According to the expert report of Prof. Mgr. Jiří Drábek, Ph.D., dated 14 August 2021, in the field of genetics, the full sibling relationship between the petitioner and Š. P. is 99.998% probable.',*

judgment of the SC SR No. 7Cdo/345/2021 *'In this context, it is necessary to deal with the question connected to ordinary life experience, and specifically, whether it is probable that a debtor would pay a creditor the debt if he knew that the debt did not belong to him.',*

judgment of the SC SR No. 4Cdo/106/2021 *'The court of first instance was of the opinion that the purpose of the future purchase contract was the intention of the plaintiffs to conclude a purchase contract with the defendant in the future, to sell him the land parcels, which intention continues, and therefore considered the action as a means of extricating themselves from the obligation which they entered into under the agreed terms probably because they have another buyer who would pay a higher price for the property, when they refused to accept the defendant's request to conclude the purchase contract.',*

resolution of the SC CR No. 21 Cdo 2245/2024 *'...The appellate court properly addressed the defendant's assertion that 'the injured party contributed to the fall himself, because he must have been in close proximity to the entrance to the balcony, or, more likely, was taking a shortcut to the second apartment unit via the balcony,' by concluding that the defendant had failed to discharge the burden of proof.'.*

The further subject of this paper will be only the probabilistic conclusion of the acting court in factual questions *(i.e., the most obviously relevant for the topic of free assessment of evidence*) – namely, probabilistic evidence-taking in civil trial.

For the analysis of statistical and probabilistic evidence, it is first necessary to establish what degree of persuasiveness or probability is required in civil proceedings *de lege lata* . In other, simpler words, if we imagine an AI judge assessing a *(im)*probable sequence of events, we must provide it within the framework of oversight of its activity with a 'threshold value' between a probable and an improbable conclusion (for example – *'Consider a claim proven only if the probability comes out higher than 90%'*). Such a 'threshold value' can be established by taking a comparative look at legal systems that have a percentage-based 'evidentiary standard' or 'measure of evidence' (a rule expressing when evidence may be considered proven).

2. Comparison of approaches in variable legal contexts

The evidentiary standard in civil contentious trials differs across the world of European legal practice *ad hoc*. The continental concept of free assessment of evidence enshrined in the CCP[30], compared to the Norwegian and *common law* percentage standard can be described as very vague *(in domestic literature one may also encounter the designation 'standard of Scandinavian states'[31], this view is however not conceptually precise given that Sweden and Denmark apply free assessment of evidence in the same way as the SR and CR[32]).*

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resolution of the SC CR No. 25Cdo 3603/2023 *'They also considered the claim for damages to be well-founded, as the conclusion of the contract appeared highly likely, the claimant expected the contract to be concluded, and the defendant terminated the negotiations on the contract without having a fair reason to do so.'.*

For the SC SR see also e.g.

resolution of the SC SR No. 7Cdo/105/2019 *'Given the strained relations between the parties to the dispute, it is most probable that further disputes would arise between them also regarding the possible maintenance of the property, if the plaintiff were required to enter the defendant's land',*

resolution of the SC SR No. 1Obdo/69/2019 *'If he had such an intense eye inflammation and pain as he claimed, it is very improbable that he would have transported himself to the place of the specialized eye examination. The court agreed with the defendant that it is notable that the announcement of the alleged health problems on the day of the hearing was made almost a month later, when he learned that the court had issued a default judgment.'.*

[30] §191(1) CCP: The court shall assess evidence at its own discretion, each piece of evidence individually and in their mutual context; in doing so it shall carefully take into account everything that came to light during the proceedings.

[31] GÁBRIŠ, Tomáš – LACLAVÍKOVÁ, Miriam. Štandardy pravdy a istoty v procesnom práve (právno-filozofické a právnohistorické pozadie problému). Právnické listy. 2022, Vol. 2, p. 17.

[32] Cf.(on the following page)

According to the commentary on §191 CCP *(Assessment of evidence), 'the conclusion as to veracity is the result of the judge's inner subjective conviction'*[33]. This, in practice, means a marginally different standard of probability for each individual judge.

In academic debate, one may also encounter the view that continental law has only two evidentiary standards: *persuasive and unpersuasive*[34]. In general, this is not an incorrect conclusion – yet ultimately it lacks the nuances of the particularities of formal truth[35] *(simplified: only what has been proven in proceedings in compliance with the rules of procedure may be considered true – i.e., even a persuasive claim resting on inadmissible evidence will in principle not be taken into account in the proceedings).* Formal truth is, according to some Slovak authors, a misleading name, given the fact that it is not about searching for '*truth*' in the proper sense – a more accurate term in this context is, in their view, formal '*probability*'[36]. In view of the above, formal *'persuasiveness'* appears to be the most suitable possible designation.

Schweizer *(Ger.)* empirically translates this continental *'persuasiveness'* in civil matters as a 90% probability – in other *(Schweizer's)* words: near certainty[37]. This corresponds loosely with the interpretation offered by the commentary on §191 CCP (*Assessment of evidence),* according to which, in the sense of '*the so-called material conduct of litigation, the factual situation established by the court should correspond to the greatest possible extent to the actual substantive-law relationship of the parties to the dispute'*[38]

In contrast to the continental model, the Anglo-American and Norwegian evidentiary standard in civil matters is defined as a mathematical probability in principle[39] corresponding to 51%[40] or *balance of probabilities* in the United States and *preponderance of evidence* in Great Britain (in criminal matters, this probability is to correspond to 90–95%[41] - *beyond a reasonable doubt*). Just like free assessment of evidence, this mathematical standard is also the subject of academic disputes,[42] e.g. according to Smith this threshold is among other things too

BYLANDER, E. Evidence in civil law-Sweden. Institute for Local Self-Government and Public Procurement Maribor, 2015, p. 24.
WAAGE, F. – HERBORN, M. Evidence in Civil Law-Denmark. Institute for Local Self-Government and Public Procurement Maribor, 2015, p. 10.
or
§ 132 of Czech Act No. 99/1963 Coll. Civil Code of Procedure as amended (hereinafter ***'czCCP.'****)*
The court evaluates evidence according to its own judgment, considering each piece of evidence individually as well as in their mutual context; in doing so, it carefully takes into account everything that has come to light during the proceedings, including what the parties have stated..

[33] ŠTEVČEK, Marek – BAJÁNKOVÁ, Jana. § 191 [Hodnotenie dôkazov]. In: ŠTEVČEK, Marek – FICOVÁ, Svetlana – BARICOVÁ, Jana – MESIARKINOVÁ, Soňa – BAJÁNKOVÁ, Jana – TOMAŠOVIČ, Marek et al. *Civilný sporový poriadok.* 2nd edition. Praha: C. H. Beck, 2022, p. 786.

[34] *'...European Civil Law, on the other hand, recognizes just one standard of full conviction…'*
SCHWEIZER, Mark. The civil standard of proof – what is it, actually? Preprints of the Max Planck Institute for Research on Collective Goods, No. 2013/12. Bonn: Max Planck Institute for Research on Collective Goods, 2013. p. 1.

[35] Cf. e.g. payment order proceedings in the conditions of the SR and CR *(without further elaboration)*
In the SR 'Payment order' (§265 et seq.CCP).
or in the CR 'Payment order' (§ 172 et seq. czCCP).

[36] Cf. GÁBRIŠ, Tomáš – LACLAVÍKOVÁ, Miriam. *Štandardy pravdy a istoty v procesnom práve (právno-filozofické a právnohistorické pozadie problému)*. *Právnické listy*. 2022, Vol. 2, p. 17.

[37] SCHWEIZER, Mark. *The civil standard of proof – what is it, actually?* Preprints of the Max Planck Institute for Research on Collective Goods, No. 2013/12. Bonn: Max Planck Institute for Research on Collective Goods, 2013. p. 5.

[38] ŠTEVČEK, Marek – BAJÁNKOVÁ, Jana. § 191 [Hodnotenie dôkazov]. In: ŠTEVČEK, Marek – FICOVÁ, Svetlana – BARICOVÁ, Jana – MESIARKINOVÁ, Soňa – BAJÁNKOVÁ, Jana – TOMAŠOVIČ, Marek et al. *Civilný sporový poriadok.* 2nd edition. Praha: C. H. Beck, 2022, p. 789.

[39] In some significant civil matters, a higher standard is applied – *clear and convincing evidence.* (e.g. wills and inheritance, fraudulent conduct, gifts and transfers of property).

[40] E.g. SMITH, M. Civil liability and the 50%+ standard of proof. The International Journal of Evidence & Proof. 2021, Vol. 25, No. 3, p. 183–199.

[41] SULLIVAN, Sean P. *A likelihood story: The theory of legal fact-finding*. *U. Colo. L. Rev.* 2019, Vol. 90, p. 20.

[42] *'Scholars cannot agree on an evidentiary theory'*

low[43] (and at the same time in some borderline situations too high – e.g. when it is beyond doubt clear and fair that a claim should not be granted; e.g. claims contrary to good morals, which the continental concept of free assessment of evidence broadly subsumes under the item '*judge's subjective conviction of the truthfulness*').

In practice, 51% probability thus means that procedural success is sufficient if the acting judge assesses the claimed right as more probable than not[44].

A higher or lower evidentiary standard may be applied in both systems on an *ad hoc basis.* Factors may include, for example, the judge's emotionality in decision-making[45], economizing on costs[46] *(a clearly probable claim will therefore not need to be proven as intensively as an improbable one),* higher social importance[47] (*note: e.g. disputes involving politicians;* Ragavan recommends introducing a special evidentiary standard), as well as subjective importance for the parties[48] *(the evidentiary standard changes depending on what is at stake).* After all, procedural rules are primarily intended to ensure that judgments are based on both a truthful description of the facts and material justice[49].

In the 1970s, a study was conducted in the United States in which judges and jurors were asked about the degree of conviction they would require in the course of evidence-taking for the procedural success of one party or the other (only judges showed an average probability of 54% required for them to consider a claim convincingly proven (*note: in civil matters)*[50]. These standards, however, according to analogous findings in continental civil procedure, range between 80% and 90%[51].

