Institute of Comparative Law, Association for Tort Law, Judicial Academy

XXVII INTERNATIONAL SCIENTIFIC CONFERENCE

CAUSATION OF DAMAGE, DAMAGE COMPENSATION AND INSURANCE

Editors:
Dr. Mirjana Glintić
Prof. Dr. Dragan Obradović

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I

Introductory Lectures

Katarina Jovičić* **DOI: 10.56461/ZR_24.ONS.01**

THE PRACTICAL SIGNIFICANCE OF THE LEGAL NATURE OF THE LIMITATION PERIOD WITH REFERENCE TO THE CLAIM FOR DAMAGE COMPENSATION**

Summary

The subject of this paper is the legal institute of limitation of claims, which has its roots in Roman law, and developed in English law in the period between the 12th and 13th centuries, on the same grounds, reasons and needs as in Roman law. By applying historical, comparative, and dogmatic legal research method, the question of the legal nature of statute of limitations is comprehensively analyzed, which in continental laws is understood as an institute of substantive law, while in Anglo-Saxon laws it is an institute of procedural law. This theoretical distinction has great practical importance in cases where a foreign element is present because it depends on the applicable law whether the creditor's claim is time-barred, in which case he will practically be unable to realize it. The paper states that differences in the legal nature of the statute of limitations create legal uncertainty in practice, which is why the causes for such a situation are analyzed as well as whether, and to what extent is that distinction justified. In the conclusion, it is stated that this is more a reflection of the division of legal norms into substantive and procedural rather than essential differences in the legal nature of statute of limitations between Anglo-Saxon and continental laws.

Keywords: *Time as a Legal Fact, Limitation Period as an Institute of Substantive Law, Limitation Period as an Institute of Procedural Law, Legal Uncertainty, Applicable Law.*

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1. Introduction

The right to claim damages is a legally guaranteed right of every individual who suffers harm due to the wrongful act of another person. The injured party can achieve the right to compensate on the condition that he proves the existence of a causal relationship between the harmful act and the resulting damage, and additionally, it is necessary that the debtor fail to release himself of contractual liability.[1] Damage that a responsible party refuses to compensate voluntarily can be enforced through a court's final and enforceable decision that accepts the injured party's claim for damages.[2] Whether the injured party will use the right to judicial protection is a matter he can decide freely, with the risk of losing the ability to demand fulfillment of the obligation if he does not use this right for a long time, that is, if the claim for compensation becomes time-barred during that period.

The statute of limitations can be determined as an institute of the law of obligations according to which the creditor, due to passive attitude towards his right within a legally specified period, loses protection of that right when the debtor expresses the will to use a right arises for him from such a creditor's attitude.[3] The purpose of the statute of limitations is to

[1] Art. 154, para. 1, Law of Contract and Torts, *Official Gazette of the SFRY*, No. 29/78, 39/85, 45/89, 57/89, *Official Gazette of the FR Yugoslavia*, No. 31/93, *Official Gazette of the RS*, No. 18/20; Anyone whoever causes injury or loss to another shall be liable to redress it, unless he proves that the damage was caused without his fault. Additionally, it is stipulated that liability for harm caused by dangerous objects of property exists regardless of fault (Art.154, para. 2 Law of Contract and Torts), and that liability without fault also applies in other cases provided by law (Art. 154, para. 3 Law of Contract and Torts). The right to compensation for damages is a legally guaranteed right and cannot be excluded based on the will of the contractual parties (such a contractual provision would be void). See K. Jovičić, S. Vukadinović, *Neizvršenje ugovora, odgovornost i naknada štete,* Institut za uporedno pravo, Beograd 2023, 151–156.

[2] In our law, compensation for damage is, as a rule, achieved by restoring the state that existed before the harmful act, that is, by paying the appropriate amount of money in case the damage is not completely removed in that way. Monetary compensation is also applied when establishing the previous state is not possible or if the court so determines, either because it considers that it is not necessary for the responsible person to establish the previous state, or because the injured party has requested the payment of monetary damages (except when, in the judgment of the court, the circumstances justify the establishment of an earlier state). See Art. 185. of the Law of Contract and Torts.

[3] J. Studin, "Član 360", in: *Komentar Zakona o obligacionim odnosima* (eds. Borislav Blagovijević, Vrleta Krulj), Savremena administracija, Beograd 1983, 1117. As a rule, all claims (all obligation relationships, regardless of the source of the obligation)

motivate, that is encourage, the creditor in the obligational relationship to attempt to realize his claim without unnecessary delay. It is not only in his interest but also in the interest of the debtor because the position of the debtor becomes more and more difficult over time because he must be ready to fulfill a debt obligation at any time in the future (even in the distant future), and to be able to do that, he has to dispose of the amount of money equivalent to the fulfillment of his obligation. In other words, he cannot use that money until the claim is paid off, so if it takes longer, the chances increase that he will suffer harm because he did not use the money in a way that would benefit him and his family, or if the value of the money decreases in the meantime. Additionally, over time, it becomes increasingly difficult for the debtor to secure and preserve evidence that could be used to challenge the creditor's lawsuit because, as the years go by, documents and evidence are lost, and witnesses' memories fade.

The fact that the debtor position becomes more challenging over time is not the only reason why the right to judicial protection might be denied to the injured party,[4] although it is not disputed that the debtor has a legitimate interest in being provided with certainty regarding the period in which he can be called upon to fulfill his obligation. This is also in the interest of society because it contributes to legal certainty by transforming a long-standing factual relationship into a legal one.[5] This change is socially justified because it is in human nature to interpret a creditor's lack of interest in enforcing his rights over a long period as a lack of intention to exercise those rights. If the creditor suddenly changes his mind after a long time and demands that the

expire, unlike real rights, which, as a rule, do not expire.

[4] The obligation still exists because it has not been terminated in any of the ways provided by law for the termination of the obligation (by fulfillment, impossibility of fulfillment, death of the debtor, discharge of debt, compensation, novation, merger). Some obligations can be extinguished based on the passage of time, and these are obligations from permanent debt relationships with a certain duration, which cease when that period expires and on the condition that it has not been validly extended. Sight. Art. 295-359, Law of Contract and Torts.

[5] B. Vizner, *Komentar Zakona o obveznim (obligacionim) odnosima*, Zagreb 1978, 1287. In the same place, Wizner points out that this is also justified because the creditor, with his passive attitude, shows carelessness to realize the claim and that society rightly considers that he and does not care about the thing that is actually held and used by another person, so further supporting that factual situation would be to the detriment of the debtor, who is convinced that he owns a certain right for many years and that, despite this, his factual authority would not be given to him could be recognized by objective law as his subjectively protected right.

debtor fulfill the obligation, it introduces disturbance and uncertainty into social relationships, leading to disputes with uncertain outcomes that can persist for a long time.[6]

2. Roots and Development of the Statute of Limitations Institute

In legal literature, it is undisputed that the statute of limitations originates from the institute of Roman law known as *Longi Temporis Praescriptio*, which prescribed that a person could acquire a certain right based on the passage of time.[7] The word "*praescriptio*" in this context signifies something that comes first or precedes, and it was used in civil litigation to denote the so-called "above written" statement drafted by the praetor or other authorized magistrate. *Praescriptio* formally constituted a part of the plaintiff's claim (*declaratio*), and its specificity lay in a particular form of presentation that required this part of the claim to be explicitly stated above or preceding the main claim drafted by the plaintiff.[8] The aim of this mode of presentation was to acquaint the person resolving the disputed issue with the facts that needed consideration before proceeding to resolve the main issue.[9] The defense of *longi temporis praescriptio* was initially used in disputes where the owner of an object (thing) sought the return of it from the defendant, who had been using that object for a long period during which the owner (here, the plaintiff) did not request return or otherwise assert his ownership rights over it. Accordingly, the plea in the form of *praescriptio* is considered, according to the formal and logical course of proceedings, prior to considering the plaintiff's claim (as a preliminary issue). Based on this plea, it is decided whether there is even a basis to discuss the plaintiff's claim.[10]

[6] J. Studin, 1119. See R. Zimmermann, *Comparative Foundations of a European Law of Set-off and Prescription*, Cambridge University Press, Cambridge 2004, 62–65.

[7] R. Zimmermann, 69. See: M. P. Opala, "Praescriptio Temporis and Its Relation to Prescriptive Easements in the Anglo-American Law", *Tulsa Law Review* 2/1971, 112; A. Triggiano, "Some Remarks on Extinctive Prescription in Legal History", *Civil Procedure Review* 13 1/2022, 101; R. Domingo, "The Law of Property in Ancient Roman Law", 2017, 16–17, available at: SSRN: https://ssrn.com/abstract=2984869, last visited 15. 6. 2024.

[8] C. P. Sherman, "Acquisitive Prescription Its Existing World-Wide Uniformity", *Yale Law Journal* 2/1911-1912, 147.

[9] *Gaius' Institutions*, Book IV, & 132, available (in English translation) at: https://droitromain.univ-grenoble-alpes.fr/Anglica/gai4_Poste.htm, last visited 06. 05. 2024.

[10] *Ea res agatur, cuius non est longi temporis posesio* (proceed to determine the main issue if you find that the defendant was not in long possession). T. C. Sandars, *The*

Longi temporis praesrceptio is a legal institute that allows a person to acquire a specific right to an object through the passage of time, in a situation where that object has been in his possession continuously for a long period (10 or 20 years), and provided that he use it as his own (*animus rem sibi habendi*).[11] It was considered fair to recognize a right to the object for a person who peacefully uses it, as well as being natural when such use persists over a long period during which the rightful owner shows no interest in the object.[12] The reason behind recognizing the effect of time on legal relationships dates back to Roman law, where new situations arose in practice. Situations where the person who uses the object under the specified conditions refuses to return it upon the owner's request, leading to numerous disputes and legal uncertainty due to uncertain outcomes. To overcome this undesirable situation, the contentious issue was legally regulated by a rule allowing long-term possession of a specific object to transform into ownership, under prescribed conditions.[13]

Over time, the application of this legal institute expanded, acquiring additional meanings, In the final stage of the development of Roman law (in the post-classical period), *longi temporis praescriptio* began to be applied as a basis for limiting legal actions due to the passage of time.[14] In this way, the same legal institute (*longi temporis praescriptio*) was used both as a basis for acquiring rights (acquiring real rights over property) and also as a basis for losing rights (loss of the right to legal remedies). In other words, within one legal institute, certain issues were regulated by different rules, so that legal scholars studying the institute of *longi temporis praescriptio* regularly pointed out its two distinguished meanings. Thus, when it comes to the basis for acquiring rights, *longi temporis praescriptio* has a positive meaning, that is, it is determined as an *acquisition prescription* in common law systems, while in situations where it comes to the basis for losing rights, this legal institute has a negative meaning, it is determined as an *extinctive prescription* in common law systems.[15]

Institutes of Justinian 208, 1876, cited according to M. Opala, 112.

[11] J. E. Jansen, "Thieves and Squatters: Acquisitive and Extinctive Prescription in European Property Law", *European Property Law Journal* 1/2012, 155.

[12] C. P. Sherman, 148

[13] G. S. Blázquez, "Praescriptio Longi Temporis", *Revista Quaestio Iuris, Rio de Janeiro* 4/ 2023, 2338, 2345–2349.

[14] C. P. Sherman, 148; R. Zimmermann, 69.

[15] R. Zimmermann, 69. The difference between the two mentioned forms lies in their effect: the positive meaning of the expression promotes the existing factual situation into a right, while the negative meaning of the expression terminates (terminates) one's

The Civil Code of France (hereafter: CC)[16] and the Civil Code of Austria (hereafter: ABGB)[17] in their initial versions followed the aforementioned concept, where prescription encompassed as a unified legal institute both meanings.[18] The same principles regulated this issue in the Serbian Civil Code of 1844 (§§ 922 – 950).[19] Over time, however, that approach proved to be impractical and outdated, which is why it was finally abandoned. Although both codes had a significant impact on civil law in Europe, this was not reflected in this issue, that is, in other civil codifications in which the limitation of claims and the acquisition of rights through long possession, from the beginning have been regulated as separate legal institutes.[20]

right or a legal action by which that right can be maintained. E. Jansen, 154.

[16] The French Code Civil (Le Code civil des Français de 1804) was promulgated in March 1804 (hereinafter: CC).

[17] Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchi*) was proclaimed on June 1, 1811 and entered into force on January 1, 1812 (hereinafter: ABGB). § 1451 ABGB contains a general rule on limitation as a legal institute according to which it is (in the free translation) the way in which a certain right is lost that has not been exercised (was not exercised) within a period of time determined by law. (*Die Verjährung ist der Verlust eines Rechts, welches während der von dem Gesetze bestimten Zeit nicht ausgeübt worden ist*).

[18] §§ 1478. ABGB (in the version until 2015); Art. 2219 of the CC (in the version up to 2008). In addition, positive and negative prescriptions are distinction by the Scottish law from 1973 (*Prescription and Limitation (Scotland) Act)*, which is still in force today. R. Zimmermann, 69.

[19] The general definition of statute of limitations was prescribed in § 922 of the Serbian Civil Code (hereinafter: SGZ), which reads: "The statute of limitations is a special provision of the law, according to which one loses the right due to non-use for a long period of time, and the other acquires and acquires it with the use itself."
The text of the SGZ is available online at: https://www.harmonius.org/sr/pravni-izvori/jugoistocna-evropa/privatno-pravo/srbija/Srpski_gradjanski_zakonik_1844.pdf, last visited 14. 6. 2014.

[20] Thus: German, Italian and Dutch civil codes (cited according to R. Zimmermann, 70). The ABGB, with amendments from 2015, demarcated (regulated within separate chapters) positive and negative statute of limitations (§1489 ABGB regulates the statute of limitations for claims), while in the French Civil Code this was done in 2008 (Art. 2219 CC regulates the statute of limitations for claims). For more on the statute of limitations in European civil codes, see.: R. Kovačević Kuštrimović, "Zastarelost i subjektivno pravo", *Zbornik Pravnog fakulteta u Nišu* 30/1990, 130-131.
On the impact of European codifications on the introduction and development of the statute of limitations in domestic law. N. Zupan, "Konstantinovićeva koncepcija uređenja zastarelosti: da li su ideje o uticaju vremena u pravu izdržale uticaj vremena

In English law, which followed its own path of development, the impact of time on the creation, alteration, and termination of rights due to the passage of time has also been recognized as a legal fact. This understanding originated in the practice of equity courts (12th-13th century)[21] and initially applied only to land ownership.[22] Over time, the influence of the passage of time in English law also extended to claim rights, and the issue of the impact of time on the creation, alteration, and termination of legal relationships was formally regulated by the Limitation Act of 1623.[23] In current English law, both forms of limitation period (prescription) are regulated by the Limitation Act 1980, which remains in force today.[24] The specificity of English law, as well as other common law systems influenced by it, lies in the fact that the same statute regulates rules regarding the impact of time on land rights and claim rights. However, unlike continental law, this does not pose a hindrance in practice because the limitation periods in this statute have always been harmonized. Professor Cartwright notes that this reflects the fact that English law, unlike continental laws, does not have a separate vindicatory action to protect property rights from third parties; rather, it achieves protection through appropriate claims under non-contractual, hence, obligational law.[25] In addition, in English law, it has never been questioned that the onset of limitation leads to the creditor or

na pravo?", *Anali Pravnog fakulteta u Beogradu*, Poseban broj u čast profesora Mihaila Konstantinovića, Vol. 70, 2022, 329-333.

[21] D. Minor, "Limitation of Actions", in: *American and English Encyclopedia of Law* (ed. D. Garland), Nortport,, N.Y., Edward Thompson Co., 146.

[22] Equity law or the so-called the right of equity was originally created by the action of the courts headed by the chancellor (Lord Chancellor), who decided on the basis of justice and fairness (mercy), unlike the king's courts, which decided on the basis of the rules of common law. Š. M. Čerkić, "Koncept pravičnosti kao univerzalni model usklađivanja prava i stvarnosti", *Anali Pravnog fakulteta Univerziteta u Zenici* 6/2013, 209–213.

[23] Common law prior to that had already established terms of 30, 50, and 60 years within which the owner of the land could recover his rights, so that in 1623 the first regulation was adopted (the Statute of Limitations) which regulated the time limits relating to legal remedies in connection with requests for the realization of claims (*Limitation Act*, 1623). Cartwright, "Reforming the French Law of Prescription: An English Perspective", in: *Reforming the French Law of Obligations*, (eds. J. Cartwright, S. Wogenauer, S. Whittaker) Hart Publishing, Oxford, and Portland, Oregon 2009, 365–366.

[24] *The Limitation Act* from 1980 has been amended several times in the meantime and supplemented (the last amendments are from November 2023). The refined version of the text of this regulation is available at: https://www.legislation.gov.uk/ukpga/1980/58, last visited 06. 06. 2024.

[25] J. Cartwright, 369.

owner of the property losing the right to legal remedy, whereas in continental law systems, this issue has been a subject of debate.

The subject under consideration in this study is prescription as a legal institute that originates from Roman law's *longi temporis praescriptio*, which regulates the termination of the right to legal recourse for the enforcement of claims (including claims for damages) due to the passage of time.

3. The Legal Nature of Prescription of Claims in Comparative Law

Rules regarding the institute of prescription in comparative legal systems are not uniform and generally differ in two aspects: firstly, the legal nature of prescription, and secondly, the prescription periods. When discussing the nature of this legal institute, the fundamental difference lies in whether it is considered a substantive law institute in some legal systems, or a procedural law institute in others. This distinction largely aligns with the division between continental law and common law systems in the way that presrciption in the continental legal systems is generally considered a substantive law institute, whereas in common law systems, it is considered a procedural law institute.

3.1. Key Differences in the Regulation and Effects of Prescription of Claims in Comparative Law

In continental legal systems until the second half of the 20th century, there was no consensus on the legal nature of prescription of claims. One of the factors that contributed to it was the fact that this legal institute in the French Civil Code of 1804, the first codification of civil law, was modeled after Roman law, where prescription was regulated as a unified legal institute.[26] Because the rules on prescription were unified (the same rules applied to both positive and negative prescription), formulating them was not a simple task and it is not surprising that the statutory rules on this legal institute in the French Civil Code were insufficiently detailed, and these two distinct institutes were not consistently delineated.[27] This issue was only resolved in 2008 when a reform of the

[26] Art. 2219. CC from 1804 reads (in a free translation): Prescription is a method of acquisition or release in a certain period of time, under the conditions established by law (*La prescription est un moyen d'acquirer ou de se libéraire par un certain laps de temps, et sous les conditions déterminées par la loi.*) The statute of limitations was standardized within Title XX of Book III CC (*Titre XX du livre III - De la prescription et de la possession, art. 2219-2281*).

[27] Over time, it became clear that the regulation of statute of limitations within

French Civil Code's prescription provisions (*la prescription*) divided the institute into two separate parts: 1. Prescription of claims (negative prescription, extinctive prescription, or so-called extinctive limitation[28]), which was systematized under Title XX book III of the French CC titled "*de la prescription extinctive*" (Art. 2219-2254) and 2. acquisition of property or rights based on long time (positive prescription, prescription acquisitive, i.e., the so-called beneficial prescription), which was systematized under Title XXI book III French CC titled , "*de la possession et de la prescription acquisitive*" (Art. 2255-2279).[29]

French CC did not exert a decisive influence on the regulation of this legal institute in German and Swiss law, where the prescription of claims (negative prescription) has always been governed by specific rules separate from positive prescription (acquisition of rights over time). Additionally, neither German[30] nor Swiss law[31] disputed that prescription affects only the right to the legal remedy, not the right itself.[32]

one (unique) legal institute is not adequate because the statute of limitations was not well balanced, that is, it was not elaborated in accordance with the needs of practice. That problem has been solved for years by the legislator intervening ad hoc, but not in the text of the CC but within the framework of other laws and regulations, and judicial practice has also formed certain positions regarding statutes of limitations for certain issues. In those circumstances, it became clear that there is a need to reform the legal institute of statute of limitations, and how serious the problem was is confirmed by the fact that in 2008 the French Parliament decided to reform only the part of the CC that governs the issue of statute of limitations, i.e. not to wait for a broader reform CC (which even then was certain had to be implemented) in order to do so. Amendments were adopted by Law no. 2008-561 of June 17, 2008. Sight. J. S. Borghetti, "France", In: *Prescription in Tort Law* (eds. Israel Gilead, Bjarte Askeland), Cambridge University Press, online edition published 22 December 2020, 309.

[28] The terms "negative" prescription and "positive" prescription are taken from J. Studin, 1117.

[29] In the current version of the French CC (after the reform of contract and obligation law carried out in 2016), this issue is regulated under Art. 2258-2277.

[30] §§ 194-225 BGB in the original version from 1912, i.e. §§ 194-218 of the current version of the BGB.

[31] The rules on limitation of claims are contained in Art. 127-141. of the Code of Obligations (*Code des obligations*), which was promulgated on March 30, 1911, and entered into force on January 1, 1912 (hereinafter: CO). Art. is also important for the statute of limitations on damages claims. 60, which specifies the deadlines in which compensation for damages can be demanded from the harmed person.

[32] In this regard, Zimmermann states that this view prevailed due to the influence of Bernard Windscheid and his monographic study entitled: *Die Actio des römischen*

This concept was already introduced into our legal system by the Law on Limitation of Claims from 1953, whose creator was Professor Mihailo Konstantinović.[33] The rules from this Act were incorporated into the Serbian Law on Contract and Torts with minor adjustments and appropriate amendments. According to the law, prescription extinguishes the right to demand fulfillment of an obligation (Article 360, paragraph 1 of Law of Contract and Torts), and the court cannot consider prescription if the debtor has not invoked it (Article 360, paragraph 3 of Law of Contract and Torts).[34] In

Civilrechts vom Standpunkte des heutigen Rechts from 1856 on legal authors of the 19th century. Cited according to Zimmermann, 70-71; "Windscheid most consistently implemented the distinction from the Roman *actio* and was the first to formulate the notion of material legal demand ("*Anspruch*"), which implies the subject's right to demand a specific act, permission or omission from another. It is not that the Roman *actio* was at its core an exclusively procedural institute, but that Roman law existed as a system of lawsuits - from every lawsuit that the praetor allowed, the plaintiff's right arose; today's law constitutes a system of rights and their legal protection (substantive) requirements, while their procedural realization is a completely separate issue (Baldus 2011, 7). If in today's law *actio* is understood as a procedural right to a lawsuit that does not say anything about its substantive legal basis, the request represents a substantive legal right to demand the realization of a fundamental right (Storme 1995, 5)." Taken from N. Zupan, 328, fn. 11. R. Wintgam, "Reforming the French Law of Prescription: A French Perspective", in: *Reforming the French Law of Obligations*, (eds. John Cartwright, Stefan Vogenauer, Simon Whittaker) Hart Publishing 2009, 356; J. Cartwright, 367–368. Both regulations (BGB and Swiss CO) stipulate by express legal rules that the statute of limitations applies exclusively to the right to a legal remedy (the right to a request for enforcement of a claim). For German first sight. §222 BGB, and for Swiss law see Art. 127. CO.