Over the last decades, the institute of assessment of evidence has in principle changed very little *[for comparison, the current (2022 ed.) commentary on §191 CCP (Assessment of evidence) draws on literature from the years 1970 to 1997 and case law up to 2010 (with one exception in 2018) and the commentary on Art. 8 (Obligation to plead and burden of proof) draws on literature from the years 1996 to 2012[52]).*

In connection with current and future developments, however, the European initiative aimed at standardizing civil procedural law in Europe deserves attention. In 2016,[53] (and again

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Cf. CLERMONT, Kevin M. A Theory of Factfinding: The Logic for Processing Evidence. Marq. L. Rev. 2020, Vol. 104, p. 351.
or CLERMONT, Kevin M. Factfinding Deconstructed Logically. A General Theory of Evidence and Proof: Forming Beliefs in Truth. Cham: Springer International Publishing, 2024, p. 165.

[43] SMITH, M. Civil liability and the 50%+ standard of proof. The International Journal of Evidence & Proof. 2021, Vol. 25, No. 3, p. 183.

[44] SULLIVAN, Sean P. *A likelihood story: The theory of legal fact-finding. U. Colo. L. Rev.* 2019, Vol. 90, p. 18.

[45] See in more detail e.g. SALERNO, Jessica M. The impact of experienced and expressed emotion on legal factfinding. Annual Review of Law and Social Science. 2021, Vol. 17, No. 1, pp. 181–203.

[46] E.g. GUERRA, Alice – LUPPI, Barbara – PARISI, Francesco. *Standards of proof and civil litigation: A game-theoretic analysis*. *The BE Journal of Theoretical Economics*. 2019, Vol. 19, No. 1, p. 26.

[47] RAGAVAN, Shamini K. An intermediate standard of proof in serious civil cases in England and Wales. N. Ir. Legal Q. 2014, Vol. 65, p. 437.

[48] RAGAVAN, Shamini K. An intermediate standard of proof in serious civil cases in England and Wales. N. Ir. Legal Q. 2014, Vol. 65, p. 505.

[49] KÁČER, Marek. Opodstatnenie procesnej spravodlivosti. *Právny obzor.* Teoretický časopis pre otázky štátu a práva (Juridical Review. Theoretical Journal for the Questions of State and Law). 2021, Vol. 104, No. 5, pp. 333–344.

[50] SCHWARTZ, David L. – SEAMAN, Christopher B. Standards of proof in civil litigation: an experiment from patent law. Harv. JL & Tech. 2012, Vol. 26, pp. 437–438 or cf. SIMON, Rita James. Judges' Translations of Burdens of Proof into Statements of Probability. Trial Lawyer's Guide, 1969, Vol. 13, pp. 103–114.

[51] Cf. e.g. SCHWEIZER, Mark. The civil standard of proof – what is it, actually? Preprints of the Max Planck Institute for Research on Collective Goods, No. 2013/12. Bonn: Max Planck Institute for Research on Collective Goods, 2013. 31 p.

[52] Cf. ŠTEVČEK, Marek – BAJÁNKOVÁ, Jana. § 191 [Hodnotenie dôkazov]. In: ŠTEVČEK, Marek – FICOVÁ, Svetlana – BARICOVÁ, Jana – MESIARKINOVÁ, Soňa – BAJÁNKOVÁ, Jana – TOMAŠOVIČ, Marek et al. *Civilný sporový poriadok.* 2nd edition. Praha: C. H. Beck, 2022, p. 785–790.

[53] Cf. TULIBACKA, Magdalena; SANZ, Margarita; BLOMEYER, Roland. Common Minimum Standards of Civil Procedure: European Added Value Assessment. Annex I – Research Paper. Brussels: European Parliament, 2016. 109 pp

in 2019,[54]), there was international discourse on a common minimum civil standard, but so far without a significant result[55]. An ambitious outcome of this discourse could, according to the authors of the cited publications, be a Code, which, however, we do not anticipate in the current situation. Nevertheless, *considering the gradual introduction of AI into the decision-making process in every country*, we anticipate that in the next decade, at least a partial shift can be expected regarding the harmonization of civil procedural law across Europe. Evidentiary standards would, in that case, have to be one of the key areas of this cooperation.

3. Legal-theory point of view

In this paper, the term 'statistical evidence' is used to denote evidence by which the fact to be proven cannot be proven with statistical certainty – in other words: evidence by statistics. The term 'probabilistic evidence' is used to denote evidence that is unable to prove the fact to with certainty due to objective limitations of human perception *(e.g., a witness's inattentiveness, the fading of a memory trace, etc.)*. Legal theory has already dealt with probabilistic and statistical evidence in the last century by means of parables that clearly demonstrate the frame of reference within which the acting judge works. These parables are illustrated below in two alternatives *(the first with purely statistical evidence and the second with probabilistic evidence, based on the subjective conviction of a witness):*

Bus analogy *(Smith v. Rapid Transit, Inc.)*[56]

Statistical evidence*: Betty Smith, the plaintiff, sued the bus company Rapid Transit, Inc. on the grounds that a bus of that company had run her off the road, thereby causing her to collide with another car parked by the road. She had not noticed the bus in detail and proved the fact solely by a timetable, according to which at that time there was a 90% chance that it was a bus of the company Rapid Transit, Inc.*[57].

Probabilistic evidence*: Betty Smith, the plaintiff, sued the bus company Rapid Transit, Inc. on the grounds that a bus of that company had run her off the road, thereby causing her to collide with another car parked by the road. Although she had not noticed the bus, the entire accident was witnessed by a witness – an elderly gentleman with poor eyesight, who is convinced that it was a bus of the company Rapid Transit, Inc.*

The Guilty Prisoner *(Parable by Charles Nesson)*[58]

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[54] Cf. EVAS, Tatjana; VAN BALLEGOOIJ, Wouter. Common Minimum Standards of Civil Procedure: European Added Value Assessment Accompanying the European Parliament's Legislative Own-Initiative Report. Luxembourg: European Parliamentary Research Service (EPRS), 2019. 45 pp.

[55] This discourse resulted in document 2015/2084(INL), a proposal for a European Parliament (EP) resolution – this resolution, however, was never adopted.

At the level of soft law one may also mention Model European Rules of Civil Procedure jointly developed by European proceduralists – specifically its Art. 87: '*A contested issue of fact is proven when the court is reasonably convinced of its truth.*' The above-mentioned publications (footnotes 51 and 52) were, however, interesting from the perspective of the article's topic, because they are accompanying documents to draft resolutions in which the authors sought to address the problem that in some European countries a percentage persuasiveness is applied and in others 'only' persuasiveness. They then debated the difficulty of a possible reconciliation. The MERCP, by contrast, is 'merely' an optional time-saving tool for arbitral tribunals from which it is possible (and indeed intended) to deviate – i.e.the authors of the MERCP sought to create an optional online 'template' that would be internationally usable and readable (analogous to a contract template downloaded from the internet), not to unify the evidentiary standard.

[56] Smith v. Rapid Transit, Inc., 58 N.E.2d 754 (1945).

[57] *The parable is also known as the 'Blue Bus', in its alternative version: In the city only blue and red buses operate. A colorblind plaintiff is struck by a bus. The Blue company owns 75% of the buses in the city. The plaintiff sues the Blue company.* Cf. e.g. PARDO, Michael S. The paradoxes of legal proof: A critical guide. BUL Rev. 2019, Vol. 99, p. 237. or RISINGER, D. Michael. Off the Rails: The Surprising Story of Smith v. Rapid Transit, Inc. Seton Hall Journal of Legislation and Public Policy. 2024, Vol. 48, No. 3, pp. 233–290.

[58] *This is also a well-known parable.*

Originally NESSON, Charles R. Reasonable Doubt and Permissive Inferences: The Value of Complexity. Harv. L. Rev. 1979, Vol. 92, pp. 1187, 1192–1193, but also elaborated later, e.g. GARDINER, Georgi. Legal evidence and knowledge. In: The

***Statistical evidence**: 100 prisoners are exercising in the prison yard. 99 of them engage in a fight, and one refuses to participate. The judge decides that, given the 99% probability that any one of them did it, he will punish a randomly selected prisoner (let us call him Marián). Marián is, in fact, guilty.*

***Probabilistic evidence**: 10 prisoners assault a guard. A second guard thinks he spotted Marián among them. Based on his testimony, the judge punishes Marián. Marián is, in fact, guilty.*

The described legal question is also technically referred to as the evidential paradox *('the paradox of legal proof'[59])*. In the academic literature, it can be read that legal practice responds to the described problem of statistical evidence with the hypothesis that claims in favour of the plaintiff *(offensive)* cannot be based on statistical evidence and, conversely, claims in favour of the defendant *(defensive)* can[60].

The problem arises, however, when we try to assign a numerical value of persuasiveness (probability) not only to statistical but also to probabilistic evidence. In both cases above, it would certainly not be 100% probability or persuasiveness. The reliability of human perception can, in the described cases, be assigned an estimated probability[61] of, say, a generous 80–90%.

In the first case *(Bus analogy)*, the mathematical degree of persuasiveness of statistical evidence would therefore be equal to or lower than the persuasiveness of probabilistic evidence. In the second case *(Guilty prisoner)*, the degree of persuasiveness of statistical evidence would in every instance be appreciably higher than that of probabilistic evidence *(it is difficult to imagine a person who under any circumstances would perceive every fact with 99% or higher accuracy)*. Nevertheless, reading *(even the more probable)* variants of both cases based on statistical evidence evokes an intuitive sense of injustice[62]. The Supreme Court, as well, in the cited case, *Smith v. Rapid Transit, Inc.*, decided that statistical evidence is not sufficient for a claim to be granted.

4. Probability and mathematics

Mathematicians have for decades been trying to solve the problem of probabilistic legal evidence. The historically oldest option is the so-called Bayes' theorem[63] *(in Slovak 'Bayesova*

Routledge Handbook of the Philosophy of Evidence. Routledge, 2022, pp. 453–466. or DAVIDSON, Barbara – PARGETTER, Robert. Guilt Beyond Reasonable Doubt. Australasian J. Phil. 1987, Vol. 65, pp. 182–183.

[59] PARDO, Michael S. The paradoxes of legal proof: A critical guide. BUL Rev. 2019, Vol. 99, p. 237.

[60] PARDO, Michael S. The paradoxes of legal proof: A critical guide. BUL Rev. 2019, Vol. 99, p. 238.

[61] The unreliability of witness testimony is pointed out by e.g. GARDNER, Dillard S. *Perception and memory of witnesses*. *Cornell LQ*. 1932, Vol. 18, pp. 391–409.

Conversely, the reliability of witness testimony is pointed out by e.g. WIXTED, John T. – MICKES, Laura – FISHER, Ronald P. Rethinking the reliability of eyewitness memory. Perspectives on Psychological Science. 2018, Vol. 13, No. 3, pp. 324–335.

[62] Author's marginal note: Although in this article we primarily speak of persuasiveness for the judge (or the 'artificially intelligent' judge), persuasiveness and its evaluation can also be debated with regard to any other observer. One of the requirements placed on the reasoning of a decision is ultimately also persuasiveness (also, for example) for the unsuccessful party to the dispute.

Cf. MOLNÁR, P. Procesná aktivita sporovej strany ako limit prieskumu v opravnom konaní. In Právny obzor. 2024, Vol. 107, No. 6, p. 636. or DUDITŠ, L. Komentár k §220 [Písomné vyhotovenie rozsudku] In ŠTEVČEK et al. Komentár CSP, 2nd edition, Praha: C.H. Beck, p. 882–895.

[63] E.g. FENTON, N. – NEIL, M. – BERGER, D. Bayes and the law. Annual Review of Statistics and Its Application. 2016, Vol. 3, No. 1, pp. 51–77.

or PEČARIČ, Mirko. Confirmation of standards of proof through Bayes Theorem. Archiv für Rechts- und Sozialphilosophie. 2020, Vol. 106, No. 4, pp. 532–553.

or DE ZOETE, Jacob, et al. Resolving the so-called 'probabilistic paradoxes in legal reasoning' with Bayesian networks. Science & Justice. 2019, Vol. 59, No. 4, pp. 367–379.

https://doi.org/10.33542/SIC2026-2-10

veta'[64]*)*, which was first applied to a legal context in the 1970s by the lawyer-mathematician duo of Michael O. Finkelstein and William Fairley[65].

Bayes' theorem:

$$P(A|B) = \frac{P(A) \times P(B|A)}{P(B)}$$

<u>Description of the equation:</u>

A and B are two random events, each with its own probability of occurrence [P(A) and P(B)],

P(A|B) is the probable occurrence of A, on the assumption that event B has previously occurred,

P(B|A) is the probable occurrence of B, on the assumption that event A has previously occurred.

As an illustration we use the probabilistic question from the above-cited judgment of the SC SR No. 7Cdo/345/2021 *'whether it is probable that a debtor would pay a creditor the debt if he knew that the debt did not belong to him.'*.

∗In the equation we use D in place of 'debtor' and C in place of 'creditor'.

P(D knows that debt does not belong to the C |and pays nonethelesss)

$$= \frac{\textit{P(that D knows that the debt does not belong to C)} \times \textit{P(that D will pay | and afterwards learns that the debt does not belong to C)}}{\textit{P(that the D will pay the debt)}}$$

$$P(A|B) = \frac{(90\%) \times (5\%)}{(80\%)}$$

<u>P(that the debtor knows that the consideration does not belong to the creditor and pays nonetheless) = 5.625%</u>[♥]

According to some authors, Bayes' theorem cannot absorb all the complexities of evidence-taking[66], contains too little data[67], and does not consider evidence in their mutual interconnections[68]. This is why these authors lean towards a more complex formula – the so-called Dempster-Shafer theory. The Dempster-Shafer theory, or the '*Theory of Belief Functions,*' is an evidential theory that is a variant of Bayes' theorem and takes into account several objectively possible eventualities *(i.e., it does not evaluate the probability of just a single piece of evidence, as is the case with Bayes' theorem).*

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[64] This is how it is translated by e.g. Staněk In STANĚK, Jakub. Úlohy diskrétní pravděpodobnosti. Matematika–Fyzika–Informatika. 2020, Vol. 29, No. 1, pp. 7–17.
or Bahník and Rubínová In BAHNÍK, Š. – RUBÍNOVÁ, E. Psychologická metodologie v praxi klinického neuropsychologa. In: KULIŠŤÁK, P. et al. Klinická neuropsychologie v praxi. 1st ed. Praha, Czech Republic: Karolinum, 2017, 904 pp.

[65] FINKELSTEIN, Michael O. – FAIRLEY, William B. *A Bayesian approach to identification evidence.* Harvard Law Review. 1970, Vol. 83, pp. 489–517.

[♥] *The values are illustrative only, for the sake of clarity. We do not have access to a sufficient body of practical cases and technical means on the basis of which we could determine the actual probability of occurrence of the described phenomena. This is not the case for courts, which have access to databases of all judicial decisions. In the future, we do not exclude interdisciplinary collaboration for a more detailed elaboration of this question.*

[66] CLERMONT, Kevin M. A Theory of Factfinding: The Logic for Processing Evidence. Marq. L. Rev. 2020, Vol. 104, p. 397. or also CLERMONT, Kevin M. Factfinding Deconstructed Logically. In: A General Theory of Evidence and Proof: Forming Beliefs in Truth. Cham: Springer International Publishing, 2024. P. 165.

[67] Cf. MARTINS, João Marques. A system of communication rules for justifying and explaining beliefs about facts in civil trials. Artificial Intelligence and Law. 2020, Vol. 28, pp. 135–150.

[68] CLERMONT, Kevin M. Factfinding Deconstructed Logically. In: A General Theory of Evidence and Proof: Forming Beliefs in Truth. Cham: Springer International Publishing, 2024. P. 165.

The Dempster-Shafer theory, as interpreted by Janasová and Strelcová, operates through 4 relationships[69]:

The degree of uncertainty is expressed in two quantities *Bel*(h_i) *and Pl*(h_i), where h_i denotes the evaluated hypothesis, i.e. the specific examined version of a factual circumstance, e.g. '*the debtor knew of the absence of a legal title*'; *m* denotes the basic assignment of credibility, i.e. the weight that a particular piece of evidence assigns to the given hypothesis or set of hypotheses:

1) The belief function *Bel*(h_i) expresses the lower bound of the probability interval.

(In other words, the least probable variant – obtained, e.g. by the subjective estimate of an expert)

$$Bel(h_i) = \sum_{h_j \subseteq h_i} m(h_j).$$

2) The plausibility measure *Pl*(h_i) expresses the upper bound of the probability interval.

(In other words, the probability that all evidence supported the established hypothesis)

$$Pl(h_i) = \sum_{h_j \cap h_i \neq 0} m(h_j).$$

3) The combination formula for multiple hypotheses takes into account multiple eventualities simultaneously.

(E.g., a plurality of expert reports, proven facts, injured parties, items of evidence, etc.)

$$m_{AB}(h_k) = \frac{\sum_{h_i \cap h_j = h_k} m_A(h_i) \cdot m_B(h_j)}{\sum_{h_i \cap h_j \neq \varnothing} m_A(h_i) \cdot m_B(h_j)} = \frac{\sum_{h_i \cap h_j = h_k} m_A(h_i) \cdot m_B(h_j)}{K},$$

4) The combination formula where the intersection of sets is empty.

(In other words, where the examined hypotheses never occur simultaneously – they are mutually exclusive, e.g., the damage could not have been caused simultaneously by a blue and a red bus)

$$m_{AB}(h_k) = \frac{\sum_{h_i \cap h_j = h_k} m_A(h_i) \cdot m_B(h_j)}{1 - \sum_{h_i \cap h_j = 0} m_A(h_i) \cdot m_B(h_j)} = \frac{\sum_{h_i \cap h_j = h_k} m_A(h_i) \cdot m_B(h_j)}{1 - K},$$

In the model case of the judgment of the SC SR No. 7Cdo/345/2021, and the question *'whether it is probable that a debtor would pay a creditor consideration if he knew that the consideration did not belong to him,'* the Dempster-Shafer theory allows for the consideration of probable eventualities – for example, with a plurality of debtors, creditors, and performances. Given the legal character of this article, however, we will not engage in a deeper mathematical analysis of this theory.

The Dempster-Shafer theory and Bayes' theorem remain to this day the two most common mathematical approaches to assessing the persuasiveness of evidence[70].

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[69] Formula taken from the publication: 24. JANASOVÁ, Denisa – STRELCOVÁ, Stanislava. Stanovenie subjektívnej pravdepodobnosti pri hodnotení podnikateľských rizík. Soudní inženýrství. 2018, Vol. 29, No. 1, pp 43-47.

[70] Cf. e.g. XIAO, Fuyuan. Generalization of Dempster–Shafer theory: A complex mass function. Applied Intelligence. 2020, Vol. 50, pp. 3266–3275. DU, Yuan-Wei – ZHONG, Jiao-Jiao. Generalized combination rule for evidential reasoning approach and Dempster–Shafer theory of evidence. Information Sciences. 2021, Vol. 547, pp. 1201–1232 or NANCE, Dale A. Belief functions and burdens of proof. Law, Probability and Risk. 2019, Vol. 18, No. 1, pp. 53–76 and NEIL, Martin – FENTON, Norman – LLOYD, David. Modelling competing legal arguments using Bayesian model comparison and averaging. Artificial Intelligence and Law. 2019, Vol. 27, pp. 403–430.

With the intent of comprehensive civil evidence-taking, the Dempster-Shafer theory thus appears to be more suitable in the conditions of the SR, given the requirement imposed by the CCP on the acting judge in §191 to evaluate each piece of evidence *'individually and in their mutual context'.* Both approaches described above, however, share one characteristic: exactness and objective verifiability of the result. This currently stands in contrast to the vagueness of 'free assessment of evidence'.