[33] With the entry into force of the Law on Limitation of Claims, the provisions of the SGZ from 1844, which regulate the issue of limitation (which was regulated in that Code in accordance with the ABGB), ceased to be valid. According to Professor Zupan, the Law on Limitation of Claims surpassed the ABGB because it followed the modern discussions of German authors in the area of determining the effect of limitation (which also determines the legal nature of limitation). The rules of the Claims Limitation Act, with minor changes and certain additions, were taken over by the Law of Contract and Torts and are in force today. On the arrangement of this legal institute in Serbian law until the adoption of Law of Contract and Torts, see. N. Zupan, 326–333.

[34] Wisner believes that not taking into account the statute of limitations *ex officio* is correctly prescribed because the statute of limitations is not one of the regular forms of the occurrence of obligations, as is the case with fulfilment, impossibility of fulfilment, compensation, etc. This is actually an exceptional case that is not treated as the termination of an existing claim, but as the loss of the possibility of its realization through the court. In addition, according to Wisner, if the court were to do the opposite (if it

Serbian law, upon the occurrence of prescription, the creditor loses the right to legal remedy, while their right to the claim still exists, but is no longer enforceable through court action.

In common law systems, the functional equivalent of prescription of claims is the institute known as "*limitation of actions*."[35] The word implies that creditor's entitlement to judicial protection ends when the limitation period expires.[36] This indicates that limitation of actions are regarded as a procedural law institute. Accordingly, English courts *ex officio* consider whether a right to action has been time-barred, and if so, the action is not permitted. Upon the occurrence of limitation of actions, the creditor loses not just the right to judicial protection but the right itself.[37]

3.2. Circumstances Defining Prescription of Claims as an Institute of Substantive or Procedural Law and the Legal Significance of That Distinction

In Roman law until the 19th century, it was believed that "negative *praescription*" only prevented the right to legal recourse (the right to sue), without affecting the primary right of the creditor.[38] This understanding was significantly influenced by the works of Windscheid, who pointed out that Roman law did not make a strict distinction between procedural and substantive law; this conclusion was drawn based on the fact that in the earliest phase of Roman procedural law, the formal litigation process was referred to as "*legis actiones*". He argued that the term "*actio*" did not refer to a specific moment marking the creation of the right to take legal action, distinct from the creditor's right to a specific action. Instead, it emphasized that the right to legal recourse was

were to take into account the statute of limitations *ex officio*) it is possible that it would be against the will of the debtor if he wants to fulfil the obligation. B. Wisner, 1294.

[35] In English law, the statute of limitations first arose in connection with the acquisition of rights to immovable property due to the passage of time, and it is considered that this right was established by court precedents already in the 12th or 13th century. Opala, 113. Subsequently, the statute of limitations began to be applied to the statute of limitations of claims, which was formally regulated by the Statute of Limitations from 1623.

[36] R. Zimmermann, 70.

[37] On the institute of limitation of claims in English and American law and other Anglo-Saxon laws see. The Harvard Law Review Association, "Developments in the Law: Statutes of Limitations", *Harvard Law Review* 7/1950, 1179–1181; M. Opala, 1971, 107 et seq.

[38] R. Zimmermann, 70.

inseparably linked to substantive law itself . [...] Today, it is commonplace in Roman law to speak of the cessation of the right to sue rather than the cessation of the right to claim. However, this merely reproduces the terminology used by the Romans without fully capturing the essence of the concept or expression. In other words, the term "*actio*" in Roman law encompassed both the procedural activity of the plaintiff and their right to succeed in litigation.[39] It was due to the principles of pandect law that the Roman lawsuit ("*actio*") acquires the character of a procedural means used to protect subjective rights, granting the holder of such rights the authority to demand specific actions from the obligor under the threat of coercion, known as "Ansrpuch".[40]

Specifically, when discussing a lawsuit as the means to initiate litigation procedure, a distinction is made between the right to lawsuit and the right authorize to enforce a specific subjective right coercively in favor of the plaintiff. The right to lawsuit encompasses the authorization of a citizen towards the state in the sense that the lawsuit is directed towards the court as a state organ, seeking legal protection for the citizen's endangered or violated civil right or legal authorization.[41] On this basis, a lawsuit as a procedural act is designated as a formal lawsuit. In contrast, the right authorize to enforce a specific subjective right coercively in favor of the plaintiff represents a lawsuit in a substantive sense.[42] A lawsuit in a substantive sense typically seeks

[39] B. Windscheid, *Lehrbuch des Pandektenrechts* (2nd ed, Verlagshandlung von Julius Buddeus, Düsseldorf, 1867), 273, cited in D. Huser, "Determining the Relevant Limitation Period for International Sales Contracts before International Arbitral Tribunals", *ASA Bulletin* 4/2015, 828. On those grounds, an understanding of the material nature of the statute of limitations developed among German authors, according to which the statute of limitations affects only the "substantive legal claim", i.e. the "enforceability" of the claim, and not the right to file a lawsuit arising from J. Brozović, "Mogućnost podnošenje tužbe na utvrđenje zastare u domaćem i poredbenom pravu", *Zbornik Pravnog fakulteta u Zagrebu* 5/2016, 696.

[40] R. Kovačević Kuštrimović, 129.

[41] M. Živković, "O tužbi u parnici", *Pravni život* 11/71, cited according to: V. Dabetić Trogrlić, M. Tomić, *Pravna dijagnoza*, Beograd 2020, 120–121. In connection with this, it is necessary to bear in mind that as long as the debtor's obligation has not reached fulfillment, but also as long as he has not violated the creditor's right to that action, the creditor does not have a compelling claim for the performance of the action (he has no right to sue), although he has the right to the action. Sight N. Gavella, "O odnosu materijalnog i procesnog građanskog prava u parnicama - pogled sa stajališta privatnog (građanskog) prava", *Zbornik Pravnog fakulteta u Zagrebu* 3-4/2013, 549.

[42] B. Vizner, 1284; The public authority is obliged to respect the subjective rights of

protection for a subjective civil right that the norms of objective civil law recognize for an individual in a specific civil law relationship.[43] Conversely, if there is no right, then there is no legal protection.[44]

Lawsuit in the formal sense does not become statute-limitation and can be filed even after the claim has become statute-barred (a lawsuit as a civil action is always allowed). However, the lawsuit in the material sense, i.e. the legally recognized right of the creditor from the obligation relationship (his authority to enforce that subjective right) may expire,[45] but without affecting the right itself (for example, the right to claim) because it does not cease, nor can it cease due to prescription.[46] However, with the onset of the statute of limitations, the right of claim loses its enforceability and becomes a natural obligation.[47] However, the debtor of the time-barred claim receives nothing in the substantive sense; he only gets the opportunity to protect himself from the creditor's attempt to exercise his basic substantive right in court.[48] Based on this, it is concluded that the limitation of claims is an institute of substantive law.

In contrast, the main focus in English law is not on the lawsuit or claim but on the enforcement of the claim. That this is so is also concluded on the basis of the fact that the original limitation periods in English law were not prescribed with regard to the action (*actio*), but referred to the "*writ*", that is, the written

all persons as well as to facilitate their realization in society, and precisely for this reason judicial mechanisms have been established in legally regulated societies to ensure the protection of subjective rights in accordance with the norms of substantive law. N. Gavella, 540.

[43] V. Dabetić Trogrlić, M. Tomić, 121; B. Vizner, 1284.

[44] Based on these considerations, the term "limitation of claims" is used in the civil codes of the 19th century instead of "limitation of claims", which also contributed to determining the limitation of claims as an institute of substantive law. D. Husser, 828.

[45] Exceptionally, on the basis of explicit legal regulation, the right to maintenance determined by law does not expire (Art. 373, paragraph 3, Law of Contract and Torts).

[46] See in detail B. Wiesner, 1284–1285. See also: N. Gavella, 541.

[47] Even in 1856, Windscheid (Windscheid) most consistently implemented the distinction from the Roman actio, and in Roman law there was a system of lawsuits and ..."from every lawsuit that the praetor allowed, the plaintiff's right arose; today's law consists of a system of rights and their legal protection (substantive legal) requirements, while their procedural realization is a completely separate issue." F. Stanković, *Zastara potraživanja*, Zagreb 1969, 7–8, cited according to N. Zupan, 328–329.

[48] N. Zupan, 328. If the debtor fulfills an outdated claim, he does not have the right to demand from the creditor that he return what he received from him in the name of fulfilling the obligation, because the right to claim has not ended.

order of the king to the sheriff or other magistrate to take certain actions, as a rule, to implement a court decision or a decision of another competent authority.[49] Consequently, even in modern English law, statutes of limitations refer to the right to sue (*actio*), and not to the claim, cause of action. This is also confirmed by Article 1, Paragraph 1. of the Limitation Act of 1980, which expressly states that the Law determines the time limits for filing a lawsuit.[50] Accordingly, the statute of limitations in English law is an institute of procedural law.

This point of view was not questioned in English law until 1984, when a special law came into force regulating the issue of limitation of claims in cases where a foreign element is present.[51] The need to adopt special rules for limitation periods in those cases was evident due to the fact that in a large number of legal systems the limitation of claims is considered a matter of substantive law, and the English courts did not at all take into account the possibility of applying foreign law to the issue of limitation of claims.[52] This was not questioned even in cases in which the parties agreed that the contract was governed by some foreign law (which would also include the question of limitation of claims), given that it is a question of procedural law under English law, and the courts on procedural questions, as a rule, apply their own law (*lex fori*).

3.3. The Practical Significance of Distinguishing the Legal Nature of Prescription

The extent to which the difference in the legal nature of the statute of limitations affects the final resolution of the disputed legal issue is adequately illustrated by the example of the settlement of the dispute due to the violation of the contract on the international sale of goods, in a situation where a claim for damages was filed in an English court (assuming that the English court declared itself internationally competent in that subject). The English

[49] K. Zweigert, H. Katz, *Einfuihrung in die Rechtsvergleichung,* 3rd ed, J.C.B. Mohr, Tibingen, 1996, 183, cited according to: D. Huser, 829.

[50] Art. 1. para. 1. Limitation Act reads: "*This Part of this Act gives the ordinary time limits for bringing actions of the various classes mentioned in the following provisions of this Part*." And in English law, a lawsuit is distinguished as a civil action by which a civil proceeding (*actio*) is initiated from a claim (*cause of action*).

[51] The Foreign Limitation Periods Act came into force on May 24, 1984. The revised text of this regulation is available at: https://www.legislation.gov.uk/ukpga/1984/16, last visited 14. 6. 2024.

[52] B. Markesinis, H. Unberath, A. C. Johnston, *The German Law of Contract - A Comparative Treatise*, Bloomsbury Academic, 2006, 488.

court, as part of the examination of the existence of procedural assumptions for conducting the dispute, will *ex officio* examine whether the lawsuit is time-barred, it goes without saying, applying the rules of its own (procedural) law.[53] When it determines that the lawsuit is time-barred, the court will not even discuss the claim because the statute of limitations is a procedural obstacle to the initiation of court proceedings. In the event that the contracting parties have expressed their will that their contract is governed by, for example, French law (or another law according to which statute of limitations is an institute of substantive law) the court will not even consider this because under English law (as the law of the court) that contractual disposition of the parties is not valid in relation to the issue of limitation of claims. In other words, the court will ignore the will of the contracting parties to determine the applicable law for their contractual relationship, which is their right, which even the English courts do not question, except when it comes to procedural issues for which English procedural law is exclusively applicable. However, even in that situation (the court does not apply the chosen applicable law) the problem will not arise if the statutes of limitation for a given issue are the same in English and French law; the problem arises only when these terms differ from each other. So, for example, if under French law the statute of limitations is longer than under English law, then the plaintiff will not have the opportunity to realize his right in court proceedings (despite the fact that the application of French law is contracted).[54] However, if the same dispute were to be resolved in a French court and, assuming that court found that the contract was governed by English law, the French court would not even be able to rule on the statute of limitations because it has no statute of limitations to apply. This is because even the French court does not apply foreign procedural law in court proceedings, and the question of limitation of claims is in English law a question that is resolved by procedural law.[55]

Professor Briggs confirms that the position of the English courts was complicated in cases where the court found that the statute of limitations had

[53] Courts always apply the rules of their own procedural law (*lex fori*), given that the rules on court proceedings are part of public law, and the legal norms that regulate court proceedings are, as a rule, of an imperative nature and their application cannot be ruled out.

[54] The example is inspired by the example in: K. Sono, "Unification of Limitation Period In the International Sale of Goods", *Louisiana Law Review* 5/1975, 1128.

[55] This legal gap can be a source of legal uncertainty if the defendant objects that the plaintiff's claim is time-barred because the issue would then be decided on a case-by-case basis. *Ibidem*.

expired (the court determines the statute of limitations *ex officio*), because in that case it is not even possible to initiate court proceedings. In order to preserve their reputation and influence in the resolution of international trade disputes, before whose courts a huge number of disputes in the field of international trade are traditionally resolved,[56] English courts have developed the practice of cumulatively applying English and foreign applicable law in such situations, in order to finally decide the question of the (non)applicability of the statute of limitations according to the law that establishes a shorter statute of limitations.[57] A further step in the solution of this issue was made in 1984 with the adoption of a special law regulating the application of the rules of foreign law regarding the limitation of claims (the law is applied in England and Wales).[58] The purpose of that regulation is to enable the English courts to, in cases in which, on the basis of domestic, that is, English conflict of law rules, determine that foreign law is applicable for resolving the disputed issue, to the question of limitation of claims, the provisions of that foreign law should be applied (instead of the rules of the Statute of Limitations from in 1980).[59] In this way, English law has accepted that, in cases of claims for damages in which a foreign element is present, the statute of limitations is a part of substantive and not procedural law.[60]

The need for a solution to this issue through an international instrument has long been recognized and in 1974 the Convention on the Limitation

[56] The English courts acquired that position over time thanks to the fact that England has always been, if not the first, then certainly among the first trading powers in the world, and it holds that position constantly to this day. The ranking of the 25 largest trading powers in the world in the period from 1978-2020 is available at: https://unctad.org/topic/trade-analysis/chart-10-may-2021, last visited 23. 6. 2024.

[57] A. Briggs, *The Confllict of Laws*, Oxford University Press 2002, 38.

[58] Foreign Limitation Periods Act. The revised text of the law is available at https://www.legislation.gov.uk/ukpga/1984/16, last visited 23. 6. 2024.

[59] In this way, the law enables the courts to recognize the right of the contracting parties to choose the applicable law for their contractual relationship if that choice is valid (and it is valid if under English law, as *lex fori*, the contracting parties have the right to choose the applicable law) and that right is applied and not a solution to the question of limitation of claims. Exceptionally, a foreign law does not apply if it would be contrary to the rules of that law on the limitations of its application to the actions of the armed forces abroad as well as the limitation periods in certain cases (as governed by the Overseas Operations (Service Personnel and Veterans) Act 2021). *Overseas Operations* (*Service Personnel and Veterans*) Act.

[60] Freedom of contract is very important for contractual relations in general, and for commercial contracts in particular, and if it is not respected then it could negatively affect the development of international trade exchange.

of Claims in the Field of International Sales of Goods was adopted.[61] Article 24 of the Convention stipulates that the court shall pay attention to the statute of limitations of claims exclusively upon the objection of the party in dispute,[62] which is more in line with the concept of limitation as a matter of substantive law.[63] However, with only 30 signatories (not including England), the Convention failed to live up to expectations.

The issue of conflict of laws regarding the limitation of claims is successfully resolved in EU law by the regulations known as Rome I[64] and Rome II.[65] According to Art. 12 paragraph 1st point. d) of the Rome I Regulation, it is expressly prescribed that the applicable law for the contract regulates the issue of limitation, and according to Art. 15th paragraph 1. point. h) Rome II Regulation also stipulates that the law applicable to non-contractual relations regulates the question of limitation of obligations, including the rules related to the beginning, termination and suspension of the limitation period

4. Conclusion

The creditor who fails to timely initiate judicial proceedings to enforce a claim that the debtor has not voluntarily fulfilled may be barred forever from realizing that right due to the expiration of the limitation period. Although it is one of the oldest legal institutes regulated by all modern legal systems, rules

[61] Convention on the Statute of Limitations of Claims from Contracts for the International Sale of Goods, *Official Gazette of the SFRY* - International Contracts, no. 5/78 (hereinafter: Convention). This convention was adopted on June 13, 1974, and entered into force in 1988, and so far there are 30 signatory states (in which it is applied) which is information available at https://uncitral.un.org/en/texts/salegoods/conventions/limitation_period_international_sale_of_goods/status, last visited 23. 6. 2024.

[62] However, due to the sensitivity of this issue, the possibility is allowed for the signatory states to place a reservation on the application of this article, which is a concession to countries where statute of limitations has a procedural nature.

[63] However, Art. 36. enables reservation on the application of the rules of Art. 24 of the Convention.

[64] Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), available at: https://eur-lex.europa.eu/legal-content/HR/TXT/ ?uri=CELEX:32008R0593, last visited 25. 6. 2024.

[65] Regulation (EC) no. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II"), available at: https://eur-lex.europa.eu/legal-content/HR/ TXT/?uri=CELEX%3A32007R0864, last visited 25. 6. 2024.

regarding limitation periods for certain claims, as well as the legal nature of prescription, vary in comparative law. This fact constitutes a source of legal uncertainty in cases involving a foreign element to the extent that it necessitates the application of rules of private international law.

Rules of international private law are inherently complex to apply, and when it comes to the institute of prescription of claims, it is even more challenging due to the complexity of this legal institute, which is governed by norms that are both substantive and procedural in nature. Specifically, the right to claim that the plaintiff refers to in the lawsuit originates from some substantive law and is regulated by legal rules that are material by legal nature, while the right to lawsuit (legal remedy) for the realization of that claim rests on the legal rules of procedural law. The right of claim and the right to a legal remedy are inseparably linked because without a right, there is practically no legal remedy; that is, a right without a legal remedy effectively does not exist.[66] Nevertheless, there exists a boundary between procedural and substantive rules, although it is fluid and has not been entirely clear for a long time.[67] In the 20th century, this question attracted significant attention of authors and it contributed to the definitive demarcation between Anglo-Saxon and continental laws in connection with the legal nature of statute of limitations.[68]

The differences in the legal nature of prescription (statute of limitations) have been a cause of legal uncertainty, and resolving this issue has required reaching certain compromises. Based on current solutions in comparative law, it is concluded that the compromise has been achieved on the basis of understanding the substantive nature of prescription. Arguments justifying this approach are that it is fair to leave the question of the admissibility of legal remedies for enforcing a particular claim to the law under which the claim arose.[69] This also prevents the formation of negative practices such as forum shopping,[70] where creditors might have an interest in initiating proceedings before a court applying rules that are more favorable to them, and these are the rules whose limitation period is longer than the limitation period determined by the applicable material law.

[66] R. Leflar *American Conflicts Law*, Indianapolis 1986, 304, D. Huser, 827, fn. 11; C. Chamberlayne, *A treatise on the modern law of evidence*, London 1919, para. 171, citated according to D. Huser, 829.

[67] C. Chamberlayne, *Ibidem*.

[68] D. Huser, 827–828.

[69] Cheshire & North's, *Private International Law*, 13th, edn, 1999, 73, citated according to B. Markesinis, H. Unberath, A. C. Johnston, 489.

[70] *Ibidem*.

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PRAKTIČNI ZNAČAJ PRAVNE PRIRODE ZASTARELOSTI POTRAŽIVANJA SA OSVRTOM NA PITANJE POTRAŽIVANJA NAKNADE ŠTETE

Apstrakt

Predmet ovog rada je pravni institut zastarelosti potraživanja, koji je nastao još u rimskom pravu, a razvio se i u engleskom pravu u periodu između XII i XIII veka, na istim osnovama, razlozima i potrebama kao u rimskom pravu. Primenom istorijskopravnog, uporednopravnog i dogmatskopravnog metoda istraživanja se sveobuhvatno analizira pitanje pravne prirode zastarelosti, koja se u kontinentalnim pravima shvata kao institut materijalnog prava, dok je u anglosaksonskim pravima to institut procesnog prava. Ovo teorijsko razlikovanje ima veliki praktični značaj u predmetima u kojima je prisutan strani element zato što od merodavnog prava zavisi da li je poveriočevo potraživanje zastarelo, u kom slučaju on praktično neće moći da ga realizuje. U radu se konstatuje da razlikovanje pravne prirode zastarelosti u praksi stvara pravnu nesigurnost, zbog čega se analiziraju uzroci takvog stanja i ispituje se da li je i u kojoj meri to opravdano. U zaključku se konstatuje da je to više odraz podele pravnih normi na materijalne i procesne a ne suštinskih razlika u pravnoj prirodi zastarelosti između anglosaksonskih i kontinentalnih prava.

Ključne reči: vreme kao pravna činjenica, zastarelost kao institut materijalnog prava, zastarelost kao institut procesnog prava, pravna nesigurnost, merodavno pravo.

Mirjana Glintić* **DOI: 10.56461/ZR_24.ONS.02**

INSURANCE MARKET RESPONSE TO CHALLENGES IMPOSED BY ARTIFICIAL INTELLIGENCE**

Summary

The author analyzes the challenges that the use of artificial intelligence poses to legal professionals and legal science concerning the regulation of new modern technologies and indemnification of damage arising from their usage. As the majority of the lay public believes that introducing mandatory liability insurance will resolve all emerging challenges related to the use of artificial intelligence, the central part of the paper is dedicated to researching realistic and legally grounded possibilities of the insurance market in this regard. The fundamental dilemma faced by insurance companies is whether their existing insurance policies are sufficient to provide protection against damages caused by the use of artificial intelligence or whether it is necessary to develop and offer new specialized policies. In this context, the paper also analyzes the newly adopted EU Artificial Intelligence Act and the proposed Directive on Liability for Artificial Intelligence, as they contain clear indications of the requirements that will be imposed on the insurance market.