5. Perspectives of the AI 'judge' on evidence-taking

At this point, it is also appropriate to specify the reason for directing our attention to probabilistic approaches. At present, one can speak of deterministic *(e.g., random forests, logistic regression, linear regression, standard neural networks)* and probabilistic methods of machine learning *(e.g., Bayesian networks, naïve Bayes classifier, Gaussian processes, hidden Markov models)*[71]. A deterministic result for the same input data will always return the same result (in our case, e.g., '*the accused is guilty*' or '*the contract is valid*') without information about the degree of certainty or uncertainty of this conclusion. A probabilistic model, by contrast, assigns to each result also a degree of uncertainty (e.g., '*the accused is guilty with 82% probability*', or there is a '*23% chance that the signature on the contract is forged*'). It is precisely the probabilistic model, therefore, that returns a result which allows the user to assess how much reliance can be placed on the AI judge's conclusion and how much it needs to be revised with human input. Likewise, a probabilistic conclusion allows for a better degree of external control *(e.g., setting the required degree of persuasiveness at a specific percentage).* Current freely available AI models are so-called 'black boxes' from the perspective of figuring out the method used[72] – the users themselves cannot see whether the model used pattern matching or Bayesian reasoning. At the same time, it holds that certain forms of evidence-taking are more suitable for deterministic models and others for probabilistic models. We demonstrate this with the model example below:

Let us say it is a civil law matter consisting of evaluating the (in)validity of a signed contract. One contractual party claims that at the time of signing, they were not of sound mind due to the influence of strong pain medication, causing their incapacity to perform legal acts. The other contractual party claims that at the time of signing, there were no visible signs of a loss of cognitive capacity. In the proceedings, it is necessary to evaluate three expert reports (let us say one in favour of one party, the second in favour of the other party, and one with an indecisive conclusion) and two witness statements (one witness claims that the influence of medication was clearly visible on the person, the second witness claims that the person behaved in a standard manner).

In making the assessment, the (AI) judge must proceed as follows:

First, the AI judge will apply probabilistic reasoning – e.g.:

a) *Which expert has a better qualification for this specific problem?*
b) *Which report is methodologically more persuasive?*
c) *Which conclusion is consistent with the other evidence?*
d) *Where do two experts agree against one?*
e) *Which witness is more credible?*

This is the so-called 'Bayesian' probabilistic reasoning carried out intuitively, without explicit numbers and concealed by the language of 'free assessment of evidence'.

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[71] See in more detail e.g. PAWLAK, Zdzislaw – WONG, S. K. Michael – ZIARKO, Wojciech. Rough sets: probabilistic versus deterministic approach. International Journal of Man-Machine Studies. 1988, Vol. 29, No. 1, pp. 81–95 or GHAHRAMANI, Zoubin. Probabilistic machine learning and artificial intelligence. Nature. 2015, Vol. 521, No. 7553, pp. 452–459.

[72] RUDIN, Cynthia. Stop explaining black box machine learning models for high stakes decisions and use interpretable models instead. Nature Machine Intelligence. 2019, Vol. 1, No. 5, p. 206–207.

The judge, of course, will not write '*the probability of incapacity is 73%.'* In the judgment, they will simply state that '*the court considers it established that...'*. The cognitive process behind this result is, however, probabilistic.

<u>In the second phase, deterministic reasoning takes over</u>– e.g.:

> Subsumption under the correct norm *(In other words, we either apply §38 of the Act. No. 40/1964 Coll. (Civil Code) or we do not. We cannot apply it with e.g. 60% probability)*

An AI judge would therefore proceed by combining both methods. A purely deterministic approach will fail, because three different expert reports do not have an unambiguous logical implication *(the pieces of evidence need not be of equal 'weight' – e.g., one expert may be more experienced and qualified in the matter than the other two combined, which will lead to their conclusions being evaluated as more probable).*

We therefore use the probabilistic model when conflicting inputs are commensurable – i.e., they address the same question through the same type of claim *(balancing of evidence).*

If, for example, we accept the assumption that the continental standard of persuasiveness corresponds to an empirically estimated 80–90%. In order for the legislator or judicial oversight to control the AI's decision, they need to know to what degree of persuasiveness the AI reached the stated conclusion. A deterministic model that returns only the data 'valid/invalid contract' without a declared degree of persuasiveness is uncontrollable for legal oversight, which, in turn, is precisely the problem this paper is attempting to address. AI systems currently used in the judiciary *(COMPAS*[73]*, etc.)* produce risk scores, not binary decisions — precisely in order to enable human oversight. Thus, practice also confirms that a purely deterministic output is insufficient for judicial practice.

IV. CONTROLLED TRANSFORMATION OF FREE ASSESSMENT OF EVIDENCE: DE LEGE FERENDA CONSIDERATIONS

The preceding chapters identified the legal problem and offered several solutions brought forward by the current state of knowledge. It may, however, be assumed that in the coming decades the legal framework will begin to adapt to the involvement of AI in the decision-making process of *(not exclusively)* civil courts, to which the continental concept of free assessment of evidence, which has remained stable and unchanged for decades, pays no heed *(see the section on evidentiary standards in the SR).*

In the academic literature, the initial phases of incorporating AI into decision-making in legally simple matters are discussed[74]. What exactly constitutes a legally simple matter can, of course, be a subject of debate – in general, however, it is possible to argue that it may involve, for example, form-based proceedings, which in many respects 'stand or fall' on probability and

[73] *Correctional Offender Management Profiling for Alternative Sanctions.*
Cf. BRENNAN, Tim – DIETERICH, William. Correctional offender management profiles for alternative sanctions (COMPAS). Handbook of Recidivism Risk/Needs Assessment Tools. 2018, p. 49–75.

[74] IU, Kwan Yuen – WONG, Vanessa Man-Yi. ChatGPT by OpenAI: The End of Litigation Lawyers? SSRN 4339839. 2023, p. 2. *The estimated level of open AI is currently approximately at the level of an American law student with a C+ grade.*
For further examples cf. the introductory part of this article, where we describe currently operating AI systems in the position of a judge.
Also cf. ANDRIATI, S. L. – MALIAN, A. N. B. M. – RIZKI, I. K. Justice on Trial: How Artificial Intelligence is Reshaping Judicial Decision-Making. Journal of Indonesian Legal Studies, 2024, Vol. 9, No. 2, p. 909 – 942. and BARYSĖ, D. – SAREL, R. Algorithms in the Court: Does It Matter Which Part of the Judicial Decision-Making Is Automated? Artificial Intelligence and Law, 2024, Vol. 32, pp. 117–146.

persuasiveness [75]*(substantiation of the claim)*[76]. In these proceedings, it will be necessary to establish an evidentiary standard that is readable for AI *(i.e., a specific percentage threshold of persuasiveness – for with the continental institute of 'free assessment of evidence', AI could again deal only statistically – by analysing the database of previous decisions, assigning percentage values and establishing the evidentiary standard as the average of these values).*

Indeed, some academics do not perceive the difference between the conditions of evidence assessment *(e.g., assessing evidence individually and in their mutual interconnection)* and the evidentiary standard *(the required degree of persuasiveness)*[77], which contributes to a certain degree of confusion in academic literature. We see the cause in the institute of free assessment of evidence, which implies an *ad hoc* degree of persuasiveness dependent on the specific judge. In the case of continental free assessment of evidence, academic attention focuses rather on the conditions of assessment, and the term evidentiary standard is used more or less interchangeably *(although passionate expert debates arise here too*[78]*).* Conversely, in Anglo-American systems, where we rely on a percentage threshold, the key question of publication efforts is the degree of persuasiveness, i.e., the evidentiary standard.

If we were to return to the European idea of a unified minimum civil standard of persuasiveness in evidence-taking, the first step would have to be agreement on a common framework of persuasiveness *(uniformity of concepts as well as uniformity of variant and level of evidentiary standard).* This would, in practice, mean for each European state the gradual overcoming of long-standing case law and legal concepts. The question of harmonization of civil evidence-taking thus comes into consideration only after some period of time, during which each individual state can naturally and spontaneously adapt its legal framework to the involvement of AI *(i.e. a gradual departure from free assessment of evidence as the subjective conviction of the judge and the application of nominal standards of persuasiveness corresponding to clearly defined thresholds – e.g. 51%, 90%, etc.).*

In the spirit of final de lege ferenda considerations, we present for consideration as a model example of this future development the following:

Given that the initial phases of this process could be concentrated on form-based proceedings, let us focus on the reminder proceedings under Act No. 307/2016 Coll. on Reminder proceedings as amended (hereinafter '***RPA***') and the analogous payment order proceedings under the CCP.

Current wording of §6(1) RPA *(Rejection of the petition)* The court shall reject the petition if a) the petition is inadmissible, c) the petitioner has failed to remedy defects in writing and other obvious errors upon the court's request, or b) the claimed right cannot be reasonably anticipated.	Proposed wording (with integration of AI in mind) §6(1)(b) RPA *'the claimed right is not reasonably persuasive'.*

Analogously, current wording of §265(1) CCP *(Payment order) 'If it is possible to decide on the*	Proposed wording of §265(1) CCP *'If it is possible to decide on the merits of the case or a*

[75] *Note: for example, reminder proceedings, judgement executrion matters or cadastral proceedings.*

[76] According to the SC SR, substantiation does not equal proof-taking. Substantiation means that the court, through the designated evidence, ascertains only the most significant facts important for the decision on the petition for the ordering of an interim measure.
See resolution of the SC SR No.6 M Cdo 5/2012, of 28 November 2012.

[77] Cf. TUZET, Giovanni. Evidence assessment and standards of proof: a messy issue. Quaestio facti. Revista internacional sobre razonamiento probatorio, 2021, No. 2, pp. 87–113. or YASYNOK, Dmytro et al. The Concept of the Standard of Proof in Common and Continental Law. Revista Justiça do Direito, 2025, Vol. 39, No. 1, pp. 125–152.

[78] CLERMONT, Kevin – SHERWIN, Emily. A Comparative View of Standards of Proof. The American Journal of Comparative Law, 2002, Vol. 50, pp. 243–275.
as against TARUFFO, Michele. Rethinking the Standards of Proof. The American Journal of Comparative Law, 2003, Vol. 51, pp. 659–677.

merits of the case or a part thereof on the basis of facts asserted by the plaintiff, <u>about which the court has no doubts</u>, in particular if these facts follow from documentary evidence, the court may decide on the action without the defendant's statement and without scheduling a hearing by means of a payment order...'	*part thereof on the basis of <u>reasonably persuasive</u> facts asserted by the plaintiff, in particular if these facts...'*

Subsequently, a specific evidentiary standard, clearly readable for AI, corresponding to reasonable persuasiveness, would need to be established by a special regulation *(for example, an executive act)* :

Current wording:	Proposed wording of a provision of such a decree:
N/A	'*For the purposes of decision-making in reminder proceedings under a special regulation by means of information and computing technologies, reasonable persuasiveness corresponds to a value of 80*[♣] *percentage points.'*

Concepts of civil evidence-taking of individual states that have evolved in this or a comparable manner could subsequently be integrated into a unified civil standard or civil framework *(initially only in the form of isolated rules or principles – for example through the precedential effect of the case law of the Court of Justice of the European Union)* and only subsequently – *(<u>with the condition that there must be common political will</u>)* within a time horizon *(in the author's estimate)* of 30 or more years will a common European evidentiary reference framework or code come into consideration. Extended *de lege ferenda* reflections on further development would, however exceed the intended scope of this paper, as they currently appear to be getting ahead of a distant and politically uncertain time horizon.

V. CONCLUSION

The paper directed its research effort at the research question formulated as: 'How should the institute of free assessment of evidence in Slovak civil contentious proceedings be transformed in the event of integrating artificial intelligence into the decision-making process?'. The analysis of the decision-making activity of the highest judicial authorities revealed that probabilistic reasoning is present and essential in almost every area of judicial decision-making. The subsequent comparison of the continental and Anglo-American approaches to evidence assessment demonstrated a fundamental difference in the conceptual understanding of persuasiveness, contrasting the continental concept of 'free assessment of evidence' and 'subjective conviction of the judge' with the common law quantified threshold of 51%. This substantive difference is no longer merely abstract-terminological today but potentially indicates a fundamental limit for the implementation of artificial intelligence into the decision-making process – the key finding being that free assessment of evidence is very difficult for artificial intelligence to read and objectively regulate. AI cannot reliably and controllably work with the instruction *'decide according to your internal conviction'*. For the purposes of human oversight and control, it is necessary to establish explicit, quantified limits of persuasiveness. Mathematical approaches to probability evaluation are a possible solution – their use, however, presupposes the existence of a quantified persuasiveness of evidence, which continental law lacks. The cited cases of AI judges being used in Estonia, China, the USA, and Canada

[♣] *The value is illustrative only. The specific level would have to be the result of a society-wide legal debate and a commented legislative process.*

demonstrate that the issue is not merely hypothetical but reflects technological development in real time, which will soon confront the Slovak legal community with dilemmas. The legislative amendments proposed above demonstrate one of the possible sustainable responses of the legal order to this development. The limitation of the research presented lies in the impossibility of empirically specifying the timeframe and exact form of the integration of AI into the decision-making process in the SR – we therefore consider it prudent to emphasize that we present one of the possible solutions above. Answering the question of whether European lawyers will choose the path of legislative preparedness or of attempting to reject AI in judicial decision-making is already beyond the scope of this research.

KEY WORDS
Free assessment of evidence, formal truth, civil litigation, artificial intelligence, persuasiveness of evidence

KĽÚČOVÉ SLOVÁ
Voľné hodnotenie dôkazov, formálna pravda, civilné sporové konanie, umelá inteligencia, presvedčivosť dôkazov

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THE INFLUENCE OF ETHNIC CUSTOMARY LAW ON THE LEGISLATION OF STEPHEN I: AN ETHNO-LEGAL ANALYSIS AND THE ROLE OF THE KING

VPLYV ETNICKÉHO OBYČAJOVÉHO PRÁVA NA ZÁKONODARSTVO ŠTEFANA I: ETNICKO-PRÁVNA ANALÝZA A ÚLOHA KRÁĽA

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ABSTRACT

This article examines the legal influence of ethnic legal traditions on the development of Hungarian law during the reign of King Stephen I. The extent of this influence is explored through an analysis of the social and political context, enabling a logical tracing of the cultural impact on Stephen I's legislation. Particular attention is paid to the Nitra Slavs; the author concurs with Jan Steinhubbel's view regarding the greater continuity of traditions that occurred under the Hungarian monarchy. To ensure a comprehensive understanding, the author analyses the influence and determines the role of Magyar legal traditions and the conditions under which they could spread and take root, drawing attention to the possibility of gradual assimilation and blending of legal traditions. The role of Roman law, which spread with Stephen I's adoption of Christianity, is examined. The Frankish influence is mentioned separately. The author concludes that Stephen I's legislation was an integral element of his open policy. The research demonstrates that both the king and the highest Hungarian nobility effectively and justifiably integrated Slavic administrative traditions and Western European legal standards into the framework of evolving Hungarian law.

ABSTRAKT

Tento článok skúma právny vplyv etnických právnych tradícií na vývoj uhorského práva počas vlády kráľa Štefana I. Rozsah tohto vplyvu je skúmaný prostredníctvom analýzy sociálneho a politického kontextu, ktorá umožňuje logické sledovanie kultúrneho dopadu na legislatívu Štefana I. Osobitná pozornosť je venovaná nitrianskym Slovanom; autor súhlasí s názorom Jana Steinhübbela na väčšiu kontinuitu tradícií, ku ktorým došlo za uhorskej monarchie. Pre zabezpečenie komplexného pochopenia autor analyzuje vplyv a určuje úlohu maďarských právnych tradícií a podmienky, za ktorých sa mohli šíriť a zakoreniť, pričom upriamuje pozornosť na možnosť postupnej asimilácie a prelínania právnych tradícií. Skúma sa úloha rímskeho práva, ktoré sa rozšírilo s prijatím kresťanstva Štefanom I. Samostatne je spomenutý franský vplyv. Autor dospel k záveru, že legislatíva Štefana I. bola neoddeliteľnou súčasťou jeho otvorenej politiky. Výskum ukazuje, že kráľ aj najvyššia uhorská šľachta efektívne a opodstatnene integrovali slovanské administratívne tradície a západoeurópske právne štandardy do rámca formujúceho sa uhorského práva.

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I. INTRODUCTION

Numerous scholarly sources are now available on the study of law during the reign of the first Hungarian king, Stephen I (c. 975–1038). Despite the diversity of approaches, a retrospective analysis of legal systems must be carried out systematically, taking into account not only individual factors but also all the significant foundations that formed the system. This approach is particularly relevant for the history of law, but it is important to adhere to a strict criterion: social, political, and cultural factors must be considered from a legal perspective.

Modern scholarship, notably represented by Pál Engel[2], Martyn Rady, and Nora Berend[3], has moved away from viewing the legislation of Stephen I as a mere imitation of Western codes. Instead, they focus on its role as a pragmatic adaptation of Christian law to the specific social realities of the Carpathian Basin. In his fundamental work King Stephen and His Work, György Györffy argues that the administrative foundations of the kingdom were built upon a synthesis of existing social structures and new royal authority, effectively integrating local traditions into a centralized state framework. Scholars such as Attila Zsoldos and Gábor Thoroczkay acknowledge that while key administrative terminology - like ispán (derived from the Slavic župan) or megye (from meja)—has Slavic roots, the actual functions of these institutions were royal innovations. These were primarily modeled after Carolingian and Bavarian patterns to ensure effective governance. Furthermore, the research of László Veszprémy confirms that the formal legal content of Stephen's decrees was heavily rooted in Western canon law and Frankish capitularies. This indicates that while the “human substrate” and certain local titles remained, the legislative goal was the deliberate integration of the kingdom into the Latin Christian world through established European legal standards.

Since the de jure formation of the Hungarian Kingdom in 1001, the peoples inhabiting Pannonia were at the center of a developing Europe. By this time, the Magyar migration was gradually fading, and the necessary goal became the harmonious cultural and legal assimilation of Hungarian ethnicities into the established Slavic culture, with which the settlers had to cooperate closely. The indigenous population—Slavs (Nitra Slavs (Slovaks), Posava Slavs (Slovenes, Croats), Rusyns, and others)[4]—did not have to oppose the systematic settlement of Slavic lands, as the mutual benefit obtained by the parties formed a different ideological profile for the settlers[5].[6]

When comprehending historical and legal material, particularly inductive legal studies, it is important to consider each element. Even after in-depth research, it is impossible to say with certainty that the structure or elements of law are one way and not another. In science, as in life, everything is relative, and this “relativity” is especially important to consider in retrospective studies. I note that this study does not go beyond the traditional assumptions that 11th-century Hungarian law was culturally homogeneous or that King Stephen I's role in shaping Hungarian

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[2] ENGEL, P. *The Realm of St. Stephen: A History of Medieval Hungary, 895–1526*. Translated by Tamás Pálosfalvi. London ; New York : I.B. Tauris, 2001, s. 30–36.

[3] BEREND, N. – URBAŃCZYK, P. – WISZEWSKI, P. *Central Europe in the High Middle Ages: Bohemia, Hungary and Poland, c. 900 – c. 1300*. Cambridge : Cambridge University Press, 2013, s. 147–153.

[4] Thus, the legal status of the Slavic population was defined by their specific economic and administrative roles within the kingdom. While most Slavic groups provided the essential agricultural and artisan backbone of the state, others, such as the Rusyns, were specifically valued for their military and border-guarding contributions. This functional diversity allowed their various customary practices to be integrated into the early Hungarian state framework as recognized legal categories. GYÖRFFY, G. *King Saint Stephen of Hungary*. Translated by Peter Doherty. Highland Lakes : Atlantic Research and Publications, 1994, s. 102–109. ISBN 0-88033-300-6.

[5] Furthermore, from a political standpoint, the Slavic peoples did not have the opportunity to oppose the Hungarians, as they themselves suffered from German and Italian conquests.

[6] ISLAMOV, T. M. – PUSHKASH, A. I. – SHUSHARIN, V. P. *A Brief History of Hungary*. Moscow : Nauka, 1991, s. 15–17.

law is unambiguous. In our opinion, these facts require not only ongoing research revision but also a methodological modernization, consisting of a more theoretically oriented approach. It can be said that this work is based on the opinions and theoretical positions of such renowned and distinguished scholars as János M. Bak, Harold J. Berman, György Bónis, Gábor Hamza, Alphons Lhotsky, and Percy Ernst Schramm.

The methodology of this study relies on general scientific and logical methods, enabling the formulation of key theoretical propositions. Induction serves as the primary structural tool, guiding the transition from specific legal facts to broader conclusions, while deduction is applied to analyze individual legal issues. A critical methodological component is the systematic analysis of historical sources and academic literature, which provides the empirical foundation of the research. Additionally, the comparative-legal method and analogy are employed to identify the distinctive features of the social, political, and legal phenomena examined in this article, specifically regarding the Hungarian and Slavic (Nitra Slavs) ethnic development in the 11th century.

The purpose of this article is to identify the socio-legal institutions of those ethnic groups that formed the basis for the formation of the law of Stephen I, and to demonstrate that the layer of Slavic cultural legal traditions (in particular, Slovak) was one of the foundations for the development of Hungarian statehood.