Keywords: *Insurance, Artificial Intelligence, Damage, Indemnification, Tort Liability, Insurance Policy.*

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1. Introduction

Nowadays there is no area of life in which the artificial intelligence (hereinafter, AI) is something unknown. White Paper on Artificial Intelligence drafted by the European Commission recognizes the significance of the AI for the improving of healthcare, national security, industry, production, farming.[1] Despite all the recognized advantages, its usage is recognized as a source of many new fears and risks that pose many challenges on personal, local and global level. Just to name some – bias, discrimination,[2] data protection, endangered cyber security, racism,[3] privacy, etc.[4] At the same time, companies feel themselves obliged to implement AI entities even though they are completely unfamiliar with them.[5]

Artificial intelligence posed a puzzle for lawyers and academia all over the world. On one side, they are still not sure how they could benefit from the AI in their area of work, while on the other side, all eyes are on them expecting to find appropriate legal solutions and regulations for the usage of AI in all other areas. The reason for such high expectations from legal scholars and legislators is that an atmosphere of fear prevailed due to the great possibility of AI causing damage to both everyday life and business.[6] Damages may vary

[1] European Commission, White Paper on Artificial Intelligence: A European approach to excellence and trust, Brussels, 19. 02. 2020, COM(2020) 65 final.

[2] M. Glintić, "The Impact of Digitalization on Insurance Contract and Insured's Rights", in: *The Dynamics of Modern Legal Order* (ed. Duško Čelić), University of Priština, Faculty of law, Institute of Criminological and Sociological Research, Institute of comparative law, Kosovska Mitrovica, Belgrade 2024, 109.

[3] Tay, a chatbot from Microsoft, was supposed to learn to use Twitter by interacting with other users. After a short time, due to the targeted influence of other Twitter users, she posted racist, even Nazi tweets. If she had insulted other users on Twitter and if they would demand compensation for defamation, it would be unclear who would be held responsible. Microsoft as a company used Tay, but had neither foreseen nor intended the development towards racist tweets.

[4] R. Rodrigues, "Legal and Human Rights issues of AI: Gaps, Challenges and Vulnerabilities", *Journal of Responsible Technology* 4/2020, available at: https://www.sciencedirect.com/science/article/pii/S2666659620300056, last visited 15. 08. 2024. Also, the 2023 Stanford AI Index reported a 2600% growth in the number of AI-related incidents and controversies since 2012. Stanford University, *The AI index report: Measuring trends in artificial intelligence*, last visited 01. 08. 2024.

[5] B. Lin, "Is your AI model going off the rails? There may be an insurance policy for that," *Mint*, October 2, 2023.

[6] Some surveys show that this fear is recognized as the most present one among

from property damage to economic losses, personal injury and immaterial harm. Also, the AI features like its autonomy and unpredictability, possibility of self-learning raise many questions regarding liability stemming from AI.

The level of always growing independence of AI, that still does not fulfill the preconditions for acquiring legal personality like natural and legal persons, leads to a question how one can protect oneself from this kind of damage and to whom the request for indemnification can be submitted. At the moment discussion takes place among scholars and practitioners on whether the tort liability for the damage caused by AI should be defined as vicarious, strict or fault-based liability, including product liability.[7] From the current theoretical stand of point it is imaginable and possible to use the concepts of the aforementioned liabilities to explain the liability for the AI-caused and related damage. It is still questionable whether the existing system of tort law will be able to provide all necessary responses since the AI system can be extremely complex, involving number of companies and individuals participating in the development, manufacturing and operation of AI systems.[8] The result of scholars' and practitioners' attempts might be that the existing rules of tort liability may not be sufficient and effective enough to cover all the AI-related damages. The current ideas of civil tort liability are still applicable since the AI systems still require the involvement and participation of true legal and natural persons. The real challenge will appear the moment when damage can be caused by intelligent entities that are completely independent from any real legal or natural persons. It will not be clear who ultimately bears the responsibility for causing the damage. Will the presumption that a person causing damage acted in the name and on the behalf of a person liable for causing damage still be acceptable or will the new concept of liability be required?[9]

professionals. World Economic Forum, *The global risks report 2024, 19th edition*. Also, P. Singh, "'AI can pose risk of extinction as great as pandemic or nuclear war': Top experts issue a 22-word warning," *Business Today*, May 30, 2023.

[7] Y. Burylo, "Civil Liability for Damage Caused by Artificial Intelligence: The Modern European Approach", *Civil Law and Process* 6/2022, 6–7. See also, K. Jovičić, „Proklamovano ili realno ostvarivo načelo pune kompenzacije štete? - Upoređivanje ugovorne i vanugovorne štete", in: *Prouzrokovanje štete, naknada štete i osiguranje* (eds. Vladimir Čolović, Zdravko Petrović, Dragan Obradović), Insitut za uporedno pravo, Udruženje za odštetno pravo, Pravosudna akademija, Valjevo 2023, 279–281.

[8] Y. Burlo, 10.

[9] The legal capacity of so-called hybrids consisting of humans and digital agents is also being discussed. C. Kemper, "Rechtspersönlichkeit für Kunstliche Intelligenz",

2. Can Insurance Solve All the Problems?

Different concepts of liability will certainly be further developed in the future and it still remains to be seen what the definite form of the liability will be. At the moment and taking into account the legislative initiatives of the European Commission and European Parliament on the EU AI Liability Directive[10] and the provisions of the newly adopted AI Act[11] there are clear signs that there will be several forms of civil liability for the AI-caused damage because different AI systems pose different levels of risk. AI Act seeks to address certain risks stemming from the use of AI which are mostly related to how their algorithms work,[12] and sets out four risk levels for AI systems: unacceptable, high, low or minimal, which all require different requirements and regulations. [13] Those AI systems to which high risk is immanent cannot be legal treated in the same manner as AI systems that are not to be classified as high-risk. That means that, at least at the European level, the concept of civil liability for the damage caused by AI will depend on and will be defined by the risk assessment (and risk management).[14] Terms risk assessment and risk management are deeply rooted in insurance law and insurance industry and for that reason it is no wonder that it is expected that insurance industry would offer magic wand that would solve or contribute to solving of many problems stemming from the usage of AI. It is observed as a certain and reliable supplement to the civil liability that will be a part of any policy response as a regulatory mechanism.[15] What is certain is that

Cognitio 1/2018, 10.

[10] Proposal for a Directive of The European Parliament and of The Council on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence (AI Liability Directive), COM/2022/496 Final.

In September 2022, the EU Commission tabled a proposal for an AI Liability Directive. In March 2024, several months before the adoption of AI Act, European Parliament adopted its position on AI Liability Directive. Since then, the legislative procedure on this act has stopped.

[11] Artificial Intelligence Act (Regulation (EU) 2024/1689), *Official Journal of 13 June 2024* (hereinafter, AI Act),

[12] T. Samman, B. de Vanssay, *What to Take away from the European Law on Artificial Intelligence*, Schuman Paper No. 757, 16th of July 2024, Fondation Robert Schuman, 1.

[13] 5.2.2 of AI Act.

[14] Risk is recognized as business dedicated to risk management, O. Ben-Shahar, K. Logue, "Outsourcing Regulation: How Insurance Reduces Moral Hazard", *Michigan Law Review* 2/2012, 197, 199.

[15] A. Lior, "Insuring AI: The Role of Insurance in Artificial Intelligence Regulation", *Harward Journal of Law and Technology* 2/2022, 467.

mandatory liability insurance is perceived as an answer to all issues, especially for all businesses using AI systems because there is a great possibility that the damage will occur and that they will be faced with damage claims, which is not a legit expectation.

Even though the pure existence of insurance does not eliminate someone's liability for the caused damage,[16] insurance policy has always been regarded as a mechanism to channel the behavior of the policy holder and the insured and to reduce the risk. This is to be the case because maintaining the validity of the policy and realization of rights from an insurance contract requires certain behavior from these persons.[17] Irrespective of the future development of AI-related liability policies, business insured will have to adapt their way of doing business in order to be entitled to the sum insured from an insurance contract. Despite the fact that new technologies set new standards of doing business and their behavior, there is no possibility that insurers will set aside standards as "reasonable person"[18] that still will have to be fulfilled in order to be eligible to receive the damage compensation. This preventive role of insurance will decrease the number of AI-related damages. Through its mechanisms, insurance industry provides sense of security for the whole process of accepting and integrating AI systems through mitigating the arising AI-related damages.

Unpredictability and uncertainty are an integral part of insurance industry and for that reason it isn't surprising that insurance is expected to provide a response to the emerging new technologies. It is estimated that the issues with AI represent one of the biggest opportunities for a development and financial gain of insurance industry, which by the 2030s should be several billion dollars in annual AI insurance premiums.[19]

At this very moment when it is still questionable how an issue of liability for AI-related damages will be solved, insurance is regarded as an instrument capable of bypassing this lack of a legal solution. Especially since the insurance industry already had to cope with some dangerous technologies to which the answer was (mandatory) insurance. At the same time those using AI technologies that do not require compulsory insurance

[16] M. Glintić, *Kumulacija prava na osiguranu sumu i prava na naknadu štete kod osiguranja lica*, Institut za uporedno pravo, Beograd 2022, 6.

[17] O. Ben-Shahar, K. Logue, 197, 199.

[18] K. Jovičić, S. Vukadinović, „Ugovorna odgovornost – pravni režim u uporednom pravu", *Časopis za društvenu teoriju i praksu* 2/2018, 650–653.

[19] https://www2.deloitte.com/xe/en/insights/industry/financial-services/financial-services-industry-predictions.html#innovation-and-growth, last visited 25. 7. 2024.

would aspire to conclude insurance contract to provide additional protection from AI risks.[20]

The question for the insurance industry and legal theory is whether the current insurance system is wide and flexible enough and prepared to cover the damages related to the usage of the new technologies or the completely new policies and concept of insurance are required in order to provide preventive and compensatory role of insurance. Is modern and traditional insurance ready to offer policies covering AI-caused damages?[21] Will it be necessary to create new policies or the existing ones will be adjusted to new and artificial forms of free will or consciousness?[22]

3. Responses from Insurance Industry

Looking at the insurance industry and expecting the solution is not something that came with the possibility of AI-caused damages. On the EU level for the last couple of years the legislator has been dedicated to finding a suitable insurance scheme as a part of rules of civil law for robotics. In 2017 the European Parliament published a resolution which in article 59 proposed, among other things, compulsory insurance scheme for AI systems accompanied by newly established compensation fund.[23] The main question and challenge ahead of insurance industry and academia are whether the current

[20] J. Rappaport, "How Private Insurers Regulate Public Police", *Harvard Law Review* 6/2017, 1539, 1553.

[21] A. Bertolini, G. Aiello, "Robot Companions: A Legal and Ethical Analysis", *The Information Society* 3/2018, 130, 135.

[22] J. Rappaport, 1539, 1553.

[23] European Parliament Resolution of 16 February 2017 with Recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)). However, nowadays many voices have been risen against these kinds of funds and that criticism even ended up in the AI Liability Directive "Believes that a compensation mechanism at Union level, funded with public money, is not the right way to fill potential insurance gaps." Preamble of the Proposal of AI Liability Directive, par. 25. The only exception should be allowed in following cases: "In exceptional cases, such as an event incurring collective damages, in which the compensation significantly exceeds the maximum amounts set out in this Regulation, Member States should be encouraged to set up a special compensation fund, for a limited period of time, that addresses the specific needs of those cases. Special compensation funds could also be set up to cover those exceptional cases in which an AI-system, which is not yet classified as high-risk AI-system and thus, is not yet insured, causes harm or damage." Preamble of the Proposal of AI Liability Directive, par. 22.

insurance system can be applied on the new technologies-related schemes, whether they are flexible enough and whether the insurers have the knowledge and time to develop and implement the new policies.

3.1. Arguments for Relying on the Existing Insurance Infrastructure – We Already Have It All!

The fact that the AI systems are characterized by the fast-paced development makes it highly questionable whether the industry can keep up the pace and offer the new policy every time the new technology appears. It is far more reasonable and practical to adjust the existing insurance schemes and infrastructure.[24] Taking into account some of the principles of the new technologies and its largely substitutive principle it is likely that most of the activities performed by the AI systems and possible damages stemming from them are already covered by the existing damage compensating policies.[25] Despite the everyday development in AI sector, in the terms of insurability, one may say there are no new categories of insurable risk.[26] New technology does not have to correspond with the emerge of a new risk that is completely unknown to the insurer and that requires new risk pool and the whole process of underwriting. That is definitely a current situation which can evolve with time with a further future technological development. Those scenarios involving new capabilities of AI systems that were not intentionally developed would require new insurance infrastructure that would be in accordance with new vulnerabilities. Currently only the existing, already known and familiar risks are manifested, which means the consequences of the risks realization still are bodily injury, financial loss, physical damage, which are all well-known risks already covered by different insurance policies. In the terms of insurability there are no surprises.

For example, AI risks may manifest in financial loss to the business that is covered a traditional D&O insurance. This insurance can be also appropriate in those cases when directors and officers have used AI in decision-making processes, which could lead to the breach of duty or mismanagement.

Professional indemnity insurance will definitely be used providing policyholders with a protection from AI systems that will be used for service

[24] A. Lior, 473.

[25] J. M. Balkin, "The Path of Robotics Law", *California Law Review – The Circuit* 6/2015.

[26] J. Holsboer, "Insurability and Uninsurability: An Introduction", *The Geneva Papers on Risk and Insurance. Issues and Practice* 77/1995, 407–413.

providing or in the event of breach of any regulation. Product liability insurance could easily be activated in cases when a damage is caused to the consumer by the product that is powered by AI. Property Damage and Business Interruption insurance will be relevant in the event that AI causes property damage and consequential business interruption.[27]

There is a long path ahead of insurers that will have to investigate and establish in which way their potential policyholders use AI systems and how precautious they are. Finding an appropriate solution requires a cooperation with policyholders, both natural and legal persons that will have to disclose the information that they are using AI systems,[28] which is all in line with the demand of transparency from AI Act.[29] The current knowledge does not indicate that some new sorts of damage will be caused by the usage of AI.[30] Apart from that, voices from insurance industry suggest that there will be shifting of responsibility, especially to product liability, which is in line with the new EU regulation on product liability framework that includes digital and AI products.[31]

Insurers worldwide tend to establish the existing cover gaps in order to define if the new insurance is necessary or not. Back in the past when the insurance policies were drafted there were no sign of AI systems or other forms of new technologies which does not mean that they don't leave enough room for interpretation that will allow insurance coverage for AI-related damages. Task ahead of the insurers will also be to potentially draft a new policy for AI-related damage, but only if they establish that the existing policies or their combination are not sufficient and that they are not up to standard with regulatory changes. Future development of AI systems will make them be more and more in usage which would result with the emergence of new damages that are completely unfamiliar in this very moment.

For now, there were no concrete steps undertaken by insurers at the EU or national level, in sense that they still haven't updated their policies by

[27] An example would be if an AI-powered thermostat malfunctions and causes a fire in a factory.

[28] For more information on duty to disclose see N. Petrović Tomić, M. Glintić, "The Hybridization of The Regulatory Framework of Insurance Contract Law: Elements of a New Setting", *Annals of the Faculty of Law in Belgrade* 2/2024, 231–232.

[29] Preamble of AI Act, par. 5.2.4.

[30] A. Lior, 479.

[31] European Commission published a proposal for a new Directive on Liability of Defective Products in September 2022. The Parliament confirmed its negotiating position in October 2023, while the Council adopted its negotiating mandate in June 2023. The Parliament and the Council are now working towards a compromise text.

excluding or limiting their scope in regard of AI-related damages. This might change if large claims appear or if the sense of legal uncertainty requires it, which still is not the case.[32]

Finally, big advantage of using the current insurance system is its possibility to cope with all the possible disadvantages of insurance policies for AI caused damage because insurance industry is used to appearance of new technologies[33] and is even capable of using the AI entities themselves to set premiums accordingly while precisely defining who should be obliged to buy a liability insurance policy. This challenge makes it possible for insurance industry to react accordingly to the high level of unpredictability[34] and lack of possibility to explain the process of decision making within AI systems, that leads undisputably to issues when establishing a legal nexus between damage and liable party.[35]

3.2. Arguments against Insurance as a Response to AI Caused Damage

The main argument that has always been triggered in order to show inadequacy of insurance infrastructure in this matter is the problem of moral hazard, a phenomenon always accompanying duo of insurance and new technologies. Under the concept of moral hazard, one understands lack of motivation of insureds to prevent the damage due to awareness of insurance coverage that will also exclude their liability.[36] When it comes to AI entities, the

[32] Similar issues happened during the COVID pandemic when many insurers didn't want to cover damage caused by the virus, even though it hasn't been explicitly excluded risk, M. Glintić, „Pokriće po osnovu ugovora o osiguranju prekida rada tokom pandemije kovida 19", in: *Pandemija Kovida 19: pravni izazovi i odgovori* (ur. Vladimir Đurić, Mirjana Glintić), Institut za uporedno pravo, Beograd 2021, 143–154.

[33] Fire insurance and liability insurance have been developed as an answer to the industry revolution and the accompanying risks. K. Abraham, "Liability Insurance and Accident Prevention: The Evolution of an Idea", *Maryland Law Review* 1/2005, 573, 580.

[34] R. Yampolskiy, "Unpredictability of Al: On the Impossibility of Accurately Predicting All Actions of a Smarter Agent", *Journal of Artificial Intelligence and Consciousness* 1/2020, 109.

[35] M. Scherer, "Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies", *Harvard Journal of Law and Technology* 2/2016, 353, 363.

[36] V. Njegomir, B. Marović, „Informaciona asimetrija u osiguranju: negativna selekcija, moralni i hazard morala", *Osiguranje i naknada štete* (ed. Zdravko Petrović), Zlatibor 2013, 67–77.

risk of moral hazard on the insured's side is even higher due to higher level of unpredictability compared to other more traditional insurances. Additional problem represents the fact that insurers are still not sure what risks will be excluded from the insurance coverage which leaves insureds with more space to test the boundaries of insurance coverage. Even though this shortcoming is obvious, it may represent the biggest opportunity for the further secure development of AI technologies that stems and will stem from the potential liable persons' wish to limit the scope of their liability. Financial security providers, such as insurance companies, differentiate risk by imposing conditions on the liable party to obtain financial security. This is done exactly to control moral hazard risks.

When reading different insurance policies, it is to be noticed that insurers still haven't excluded the risk of AI even though it has been used widely. Is it because the probability of the AI caused damage cannot be actuarially calculated at all?[37] Or because this kind of risk is manageable according to the existing data, but insurers still wait for the additional information on the required reserves, height of premiums and solvency requirements before putting their final decision on AI risks out there?

The main task for the insurers in the context of AI will be how they will do the risk pooling in order to enable sustainable business and development. That shouldn't cause problems in the areas where large insurance pools already exist, like auto insurance, professional liability insurance because insurers will be able to establish and keep the balance between AI related risks and non-AI risks.[38] It is not even imaginable that all the AI risks will end up in the same pool because the variety of possible damages is not unique. "The pre-existing categories of specialized insurance policies allow insurers to issue policies to AI users, manufacturers, or whoever is obligated or desires to purchase this type of hedging within their field of expertise."[39]

Since the insurers haven't excluded any of damages caused by AI entities, those policyholders who have other policies will request the indemnification from their insurers, relying their right on indemnification on their existing policies. Further evolution of coverage of AI caused damages will probably request additional premiums for the coverage of these damages. After collecting all the necessary information, there is always a possibility

[37] The reasons for that can be numerous, starting from the fact they don't happen too often which enables insurers to discover the exact pattern in their occurrence. For that reason, insurers decide to exclude risks like war, terrorism, etc.

[38] A. Lior, 507.

[39] *Ibidem.*, 507.

that insurers will develop and offer a specialized AI insurance policy that would at certain point overlap with "traditional" policies till the point these damages will be covered exclusively by AI specialized policies while representing exclusion according to traditional policies.

4. Which Policy Is an Adequate One?

Another question standing in front of the insurance industry is what kind of insurance policy would offer an adequate insurance coverage for AI caused damage – first-party or third-party policy? Difference between two depends on who is a policyholder and to whom the insured sum is provided. Third-party financial security covers the risk of having to compensate a third party for damages incurred due to liability. That is referred to as third-party cover because the potential victim does not directly seek financial insurance; rather, financial cover is provided in the event that someone is liable to cover the loss incurred by a third party (the victim).[40] The primary reason for establishing financial protection for third-party liability is to mitigate the risk of insolvency for parties responsible for AI-related risks.

What is sure is that a lot is expected from liability insurance policy that would have to be bought by AI manufacturers or the users.[41] However, even if some will be obliged to conclude liability insurance contracts, that doesn't prevent consumers to buy first-party insurance policies as a form of additional protection.

Some actions by AI manufacturers show that they want to be seen as responsible actors on the market, despite of all the disadvantages of AI systems. Companies, such as Tesla and Volvo already offer in-house insurance for their autonomous vehicles for all the damage caused by them.[42] In this model the burden of liability is upon the manufacturer and not the operator or even the owner of the vehicle.[43] At the EU level different points of view

[40] M. Faure, S. Li, "Artificial Intelligence and (Compulsory) Insurance", *Journal of European Tort Law* 1/2022, 7.

[41] It is argued that is economically undesirable that users of AI are obliged to conclude liability insurance contracts, which is the case with cyber insurance where the software producers are not to one obliged to conclude the contracts on insurance.

[42] K. Korosec, *Volvo CEO: We Will Accept All Liability When Our Cars Are in Autonomous Mode,* http://fortune.com/2015/10/07/volvoliability-self-driving-cars/, last visited 16. 08. 2024.