II. POLITICAL AND SOCIAL CONDITIONS IN THE FORMATION OF HUNGARIAN LEGISLATION

The coronation of Stephen I marked the starting point in the formation of the socioeconomic structure of the Kingdom of Hungary. By implementing a policy of centralization aimed at fiscal stability, strengthening the borders, and integration into the European economic system, the monarch laid the foundation for feudal relations. The establishment of counties became a key instrument for strengthening royal authority. Although this administrative-territorial division lacked a comprehensive legal framework at the time, its legal contours are clearly evident in Stephen I's decrees. A decisive factor in the political stability of the system was the principle of appointing ishpáns (counts)[7] solely by the monarch's will, rather than by patrimonial law. This measure minimized the risk of regional opposition and prevented internecine conflicts.

It is particularly important that King Stephen I took the state's geography into account and leveraged it into his policy. The Kingdom of Hungary was located in Pannonia and, moreover, was so surrounded by other nations that the connection between Central Europe and the Balkans, and onward to Anatolia and even Jerusalem[8], passed through its territory[9]. Therefore, special

[7] It is traditionally claimed that the administrative divisions that emerged in Hungary in the 11th century were adopted from the Franks and inherited from the Great Moravian tradition. This is convincing, but at the same time superficial, since traditional administrative divisions in the 11th century were not complex and did not require special organization – the elevation of urban and fortified settlements to the status of county capitals fulfilled the natural functions of tax collection, defense, and ecclesiastical division. For example, György Györffy and Gyula Kristó, among other authors, have argued that the ispánate system was, in one way or another, an adaptation of European experience. GYÖRFFY, G. *King Saint Stephen of Hungary*. Translated by Peter Doherty. Highland Lakes : Atlantic Research and Publications, 1994, s. 102–109; KRISTÓ, G. *Hungarian History in the Ninth Century*. Szeged : Szegedi Középkorász Műhely, 1996, s. 172–201.

[8] King Stephen I strategically leveraged Hungary's geography by establishing the safety and infrastructure necessary to reopen the pilgrimage route to Jerusalem in 1018. ADAMUS BREMENSIS. *Gesta Hammaburgensis ecclesiae pontificum*. Edited by Bernhard Schmeidler. Hannover : Hahnsche Buchhandlung, 1917, Lib. II, Cap. 54.

[9] „...everyone from Italy and the Gauls who wished to go to the Holy Sepulchre at that time avoided the accustomed route by sea and travelled through the country of King Stephen...“. GLABER, R. *The Five Books of the Histories*. Edited and translated by

attention was paid not only to formal trade relations with states, but also to merchants, knights, and clergy—hospites who wished to exploit the newly formed Hungarian market and become part of the new nobility. This is an important factor that should be taken into account in the future, as 'hospites' contributed to the economic dynamism by introducing new goods, exchanging or selling them, etc.

As Bryan Cartledge has pointed out, the fledgling Hungarian Kingdom, similar to the Frankish Kingdom, was a “melting pot” of diverse nationalities.[10] It can be argued that in the 11th century, the Hungarian ethnic dominance had not yet emerged, and the Kingdom itself represented a wide range of ethnic groups, among which the Slavs, particularly Nitra Slavs, were prominent. The development of Hungarian and future Slovak statehood was influenced not only by Hungarians and Slavs themselves, but also by “hospites” ethnic groups—Germans, Latins, Pechenegs, Jews, and others[11]. Today, one can only admire how Stephen I, striving to satisfy military, political, and social needs, maintained a balance in national policy, which for many others proved to be a weakness.

III. THE INFLUENCE OF SLOVAK LEGAL TRADITIONS

The Slovaks[12], concentrated in the northern territories of the newly formed Hungarian Kingdom, represented a demographic and cultural segment that could not be ignored. Prior to the centralization of Hungarian authority, these Slavic groups fell under the jurisdiction of various regional powers, most notably Great Moravia and subsequently the Duchy of Bohemia. Despite these political shifts, the Slovak people maintained their identity, avoiding total assimilation. However, they lacked an independent socio-political organization of their own at that stage. It was only with the consolidation of the Magyar state that the Slavic populations of Pannonia gained the opportunity for centralized development within a powerful medieval kingdom—a political entity that remained unrivaled until the 16th-century Habsburg control in the Slavo-Hungarian regions.

Identifying specific Slavic cultural markers in Stephen I's law is difficult, as the Slavs did not constitute a single, unified people whose laws and traditions could be incorporated in a single law. Instead, they represented diverse communities distinguished by their cultural customs and traditions, particularly legal ones.[13] This is reminiscent of the post-Carolingian French kingdom, where regulations varied from province to province. This is confirmed, for example, by the fact

John France. The Life of St William. Edited by Neithard Bulst and translated by John France and Paul Reynolds. Oxford : Clarendon Press, 1989, s. 96–97.

[10] CARTLEDGE, B. *The Will to Survive: A History of Hungary*. London : C. Hurst & Co., 2011, s. 18–24.

[11] The 'Hospites' were welcomed by the Hungarian nobility and were granted land holdings, sometimes of strategic importance; however, their influence on the law was unique: they arrived with 'their own' law, which was traditionally confirmed by royal decree, and were able to live under a mixed legal system – personal 'ancestral' law combined with legal privileges granted by the king or his vassals. To this day, there are settlements in Hungary where the influence of the 'hospites' remains evident. PÉTER, L. The Holy Crown of Hungary, Visible and Invisible. In: LOJKÓ, M. (ed.). *Hungary's Long Nineteenth Century: Constitutional and Democratic Traditions in a European Perspective*. Leiden : Brill, 2012, s. 19–25. ISBN 978-90-04-22212-0. DOI: https://doi.org/10.1163/9789004224216_003.

[12] The use of the term “Slovaks” in this study is retrospective and is used to refer to the Slavic ethnic community of the northern counties of the Kingdom of Hungary. Although sources from the reign of Stephen I refer to these groups under the general exonym “Sclavi,” their territorial location within the borders of the former Principality of Nitra and the specificity of their socio-legal structure allow them to be viewed as the foundation upon which the formation of the Slovak people and their integration into the legal system of the early Hungarian state took place. STEINHÜBEL, J. *The Nitrian Principality: The Beginnings of Medieval Slovakia*. Leiden : Brill, 2021, s. 487–504. ISBN 978-90-04-43782-1. DOI: https://doi.org/10.1163/9789004438637.

[13] BEREND, N. – LASZLOVSZKY, J. – SZAKÁCS, B. Z. The Kingdom of Hungary. In: BEREND, Nora (ed.). *Christianization and the Rise of Christian Monarchy: Scandinavia, Central Europe and Rus' c. 900–1200*. Cambridge : Cambridge University Press, 2007, s. 331–333. ISBN 978-0-521-87616-2. DOI: 10.1017/CBO9780511496400.009.

that no single approach to understanding the role of various Slavic communities in the Kingdom of Hungary under Stephen I has yet come to dominate academic discourse. An analysis of contemporary researchers, such as Ján Steinhübel and Miroslav Lysý[14], leads to the conclusion that it is not possible to assert a direct influence of the Slovaks specifically among all Slavs, since the county system was based on the traditional division of lands that had existed as far back as Great Moravia. This indicates that, firstly, the system of vármegye (comitatus)[15] introduced by the Hungarians influenced the ethnic concentration of the population[16]; it can be argued that the formation of the county system (vármegye) was influenced by existing socio-economic and settlement patterns. Consequently, the territorial continuity of the Nitra region likely played a significant role in the cultural and ethnic consolidation of the Slovak group[17]. Secondly, this emphasises that Slavic law was not universal. Under Stephen I, the territorial demarcation of the Slavs was maintained and, despite their immediate proximity, their interaction was formalised - this indicates the original existence of cultural and, in particular, legal differences among the Hungarian Slavs[18].

Particular attention should be paid to territorial factors, since, as in the Frankish states, the law underwent a natural transformation under the influence of the growing political role of the territories. This was a necessary process of transition from the personal principle of law to the territorial one. Being aware of the way of life in the northern Slavic lands[19], Stephen I regarded the Slavic population as an important social stratum, since it was the settled Slavs who formed the basis of the tax base and the early state economy. Recognising the significance of these structures, Stephen I adapted the Slavic system of župans into a new administrative network of vármegye (comitatus). This decision not only ensured the stability of governance but also laid the foundations for the integration of various ethnic groups into the kingdom's unified political system.

Although we are unable to directly identify specific references to or influence of Slavic groups on Stephen I's legislation, and their existence is not reflected therein, the laws of the *Decretum Sancti Stephani Regis*[20] are formulated in a highly transethnic manner, confirming the territorial nature of law. It can be argued that the territorial principle of law can only develop in a context where the population of a state represents a diverse collection of peoples and tribes. In this case, Stephen I, as well as the emerging Hungarian nobility, represented by the Ishpáns, consciously created the territoriality of law. Moreover, *Legenda Maior Sancti Stephani* praises his kindness and benevolence toward the poor and his acceptance of people of different

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[14] LYSÝ, M. *Moravania, Mojmírovci a Franská ríša. Štúdie k etnogenéze, politickým inštitúciám a ústavnému zriadeniu na území Slovenska vo včasnom stredoveku*. Bratislava : Atticum, 2014, s. 124–153. ISBN 978-80-971381-4-1.

[15] Researchers also note the continuity of the system of counties that was formed under Stephen I, since such a system was borrowed from the Frankish Kingdom and Germany.

[16] ENGEL, P. *The Realm of St. Stephen: A History of Medieval Hungary, 895–1526*. Translated by T. Pálosfalvi. London ; New York : I.B. Tauris, 2001, s. 70–72.

[17] STEINHÜBEL, J. *The Nitrian Principality: The Beginnings of Medieval Slovakia*. Leiden : Brill, 2021, s. 441–445. ISBN 978-90-04-43782-1. DOI: https://doi.org/10.1163/9789004438637; KUČERA, M. *Slovensko po páde Veľkej Moravy: štúdie o hospodárskom a sociálnom vývine v 9.–13. storočí*. Bratislava : Veda, 1974, s. 112–118.