[43] More precisely, Tesla acts as an insurer when selling its autonomous vehicles in which insurance policy is already built in. F. Lambert, *Tesla (TSLA) Is About to Launch*

have been taken regarding the appropriate insurance scheme for AI caused damages.[44] Despite the differences in approaches, the main idea is to establish the main insurance infrastructure (current or the new one) while all the other models would be an addition to it.[45]

4.1. Proposition from the EU Legislator

The main document on the EU level that concerns the role of insurance in regulation and protection from the AI linked damage, AI Liability Directive, has an idea to enable the adjustment of non-contractual civil liabilities to the usage of AI. This idea has been mainly inspired by the fact that fault-based liability rules are not applicable on AI caused damages since it can and will be almost impossible to identify a liable person and his wrongful action.[46] In order to avoid legal uncertainty that could be a result of adaption of existing rules to AI caused damages, legislator motivation was to purpose a legislative act that would be an addition to AI Act in terms of rules on liability and forms of financial security. For that reason, AI Liability Directive relies on the risk classification idea and purposes the liability rules accordingly. Also, the Directive recognizes the necessity of an adequate insurance scheme that would provide the users with the feeling of security since the AI caused damage would be covered by insurers.[47] It is however pretty unique that the European legislator has decided to limit financial security on insurance only, on one hand. When other international legislative acts are taken into account, the necessity of providing financial security is usually defined

Its In-House Insurance Program in More States, http://www.electrek.co/2021/03/22/tesla-tslalaunch-in-house-insurance-program-more-states/, last visited 16. 08. 2024. This idea was a basis for one more model called MER defined as "manufacturer-financed, strict responsibility bodily-injury compensation system, administered by a fund created through assessments levied on HAV [high autonomous vehicles] manufacturers." See K. Abraham, R. Rabin, "Automated Vehicles and Manufacturer Responsibility for Accidents: A New Legal Regime for a New Era"*, Virginia Law Review* 1/2019, 127.

[44] F. Patti, "The European Road to Autonomous Vehicles"*, Fordham International Law Journal* 43/2019, 129–131.

[45] One of the ideas was to establish a compensation fund on EU level to which programmers, manufacturers, owners and users would contribute, which would provide them with the benefit of limited liability. Section 59(c) of the Report with Recommendations to the Commission on Civil Law on Robotics

[46] K. Jovičić, S. Vukadinović, 650–653.

[47] Preamble of the Proposal of AI Liability Directive.

in that manner that solvency guarantee is required without limiting it just to one form of financial security.[48] On the other hand, if one examines the way in which mandatory financial security is regulated, for example in the international conventions that have introduced mandatory financial security, it is striking that the duty to provide financial security is usually channeled to one particular actor who controls the activity, which is also the case within the proposed AI Liability Directive.

4.2. Mandatory Insurance for High-Risk AI Systems

Idea that insurance can be a key instrument for regulating AI caused damage is not a new idea that occurred in the 21st century. Model of "Turing Registry" dates back to 1996[49] and was developed by Curtis Karnow whose idea was that only registered AI systems could be covered by insurance policies. The premiums would be paid by programmers that would be obliged to obtain Turing certificate, that would be a way to secure protection from the further usage of AI entities.[50] Even though this idea has its shortcomings (especially in the terms of capacity to run such broad registry that would comply all AI entities and the problem of liable person),[51] the main idea in accordance with which "higher the risk stemming from AI, higher the premium" is the idea European legislator has in mind when purposing legal solutions nowadays.

AI Liability Directive proposes that all operators of high-risk AI-systems[52] listed in the Annex to the proposed Regulation must hold liability insurance which shouldn't be requiring premiums that are too expensive even though the whole idea is followed by the feeling of uncertainty and is *pro*

[48] International regimes on nuclear liability provide a duty for the operator to maintain insurance or other financial security up to the cap of its liability. Other international conventions do not specify the type of financial security to be provided or refer broadly to 'insurance, bonds or other financial guarantees including financial mechanisms providing compensation in the event of insolvency', stated according to M. Faure, S. Li, 14.

[49] A. Lior, 487.

[50] G. Marchant, D. Sylvester, K. Abbott, "A New Soft Law Approach to Nanotechnology Oversight: A Voluntary Product Certification Scheme", *UCLA Journal of Environmental Law and Policy* 1/2010, 146–152.

[51] Numerous other problems have been recognized within this model, including the general nature of this Registry that wouldn't be taken into account the differences between AI entities, which makes the whole model unattractive to insurers. *Ibid*.

[52] Article 4 of the proposed AI Liability Directive establishes operators of high-risk AI systems as the ones responsible of concluding contract on mandatory liability insurance.

futuro oriented.[53] Even though the idea of introducing mandatory insurance[54] sounds appealing and as a quick solution to all problems, it will be prescribed only for high-risk AI systems.[55]

In accordance with AI Liability Directive High risk AI systems require from the frontend operator to conclude a contract on mandatory liability insurance, while the backend operator is responsible for ensuring that the services of the AI high-risk system are covered by business or product liability insurance.[56] Since this Directive aims at the standard of minimum harmonization, it also provides with the following rule: If compulsory insurance regimes of the frontend or backend operator already in force pursuant to other Union or national law or existing voluntary corporate insurance funds are considered to cover the operation of the AI-system or the provided service, the obligation to take out insurance for the AI-system or the provided service pursuant to this Regulation shall be deemed fulfilled, as long as the relevant existing compulsory insurance or the voluntary corporate insurance funds cover the amounts and the extent of compensation provided for in Articles 5 and 6 of this Regulation.[57]

The duty defined this way sets duty not only on the operators of high-risk AI-systems, but also on the European Commission. The Commission

[53] Preamble of the Proposal of AI Liability Directive, par. 24.

[54] Compare to G. Borges, "New Liability Concepts: The Potential of Insurance and Compensation Funds", in: *Liability for Artificial Intelligence and the Internet of Things* (eds. Sebastian Lohsse, Reiner Schulze, Dirk Staudenmayer), Nomos, Baden Baden 2019, 159–163.

[55] Some of the examples of high-risk AI systems from the Anex VI of AI Act are Essential private and public services (e.g. financial institutions using credit scoring models that could deny citizens the opportunity to obtain a loan), employment, management of workers and access to self-employment (e.g. CV-sorting software for recruitment procedures), critical infrastructures (e.g. transport) that could put the life and health of citizens at risk, educational or vocational training that may determine access to education and the professional course of someone's life (e.g. the scoring of exams), safety components of products (e.g. AI applications in robot-assisted surgery), law enforcement that may interfere with people's fundamental rights (e.g. evaluation of the reliability of evidence), systems intended to be used to make or substantially influence decisions on the eligibility of natural persons for health and life insurance, migration, asylum and border control management (e.g. verification of authenticity of travel documents), administration of justice and democratic processes (e.g. applying the law to a concrete set of facts).

[56] Art. 4, par. 2 of the proposed AI Liability Directive.

[57] Art. 4, par. 4 of the proposed AI Liability Directive.

will have to start the assessment if a new AI system is a high-risky one at the same time when the product safety assessment begins because only that kind of dynamic would allow the approval of high-risk AI systems for the market that will operate with appropriate mandatory insurance cover.

Further close cooperation between European Commission and insurance industry is and will be required in order to provide operators with a mandatory insurance product that wouldn't be unreasonably expensive, which would stimulate future policyholders to choose the cheaper insurance product that would provide them with an appropriate coverage. The main focus of the insurers will be product and not the responsible persons because "one-size-fits-all" doesn't make an adequate response in this case either.

Most European insurers will wait and watch to see how large global carriers establish their system and pricing model before they decided to offer their insurance policies. Despite the idea that AI caused damage should be covered by the current insurance scheme, certain examples of new affirmative AI policies can be found on an insurance market. For example, Munich Re offers a policy for AI users that covers losses caused by AI model that didn't deliver the result properly.[58] Armilla Insurance offers a policy which would be activated if AI model doesn't work in a manner that seller promised.[59] Some cyber insurance policies now include coverage for AI caused damage.[60] One can even say that these policies were a prompt reaction of the insurance industry when compared to mandate auto insurance in the USA that took more than 30 years since the production of the first gasoline-powered cars in the late 1800.[61]

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[58] For a example, if a bank replaced property valuers used for loan assessments with an AI model, and the AI makes a mistake that a human valuer would not have made, the policy would engage. https://www.munichre.com/en/solutions/for-industry-clients/insure-ai.html, last visited 16. 08. 2024.

[59] https://www.webwire.com/ViewPressRel.asp?aId=311864, last visited 16. 08. 2024.

[60] Coalition, the world's first Active Insurance provider designed to prevent digital risk before it strikes, has added a new Affirmative Artificial Intelligence (AI) Endorsement to clarify what is covered by its U.S. Surplus and Canada Cyber Insurance policies, https://www.coalitioninc.com/announcements/coalition-adds-new-affirmative-ai-endorsement-to-cyber-policies, 10. 08. 2024.

[61] M. Musson, J. Root, *When did auto insurance become mandatory*?, available at https://www.autoinsurance.org/when-did-auto-insurance-become-mandatory/#:~:text=While%20auto%20insurance%20has%20existed,to%20do%20so%20in%201925, last visited 07. 08. 2024.

5. Conclusion

When it comes to AI and linked damages, it is obvious that there will be a high demand for financial security, which comes as no surprise due to risk-aversion, that usually accompanies risks that have a high probability of realizing and causing damage. Limited assets and lack of security make everyone risk averse and craving for financial security. Even though insurers are generally reluctant to provide cover as they often consider the risks of the digital world to be largely unknown and thus difficult to calculate, it is definitely sure that insurance will play an important part in providing additional level of security to those that manufacture AI systems, that control and use them. When regulating scheme of indemnification of AI caused damage, it came quite as a surprise that the European legislator decided to offer an insurance as the only form of financial security. That would be a great burden on the back of an insurance industry. Much more common approach of international legislator is the requirement of solvency without limiting it to a unique form of financial security.

Since the process of defining new rules on AI and the AI liability still runs, it is questionable whether the legislator will offer some other forms of financial security. What is however certain, is that insurance represents a good form of financial security because certain rules on duty to pay the damage and to conclude a contract will be established. In this manner a protection will be secured to those suffering a loss. It still does not mean that the question of liability for the caused damage will be resolved, but it certainly enables solving at least one level of problem stemming from the usage of AI entities. Apart from that, insurance policy is always to be regarded as a mechanism to channel the behavior of the policy holder and the insured and to reduce the risk. This is to be the case because maintaining the validity of the policy and realization of rights from an insurance contract requires certain behavior from these persons. Regardless of the future rules on AI liability, policyholders will always adapt their way of doing business in order to be entitled to the sum insured from an insurance contract.

Maybe the biggest advantage of insurance scheme as a part of response to AI caused damages is the capacity to handle unpredictability and uncertainty, that accompany all new technologies. The question that still remains is whether the existing insurance policies are suitable to indemnify the AI-caused damage. Response to this question will require a strong cooperation between insurers and "consumers" who will have to be honest and transparent about the fact that they are using AI systems, on one hand. Only that way insurers will be able to collect the additional information on AI-caused

damages, which would help them decide on the required reserves, height of premiums and solvency requirements before putting their final decision on AI risks out there. At the same time, at the EU level, EU Commission will have to nourish the cooperation with the insurers in order to provide the liable persons with an appropriate policy and coverage. Based on the current situation at both AI and insurance market, it seems that the current insurance scheme is an adequate one to provide financial security because there are neither new risks in the term of insurability nor new forms of damage, despite being caused by completely new technologies.

The end result may be that insurers will develop and offer a specialized AI insurance policy that would at certain point overlap with "traditional" policies till the point these damages will be covered exclusively by AI specialized policies while representing exclusion according to traditional policies.

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ODGOVOR TRŽIŠTA OSIGURANJA NA IZAZOVE UPOTREBE VEŠTAČKE INTELIGENCIJE

Apstrakt

Autorka analizira izazove koje je upotreba veštačke inteligencije stavila pred pravnike i pravnu nauku u pogledu regulisanja novih modernih tehnologija i vidova štete proisteklih iz njihove upotrebe. Kako veći deo nestručne javnosti veruje da će uvođenje obaveznog osiguranja od odgovornosti rešiti sve novonastale izazove u pogledu upotrebe veštačke inteligencije, centralni deo rada posvećen je predstavljanju realnih i pravno zasnovanih mogućnosti tržišta osiguranja u ovom pogledu. Osnovna dilema pred kojom se nalaze osiguravajuća društva jeste da li su njihove postojeće polise osiguranja dovoljne da pruže zaštitu od štete prouzrokovane upotrebom veštačke inteligencije ili je potrebno da sastave i ponude nove specijalizovane polise. U tom konteksu, u radu su analizirani i novousvojeni EU Zakon o veštačkoj inteligenciji i predlog Direktive o odgovornosti za veštačku inteligencije, jer sadrže jasne indicije koji će zahtevi biti postavljeni pred tržište osiguranja.

Ključne reči: osiguranje, veštačka inteligencija, šteta, naknada štete, vanugovorna odgovornost, polisa osiguranja.

II

Causation of Damage and Damage Compensation

Slobodan Stanišić* **DOI: 10.56461/ZR_24.ONS.03**

CONTRIBUTION OF THE INJURED TO THE CAUSATION OF DAMAGE – THE SO-CALLED SHARED LIABILITY

Summary

This paper examines the participation and significance of the active or passive actions of the injured party in the damage that affects their material and immaterial goods, with a focus on the understandings and legal solutions that were contained in previous civil codes and the current Law on Contract and Torts. It attempts to answer the question of whether the acknowledgment and extent of the compensation awarded to the injured party is influenced by their active or passive contribution to the causation of the damage, i.e., the fault of the injured party in the occurrence of the damage. Based on the general rule of civil law that no one can be liable to themselves but only to another person whose property or non-material status has been negatively altered by a harmful act, the participation of the injured party in their own damage cannot be evaluated based on subjective but rather objective criteria. It assesses whether the behavior of the injured party in a specific case was causally linked to the harmful consequence concerning the portion of the damage that stems from their actions. Damages caused by actions of both the tortfeasor and the injured are mutually offset ("compensatio damnum cum damno"). Therefore, when we speak of the so-called "shared liability", we refer to the proportional reduction of compensation to the injured party who has contributed to the occurrence or increase of damage beyond what it would otherwise have been.

Keywords: *Causation, Damage, Injured Party, Contribution.*

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1. Introduction

Damage is not always a result of an active or passive action attributed to the tortfeasor; rather, in its occurrence and scope, in addition to the behavior of the tortfeasor, the active (commissive[1]) or passive (omissive[2]) behavior (action) of the injured party can also participate. In other words, the action of the injured party can contribute to the occurrence of damage, or the damage can be greater than it would have otherwise been. The behavior of the injured party in terms of active or passive participation in the occurrence and extent of the damage can manifest in actions that enable or facilitate the tortfeasor in causing the damage or in actions that consist of failing to take measures to limit or completely eliminate the effects of already occurred damage.[3]

The participation of the injured party in causing damage implies any action they take that contributes to the occurrence of the damage, such as, for example, when the injured party participates in a fight involving multiple parties, when they enter a dangerous room despite a warning, when they drive a vehicle recklessly in traffic, when they unjustifiably refuse the payment of a debt and so on.[4] The participation of the injured party in the occurrence of damage also includes any active or passive action that allows for already incurred damage to increase, which is the case, for instance, when a person neglects to seek treatment for an injury they sustained; when they do not take measures to extinguish or contain a fire, measures for winter maintenance of roads, or measures to prevent further spoilage of goods; or when they do not prevent the impact of others' harmful actions by procuring goods, machinery, raw materials, or materials themselves that the tortfeasor did not deliver to them.[5]

The participation of the injured party in the occurrence of damage also includes instances where the injured party fails to warn the tortfeasor of the "...danger of particularly severe damage occurring or the particularly minor possibility of damage occurring, such that the tortfeasor did not devote greater attention or take special measures"; as, for example, in the case when the injured party did not warn the guard or transporter that the package handed to him contained valuable or highly flammable items

1 Lat. *committo, commisi, commissum*.

2 Lat. *omitto, omisi, omissum*.

3 M. Toroman, in: „Komentar Zakona o obligacionim odnosima", Beograd 1983, 711.

4 S. Jakšić, *Obligaciono pravo, Opšti dio*, IP Veselin Masleša, Sarajevo 1960, 316.

5 *Ibid.*

or sensitive instruments, or when they did not inform "...the doctor, transporter, or other... persons of any unusual physical or mental disability."[6]

In all the mentioned cases, the actions of the injured party are recognized as having been, in principle, at fault, which is why it is emphasized that the mere causality between the actions of the injured party and some part of the damage incurred is not sufficient for reducing the compensation that the tortfeasor is obliged to pay to the injured party; rather, the "fault of the injured party" is also required.[7] "The tortfeasor who invokes the participation of the injured party in causing the damage to reduce the compensation is obliged to prove the fault of the injured party, as it is not presumed."[8]

In line with this, under the former Yugoslav law and judicial practice between the two world wars, as well as in the new Yugoslavia until the adoption of the Law on Contract and Torts, the fault of the injured party was considered one of the factors for reducing the amount of compensation that would have otherwise been owed, if not for the injured party's contribution to their own damage. This approach was influenced by the provisions of the old civil codes.[9]

However, if the damage was caused by an intentional criminal act, then the fault of the injured party, as a rule, had no influence, meaning that the rule regarding the participation of the injured party's fault in the total damage does not apply,[10] thus the tortfeasor will bear all the damage that arises from such intentional or deliberate conduct.

The fault of the injured party as an element relevant for determining total or reduced compensation for damages will also be considered by the court if the damage was inflicted in excess of necessary self-defense.[11]

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6 *Ibid*.

7 S. Jakšić S, 315–317.

8 *Ibid*., 317.

9 § 1304 Austrian Civil Code (ABGB); § 805 Serbian Civil Code and art. 571. par. 2. General Property Code of Montenegro

10 Judgment of the Supreme Court of Croatia Gž.25/57 of 06.03.1957, Collection of court decisions, Belgrade, 1957, book II, volume 1, p. 177, decision no. 105 - stated according to M. Toroman, 712.

11 Judgment of the Supreme Court of Bosnia and Herzegovina. Gž.166/56 of 12 March 1956, Collection of court decisions, Belgrade, 1956, book I, volume 2, p. 126, decision no. 369– stated according to M. Toroman, 712.

According to this subjective understanding, which has its proponents in both foreign[12] and domestic[13] compensation law, the subjective relationship of the injured party to their own behavior is taken into account, meaning their fault is considered. In this regard, it is interesting to note the view of Professor Vuković, who, among other things, argues that "...the injured party, who does not prevent harmful consequences, thereby increasing the damage, has not violated any duty of care toward themselves, as such a duty cannot be violated toward themselves, but has thus caused damage to the tortfeasor. It is therefore justified to speak of the fault of the injured party."[14]

Nowadays it is not uncommon for two or more individuals to find themselves simultaneously in the position of both tortfeasor and injured party. For example, we cite traffic accidents, or so-called collisions of moving motor vehicles. During an accident, two or more motor vehicles make contact, and their owners can be at fault to each other regarding the cause of the accident and the damage that arises from it. In that case, each driver appears as both the tortfeasor and the injured party in relation to the other driver. Due to the unlawful harmful act of a driver, damage is not only inflicted on the other driver and third parties but also each driver causes damage to themselves.

Consequently, the issue of the injured party's contribution to their own damage, as well as the assessment of reduced compensation in such cases, presents a particularly complex challenge. Regarding the fault of the injured party, in light of Professor Vuković's reasoning, it can only be discussed in situations where they actively or passively cause damage to another, and not in cases where their behavior contributes to their own damage. In such cases, the injured party, in addition to causing damage to themselves, also takes on the role of the tortfeasor as they simultaneously cause damage to another.

When determining the compensation for damages, the fault of the tortfeasor is compared with the fault of the injured party in relation to the occurrence of damage and its extent, so the compensation that should be recognized to the injured party is determined through the proportional offset of the tortfeasor's and the injured party's fault (*compensatio culpae*). The tortfeasor's fault is compensated by the fault of the injured party,

[12] W. Karl, „Von dem Rechte des Scahdenersatzes", in: *Kommentar zum Allgemeinen bürgerliche Gesetzbuch* (Hrsg. Klang Heinrich) Wien 1951, 143; M. Agarkov, *Sovjetsko građansko pravo, Knjiga I*, Beograd 1948, 451.

[13] M. Vuković, *Obvezno pravo*, Školska knjiga, Zagreb 1956, 282–287; S. Jakšić, 315–317.

[14] M. Vuković, 284.

such that the total established monetary compensation for the damage is reduced by the amount attributable to the damage caused by the fault of the injured party.

This understanding has recently faced serious objections that boil down to the claim that the fault of the injured party is not fault in the true sense, as liability can only arise for unlawful acts and their consequences inflicted on others, not on oneself. According to civil law principles, no one can be liable to themselves, but only to another person whose property status has been negatively altered or diminished by a harmful act. Consequently, the involvement of the injured party in their own damage should not be assessed using subjective criteria, but rather through objective standards. This involves determining whether, and to what extent, the injured party's specific behavior is causally linked to the occurrence of a particular portion of their own damage.[15]

In this case, the subjective relationship of the injured party to their own behavior is not taken into account, meaning their fault is not considered; rather, it is assessed whether the behavior of the injured party was different from the usual, standard behavior of other individuals in a specific situation, or not. In other words, objective circumstances are taken into account, namely whether the behavior of the injured party in the specific case was causally linked to the harmful consequence regarding the portion of damage that stems from their actions.[16]

According to this objective understanding, there is no examination of the subjective relationship of the injured party regarding their share in the total damage; rather, it only involves the examination and determination of whether the specific damage was actually caused by the active or passive joint behavior of the injured party and the tortfeasor. Then, the portion of the damage caused by the injured party is separated, and the total amount of assessed damage is reduced by that monetary amount, while the remainder is awarded to the injured party.[17]

It is evident that this case involves offsetting the damages caused by the actions of both the tortfeasor and the injured party, hence the term "***compensatio damnum cum damno"***.

Recent Yugoslav compensation law and judicial practice indeed starts from the understanding that "...the burden of damage is always proportionally

[15] B. Vizner, *Komentar Zakona o obveznim (obligacionim) odnosima*, Zagreb 1978, 856.

[16] *Ibid*., 856–857.