[18] The author argues for the initial disunity of the Slavic groups in the territory of Pannonia, emphasizing the absence of ethnocultural ties between them and their development in the form of isolated settlements with deep dialectal differences. KRISTÓ, G. *Die Arpadendynastie: Die Geschichte Ungarns von 895 bis 1301*. Budapest : Corvina, 1993, s. 12–25. ISBN 963-13-3857-6.

[19] THIETMARUS MERSEBURGENSIS. *Chronicon*. Liber IV, Cap. 59. Edit Robert Holtzmann. Monumenta Germaniae Historica. Scriptores rerum Germanicarum, Nova series, Tomus IX. Berlin : Weidmannsche Buchhandlung, 1935, s. 197.

[20] Decretum Sancti Stephani Regis. In: MÁRKUS, D. (ed.). *Corpus Juris Hungarici. Magyar Törvénytár: 1000–1526. évi törvényczikkek*. Budapest : Franklin-Társulat, 1899, 853 s.

languages and customs[21]. Even in the established counties, Slavic legal traditions did not disappear; on the contrary, they continued to be transmitted and applied, regulating general socio-economic relations. The role of customary Slavic law, including that of the Nitra Slavs, not only did not disappear but was consistently upheld over the centuries. It has survived to the present day in the form of Slovak cultural traditions and customs, thanks to the territorial principle of law established in the Kingdom of Hungary as early as the reign of Stephen I[22].

IV. THE SPREAD OF MAGYAR LEGAL TRADITIONS

1. Political and legal conditions of interaction between the Magyars and the Slavs

Towards the end of the 9th century, the Magyars undertook their main crossing of the Carpathians: led by Árpád (the founder of the Árpád dynasty)[23], they settled in what had once been Moravian lands and consolidated their presence. This migration took place in Pannonia, a region already inhabited by Slavs but lacking strong monarchical authority. The Magyars consolidated their positions through military means, and by the mid-10th century the borders of the future Kingdom of Hungary had been established, with the Slavic communities remaining under Magyar control. Despite an initially aggressive policy towards them, after the Magyar tribes settled in the second half of the 10th century, socio-political and cultural contacts gradually began to develop. It is possible that during this period the Hungarian nobility recognised the advantages of ethnic pluralism.

As they migrated, the Magyars brought with them a harsh nomadic way of life and corresponding cultural and religious customs, which seemed alien to the indigenous Slavs, who had interacted with the Germans, Italians and other Christian peoples. It may be assumed that a social balance in relations between the Magyars and the Pannonian Slavs was achieved thanks to the initiative of the dominant Hungarians, who, recognising the Slavic people's considerable military and economic potential, created special cultural and legal conditions for their gradual integration into the emerging Hungarian state.

One cannot fail to notice the Slavic influence on the Magyars, which was manifested, above all, in the transmission of economic, geographical and general cultural knowledge about the Slavic lands and their traditions.[24] Traditionally, researchers have emphasised the coexistence of various Slavic communities with the Hungarians, and this cannot be doubted, as historical sources point to a Slavic integration into Hungarian society that, whilst perhaps inevitable, was nevertheless achieved by mutual agreement[25]. Christianity played a significant role in establishing social interaction and legal regulation, as marital and family relations and general norms of behaviour were based on its legal dogmas. At the end of the 9th century, the Magyars arrived in Christian Pannonia as non-Christians, but by the end of the 10th century Prince Geza had been baptised, thereby initiating the Christianisation and ideological Europeanisation of the Hungarian people.

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[21] Legenda Maior Sancti Stephani regis. In: BARTONIEK, E. (ed.). *Scriptores Rerum Hungaricarum tempore ducum regumque stirpis Arpadianae gestarum*. Vol. II. Budapestini : Academia Litterarum Hungarica, 1938, s. 380–381.

[22] DVORNIK, F. *The Slavs in European History and Civilization*. New Brunswick : Rutgers University Press, 1962, s. 145–146. ISBN 0-8135-0799-5.

[23] BRITANNICA EDITORS. Árpád dynasty. In: *Encyclopedia Britannica* [online]. 2014-12-10 [cit. 2026-03-22]. Dostupné online: https://www.britannica.com.

[24] On the first contacts and coexistence, see: ANONYMUS. *Gesta Hungarorum: Skutky Maďarov*. Preklad a zostavil Vincent MÚCSKA. Budmerice : Vydavateľstvo Rak, 2000, cap. 24, s. 57–59. ISBN 80-85501-17-1.

[25] KONTLER, L. *A History of Hungary: Millennium in Central Europe*. New York : Palgrave Macmillan, 2002, s. 42–44.

2. Legal result of interethnic interaction

For the Magyars, the 'Honfoglalás' implies not only political and military dominance in the region and control over key economic resources, but also the establishment of a cultural presence there. Even when discussing Magyar law, one cannot fail to mention the changes that occurred under the influence of the development of their statehood. Nomadic law was oral, and since the bearers of such a legal culture were always engaged in long-distance migrations, the law could not be tied to a specific land or be written down; consequently, it was oral in nature.[26] It was only with the coronation of Stephen I that the opportunity arose not only to formulate their own written law, but also, as was characteristic of Stephen I's policy[27], to adopt Western European legal experience, the source of which were the 'hospites' of Hungary.

Thus, in these same *Decretum Sancti Stephani Regis*, one can find Latin equivalents of Slavic concepts adopted by the Hungarians. For example, the term '*comes*' (count) served as the official Latin designation for the Slavic socio-political institution of the '*župan*' (ispán). In the legislation of Stephen I, this title denotes not a Western European feudal lord, but the head of a territorial district, whose administrative functions were entirely borrowed from the Pannonian Slavs. Similarly, the Latin term '*christianus*' (Christian) in the legal framework of the Decrees became the equivalent of the Slavic '*khrestian*' (keresztény), reflecting the specific nature of early Hungarian Christianisation. In the legislative acts of Stephen I, this term acquired a clear legal dimension: the status of 'Christian' imposed specific legal obligations on the subject, such as the payment of the church tithe, compulsory church attendance and a ban on working on Sundays. Through the Latin form christianus, the Slavic model of a believer's social responsibility entered Hungarian law, whereby violations of religious norms were punished not only by ecclesiastical but also by secular sanctions imposed by the royal authority. Thus, the legal category of 'Christian' in the Decrees served as a tool for integrating the nomadic Magyars into a settled administrative order modelled on the Slavic pattern[28].

Although the Magyars encountered various Slavic communities during their migration, historical documents, in particular the *Gesta Hungarorum*[29], *Chronica Hunnorum et Hungarorum*[30], and *Rerum Ungaricarum Decades*[31], indicate a separate presence of Vlachs who inhabited the southeastern mountainous zones (Transylvania).[32]

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[26] On the nomadic rights of the Magyars, see: BÓNIS, G. *Középkori jogunk elemei: Római jog, kánonjog, szokásjog*. Budapest : Közgazdasági és Jogi Könyvkiadó, 1972, s. 13–25.

[27] In our view, Tomáš Gábriš rightly notes that the creation of legislative acts, both in the Kingdom of Hungary and in the Middle Ages as a whole, was becoming a more symbolic act of the monarch themselves. In the Hungarian context, this is confirmed by the historical documents left behind as a 'testament' by Stephen I himself. It is therefore important to consider that the law of Stephen I that has come down to us is particularly characterised by a symbolic and formalistic nature rather than a practical orientation. At the very least, this aspect should be the subject of a separate study. GÁBRIŠ, T. Conflict Resolution and Punishment in Hungarian Medieval Laws and in Practice. In: *Beiträge zur Rechtsgeschichte Österreichs*, 2013, roč. 3, č. 2, s. 403. DOI: 10.1553/BRGOE2013-2s403.

[28] GYÖRFFY, G. *King Saint Stephen of Hungary*. Translated by Peter Doherty. Highland Lakes : Atlantic Research and Publications, 1994, s. 97–104.

[29] ANONYMUS. *Gesta Hungarorum: Skutky Maďarov*. Preklad a zostavil Vincent MÚCSKA. Budmerice : Vydavateľstvo Rak, 2000, cap. 24, s. 57–59. ISBN 80-85501-17-1.

[30] So, Simon Keza writes about the "Romans" who remained in Pannonia after Attila's death and became Vlach shepherds. DE KÉZA, S. *Gesta Hungarorum / The Deeds of the Hungarians*. Edited and translated by László Veszprémy and Frank Schaer. Budapest : Central European University Press, 1999, s. 24–31. ISBN 963-9116-31-9.

[31] BONFINI, A. *Rerum Ungaricarum decades*. Tomus II. Ediderunt Iosephus Fógel, Beda Iványi et Ladislaus Juhász. Lipsiae : Teubner, 1936, s. 12–16.

[32] The establishment of the county system under Stephen I created an administrative framework which, in the long term, enabled various ethnic groups, including the Vlachs, to integrate into the structure of the kingdom. Although the formal codification of 'Vlach law' (ius valachicum) in documents dates to later centuries, the roots of this distinct legal regime lie in the early period of coexistence between pastoral communities and Hungarian rule. Within the early system of counties, local administration often

Thus, the Magyar population found itself in a complex legal situation; however, the Hungarian nobility and the political principles of Stephen I were able to lay the foundations for favourable socio-legal conditions. It should be noted separately that Stephen I's law, as set out in the *Decretum Sancti Stephani Regis*, was not based on the personalist principle, whereby the legal order was linked to personal lineage (for example, as was the case with the Franks during the Carolingian period), but was founded on the territorial principle - administration - counties and class divisions. Although such a legal system had a number of systemic and inherent problems, it nevertheless marked a significant step forward in the development of Hungarian statehood and signalled the transition from a nomadic to a sedentary, state-based structure. Of course, in the process of the Hungarians' integration, their people faced a number of classic developmental challenges, in particular the aforementioned issue of social classes - it was necessary to organise society and create the legal, social and economic conditions that would enable the formation of the state's social framework, namely:

Oratores[33] - the Árpáds adopted Christianity, realising that integration into Europe was impossible without it;

Bellatores - Stephen I invited representatives of various distinguished and renowned European houses to his court - from Germany, France, Italy, etc.;

Laboratores - Stefan and his predecessors—either conquered territories or peacefully integrated Hungarian tribes into regions dominated by a Slavic population, resulting in an inter-ethnic alliance that endured for many centuries.