[17] *Ibid*., 857.

shared between the injured party and the tortfeasor..."[18] but without expressly acknowledging the possibility of fully extinguishing the tortfeasor's obligation to compensate the damage.

Namely, the Law on Contract and Torts, similar to the Draft Code on Obligations and Contracts, prescribes a proportional division of the burden of damage between the injured party and the tortfeasor,[19] while in cases where "it is impossible to determine which part of the damage stems from the actions of the injured party," it states that the court will "...award compensation considering the circumstances of the specific case."[20] In other words, "... the Law on Contract and Torts only envisages the possibility of reducing the compensation, given that the fault of the injured party that could serve as a basis for excluding the liability of the tortfeasor is not fault in the true sense of the word, and is not sanctioned by law."[21]

When damage or its increase is caused not only by the actions of the tortfeasor but also by the actions of the injured party, the legal theory and legislation commonly refer to this as "shared liability."[22] The damage, in this case, is the result of the actions of both the tortfeasor and the injured party, thus their mutual participation in the occurrence and extent of the damage. However, some of our legal scholars correctly consider that in this case, when the injured party causes damage to themselves through their behavior and not to someone else, there cannot be talk of shared liability, for the reason that "...to be liable means to account to another, not to oneself. One who is 'liable can be sued and compelled to compensate for the damage, while no one can compel the injured party to compensate themselves for the damage through a lawsuit, since they are entitled to dispose of their property at their discretion."[23]

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[18] M. Toroman, 712. Also, Principle position no. 2/80 adopted at the XIV Joint Session of the Federal Court, the Supreme Courts of the Republics and Autonomous Provinces, and the Supreme Military Court from March 25 and 26, 1980, Collection of court decisions, Belgrade, 1980, Book V, volume 1, p. 13, according to which: in a situation where the injured party contributed to the occurrence of the damage, the responsible person is obliged to compensate the injured party for the damage in proportion to the shared responsibility.

[19] Art. 192, par. 1 Law on Contract and Torts.

[20] Art. 192, par. 2 Law on Contract and Torts.

[21] M. Toroman, 711.

[22] B. Loza, *Obligaciono pravo*, Dom štampe, Zenica, Sarajevo 1978, 222–223; I. Kaladić, *Podijeljena odgovornost za štetu*, Inžinjerski biro, Zagreb 2004, 108–133.

[23] J. Radišić, *Imovinska odgovornost i njen doseg*, Institut društvenih nauka, Beograd

The phrase "shared liability" does not imply a division of liability between the tortfeasor and the injured party but is used in the context of the distribution of the burden of harmful consequences between the tortfeasor and the injured party. "The liability of the responsible party is reduced by a certain amount in comparison to the amount of the caused damage. For damage whose causation is attributed to the injured party, they are not liable but bear that damage in the sense that they have no right to compensation."[24]

The proportionally reduced compensation is awarded according to the previously determined amount of total damage or full compensation, in such a way that the total compensation that would have been due to the injured party if there had been no participation in the damage is reduced by the amount that the injured party has caused to themselves through their own actions. Therefore, the degree of the injured party's participation in their own damage is taken as a measure for determining the amount of proportional reduction of the damage compensation. There is no proportional offsetting of the faults of the tortfeasor and the injured party (***compensatio culpae***), but rather a proportional offsetting of the damages caused by the tortfeasor and the injured party (***compensatio damnum cum damno***).[25] The liability of the tortfeasor is not reduced, nor is it "shared" with the liability of the injured party, but rather the total damage is only reduced to the portion that originates from the tortfeasor's actions.[26]

Thus, it is not about dividing the fault between the tortfeasor and the injured party, but rather "about the injured party losing the right to claim compensation for a certain part."[27]

2. Shared Liability under the Law on Contract and Torts

2.1. Sources and Fields of Application

The legal provision regarding so-called "shared liability", or more precisely, the proportional reduction of compensation for an injured party who has contributed to the occurrence or extent of the damage beyond what it would

1979, 138–139.

[24] Ž. Đorđević, *Komentar Zakona o obligacionim odnosima*, Beograd 1995, 446.

[25] B. Vizner, 859.

[26] Compare with V. Gorenc, *Zakon o obveznim odnosima s komentarom*, RRiF Plus, Zagreb 1998, 274–275.

[27] O. Palandt, *Burgerliches Gesetzbuh*, München 1996, regarding comment par. 254. BGB and further, and there to the aforementioned case law - cited according to V. Gorenc, 275.

have otherwise been, represents a notable deviation from the principle of "full compensation". According to this principle, compensation is awarded in an amount corresponding to the damage caused, or in an amount necessary to restore the injured party's material situation to the state it would have been in had the harmful act or omission by the liable party (the tortfeasor) not occurred.

Some of these exceptions are governed by the Law on Contract and Torts, such as, for example, "determining the amount of damage compensation based on the value that the item had for the injured party, which was destroyed or damaged by a criminal act (affectionate value, affectionate price, ***pretium affectionis***)"[28] and "lowering the compensation".[29]

In the forthcoming discussions, we will focus on situations where, along with the tortfeasor, the injured party has also contributed to the occurrence of damage or to its increase beyond what it would otherwise have been. In such a situation, the Law on Contract and Torts prescribes two possible solutions: first - "when it is possible to determine to what extent the injured party's actions contributed to the occurrence of damage or to its increase beyond what it would otherwise have been" and second - "when it is impossible to determine which part of the damage stems from the actions of the injured party."

The first solution indicates a case where it is possible to establish the proportions of the tortfeasor's and the injured party's actions in causing the damage, or in the total damage, and they can usually be expressed in fractions (for example, 1/2:1/2, 1/3:2/3, etc.). The injured party will not have the right to compensation for the portion of the total damage that stems from their actions, which means the court will not award them full compensation, but rather compensation that has been reduced in proportion to the extent of their contribution to causing the damage. Accordingly, the Law on Contract and Torts states: "A party injured who has contributed to the damage occurring or to its being greater than it otherwise would have been is entitled only to proportionally reduced compensation".[30] In other words, the injured party is entitled only to compensation for that part of the damage that originates from the tortfeasor's actions, and not for the damage they have caused to themselves.

The second solution pertains to the case when "...it is impossible to determine which part of the damage stems from the actions of the injured party..." or to what extent they contributed to causing the damage. For this

[28] Art. 189, par. 4 Law on Contract and Torts.

[29] Art. 191 Law on Contract and Torts.

[30] Art.192, par. 1 Law on Contract and Torts.

case, the Law on Contract and Torts prescribes the rule: "When it is impossible to determine which part of the damage originates from the actions of the injured party, the court will award compensation taking into account the circumstances of the case."[31]

According to one understanding presented in legal science, compensation awarded by the court "taking into account the circumstances of the case" "...must be less in amount than the damage caused..." since the very text of the law implies "...that the injured party has also contributed to the occurrence of the damage."[32]

When it is impossible to determine which part of the damage stems from the actions of the injured party, the court decides on the amount of proportionally reduced compensation based on the so-called free assessment, meaning "...free in the sense that it approximates the actual state when that actual state cannot be expressed by entirely precise measures, but is related to all circumstances that indicate a solution that is closest to the actual state."[33]

In addition to the aforementioned legal provisions governing the extent of compensation for material damage in the domain of tort liability, the Law on Contract and Torts contains provisions regarding the extent of compensation for material damage in the domain of liability for damage due to non-fulfillment or delay in fulfilling contractual obligations, as well as for damage resulting from the non-fulfillment of obligations not arising from a contract, unless otherwise provided for by law for specific cases.[34]

Thus, in the case of a breach of contract, the Law on Contract and Torts prescribes: "The party invoking a breach of contract is obliged to take all reasonable measures to reduce the damage caused by that breach, otherwise the other party may seek a reduction in compensation."[35]

Furthermore, the Law on Contract and Torts also prescribes a situation where the wrongful behavior of the creditor in a contract contributes to the occurrence of damage or its extent or complicates the position of the debtor. The consequence of such wrongful behavior of the creditor is reflected in the reduction of the compensation to be awarded to the creditor. "When there is fault on the part of the creditor with respect to the damage caused or its

[31] Art. 192, par. 2 Law on Contract and Torts.

[32] Ž. Đorđević, 446.

[33] Decisions of the Supreme Court of Yugoslavia Rev. 349/69 of 17.12.1969. and Rev. 21/70 from 11.03.1970. published in the Collection of court decisions, book XV, volume 2, no. decision 145 - stated according to J. Radišić, 144 –145.

[34] Art. 266, par. 4 and 5 Law on Contract and Torts.

[35] Art. 266, par. 4 Law on Contract and Torts.

extent, or with respect to the aggravation of the debtor's position, the compensation shall be reduced proportionately."[36]

Both cited legal provisions regulate the possibility of reducing compensation for damages, with the first relating to the creditor's actions after the debtor has breached the contract, and the second, to the creditor's actions that contributed to the breach of contract by the debtor.[37]

Thus, in Yugoslav judicial practice, it has been established that the creditor contributed to the occurrence of damage due to the breach of contract by the debtor in a situation where they entrusted the building of their own house to a person they knew did not have adequate expertise, or could have known this by exercising ordinary care,[38] or in a situation where they loaded goods onto a railway car with an error that they could have noticed even upon a cursory inspection of the car.[39]

The provisions of Article 266, paragraph 4, and Article 267 of the Law on Contract and Torts reflect the understanding of our legal theory that the fulfillment of a contractual obligation is not only the liability of the debtor but also of the creditor, considering that the contractual parties must "cooperate" during the fulfillment of the contractual obligation.[40]

The obligation to take "all reasonable measures" implies such behavior on the part of the creditor (the injured party) that facilitates and assists the debtor in fulfilling their contractual obligation. For example, if it is impossible for the debtor to fulfill their obligation to mount equipment due to a lack of certain parts, the creditor should procure the necessary parts from the market for the completion of the work, provided that they can do so without significant difficulty.[41]

Taking reasonable measures is, in fact, a kind of legal standard for behavior in establishing and fulfilling rights and obligations in legal transactions, according to which the creditor should act. The reasonable measures that they

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[36] Art. 267 Law on Contract and Torts.

[37] I. Jankovec, *Komentar Zakona o obligacionim odnosima*, Beograd 1995, 618.

[38] „Sudska praksa", *Naša zakonitost* 15/79, 37, stated according to *Ibid*., 622.

[39] Collection of court decisions, Book III, volume 1., Belgrade, decision no. 92– stated according to *Ibid*., 622.

[40] *Ibidem*. By the way, Prof. Jankovec points out that the provisions of Art. 266. st. 4. ZOO and Art. 267. ZOO taken from the Outline for the Code of Obligations and Contracts by Prof. Mihailo Konstantinović, because he believed that the performance of the obligation from the contract is not only a matter for the debtor, but for both parties to the contract. M. Konstantinović, *Obligacije i ugovori – Skica za zakonik o obligacijama i ugovorima*, Beograd 1969.

[41] I. Jankovec, 618–619.

need to undertake are not extraordinary or unusual actions that expose them to great efforts and costs, but rather typical and regular measures that would be taken by any good entrepreneur, good householder, or competent expert in a similar situation. Therefore, it is rightly noted in legal science that this legal standard for taking reasonable measures should not be particularly strict.[42] In this regard, it cannot be required of the creditor, in order to reduce the damage, to undertake actions that may jeopardize their business reputation, nor can they be required to incur enormous costs to that end.[43]

The obligation to take actions or "reasonable measures" to reduce the damage arises at the moment the breach of contract occurs. From this, it follows that the injured party is not obliged to take these measures before the breach of contract occurs.[44] However, considering the creditor's right to terminate the contract and seek damage compensation even before the deadline for fulfilling the debtor's obligation has expired if it is evident that the debtor will not fulfill their contractual duty,[45] it is not difficult to conclude that the creditor, if they utilize this legal authority, will be required to take measures to reduce the damage from the moment of termination of the contract (that is, before the deadline for fulfillment or due date).[46]

"The party invoking the breach of contract" is, in fact, the party that has been harmed by the breach of contract, namely, the party that has suffered damage due to the breach of contract. The failure to take "reasonable measures" by the injured party grants the tortfeasor, as the other contracting party, the right to demand that their obligation to compensate for the damage they caused be reduced. The condition for the success of such a request by the tortfeasor is the existence of a negative fact on the side of the injured party – that is, that the injured party, as the other party in the contract, did not "... take all reasonable measures to reduce the damage."

To assess whether the injured party in the contract has taken "reasonable measures" to reduce the damage, the court is obliged to compare the behavior of the injured party in the contract with the appropriate standards of care required in legal transactions in contractual relationships, referring to the "care of a good entrepreneur," "care of a good householder," or "care of a good expert."[47]

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42 *Ibid.,* 619.

43 G.H., Treitel, *The Law of Contract*, London 1970, 736, stated according to *Ibidem.*

44 *Ibid.,* 620.

45 Art. 128 Law on Contract and Torts.

46 I. Jankovec, 620.

47 D. Mitrović, *Komentar Zakona o obligacionim odnosima*, Beograd 1983, 941.

The burden of proof for this negative fact lies with the tortfeasor – the party that breached the contract and thereby caused damage to the other party.[48]

The provisions regarding the extent of damage compensation in the case of breach of contract[49] (non-fulfillment of the contractual obligation), including the one relating to the reduction of damage compensation in the case that the debtor proves that the creditor did not take "all reasonable measures" to reduce the damage,[50] "...apply correspondingly to the non-fulfillment of obligations that did not arise from a contract, unless otherwise provided for by this law."[51] Under the phrase "obligations that did not arise from a contract," one should understand obligations arising from other sources of obligations, such as "causing damage," "unjust enrichment," "management without a mandate," "unilateral declaration of will," and "other law-established facts." This means that the provisions concerning the extent of compensation or its reduction prescribed in Articles 266, paragraphs 1, 2, 3, and 4 of the Law on Contract and Torts will also apply to cases of non-fulfillment of obligations arising from the mentioned extracontractual sources, provided that for individual cases the Law on Contract and Torts does not prescribe otherwise.

Although the provisions on proportional reduction of compensation in the case of the injured party's contribution relate to tort (extracontractual) liability for damage or obligations arising from the causing of damage, legal scholars rightly indicate that the application of Article 192 of the Law on Contract and Torts "...is not excluded for contractual liability, because according to the provisions of Article 269 of the Law on Contract and Torts, if the provisions in the section on rights to compensation for contractual damage do not provide otherwise, the provisions on compensation for extracontractual damage apply accordingly (analogy – author's note)."[52]

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[48] S. Benjamin, *Sale of Goods*, A.G. Guest, London 1981, 659, stated according to I. Jankovec, 622.

[49] Art. 266, par. 1-4 Law on Contract and Torts.

[50] Art. 266, par. 4 Law on Contract and Torts.

[51] Art. 266, par. 5 Law on Contract and Torts.

[52] I. Kaladić, 109.

2.2. Conditions for the Application of the Rule on "Shared Liability" or Proportional Reduction of Compensation in Cases Where the Injured Party Contributes to the Occurrence of Damage and Its Increased Extent

Conditions for the Application of the Rule on Shared Liability or Proportional Reduction of Compensation That Would be Due to the Injured Party if not for their contribution to causing damages are:

a) Civil Liability of the Tortfeasor for the Damage Incurred
b) Contribution of the Injured Party to the occurrence of damage or to its being greater than it would have otherwise been
c) Behavior of the Injured Party that is not aimed at protecting their legal goods and interests

a) Civil Liability of the Tortfeasor for the Damage Incurred

The division of harmful consequences between the tortfeasor and the injured party is only possible when there is civil liability of the tortfeasor for the damage incurred. This implies the existence of a harmful active or passive action by the tortfeasor as the subject of that liability, damage, a causal link between the harmful action and the damage incurred, and unlawfulness.

If there is no action by the tortfeasor that, alongside the action of the injured party, caused the damage, there can be no division of liability between the tortfeasor and the injured party, which means that the entire damage will fall on the injured party.[53]

b) Contribution of the Injured Party to the Occurrence of Damage or to Its Being Greater than It Would Have Otherwise Been

The second condition required for the division of harmful consequences between the tortfeasor and the injured party is the contribution of the injured party to the causation of the damage incurred. In other words, the injured party appears alongside the tortfeasor as a co-cause of their own damage. The injured party can engage in a harmful action at the same time as the tortfeasor, but also before and after the tortfeasor's actions. For them to be attributed with a contribution to their own damage, the action of the injured party must be causally linked to the damage and must, together with the action of the tortfeasor, represent a ***condicio sine qua non*** for the occurrence of the damage. The causal link between the behavior of the injured party and the harmful consequence that affected them is assessed by the same rules as

[53] *Ibid.,* 110.

the causation between the tortfeasor's behavior and the damage. When determining the causal link between the action of the injured party and the damage that affected their legal goods, it is examined "...whether the behavior of the injured party, taking into account the rules of life experience, is adequate as a cause of the damage incurred or its increase."[54] If the probability of a causal link between the action of the injured party and the damage or its increase is slight, then such a minimal contribution of the injured party should not be taken into account,[55] which means that there will be no division of damage between the tortfeasor and the injured party and that the entire damage, or the obligation to bear it, will fall on the tortfeasor.

c) Behavior of the Injured Party That Is Not Aimed at Protecting Their Legal Goods and Interests

If the behavior or specific actions of the injured party harm their legal goods or interests, then we say that the behavior of the injured party is not aimed at protecting their legal goods and interests. Whether the actions of the injured party are aimed at protecting their legal goods and interests should be assessed by the court in each specific case, taking into account the regulations governing a certain binding manner of behavior for the injured party (for example, the behavior of the injured party as a participant in public traffic), but also life experience and standards applicable in the marketplace if such a binding manner of behavior is not regulated by law.[56]

Therefore, from the perspective of the rules on the division of damages between the tortfeasor and the injured party, only the behavior of the injured party in the specific situation of causing damage and its possible increase is legally relevant when assessed as inadequate, inappropriate, and unacceptable in terms of protecting their legal goods and interests. When we speak of unacceptable or inadequate behavior of the injured party, we refer to the actions of the injured party that endanger and directly harm their legal goods and legally protected interests; in other words, behavior that contributes to the occurrence of damage or makes the damage greater than it would otherwise have been. This behavior may also encompass all elements of fault. However, the fault that causes damage to another is not the same as inadequate or erroneous conduct that causes damage to oneself. Fault that causes damage to another, provided that the other conditions for liability for damages

[54] *Ibidem*.
[55] *Ibid*., 61.
[56] *Ibid*., 62.

are met, results in the tortfeasor's liability for the damage incurred. On the other hand, inadequate actions of the injured party that contribute to their own damage, whether intentional or due to negligence, do not result in their liability for damages, because the injured party cannot be liable to themselves for the damage they have caused to themselves. For this reason, the phrase "shared liability" used in the Law on Contract and Torts to denote the arrangement of issues regarding the distribution of the burden of damage between the tortfeasor and the injured party is also incorrect. Here, it is not about the compensation of "liability" between the tortfeasor and the injured party as co-causes of the damage, but rather about mutual accounting of the individual parts of the damage, namely those that stem from the actions of the tortfeasor compared to those stemming from the actions of the injured party. It is, therefore, about "***compensatio damnum cum damno***". For this reason, in the text of the legal provision governing the division of damage between the tortfeasor and the injured party, the terms "liability" and "fault of the injured party" have not been used, but rather "action of the injured party" and "contribution of the injured party", in the appropriate case.

The behavior of the injured party in causing their own damage cannot be qualified as fault, particularly because fault, as a key legally relevant fact for establishing subjective liability for damage, is significantly determined by the subjective elements on the part of the tortfeasor: the ability to understand the significance of their own behavior and the consequences arising from such behavior (capacity for judgment), as well as the will (intention or negligence) to undertake a certain action with the aim of achieving a specific harmful result.

For the application of the legal rules on the distribution of the burden of harmful consequences between the tortfeasor and the injured party, "...the injured party's capacity for judgment is not required, which means that neither is their tort liability, but the contribution of the injured party to their own damage is sufficient."[57]

Therefore, the actions of an injured party who is torturously incapable do not affect the distribution of the consequences of the damage between the tortfeasor and the injured party. Only their causal contribution to the damage incurred is relevant. Thus, even before the adoption of the Law on Contract and Torts, a stance was taken at the working meeting of judges of the

[57] I. Grbin, „Neka pitanja naknade imovinske štete", *Naknada štete*, Zagreb 1986, 1315; J. Crnić, „Odgovornost više osoba za istu štetu i podijeljena odgovornost", *Odgovornost za štetu*, Zagreb 1987, 1050.

Civil Department of the Supreme Court of Yugoslavia on April 25, 1965, stating that a motor vehicle driver is not liable for damage caused by the behavior of the injured party "...only if that behavior has the character of force majeure for them." According to this understanding, the driver, as the holder of a dangerous item, would be exempt from liability for damage if the damage was caused by the behavior of the injured party that they (the tortfeasor, the driver) could not have predicted, avoided, or prevented.[58] "A sudden darting out by a six-year-old child in front of a bus, who is unable to understand the significance of their actions and control their behavior, resulting in their death even though the driver took all possible steps required to avoid the accident, represents a form of force majeure for which the owner of the bus is not liable for the damage caused by the child's death."[59] From the abstract of the mentioned court ruling, it follows that equating the actions of a torturously incapable person with force majeure—broadens the existing concept of force majeure to include human actions, so that some of our courts interpreted force majeure as any event that comes from outside (external), either through natural influence (earthquake, flood), or under human influence, provided it is unpredictable or unavoidable.[60]

The actions of the injured party that cause damage to themselves have not been viewed by either judicial practice or legal theory from the perspective of civil liability, but only from the perspective of the possibility of reducing the compensation that falls on the tortfeasor. In this sense, legal theory does not understand the participation of the injured party in their own damage in terms of establishing civil liability for damages, but rather in terms of the distribution of the consequences of that liability. In this sense, Professor Mihajlo Vuković, in explaining paragraph 1304 of the General Austrian Civil Code (ABGB), which governs the distribution of damages between the tortfeasor and the injured party, notes among other things: "Here, one should not speak of 'division of liability,' because the fault of the injured party does not serve as a basis for establishing any liability, but only to reduce the compensation that the tortfeasor will pay."[61]

[58] I. Kaladić, 111–112.