The establishment of political ties between the invading Magyars and the indigenous peoples was marked, above all, by the integration of the local nobility into the overall system of royal administration, in particular into the developing system of counties.[34] From the time of the Hungarian conquests and raids of the 10th century, the highest Slavic nobility had either been destroyed or had voluntarily submitted to Hungarian rule; however, the administration of the Slavs took place through the cooperation of Hungarian representatives and the middle Slavic nobility, which may have included representatives of the highest nobility who had been demoted by the Hungarians. The incorporation of the Slavic peoples into the Hungarian Kingdom could not take place without the destruction of the Slavic administrative structure, and the role of Slavic legal traditions also underwent a visible decline; nevertheless, they remained the primary regulator of daily life, the economy, and local Slavic administration in the counties remote from the capital. Thus, all the conditions were created for the formation of administrative and legal dualism; this manifested itself in the adoption of Slavic terminology in the spheres of land demarcation, witness testimony and grassroots communal administration, which enabled the new authorities to effectively collect taxes, administer justice, etc.

relied on traditional institutions. Elders or kenez, whose functions echoed Slavic communal traditions, could act as intermediaries between their groups and the royal administration (ishpans) to resolve fiscal and judicial matters. Such a governance structure, not aimed at immediate cultural assimilation, allowed the Vlach population to preserve their specific pastoral way of life and customary law. Under the unique conditions of the formation of Hungarian statehood under Stephen I, the foundations were laid for the coexistence of various identities within the state apparatus, which subsequently contributed to the preservation of the socio-cultural character of the Vlachs. It should be noted that the presence of the Vlachs, if it did not contribute to the formation of individual legal norms, then at least they were known about them.

[33] DUBY, G. *The Three Orders: Feudal Society Imagined*. Translated by Victor Goldhammer. Chicago : University of Chicago Press, 1980, s. 109–115. ISBN 9780226167725.

[34] ZSOLDOS, A. *The Árpáds and Their People: An Introduction to the History of Hungary from cca. 900 to 1301*. Budapest : Research Centre for the Humanities, 2020, s. 140–155. ISBN 978-963-416-226-1.

V. THE INFLUENCE OF ROMAN LEGAL TRADITIONS

Virtually all the peoples of Europe were subject to the influence of Roman law, but it reached some of them rather late, as was the case with Rus', for example.[35] With Stephen I's adoption of Christianity, a mutually beneficial partnership began between the Roman Church and Hungary; above all, Stephen became a recognised Christian monarch. Undoubtedly, the aim of the Christianisation of Hungary entailed, to a certain extent, the Latinisation of the Hungarian intelligentsia and nobility, and from the Church's perspective, adherence to the canonical norms of the Latin Church. Roman law manifested itself in this process through the adoption and copying not only of Roman ecclesiastical collections, but also, as is well known, of the capitularies of the Frankish kings; the church's normative acts contained not only rules governing church ministry but also Christian life, regulating marital and family relations and establishing dogmatic norms of morality and Christian ethics. Thus, for example, it was precisely during the Christianisation carried out by Stephen I that the Hungarians began the transition from polygamy to monogamy.

As mentioned above, Roman law found its way into Hungary through collections of Roman ecclesiastical laws and the capitularies of the Frankish kings; however, it can be assumed that, following the consolidation of Christianity in Hungary, the political and social conditions were created for the dissemination of Latin literature, including Christian works. Furthermore, one cannot overlook the trade links through which Roman law could have been 'imported' into both Hungary and neighbouring states. A personal factor may also have played a role here, as Stephen I's wife was Gisela of Bavaria, who may have drawn the Hungarian king's attention not only to Christian worship according to Roman and Western European canons, but also to Frankish (Germanic) law. One might agree with a similar view expressed by Gábor Barabás, who also specifically pointed to the possibility of missionary influence exerted by both German knights and clergy, as well as by Gisela herself.[36] This may have been a manifestation of the law of Charlemagne's Capitularies, the provisions of which, after 843, could have been culturally and politically adapted to the conditions of the East Frankish state.

G. Hamza pointed to the reception of Roman law in a 'Franconianised' form-through the capitularies of the Frankish kings.[37] Indeed, textual and comparative legal analyses show that many formulations and terms, not to mention the very structure of the *Decretum Sancti Stephani Regis*, bear direct similarities to the text and structure of the capitularies of Charlemagne and Louis the Pious. Thus, Roman law migrated from the Frankish tradition into the newly formed Hungarian law. It is important to note, however, that despite the Frankish origin of these texts, their essential core remained Roman, as the Carolingian capitularies themselves were based on Roman state-legal traditions, which operated in parallel with the Frankish collections of law.

For example, one of the clearest manifestations of civilized European law at that time was private property, which emerged after Stephen formulated his law books. With their enactment, nomads were able to develop their own private property, while still being protected by Hungarian law[38].

Thus, speaking about Roman law in the context of the formation of the Hungarian Kingdom under Stephen I, we could not help but pay attention to the Frankish influence, since it

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[35] SAVIGNY, F. C. *Geschichte des römischen Rechts im Mittelalter*. 2. Ausg. Bd. 1. Heidelberg : Mohr, 1834, s. 2–5.

[36] BARABÁS, G. The Christianization of Hungary. In: DOBOSZ, J. – STRZELCZYK, J. – MATLA, M. (eds.). *Chrystianizacja „Młodszej Europy"*. Poznań : Wydawnictwo Naukowe UAM, 2016, s. 115–116. ISBN 978-83-232-3074-8.

[37] HAMZA, G. Szent István törvényei és Európa. In: *Magyar Tudomány*, 2001, roč. 108, č. 8, s. 916–918.

[38] GYÖRFFY, G. *King Saint Stephen of Hungary*. Translated by Peter Doherty. Highland Lakes : Atlantic Research and Publications, 1994, s. 83–85.

was thanks to Frankish legal experience that Stephen carried out the legal Europeanization of Hungary.

VI. THE ROLE OF STEPHAN I THE SAINT IN THE DEVELOPMENT OF LAW

1. The role of the king in the consolidation of legal cultures

Certainly, Stephen I's role can be considered key in the sociopolitical processes under consideration, but it is not so much the individual himself that should be analyzed, but rather the title itself—its structural position and influence. After his coronation, Stephen I received recognition from the Christian church; in fact, he could remain a leader even without a crown, as his very descent from the Árpád family ensured his authority.

From a legal perspective, the Hungarian monarch, as the eminent György Györffy emphasized, facilitated not only political unification (which, without Stephen I's legislative activity, would likely have been temporary), but above all the formation of a legal order. Through it, Slavs, Magyars, Vlachs, Germans, and other could be legally integrated into the emerging kingdom.[39] Certainly, the royal title lent Stephen I's will not only authority but also legitimacy, finally cemented by papal recognition.

2. Legal synthesis carried out by Stephen I

Thanks to the political and legal control that Stephen I exercised by delegating powers to the ispanes, an initial legal balance was achieved. However, institutional stability required the legal order to be set down in writing. The *Liber I Decretum Sancti Stephani Regis*, issued after his coronation, laid the normative foundation for legal regulation during his reign.

It is important to emphasise that the consolidation of various legal cultures would have been impossible without administrative guarantees and respect for the rights of the Slavic and other peoples inhabiting the Kingdom of Hungary. It was precisely this territorial division that allowed unique local legal systems to be preserved.

The system of counties not only enhanced the efficiency of royal administration but also contributed to the preservation of ethnic groups and their traditional way of life. Particularly telling in this context are Stephen I's 'Instructions', in which his political creed is formulated: '*Nam unius linguae, uniusque moris regnum imbecille et fragile est*' ('A kingdom of a single language and a single custom is weak and fragile')[40].

In retrospect, Stephen I's actions appear to have been exceptionally rational decisions in the context of the 11th century, confirming his outstanding role as a statesman deserving of profound historical recognition.

VII. CONCLUSION

The legal system of Hungary during the reign of Stephen I was shaped at the intersection of various traditions. Slavic customary law, deeply rooted in local life, shaped administrative terminology and the rules governing economic activity, and was preserved at the level of communal self-government. Canon law became the most important instrument of social transformation; it not only influenced but also altered the population's legal consciousness, introducing new norms governing family and marital relations.

[39] GYÖRFFY, G. *King Saint Stephen of Hungary*. Translated by Peter Doherty. Highland Lakes : Atlantic Research and Publications, 1994, s. 144–158.

[40] Admonitiones Sancti Stephani regis. In: SZENTPÉTERY, Imre (ed.). *Scriptores Rerum Hungaricarum tempore regum stirpis Arpadianae gestarum*. Vol. 2. Budapest : Academia Litterarum Hungarica, 1938, s. 624–625.

Hungarian law was not so much developed under Stephen I as completely restructured - Stephen's decrees clearly show that legal traditions were borrowed from the capitularies of the Frankish kings. This also demonstrates the Frankish continuity of Roman law in the Kingdom of Hungary, alongside the path of canonical borrowing.

Although the systematic influence of the Vlachs and the mass settlement of hospites date to later centuries, the first signs of interaction between various ethnic groups were already evident under Stephen I. It may be summarised that the legal system of Hungary under Stephen I did not constitute a chaotic application of customary law or a complex stratification of statutes, but rather the purposeful formation of an administrative structure aimed at establishing a legal balance. This is a significant achievement of Stephen I, which should be taken into account in historical and legal research.

Based on the results of this analysis, contemporary historical and legal scholarship, when addressing the emergence of Hungarian law and the formation of ethnic cultural and legal traditions, should not merely consider the uniqueness of the processes that took place in multiethnical Hungary—combining the two strands of Stephen I's statecraft, namely the utilisation of pan-European legal experience (Roman and Frankish) and the 'elevation' of nomadic Hungarian traditions to the royal level—but must also pay particular attention to the ethnic characteristics of early medieval Hungary, which, as we have established, carried greater significance than is generally acknowledged. A further issue in this debate is the identification of, and answer to, a fundamental question: at which level—ranging from everyday lifestyle to royal governance—did the unique legal traditions of ethnic groups in Hungary take shape? Given the sheer kaleidoscope of peoples in Hungary during that period, it can be summarised that this is a complex, multifaceted issue requiring further historical and legal research.

KEY WORDS
Saint Stephen I, customary law, legal traditions, ethnic legal traditions, Kingdom of Hungary, Slavs

KĽÚČOVÉ SLOVÁ
Svätý Štefan I., obyčajové právo, právne tradície, etnické právne tradície, Uhorské kráľovstvo, Slovania

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