[59] Decision of the Supreme Court of Macedonia Gž. 559/66 of 26 October 1966, Overview of the judicial practice of the Supreme Court of Croatia in civil cases in 1966 and 1967, 24. See also extracts from the decision of the Supreme Court of Slovenia no. Pž.435/72 dated July 13, 1972, Collection of court decisions, book XIII, volume 3, no. 324 and the decision of the Supreme Court of Serbia Gž.3346/68 of January 27, 1968 stated according to *Ibidem*.

[60] I. Kaladić, 212.

[61] M. Vuković, *Pravila građanskih zakona*, IP Školska knjiga, Zagreb 1961, 1017.

Given the aforementioned aspects concerning the nature and assessment of the injured party's behavior in co-causing damage (their contribution to the occurrence and extent of the damage) from the standpoint of protecting their legal rights and interests, it can be concluded that the court is obligated to establish a formula for apportioning the burden of damage between the tortfeasor and the injured party in each individual case.

In this regard, it has been expressed in legal science that the court, in each specific case of co-causing damage by the tortfeasor and the injured party, will compare the significance and weight of the contribution of the injured party to the occurrence or increase of their own damage with the significance and weight of the circumstances constituting the basis for the tortfeasor's liability for the caused damage. "If the tortfeasor is liable based on fault, the significance of the contribution of the injured party to the occurrence or increase of the damage will be compared with the degree of the tortfeasor's fault (ordinary negligence, gross negligence, intent). A greater degree of the tortfeasor's fault will ultimately result in bearing a larger portion of the damage on the tortfeasor's side."[62]

In cases where the tortfeasor is liable under the rules of objective liability for damages, the court will compare the significance of the contribution of the injured party to the damage incurred with the significance of the danger posed by the item or activity from which the damage arises, for which the tortfeasor, as its holder or executor, is liable for the damage.[63] If there is no significant contribution from the side of the injured party to the damage caused, their contribution will be treated as ordinary, i.e., the contribution of the injured party will be given less significance than that of the tortfeasor, so the compensation to be awarded to the injured party will not be significantly reduced.[64] If the contribution of the injured party to their own damage is significant, the damage between the tortfeasor and the injured party should be divided into equal parts.[65] In cases of particularly significant contributions by the injured party to their own damage, the injured party should be awarded a proportionately smaller amount of damage compensation. If, in addition to liability based on the objective principle, there is also a degree of fault on the tortfeasor's part, the court cannot disregard this and is required to take it into account because the fault of the tortfeasor, which exists alongside their objective liability, depending on its severity (intent, negligence),

[62] I. Kaladić, 65.
[63] *Ibid*., 67.
[64] *Ibidem*.
[65] *Ibidem*.

reduces the significance of the injured party's contribution in determining the formula for the distribution of damages.[66]

2.3. The Liability of the Injured Persons to Prevent or Reduce His own Damages

In cases where there is a party liable for the damage caused to the legal goods and interests of the injured party, against which the injured party can assert a claim for damages, the injured party has an obligation to take measures to prevent the occurrence of damage or measures to reduce it. This obligation of the injured party is not explicitly mentioned in the text of the provision of the Law on Contract and Torts that governs the so-called "shared liability" or the division of damages between the tortfeasor and the injured party, but it follows from the context of the words and phrases used within it that the law sanctions any behavior of the injured party that contributes to the occurrence of damage or to its being greater than it otherwise would have been.[67] The injured party can contribute to the occurrence of damage or to its being greater than it would otherwise have been, both through active and passive behavior—meaning through the failure to take necessary and adequate measures to prevent the occurrence of damage or to reduce it. Therefore, if the injured party contributes to their own damage by not taking measures to prevent its occurrence or to reduce it, the law prescribes a specific sanction for the injured party, which is reflected in the limitation of their right to compensation for the damage incurred. In the case of contributing to their own damage, which may also manifest in failing to take measures to prevent the occurrence of damage or to reduce it, the injured party will not be able to achieve full compensation from the tortfeasor but will only be entitled to proportionally reduced compensation.

The obligation to prevent the occurrence of damage or to reduce it can also be linked to some general principles of obligation law that the Law on Contract and Torts proclaims, referring to the principle of autonomy of will, the principle of prohibition of abuse of rights, and the principle of good faith and fairness.[68] Indeed, although participants in an obligation relationship freely and at their discretion organize their relations, they cannot do so outside the limits of coercive regulations, public order, and good customs.[69]

[66] *Ibidem*.

[67] Art. 192, par. 1 Law on Contract and Torts.

[68] J. Crnić, 1047.

[69] Art. 10 Law on Contract and Torts.

Additionally, in our obligation law, the principle of prohibition of abuse of rights is proclaimed, which prohibits exercising rights from obligation relations contrary to the purpose for which they were established or recognized.[70]

Considering the aforementioned principles and linking them to the obligation of the injured party to take measures to prevent the occurrence of damage or to reduce it, we can conclude that the injured party who does nothing to prevent the occurrence of or reduce already incurred damage does not act in accordance with public order and good customs, even though such possibilities exist. The injured party cannot fully exercise their right to compensation for damage if they contributed to the occurrence of damage by not taking action to prevent its occurrence and extent. Such exercise of the right would indeed be contrary to the purpose for which the right of the injured party to compensation for damages is established or recognized under the Law on Contract and Torts.

Finally, the failure of the injured party to take measures to prevent the occurrence of damage or to reduce it must also be linked to the principle of good faith and fairness, which the participants in the obligation relationship (and thus the injured party in the legal relationship arising from the causing of damage) are obliged to adhere to in establishing and exercising rights from obligation relations.[71]

The injured party who merely expects that the obligation to compensate for damages will be imposed on the tortfeasor or that its extent will increase, while taking no steps to prevent the occurrence of damage or to reduce the damage already incurred, essentially allows and facilitates the occurrence of damage or its being greater than it would otherwise have been. It is clear that such behavior of the injured party is not in accordance with the principle of good faith and fairness.

Regarding the breach of the obligation to prevent or reduce damage, the court considers this ***ex officio***. This means that when deciding on a claim for compensation for damages, the court must take into account the injured party's failure to take measures to prevent or reduce the damage if such a fact is established during the proceedings, even when the liable party (the tortfeasor) as the opposing party in the dispute does not indicate such behavior of the injured party.[72]

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[70] Art. 13 Law on Contract and Torts.

[71] Art. 12 Law on Contract and Torts.

[72] I. Kaladić, 116.

The obligation of the injured party to prevent the occurrence of or to reduce damage is explicitly prescribed by law in the domain of contractual liability: "The party invoking a breach of contract is obliged to take all reasonable measures to reduce the damage caused by that breach; otherwise, the other party may demand a reduction in compensation."[73]

2.4. Special Cases of Division of Damage Consequences between the Tortfeasor and the Injured Party

The special cases of the division of the burden of damage between the tortfeasor and the injured party, which lead to a reduction in the compensation for damages that would otherwise be awarded to the injured party, include: 1. the fault of the person for whom the injured party is liable, 2. the consent of the injured party to the damage, 3. the consent of the injured party to the risk of damage occurring, and 4. providing the occasion for the damage to occur.

2.4.1. The Fault of the Person for Whom the Injured Party is Liable

This refers to a case where a person for whom the injured party is liable is at fault for the damage incurred to the injured party. The individuals for whom the injured party is liable are primarily those who act on behalf of and for the account of the injured party, such as workers employed by the injured party, the authorities of the injured party (director), the attorneys of the injured party, and also the legal representatives of tortiously incapable persons when, in representation within a contractual relationship, they negligently co-cause damage alongside the tortfeasor to the injured party.[74] If the damage is caused by a person for whom the injured party is liable, such inadequate conduct by that person will be attributed to the injured party, which will result in a reduction of the injured party's right to compensation for the damage incurred. If the contribution of the injured party to their own damage is significant, the damage should ideally be divided between the tortfeasor and the injured party according to their respective contributions. According to some of our authors, the tortfeasor (the debtor of the damage compensation) could be completely relieved of liability if the fault of the person for whom the injured party is liable is predominant in causing or increasing the damage.[75]

[73] Art. 266, par. 4 Law on Contract and Torts.

[74] I. Kaladić, 117.

[75] *Ibidem*.

Such reasoning cannot be agreed upon, as the legal provision governing the reduction of compensation in the case of "fault of the creditor" clearly indicates that it concerns the fault of the creditor in terms of contributing to the occurrence or increase of the damage, which implies the impact of the tortfeasor's actions on the occurrence of the damage or its increase. This provision exclusively states that in the event of the creditor's fault participating in the damage itself, its extent, or in the aggravation of the debtor's position, the damage compensation will be reduced proportionally, but does not pertain to the "complete absolution of the debtor from liability" for the damage. Therefore, this provision does not regulate the release of the tortfeasor from liability for the damage but rather the distribution of the burden of damage compensation between the tortfeasor and the injured party. The debtor can be relieved of liability for damages, and thus of the obligation to compensate for damages, only if they can prove they are not at fault or that there are no other prerequisites for establishing subjective liability for the damage. The predominant influence of the fault of the person for whom the injured party is liable in the occurrence and increase of the damage is not a legally prescribed reason for the complete release of the tortfeasor from subjective liability for damages but only for their partial release from liability, and thus a reason for the partial reduction of their compensation obligation.

The release of the tortfeasor from subjective liability, and thus from the obligation to compensate for damages, could only be discussed in cases where the fault of the person for whom the injured party is liable completely affected the occurrence of the damage or its increase, because in such cases, it would turn out that the tortfeasor is not at all at fault for the incurred damage or its increase, but that the damage occurred or increased solely due to the fault of the person for whom the injured party is liable. This conclusion also derives from the general provision on the bases of liability, which states: "One who causes damage to another is obliged to compensate for it unless they prove that the damage occurred without their fault."[76]

Therefore, if the tortfeasor proves that the damage occurred without their fault, or that it arose exclusively from the fault of the person for whom the tortfeasor is liable, then there would be no conditions for the division of damages between the tortfeasor and the injured party; instead, the entire damage would fall on the injured party.

[76] Art. 154, par. 1 Law on Contract and Torts.

2.4.2. The Consent of the Injured Party to the Damage

In this case, we will focus on the consent of the injured party from the perspective of the potential division of damages between the tortfeasor and the injured party, or attempt to answer the question of under what circumstances the consent of the injured party to incur damage would affect the possible reduction of damage compensation. When it comes to the consent of the injured party to incur damage, the law provides for two different legal situations.

The first relates to the consent of the injured party to incur damage through an action that is not prohibited, while the second pertains to their consent to incur damage through an action that is prohibited by law.

In the first situation, the injured party who allows another to undertake some action to their detriment has no right to seek compensation for the damage caused by that action from the tortfeasor.[77] They do not have that right because in such a situation there is no unlawfulness of the harmful act nor unlawfulness of the damage itself.[78] In the second situation, the injured party makes a statement or consents to the incurrence of damage through an action that is prohibited by law, in which case the law explicitly states that such a statement is null and void.[79] However, regardless of the fact that the law states that such a declaration from the injured party is null and void, it can also be considered as a contribution of the injured party to the damage incurred, in which case the rules of the Law on Contract and Torts that regulate the distribution of the consequences of the damage between the tortfeasor and the injured party proportionately according to the injured party's contribution to the occurrence or increase of the damage apply.[80]

In the literature,[81] the possibility of the court reducing the compensation is mentioned as one of the bases for awarding reduced compensation to the injured party if the tortfeasor caused the damage "by doing something for the benefit of the injured party."[82] This is based on the assumption that the injured party themselves, for some personal benefit, allowed damage to be caused to them.[83]

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77 Art. 163, par. 1 Law on Contract and Torts.

78 I. Kaladić, 117.

79 Art. 163, par. 2 Law on Contract and Torts.

80 I. Kaladić, 117; J. Crnić J, 1051.

81 B. Vizner, 117.

82 Art. 191, par. 2 Law on Contract and Torts.

83 *Ibidem*.

2.4.3. Consent of the Injured to the Risk of Acts of Damage

We refer to the consent of the injured party to the risk of damage when the injured party does not desire the harmful consequences to occur., "...but is aware, or should have been aware, of certain circumstances that indicate the danger of the occurrence of the harmful event."[84]

The consent of the injured party to the risk of damage occurring exists, for example, in the case of the injured party consenting to ride with a driver who is unfit to drive due to inexperience, exhaustion, intoxication, or the influence of drugs and certain medications. In the aforementioned situations, the injured party did not contribute to the occurrence of the damage through any active or passive action, which means that the division of damage between the tortfeasor and the injured party would not be formally possible. However, our courts nevertheless classify (subsumption) such situations under the rules for the distribution of the burden of damage between the tortfeasor and the injured party, awarding the injured party proportionally reduced compensation, even though the injured party did not actually contribute to the occurrence of the harmful event that would have happened without their presence in the motor vehicle. Had they refrained from riding with an unfit driver, the injured party could have avoided the harmful consequences; therefore, as they did not act accordingly, they partially assumed the risk of the danger of damage occurring because they hoped that damage would not occur.[85]

Supporting this reasoning is a decision from the Supreme Court of Croatia from the period before the adoption of the Law on Contract and Torts, whose abstract in the relevant part reads: "...a person who consents to ride in a car for free, knowing that the driver has no valid driver's license and is drunk, partially assumes the risk for the damage they suffer in a traffic accident."[86]

2.4.4. Providing Grounds for the Occurrence of Damage

An injured party who has, through their actions, provided grounds for the infliction of damage on themselves has no right to compensation for

[84] I. Kaladić, 118.

[85] *Ibidem*.

[86] Decision of the Supreme Court of Croatia Gž.2320/68 of 05.12.1968, Collection of court decisions, Belgrade, 1971, book XVI, volume 1, no. 36; See also the decision of the Supreme Court of Croatia Gž. 2856/72 of 05.09.1973, Overview of judicial practice, Annex to Our Legality 4, no. 5.

damages from the person who is otherwise liable for the tortfeasor. Such a case exists when someone suffers damage from a person who is incapable of reasoning. If, for instance, the injured party provokes or angers such a person through their actions, and that person then attacks them and causes harm, the injured party will not have the right to compensation from the person who is liable for such an irrational individual. A similar situation will arise in cases where the injured party irritates an animal that then attacks and injures them. In such a circumstance, the injured party will not be able to receive compensation from the animal's owner, as their behavior provided grounds for the damage to occur.

However, if the person liable for the actions of the irrational individual or the person responsible as the owner of the animal could have taken measures to prevent the damage but failed to do so, in such cases, the damage will still be divided between the injured party and the person liable for the irrational tortfeasor or between the injured party and the owner of the animal.[87]

3. Burden of Proof That the Behavior of the Injured Party Is Not Aimed at Protecting Their Legal Goods and Interests, as Well as the Existence of the Injured Party's Contribution to Their Own Damage

While the fault of the tortfeasor, due to the rebuttable presumption of fault contained in Article 154 of the Law on Contract and Torts, does not need to be proven, as the burden of proof is shifted from the injured party to the tortfeasor, the inadequacy of the behavior of the injured party regarding their own goods (i.e., the so-called "fault of the injured party") is not presumed but must be proven. It must also be proven that the injured party contributed to their own damage. The burden of proof that the actions of the injured party regarding their own goods are not aimed at protecting their legal goods and interests, as well as the existence of their contribution to the occurrence or increase of the damage, lies with the tortfeasor. Thus, the tortfeasor is obliged to prove the inadequacy of the injured party's behavior, i.e., the so-called "fault of the injured party", as well as the existence of a causal link between such behavior of the injured party and the damage incurred.

Regarding the burden of proof concerning the inadequacy of the injured party's behavior or their "fault" and the causation between such behavior and the damage incurred, Yugoslav legal science[88] and judicial prac-

[87] I. Kaladić, 118.

[88] S. Jakšić, 281; I. Kaladić, 119.

tice are consistent.[89] An interesting position in Yugoslav judicial practice is that in the absence of evidence regarding the "fault of the injured party" and the tortfeasor, the court may decide on the degree of liability of the tortfeasor and the injured party based on free assessment.[90]

4. Transfer of the Claim of the Injured Party to a Third Party

In the case where the injured party assigns their claim for damage compensation against the liable party to a third party (cession of the damage compensation claim), the liable party no longer owes compensation to the injured party (the old creditor) but rather to the third party as the new creditor. The liable party (debtor) cannot find themselves in a worse position due to the transfer of the claim than they were in with respect to the injured party as the old creditor. In this sense, the liable party (tortfeasor) can raise the defense of "shared liability" with regard to the third party to whom the claim has been transferred (the new creditor) and also against all subsequent or later creditors. If, by any chance, the new creditor is also liable for the harmful event, the old creditor as the assignor can only transfer their claim for damage compensation to them to the extent that the tortfeasor was liable for the damage.[91] If the right from social insurance that belongs to the injured party – the assignor of the claim, fully covers the damage, the liable party (debtor) will not be obligated to the injured social insurance beneficiary, but to the social insurance community, which, after paying the compensation from insurance, has the right of recourse against them.

Namely, in that case, the liable party can successfully argue with the injured insurance beneficiary (the old creditor) but also with the third party to whom the old creditor (the injured party) has transferred their claim for damage compensation, that the claim for damage compensation has been fully settled by the payment from the social insurance community. Therefore, the injured party who is also a social insurance beneficiary could only transfer to the third party that part of their damage compensation claim that is not covered by the compensation from social insurance.[92]

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[89] Decision of the Supreme Court of Yugoslavia Rev. 1667/65 of 17.12.1965, Collection of court decisions, Book X, volume 3, Belgrade, 1969, no. 300.

[90] Decision of the Supreme Court of Yugoslavia Rev. 21/70 of 11 March 1970, Collection of court decisions, Book XV, volume 2, Belgrade, 1970, no. 145.

[91] I. Kaladić, 119.

[92] *Ibid*., 120.

5. Division of the Tortfeasor's and the Injured Party's Share in the Damages and Natural Restorations

In principle, the rules on shared liability for damages apply only in cases where the incurred damage is compensated in cash or by delivering generic items, as the compensation in cash or items specified by type that the tortfeasor is liable for can be easily calculated once their share in the damage is determined as a percentage or fraction.

The situation is quite different if, instead of compensation in cash, the damage is settled by restoring the condition of the injured party's property that existed before the damage occurred (natural restitution). In that case, it would be difficult to accept that in the case of dividing the burden of damage between the tortfeasor and the injured party, meaning in the case of the injured party's contribution, the previous condition of the property is partially restored. For example, due to the actions of the tortfeasor and the injured party, a fire occurred that completely destroyed the injured party's house, necessitating its reconstruction. In such a situation, it would not be possible, nor effective, to bind the tortfeasor to partially restore the previous condition of the injured party's property in relation to the extent of their participation in the damage incurred. Our courts have rejected such claims, and the injured party, in such a situation, could only seek compensation for damages in cash. In other words, in the case of the so-called "shared liability", as a rule, there is no natural restitution, especially in situations where natural restitution would fully remedy the damage.[93] However, if part of the damage is remedied by natural restitution and part in cash, it is possible to repair at least that part of the damage attributed to the tortfeasor through natural restitution, while the part attributed to the injured party would be taken into account when determining the cash portion of the damage compensation.[94]

6. Division of the Tortfeasor's and the Injured Party's Share in the Damage and the Indirect Claim of the Injured Party for Compensation for Damages

Individuals whose legal goods and interests are not the direct object of the harmful act, but who suffer damage due to some harmful event that occurred to the person or property of another individual with whom they are somehow

[93] *Ibidem*.

[94] Z. Gičić, „Naturalna restitucija kao oblik naknade štete", *Naša Zakonitost* 10/79, 66; I. Kaladić, 120.

connected (for example, through kinship, marriage, or cohabitation) are referred to as indirectly injured parties. In this case, the person liable for the damage (the tortfeasor) can raise the same objection of "shared liability" against the indirectly injured party as against the directly injured party, regarding their contribution to the damage incurred. The indirectly injured party will only have the right to proportionally reduced compensation from the tortfeasor if the tortfeasor proves that the directly injured party participated in or contributed to the damage incurred. The tortfeasor's liability is, in such a case, nullified to the extent that it corresponds to the participation (contribution) of the directly injured party in causing the damage. Consent to ride in a vehicle driven by a driver in an intoxicated state, during which the injured party is harmed, has been verified by judicial practice as a contribution of the directly injured party (a passenger in the vehicle) to the occurrence of the harmful consequence.[95]

Even an indirectly injured party can contribute to the occurrence of damage, and therefore their contribution to the damage incurred can be considered alongside the existing contribution of the directly injured party. In the literature, an example of such a situation is presented by the injury of a young child while crossing the roadway, provided that there is also liability on the part of the driver who struck the child pedestrian, as well as the liability of the parents for failing to supervise the child.[96]

Just like the directly injured party, the indirectly injured party is also burdened by the obligation to prevent or reduce damage. In this regard, Yugoslav judicial practice has expressed the view that "...a spouse who refuses a job offer without justifiable reason after the death of their partner is not entitled to compensation for loss of support due to the death of their spouse, as it is considered that they have caused the damage they suffer."[97]

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[95] "The plaintiff's now deceased daughter also contributed to the damage. Although she is a minor (16 years old), her life experience was enough to conclude from the circumstances of the case that she agrees to drive in a car driven by an intoxicated person. The contribution of the injured party's daughter was correctly determined at 30%." (Decision of the Supreme Court of Croatia No. Rev. 1540/86 from 11.1.1.1986) published in the journal *Judicial Practice* 4/1987, s. 41

[96] I. Kaladić, 121.

[97] Decision of the Supreme Court of Bosnia and Herzegovina Mrs. 1053/73 of 15.11.1973, Collection of court decisions, Book I, volume 1, Belgrade 1976, no. 48.

7. Conclusion

The legal provision regarding the so-called "shared liability" or "proportional reduction of compensation for the injured party who has contributed to the occurrence of damage or to its being greater than it would otherwise have been" represents one of the significant deviations from the principle of "full compensation", according to which compensation for damages is awarded in an amount that corresponds to the damage inflicted, or in an amount necessary to restore the injured party's material situation to the state it would have been in had there been no harmful act or omission by the liable party (the tortfeasor).

The phrase "shared liability" does not mean a division of liability between the tortfeasor and the injured party, but rather it is used in the Law on Contract and Torts in the sense of distributing the burden of harmful consequences between the subjects causing the damage - the tortfeasor and the injured party. For the portion of the damage attributed to them, the injured party is not liable; rather, they bear that damage in the sense that they are not entitled to full compensation but to proportionally reduced compensation for damages. Proportionally reduced compensation is calculated based on the previously determined total amount of damage or full compensation. This reduction is applied to the total compensation that would have been awarded to the injured party, had they not contributed to the damage. The reduction reflects the amount of damage that the injured party has inflicted upon themselves through their own actions. Therefore, the degree of the injured party's participation in their own damage is taken as a measure for determining the amount of proportional reduction of the damage compensation. There is no proportional offsetting of the faults of the tortfeasor and the injured party (***compensatio culpae***); rather, there is a proportional offsetting of the damages caused by the tortfeasor and the injured party (***compensatio damnum cum damno***). The liability of the tortfeasor is not reduced, nor is it "shared" with the liability of the injured party, but the total damage is only limited to the portion that originates from the tortfeasor's actions.

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DOPRINOS OŠTEĆENOG U PROUZROKOVANJU ŠTETE – TZV. „PODIJELJENA ODGOVORNOST“

Apstrakt

U radu se razmatra učešće i značaj komitivnih ili omitivnih postupaka oštećenog u šteti koja pogađa njegova materijalna i nematerijalna dobra, uz osvrt na shvatanja i zakonska rješenja koja su bila sadržana u starim građanskim kodifikacijama i važećem Zakonu o obligacionim odnosima. Pokušava se dati odgovor na pitanje da li na priznavanje i obim naknade koja se ima dosuditi oštećenom ima uticaja njegovo skrivljeno aktivno ili pasivno učešće u prouzrokovanju štete, tj. krivica oštećenog u nastanku štete. Polazeći od opšteg pravila građanskog prava da niko ne može odgovarati samom sebi, već samo drugom licu čije je imovinsko ili neimovisko stanje štetnom radnjom negativno promijenjeno, učešće oštećenoga u vlastitoj šteti se, zbog toga, ne može vrednovati po subjektivnim, nego po objektivnim kriterijumima. Ocjenjuje se da li je ponašanje oštećenog u konkretnom slučaju bilo uzročno sa štetnom posljedicom u pogledu dijela štete koji potiče od njegove radnje. Štete koje su svojim radnjama prouzrokovali štetnik i oštećeni se međusobno prebijaju („compensatio damnum cum damno.“) Prema tome, kada govorimo o tzv.“podijeljenoj odgovornosti“ mislimo na srazmjerno smanjenje naknade oštećenom koji je svojim ponašanjem doprineo da šteta nastane ili da bude veća nego što bi inače bila.

Ključne riječi: prouzrokovanje, šteta, oštećeni, doprinos.

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THE ACTION FOR DAMAGES AGAINST THE EUROPEAN UNION: THE DIFFICULT RECOGNITION OF THE EU LIABILITY IN THE RECENT CASE LAW OF THE COURT OF JUSTICE***

Summary

An action for damages against the European Union (EU) may be brought by any person who considers that the EU has incurred non-contractual liability. In particular, the Court of Justice can be directly appealed for the purpose of establishing the EU's liability and obtaining compensation for damage caused by unlawful acts and conduct committed by the EU Institutions or bodies or by their servants in the performance of their duties.

This type of action, as is well known, is not typical only of EU Law, as most legal systems - both of States and International Organizations - provide for the liability of public administrations for damage done to individuals.

As for the EU, this set of rules is codified by the Treaties in a few and vague regulatory provisions, that basically refer to the "general principles common to the laws of the Member States" (Article 340, TFEU). Given the significant differences between the national regulatory systems in the EU Member States in this matter, as well as the mentioned haziness and brevity of the normative

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provisions of the EU Treaties, a central role has been played, over time, by the CJEU. In its even recent jurisprudence, however, a difficult recognition of the EU Liability can be noticed, as will be analysed in this paper.

Keywords: *Action for Damages, Compensation, European Union, EU Liability, Court of Justice.*

1. Introduction

The action for damages against the EU is provided for by the Treaties as a specific type of appeal that can be brought before the Court of Justice of the European Union (comprising the Court of Justice - or "the Court" - and the General Court, collectively indicated as "EU Courts").[1]

In particular, the Court can be directly appealed by any EU Member States, legal person or individual (who are, therefore, the appellants), for the purpose of establishing the Union's non-contractual liability and, consequently, obtaining compensation for damage caused by the EU Institutions or bodies or by their servants in the performance of their duties.

This action, therefore, "seeks to have the Union held non-contractually liable to make good damage caused by its institutions or by its servants in the performance of their duties"[2] and its role and effectiveness shall be considered in the more general framework of the EU judicial system and its relationship to other actions brought before the Union Courts, such as the action for annulment or the action for failure to act. That is why next paragraph will deal with the legal framework governing the action for damages and its functioning in practice.

Moreover, in a further paragraph, an evaluation of the Court's jurisprudential practice will be attempted, in the belief that the Union Courts' case law is the main data to consider and interpret in order to assess whether EU liability is actually recognized.

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[1] See Article 19 (1) of the Treaty on European Union (hereinafter: TEU) - consolidated version (OJ C 202 of 7.6.2016, 13-45): "1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed."

[2] K. Lenaerts, K. Gutman, J. T. Nowak, "The Action for Damages", in: *EU Procedural Law* (eds. K. Lenaerts, K. Gutman, J. T. Nowak), Oxford University Press, Oxford 2023, 473–520.

2. The Legal Framework and the Functioning of the Action for Damages

As for the legal framework that regulates the action for damages against the EU, it is necessary first of all to recall the provisions of the primary law of the European Union, starting from Article 268 of the Treaty on the Functioning of the European Union (TFEU), which establishes the jurisdiction of the Court of Justice in this matter. Pursuant this provision, "the Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage".[3]

The exclusivity of the jurisdiction of the Court of Justice in disputes relating to compensation for damage against the EU can be easily deduced from this provision. Consequently, jurisdiction of national Courts of the EU Member States, as well as of any other International Jurisdiction, is excluded, making impossible to sue the EU before national or international courts to obtain compensation for a damage caused by the administrative or legislative activity of its institutions, bodies or servants.[4]

In addition to Article 268 TFEU, another provision of absolute importance for the topic we are dealing with is Article 340 TFEU, that codifies and regulates the conditions for the liability of the EU for public torts (wrongs), in the form of action for damages against the EU.[5]

In particular, paragraph 1 of Article 340 sets for the contractual liability of the Union, providing that it "shall be governed by the law applicable to the contract in question".[6]

In the case of non-contractual liability, "the Union shall, in accordance with the general principles common to the laws of the Member States, make

[3] Art. 268 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) of 13 December 2007 - consolidated version (OJ C 202 of 7.6.2016, 47-360). It should be recall that there are no sources of secondary EU law that regulate the matter in detail.

[4] For an in-depth overview on the topic see, among others, A. Biondi, M. Farley, *The Right to Damages in European Law*, Wolters Kluwer, 2009.

[5] It should be recalled that the liability of the EU for public torts (wrongs) in the form of action for damages against the EU, codified in Article 340 of the TFEU, falls within the area of law known as "public tort law". This is an area specific to both the legal systems of States and International Organizations, each of which establishes its own rules with regard to the liability of public administrations for damage done to individuals. As for the the European Union, it is referred to, among many, the essential Volumes of G. Brüggemeier, *Tort Law in the European Union*, Wolters Kluwer, 2018; C. Van Dam, *European Tort Law*, Oxford University Press, Oxford 2013.

[6] Art. 340, para. 1 TFEU.

good any damage caused by its institutions or by its servants in the performance of their duties".[7]

Notwithstanding this, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, "make good any damage caused by it or by its servants in the performance of their duties".[8]

Finally, last paragraph of Article 340 provides that the personal liability of its servants towards the Union "shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them."[9]

Together with the provisions of the TFEU, we should also recall the Charter of Fundamental Rights of the European Union and, in particular, Article 41 entitled "Right to good administration", that states, at paragraph 3: "Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States".[10]

Thus, with the entry into force of the Lisbon Treaty and of the Charter of Fundamental Rights at the same level as the Treaties in 2009, "the right to damages became an officially binding fundamental right, considered as part of the right to good administration".[11]

As can be deduced from the regulatory provisions reported here, there isn't any list of possible appellants in the mentioned articles, except for the reference to "every person" (to be read as any natural or legal person) in Article 41 of the Charter of Fundamental Rights.[12] The other categories of appellants for an action for damages can be thus deduced from the "general principles common to the laws of the Member States", as for Article 340. At this regard, the question remains open whether an action for damages can be brought by a EU Member State; also by analogy with other types of appeal

[7] Art. 340, para. 2 TFEU.

[8] Art. 340, para. 3 TFEU.

[9] Art. 340, para. 4 TFEU.

[10] Art. 41, para. 3 of the Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, 391–407).

[11] European Parliamentary Research Service (EPRS), *Action for damages against the EU*, Brussels 2018, 1-11, available on the European Parliament Website at the following link: https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630333/EPRS_BRI(2018)630333_EN.pdf, last visited on August 1st, 2024.

[12] R. Geiger, D. E. Khan, M. Kotzur, *European Union Treaties: A Commentary*, C.H. Beck, London 2015, 1026.

typical of the European Union jurisdictional system, many scholars affirm this possibility, even if it has not occurred in practice so far.[13]

As for the possible subject against whom an action for damages can be filed, we should read together paragraph 2 of the aforementioned Article 340, that indicates the EU liable as a whole («the Union shall [...] make good any damage caused by its institutions or by its servants […]") and paragraph 3 (introduced by the Lisbon Treaty), stating the liability of the European Central Bank (ECB), that is, thus, liable for its own acts. The reference to "institutions" by Article 340, paragraph 2, makes it possible that all Institutions – to be intended, given the CJEU case law, as including all bodies and agencies - may be defendants in the action for damages.[14]

Another essential aspect to be examined with regard to the functioning of the action for damages concerns the main substantive requirements under which the EU liability can be established. In fact, such liability presupposes that three cumulative conditions relating to unlawfulness are met – so the claimant must prove that all three of the following elements cumulatively prevail - namely: a sufficiently serious breach of a rule of law intended to confer rights on individuals; the fact of damage; the existence of a causal link between the unlawful conduct of the European Union and the harm suffered and damage claimed.

These conditions have been developed by the Union Courts that, in the relevant case law, have underlined the necessity for individuals to establish that three substantive conditions are satisfied cumulatively in order for the European Union to incur non-contractual liability, and more specifically: the unlawfulness of the conduct attributable to the institution or its servants in the performance of their duties in the light of EU law (conduct consisting of a positive action or an omission or abstention); the existence of real and certain damage; the existence of a causal link between the alleged conduct and the damage complained of.[15]

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[13] A. Biondi, M. Farley, 88.

[14] K. Gutman, "The evolution of the action for damages against the European Union and its place in the system of judicial protection", *Common Market Law Review* 48/2011, 701.

[15] See, *inter alia* and in the most recent case-law: Judgment of the General Court of 5 June 2024, *Malacalza Investimenti Srl and Vittorio Malacalza v European Central Bank,* C T-134/21, ECLI:EU:T:2024:362, paragraph 34; Judgment of the Court of 20 September 2016, *Ledra Advertising and Others v Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 64; see also Judgment of the General Court of 7 October 2015, *Accorinti and Others v ECB*, T-79/13, EU:T:2015:756, paragraph 65; Judgment of

As for the Court deciding on the admissibility of the action, this depends on the fact that the damage is attributable to an institution, as well as that it was caused by an institution or one of its staff in the performance of their duties.

Furthermore, certain additional requirements are generally relevant to its admissibility, such as compliance with the limitation period. In particular, proceedings against the Union in matters arising from non-contractual liability "shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court of Justice or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Union".[16]

In the latter case, the application must be made within the period of two months or, if the institution concerned fails to respond, under the conditions laid down for bringing an action for failure to act.[17]

As already mentioned, there are no sources of secondary EU law that regulate the matter of the action for damages in detail. This also concerns the amount of possible compensation to grant to the applicant from the EU budget. Thus, there are no specific rules regarding the amount of compensation or the method for its calculation, and also this aspect is left to the discretion of the Union Courts. In most cases, when the General Court rules that an institution is liable, it let the parties decide amicably on the calculation and amount of damages. Only in case an amicable agreement is not reached, it is up to the Court to decide the amount of the compensation.[18]

Looking at the practice in this matter, it is easy to notice how, in proportion, very few have been the cases in which satisfaction has been given to the applicants, thus making it difficult to recognise the EU's liability, as will be better evaluated in the next paragraph.

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the General Court of 2 March 2010, *Arcelor SA v European Parliament and Council of the European Union*, T-16/04, ECR, EU:T:2010:54, paragraph 139 and the case-law cited; Judgment of the Court of 9 November 2006, *Agraz and Others v Commission*, C-243/05 P, ECR, EU:C:2006:708, paragraph 26; Judgment of the Court of 30 June 2005, *Alessandrini Srl and Others v Commission* [2005], Case C-295/03 P, ECR I-5673, paragraph 61.

[16] Statute of the Court of Justice of the European Union (consolidated version), Art. 46.

[17] In particular, according to the mentioned Article 46 of the Statute of the CJEU, "In the latter event the proceedings must be instituted within the period of two months provided for in Article 263 of the Treaty on the Functioning of the European Union; the provisions of the second paragraph of Article 265 of the Treaty on the Functioning of the European Union shall apply where appropriate".

[18] European Parliamentary Research Service, 7. It should be recalled that it is possible for the Court to quantify both material and immaterial damages.

3. The Case Law of the Court of Justice: The Recognition of the EU Liability in Practice

With regard to the effective recognition of the EU Liability, it should be noted the very low number of cases in which the Union Courts have ruled in favour of the applicants, thus recognising their right to compensation for damages.

From this point of view, many Authors have criticized this EU jurisprudential practice, underlining how difficult it is for individuals to have their "Right to good administration" guaranteed and to breach immunity of EU institutions and bodies.[19]

This is explained by several Scholars with the fact that the requirements developed and specified over time by the EU Judge are such as to make it very difficult to meet them in order to demonstrate EU liability and receive compensation.[20]

In this regard, several cases decided by Union Courts can be recalled and among these it is worth mentioning - as it is, at the time we are writing, one of the latest in order of time to exemplify this jurisprudential orientation, as well as for the notable media coverage it has been the object of in the country of the parties (Italy) - the case *Malacalza Investimenti Srl and Vittorio Malacalza* v *European Central Bank* (hereinafter *Malacalza* case).[21]

In particular, in his Judgment of 5 June 2024 given in the '*Malacalza* case', the General Court of the European Union has dismissed the action for damages brought by Malacalza Investimenti and Mr Vittorio Malacalza against the ECB stating that none of the instances of unlawful conduct alleged against the ECB (in the context of its supervision of Banca Carige between 2014 and 2019) and relied on by the applicants "is capable of giving rise to non-contractual liability on the part of the European Union within the meaning of the third paragraph of Article 340 TFEU."[22]

More in detail, we should contextualize the General Court's decision by recalling that Banca Carige is a major credit institution established in Italy which is listed on the stock exchange and has been subject to direct prudential supervision by the ECB since 2014.[23]

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[19] In this sense, see C. Van Dam, 533, but also N. Półtorak, „Action for Damages in the Case of Infringement of Fundamental Rights by the European Union", in: *Damages for Violations of Human Rights* (ed. E. Bagińska), Springer, 2016, 439.

[20] On this point, see A. Biondi, M. Farley, 162; K. Gutman, 700.

[21] Judgment *Malacalza*, C T-134/21, cit.

[22] Judgment *Malacalza*, C T-134/21, paragraph 216.

[23] This supervision is to be framed within the Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the ECB concerning policies relating

Between 2015 and 2019, the ECB adopted several intervention measures in the context of that supervision until the decision to place the bank under temporary administration.[24]

to the prudential supervision of credit institutions (OJ 2013 L 287, 63-89).

[24] In particular, by decision of 9 December 2016, the ECB adopted an early intervention measure which consisted of requesting that the bank submit, by 28 February 2017, a strategic plan and an operational plan to reduce the issue of non-performing loans, with a clear indication of the measures to be taken and the schedule to be followed in order to achieve that objective. In order to meet the objectives set out in the early intervention measure, in September 2017 the bank's board of directors approved a recapitalisation plan which included, inter alia, a capital increase of EUR 560 million to be implemented by the end of 2017; plan completed in December 2017, for an amount of EUR 544 million.

Few days after, the ECB notified the bank of its decision establishing the prudential requirements for 2018 and, as a consequence, the bank tried unsuccessfully to increase its own funds in order to meet the applicable requirements.

Later on, given the bank's failures in its attempt to place its capital instruments on the market, by decision of 14 September 2018 ('the own funds decision') the ECB refused to approve the capital conservation plan drawn up by the bank and asked it to submit and obtain approval from its board of directors, by 30 November 2018 at the latest, of a new plan to restore and ensure sustainable compliance with the financial requirements by 31 December 2018 at the latest. In response to that request, the bank's board of directors adopted a capital strengthening plan involving two stages: the issue of Class 2 subordinated bonds and an increase in capital subject to shareholder approval.

About the second stage, the proposal was rejected given the opposition expressed by shareholders holding 70% of the capital, thus causing the resignation of several members of the bank's board of directors. Those resignations led to the disqualification of that board of directors pursuant to Article 18(12) of the bank's statutes and Article 2386 of the Italian Civil Code.

On 1 January 2019, the ECB decided to place the bank under temporary administration pursuant to the italian *Testo unico delle leggi in materia bancaria e creditizia* (consolidated version of the Legislative Decree No 385 of 1 September 1993, transposing Article 29 of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms) thus provoking that the trading of securities issued or guaranteed by the bank was suspended by the Italian National Companies and Stock Exchange Commission during the period of application of that decision or until the restoration.

The decision to place the bank under temporary administration was extended three times until, on August 2019, the bank, Cassa Centrale Banca – Credito Cooperativo Italiano, the FITD and the FITD's voluntary intervention fund signed a framework agreement defining the characteristics of a business plan which provided for a capital

The appeal filed by Mr Vittorio Malacalza, an individual shareholder of the bank, and Malacalza Investimenti, an investment company, which in 2018 were the largest shareholders of Banca Carige with a 27.5% share before the temporary administration decided by the ECB the following year, was aimed at contesting the decisions (and omissions) of the supervisory body and the final decision to initiate extraordinary temporary administration at the beginning of 2019.[25]

Both applicants claimed that the General Court should order the European Union to pay them, respectively, the sums of EUR 9 546 022 (for the former) and EUR 870 525 670 (for the latter) as compensation for the harm which they considered they have suffered as a result of actions undertaken by the ECB in the context of its supervisory functions over Banca Carige. From their point of view, in fact, some of those actions were contrary to the duties associated with those functions, such as the principles of protection of property, proportionality, sound administration, impartiality, equal treatment, transparency, good faith and the protection of legitimate expectations.

In particular, the applicants claimed that the European Union has incurred non-contractual liability on the basis of eight instances of unlawful conduct on account of the sufficiently serious breach by the ECB of EU rules in its relations with the bank's board of directors and of the Italian law.[26]

Furthermore, the applicants complained sufficiently serious breaches by the ECB: "when adopting the early intervention measure, of various rules

increase of EUR 700 million and the issue of new Class 2 subordinated bonds.
This proposed capital increase was considered, by the ECB, "not contrary to the sound and prudent management of the bank", and was approved at an extraordinary general meeting of the bank's shareholders on September 2020. After the implementation of the capital increase, on January 2020 a new board of directors and supervisory board were elected at the bank's ordinary general meeting of shareholders, thus putting an end to the temporary administration of the credit institution (cfr. paragraphs 6-25 of the Judgment *Malacalza*, C T-134/21).

[25] For an initial comment immediately after the Judgment see, among others, the article published in the Italian daily newspaper *La Repubblica* on June 5th, 2024: *Corte UE respinge ricorso e maxi risarcimento ai Malacalza per Banca Carige,* available at https://finanza.repubblica.it/News/2024/06/05/corte_ue_respinge_ricorso_e_maxi_risarcimento_ai_malacalza_per_banca_carige-45/, last visited on August 1st, 2024.

[26] In particular, the applicants claimed that a sufficiently serious breach by the ECB of Italian law would have occurred: when the ECB failed to intervene to rectify misleading statements made about the soundness of the bank by its directors; as regards the approval, on September 2019, of an increase in capital contrary to the pre-emption rights provided for in the bank's statutes; in relation to the appointment of temporary administrators who had a conflict of interest.

and principles"; "in the own funds decision, of the principle of proportionality as a result of the imposition on the bank of a period of time that was too short to allow it to comply with the own funds requirements imposed on it»; «of the principle of the protection of legitimate expectations as a result of the assurances given to shareholders as to the situation of the bank"; "of the shareholders' right to property as a result of the significant reduction in the value of their shareholdings in the bank".[27]

In its judgment the General Court pointed out, as a preliminary remark and referring to its own case-law, that the European Union "is a union based on the rule of law in which its institutions, bodies, offices and agencies are subject to review of the conformity of their acts, *inter alia*, with the Treaty and the general principles of law."[28]

The General Court then recalled that, in order for the European Union to incur non-contractual liability, "individuals must establish that three conditions are satisfied cumulatively: the unlawfulness of the conduct attributable to the institution or its servants in the performance of their duties, the fact of damage and the existence of a causal link between the alleged conduct and the damage complained of."[29]

With regard to the first of the mentioned conditions, the General Court considered appropriate to examine whether it was satisfied in the *Malacalza* case, affirming that, according to the relevant and consolidated case-law, that is the case "where the contested conduct involves a rule of law intended to confer rights on individuals and where the breach alleged against the institution is sufficiently serious."[30]

Thus, according to the General Court as regards the first requirement concerning the nature of the rules which may give rise to the non-contractual liability of the European Union, "the case-law makes it clear that a rule of law is intended to confer rights on individuals where it creates an advantage for

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[27] Judgment *Malacalza*, C T-134/21, paragraph 28.

[28] *Ibid*., paragraph 29, where the General Court recalled, in particular, relevant judgments on this point such as (judgment *Ledra Advertising*, C-8/15 P to C-10/15 P, paragraph 64; judgment *Accorinti*, T-79/13, paragraph 65 and the case-law cited).

[29] Judgment *Malacalza*, C T-134/21, paragraph 34.

[30] *Ibid*., paragraph 35. At this regard the General Court mentioned the following case-law: judgment of the Court of 4 July 2000, *Bergaderm and Goupil* v *Commission*, C-352/98 P, EU:C:2000:361, paragraph 42; of 7 October 2015, judgment *Accorinti*, T-79/13, paragraph 67; judgment of the General Court of 24 January 2017, *Nausicaa Anadyomène and Banque d'escompte* v *ECB*, T-749/15, not published, EU:T:2017:21, paragraph 69).

individuals which could be defined as a vested right, is designed for the protection of their interests or entails the grant of rights to individuals, the content of those rights being sufficiently identifiable".[31]

In this sense, in order for the European Union to incur liability the General Court reiterated, in the judgment we are dealing with, that the protection offered by the rule invoked "must be effective vis-à-vis the person who invokes it. A rule cannot be taken into account if it does not confer any right on the person who invoked it, even if it confers a right on other natural or legal persons."[32]

As regards the second requirement, concerning the type of infringement required for the European Union to incur non-contractual liability, the General Court has underlined, in the judgment *Malacalza*, that the main element to keep into consideration in order to determine whether a breach is sufficiently serious, is whether the institution concerned "gravely and manifestly disregarded the limits on its discretion."[33]

Thus, a determining factor in deciding whether there has been a sufficiently serious infringement is the extent of the discretion available to the institution, taking into account "the complexity of the situation to be regulated, the difficulties in the application or interpretation of the legislation, the clarity and precision of the rule infringed, and whether the error made was inexcusable or intentional", bearing in mind that "mere errors of assessment cannot of themselves be sufficient to define an infringement as manifest and grave."[34]

On this element, the General Court held that the conduct complained of was adopted by the ECB in the exercise of the prudential supervision tasks to ensure the safety and soundness of credit institutions, and in this performing those tasks the ECB has the power to carry out a series of transactions (pursuant

[31] Judgment *Malacalza*, C T-134/21, paragraph 36, and the case-law cited (judgment of the General Court of 23 May 2019, *Steinhoff and Others* v *ECB*, T-107/17, EU:T:2019:353, paragraph 140 and the case-law cited, and Judgment of the General Court of 9 February 2022, *QI and Others* v *Commission and ECB*, T-868/16, EU:T:2022:58, paragraph 90 and the case-law cited).

[32] Judgment *Malacalza*, C T-134/21, paragraph 37, and the case-law cited (judgment *Steinhoff*, T-107/17, paragraph 77 and the case-law cited, and judgment *QI*, T-868/16, paragraph 90 and the case-law cited).

[33] Judgment *Malacalza*, C T-134/21, paragraph 38, and the case-law cited (judgments *Bergaderm*, C-352/98 P, paragraph 43; *Accorinti*, T-79/13, paragraph 67; and *Nausicaa*, T-749/15, paragraph 69).

[34] Judgment *Malacalza*, C T-134/21, paragraphs 38-41.

to Article 4 of Regulation No 1024/2013) that, on account of their complex nature, "justify granting the ECB, according to the case-law, a broad discretion."[35]

Taking into account the reasoning reported here and the case law recalled, the General Court concluded that, in the *Malacalza* case, "if the applicants wish to establish the non-contractual liability of the ECB, they must prove to the requisite legal standard that the ECB seriously and manifestly disregarded, beyond the discretion conferred on it, a rule of EU law conferring rights on individuals". Moreover, in order to determine whether such an infringement has been committed, the Courts of the European Union must take into account, in the light of the information put forward by the applicants, "the broad discretion conferred on the ECB in the exercise of its prudential supervision tasks."[36]

Just a few months before the *Malacalza* ruling, in a Judgment of March 7th, 2024 rendered in the case *OC* v *Commission*, the Court of Justice had ruled in a different matter - but always in relation to an action for damages brought to establish non-contractual EU liability and obtain compensation for damage caused by unlawful acts and conduct committed by the EU Institutions or bodies - with a significant judgment that should be recalled.[37]

In this case the Court of Justice did not reject the applicants' appeal, as in the *Malacalza* case, but ruled on the request for annulment of the General Court's judgment of May 4th 2022 (hereinafter: the judgment under appeal),[38] in the sense of only partially annul the judgment while dismissing the appeal as to the remainder. In particular, the Court considered that it was not in a position to make a definitive decision given that «the state of the proceedings does not permit final judgment to be given in the matter», thus effectively denying an immediate compensation for the alleged damage suffered by the appellants referring the case back to the General Court.[39]

More in detail, it should be recalled that in the case *OC* v *Commission* the appellant OC (a Greek national, university researcher in the fields of nanotechnology applications, energy storage and biomedicine) asked to have set aside the judgment under appeal, by which the General Court rejected her action under Article 268 TFEU seeking compensation for the damage she allegedly

[35] *Ibid*., paragraphs 42-45.

[36] *Idem*, paragraphs 46-47.

[37] Judgment of the Court of 7 March 2024, *OC* v *Commission,* C-479/22 P, ECLI:EU:C:2024:215.

[38] The judgment under appeal is the Judgment of the General Court of 4 May 2022, *OC* v *Commission*, T-384/20, EU:T:2022:273.

[39] Judgment of the Court, *OC* v *Commission*, C-479/22 P, paragraph 93.

suffered as a result of Press Release No 13/2020 of the European Anti-Fraud Office (OLAF) of 5 May 2020, entitled 'OLAF investigation uncovers research funding fraud in Greece' ('the press release at issue'), in that it allegedly unlawfully processed her personal data and conveyed false information about her.[40]

On that point, the Court of Justice decided to annul the General Court judgment under appeal "in so far as, by that judgment, the General Court rejected the form of order of the action seeking an order that the European Commission pay compensation for the damage resulting from the infringement by the European Anti-Fraud Office (OLAF) of its obligations under Regulation (EU) 2018/1725, of the principle of the presumption of innocence and of the right to good administration."[41]

As to the remainder, as said, the Court of Justice has dismissed the appeal.[42]

The 2024 Judgments briefly examined here, which represent only some and more significant ones among the many ruled by the Union Courts, even recently, on the subject of action for damages against the EU, fall fully within the scope of a consolidated line of case-law which, as mentioned, tends to deny the non-contractual liability of the EU and the recognition of compensation for damages.

In all the examined cases the appeals were rejected or only partially accepted by the EU Jurisdictions, denying the EU liability and a compensation for damages to the appellants.

4. Conclusion

From the regulatory and jurisprudential data, even the most recent ones so far examined, a persistent difficulty emerges in making the action for damages an effective instrument of protection for individuals towards the damages caused by the institutions of the European Union.

On this point many Scholars agree, albeit with some differentiations. For example, in Van Dam's opinion, the case law of the Union Courts gives

[40] *Ibid*., paragraph 1.

[41] *Ibid*., paragraph 94.1. The reference is to the Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21/11/2018, 39–98.

[42] Judgment of the Court, *OC* v *Commission*, C-479/22 P, paragraph 94.2.

"only a modest contribution to breaking down immunities of public bodies",[43] also because the hurdles set up by the Courts are so strict as to endanger "the effectiveness of the rules of liability for breach of EU law."[44]

For Nina Półtorak "the liability in damages of the EU can hardly be treated as an effective remedy protecting individuals."[45]

Also with specific regard to the requirement of fault, some Authors have underlined how the Courts require "proof of special and abnormal damage" to the applicants in order to demonstrate a "sufficiently flagrant violation" and a 2manifest and grave disregard of the limits on the exercise of power".[46]

For all these reasons, it can be agreed with the mentioned Authors in assessing the difficulty, in practice, of enforcing the provisions of the EU Treaties concerning the non-contractual liability of the European Union through the instrument of the action for damages.

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TUŽBA ZA NAKNADU ŠTETE PROTIV EVROPSKE UNIJE: TEŠKO PRIZNAVANJE ODGOVORNOSTI EU U NOVOJ PRAKSI SUDA PRAVDE EU

Apstrakt

Tužbu za naknadu štete protiv Evropske unije (EU) može podneti svako lice koje smatra da EU snosi vanugovornu odgovornost. Konkretno, Sudu pravde Evropske unije može da se obrati direktno u cilju utvrđivanja odgovornosti Unije i dobijanja naknade za štetu prouzrokovanu protivpravnim radnjama i ponašanjem institucija ili tela Evropske unije ili za štetu koju su prouzrokovali njihovi službenici u obavljanju svojih dužnosti.

Ta vrsta aktivnosti kao što je poznato, nije tipična samo za pravo Evropske unije, jer većina pravnih sistema – i država i međunarodnih organizacija – predviđa odgovornost javne uprave za štetu nanetu pojedincima.

[43] C. Van Dam, 533.

[44] *Ibid.*, 50.

[45] N. Półtorak, 439.

[46] L. Antoniolli, „Community Liability", in: *Tort Law of the EC. Tort and Insurance Law* (ed. H. Koziol, R. Schulze), Springer, Vienna 2008, 238.

Na nivou Evropske unije, ovaj skup pravila je kodifikovan ugovorima i sadržan je u nekoliko nejasnih regulatornih odredbi, koje se u osnovi odnose na opšta načela koja su zajednička za zakone država članica (Član 340 Ugovora o funkcionisanju Evropske Unije).

S obzirom na značajne razlike između nacionalnih regulatornih sistema u državama članicama EU u vezi sa navedenim pitanjem, kao i samoj nejasnoći odredbi Ugovora EU, centralnu ulogu je, vremenom odigrao Sud pravde Evropske unije. U praksi, pa čak i novijoj suda pravde Evropske unije, može se uočiti teško prepoznavanje odgovornosti Unije, a što predstavlja predmet analize u ovom radu.

Ključne reči: tužba za naknadu štete, kompenzacija, Evropska unija, odgovornost EU, sud pravde Evropske unije.

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STATE'S LIABILITY FOR DAMAGES CAUSED BY FAILURE TO PROTECT THE PRISONER FROM BEING ILL-TREATED BY INMATES**

Summary

The topic of the research is related to the liability of state for failure of state authorities to protect the life and integrity of prisoners from violence other prisoners. The aim of research is a critical review of the normative framework in the Republic of Serbia and judicial practice.

The state liability in tort is clearly the attainment or the rule of law (Rechtstaat). The responsibility of the state for violations of basic human rights and freedoms, especially the rights of the prisoners and other persons for whom the state takes care is universally has become a universally accepted rule in the modern times. The comparative analysis shows that the common law legal system has recognized until recently the immunity of the state and strictly personal responsibility for the unlawful acts of state officials, but the concept of human rights protection has influenced changes, as shown by the examples of Great Britain and the United States of America. The tort liability of the EU Member State, for damages caused to the other EU Member State, legal entity or individual emerges as a new hybrid legal phenomenon.

The Constitution of the Republic of Serbia defines the liability of the state in case of unlawful or improper work of its organs. This guarantee is specified primarily in the Law on Contract and Torts and the Law on Enforcement of Criminal Sanctions. Examples of good

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judicial practice were highlighted - judgments of the Appellate Court in Belgrade (Gž 4868/15) and the Supreme Court (Rev 661/2017). The judgment of the Supreme Court insists on the non-fault (strict) liability of the state for damage if the failure of the prison administration to prevent il-treatment between prisoners. Such determination supports the practice of the European Court of Human Rights.

Keywords: *Strict Liability, Tort Liability, Prisoner's Rights, Violence in Prison, Human Rights*

1. Introduction

On February 4th, prisoner S.B. (age 74) died in the prison "Padinska Skela". He was abused for days by inmates from the same room.[1] The cause of violent death of S.B. was established by autopsy on March 8th, 2024. The Prison administration of Republic of Serbia considers that there is no state responsibility, even though the abuse of S.B. was not prevented. After the supervision, the director of the prison was dismissed and disciplinary proceedings were initiated against several officers, medical officer included. From the description of the circumstances, it is clear that other prisoners tortured S.B. what led to his 'unnatural'[2] but it was not directly caused by unlawful actions of the prison officers. Three prisoners will be held accountable for murder and will be liable for damages to the relatives of the murdered S.B. However, the question of the state's liability for damage due to the death or injury of a prisoner can be raised, since the state has a duty to provide care for the prisoners and other persons deprived of their liberty (in jails, prison or psychiatric hospital, police stations, correctional institutions etc.), especially to protect their rights to life and physical and mental integrity. Moreover, state could be liable because of failure to control work of private institutions (hospitals, prisons) in which violent death or injury violence of the inmate has occurred.

[1] D. Ljutić, "Jecaji sistema – Zakon ćutanja za smrt starca u KPZ-u Padinska skela", *Direktno*, 21. 3. 2024., D. Čarnić, "Zatvorska uprava odbija optužbe da nije blagovremeno reagovala u slučaju ubistva osuđenika", *Politika*, 21. 3. 2024., M. Derikonjić, "Istražuju se propusti koji su doveli do smrti osuđenika u zatvoru", *Politika*, 26. 03. 2024.

[2] "'Unnatural' death in prisons are suicides, homicides, State-sponsored executions or 'accidental' work-related deaths" but the line between 'natural' or 'unnatural' death in prison is not always clear, and decisions as to where it is drawn are subjective (Blue, 2012 from: D. M. Doyle, S. Scott, "Criminal Liability for Deaths in Prison Custody: The Corporate Manslaughter and Corporate Homicide Act 2007", *The Howard Journal* 3/2016, 299).

The mentioned example opens the problem of tort liability of the state for damage caused by the exercise of state power, which as a border area, connects private and public law – more specifically, tort law, international public law, and constitutional law (in areas of protection of human rights), as well as administrative law. In modern times, the state's liability for damage has been modified based on the concept (from public law) of prime responsibility and duty of state to protect and implement basic human rights and fundamental freedoms in a democratic society and that is why in the paper cannot avoid referring to Art. 2 and 3 European Convention on Human Rights and Fundamental Freedoms – ECHR (human right of life and right to integrity of person) and international standards of the United Nations and Council of Europe on the rights of prisoners and the prohibition of torture, inhuman and degrading treatment, which are fully accepted in the legislation of the Republic of Serbia. However, the primary goal of the analysis is to examine the solutions of domestic legislation and practice in the field of tort law, according to the hypothesis that they are very progressive. The analysis is preceded by an explanation of doctrinal positions and basic differences in comparative law regarding the legal possibility of the state being liable for damage to citizens, including prisoners and other persons under its care.

2. Theoretical Approach

State's liability in damages is a special type of legal responsibility, which can only arise in condition of supremacy of law in democratic society (state founded on the rule of law so called *Rechtsstaat* in German). Theoretical concepts of the basis of state liability for damage caused by administrative actions to citizens in exercise to power are various and can be determined by law, ranging from principled immunity of the sovereign state to the acceptance that state responsibility (or liability).[3] Theoretical concepts have the characteristics of the time in which they were created (19th century) and tradition of the development of law systems both in common law and continental law.[4]

[3] N. Mrvić-Petrović, N. Mihailović, Z. Petrović, *Vanugovorna odgovornost države za štetu pričinjenu njenim građanima*, Institut za uporedno pravo, NIO Vojska, Beograd 2003, 60–67.

[4] The concept of state's tort liability is most fully developed in German law theory. It is most restrictively regulated in common law. Special "hybrid" the regime of liability of a member state of the European Union (EU) due to a violation of EU law appears (N. Mrvić-Petrović, N. Mihailović, Z. Petrović, 90–96; M. Bukovac Puvača, N. Žunić Kovačević, "Problem temelja odgovornosti države za štetu prouzročenu

Since the half of the 20th century, the prevailing view is that the state must be responsible for violations of human rights and basic freedoms of its citizens.

This had a particular impact on the common law system, in which is accepted that no duty in damages of the state can be imposed because the power is exercised for the benefit of the citizens generally. Thus, in Great Britain, the adoption of the Human Rights Act in 1998, which implemented ECHR, had the effect that the principles of private law must be adapted to the protection of the fundamental rights of detained persons – although the public still consider controversial court decision which is obliges the Ministry of Justice to compensate the prisoner (especially the perpetrator of the most serious crimes) who was attacked in prison by other prisoners.[5] ECHR rights have made it possible for a prisoner to refer to the provisions of Art. 2 and 3 of the ECHR even when he was harmed in an attack instructed by other prisoners, based on the positive obligations of the prison authorities in accordance with Art. 2 and 3 of the ECHR to take reasonable measures to protect prisoner's right to life, which was also accepted in court practice in UK (case *Newell v. The Department of Justice, 2021)* which Foster analyzes.[6]

A special act additionally prescribes the corporate criminal liability of prison staff to prisoners under the Corporate Manslaughter and Corporate Homicide Act of 2007.[7] In the law of the United States of America, for example in the legislation of the State of California, it may be expressly provided that the public authority shall not be liable for any injury done to a prisoner by fellow inmates, nor it would be possible to establish liability of public officer (guard), unless he had a duty to prevent such injuries – when his liability is based on the employee's negligence.[8]

In the context of the rights of prisoners and persons in custody in addition to basic human rights documents, international law is of high importance, especially rules provided by the United Nations[9] and Council of

nezakonitim i nepravilnim radom njenih tijela", *Zbornik Pravnog fakulteta u Rijeci* 1/2011, 272–280).

5 S. Fooster, "Dangerous Prisoners and Attacks on fellow prisoners", *Coventry Law Journal* 1/2021, 95.

6 S. Fooster, 93, 97.

7 D. M. Doyle, S. Scott, 295–311.

8 C. W. Sanders, "The Sovereign Should Be Liable for the Wrongful Injury of Prisoners", *McGeorge Law Review* 1/1971, 711–712.

9 Standard Minimum UN Rules for the Treatment of Prisoners, 1955. Resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, appended in 1985, reviewed by the Nelson Mandela Rules (General Assembly resolution 70/175, annex,

Europe,[10] related to the position of inmates in the penitentiary system and for the prohibition of torture, inhuman and degrading treatment.

Protection of the rights of prisoners in proceedings before the European Court of Human Rights is subsidiary realized, under special conditions,[11] so that the primary question of the state's responsibility for damage according to national law in the proceedings conducted by domestic courts.

The state's liability for damage is usually liability for another. The state is liable for the damage caused by the actions or omissions of the state authorities or generally of employed in public service, especially if such actions are resulting in harm or human rights violations. It is less often allowed to the state's liability without of the fault (willful intent), or failure, or the misconduct of the public servant (strict liability).[12] The state's strict liability is allowed exclusively for tortious damage, caused under specific conditions, even when the damage is caused when the authorities are been strictly conducted with the legal rules.[13] The law may be determined that the state is strictly liable for damage in various cases, but the most significant are the cases in which the state should take care of some persons or objects of property. The prisoners are a persons cared for by the state, so theoretically is clear that the state could and should be liable for damage under a prisoner's unnatural death or injury. The state can be liable for damage only when it is bound by a legal relationship with the person who caused the harm. If the harm was caused by the actions of the state authorities, such liability of the state would always be

adopted on 17 December 2015); The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 59/46 on 10 December 1984 entered into force on 26 June 1987.

[10] Convention for the Protection of human Rights and Fundamental Freedoms (1950) with amendments from Protocol 11 and Protocols 1, 4, 6, 7, 12 and 13; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987; Recommendation R (2006) 2 on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952nd session at the level of deputy ministers; Recommendation R (2006) 13 on use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of minister's deputies .

[11] V. Ćorić, *Naknada štete pred evropskim nadnacionalnim*, Institut za uporedno pravo, Beograd 2017, 25–123.

[12] In european tort law so called objective (non-fault) liability, or in german law doctrine, "liability for damage without of fault" (J. Radišić, *Imovinskopravna odgovornost i njen doseg*, Beograd 1979, 42).

[13] I. Krbek, *Odgovornost države za štetu*, Zagreb 1954, 573.

absolute (strict liability) – in such case liability of state is never based on the fact that the state could foresee or intended the harmful consequence.[14] In the described case of the prisoner's death in prison "Padinska skela", the failure of the prison authorities to notice and to react to attacks on the abused prisoner by other inmates can be considered as a "failure" of state, if the disciplinary responsibility of the officers is proven. But, as Digi would say, the state's liability for damaged does not even need to be based on the concept of wrongful duty of public authority[15] - the idea was accepted decades later within the concept of the state's responsibility for a violation of human rights, which are the counterpart of former (civil) the personal rights.

3. The Normative Framework in the Republic of Serbia

In the Republic of Serbia, the legal source of the state's tort liability for damages caused by prisoner's unnatural death or injury or by other person deprived of liberty under care of the state are accepted public international law, the Constitution of the Republic of Serbia[16] (Constitution) and general rules in the law on compensation for damages. It is prescribed in Article 18 of Constitution: "The Constitution shall guarantee, and as such, directly implement human and minority rights guaranteed by the generally accepted rules of international law, ratified international treaties and laws". The right to life and the inviolability of physical or mental integrity are guaranteed by special provisions (art. 24 and 25) of the Constitution. In the art. 35 sec. 1 of the Constitution is guaranteed the right to rehabilitation and compensation of damage by the Republic of Serbia for any person deprived of liberty, detained or convicted for a criminal offence without grounds or unlawfully. In art. 35 sec. 2 of the Constitution is particularly prominent that "(e)veryone shall have the right to compensation of pecuniary or non-pecuniary damage inflicted on him by unlawful or irregular work of a state body, entities exercising public powers, bodies of the autonomous province or local self-government". So, the Constitutions of the RS expressly provides for the responsibility/liability of the state for damage caused by the unlawful or irregular work of the state authorities.

[14] H. Kelzen, *Opšta teorija prava i države štetu,* Centar za publikacije Pravnog fakulteta, Beograd 1988, 124.

[15] L. Digi, *Preobražaji javnog prava*, Centar za publikacije Pravnog fakulteta, Beograd 1998, 170.

[16] *Official Gazette of the RS*, No. 98/2006 of 10 November 2006, 115/21 of 30 November 2021 and 16/22 of 9 February 2022.

The Law of Contract and Torts (Zakon o obligacionim odnosima – hereinafter ZOO) is a general law on obligations, tort liability, and compensation for damage. That law, as *lex generalis,* also regulates the liability of enterprises and other legal persons (including the state) in Subsection 4. Different legal grounds of the state's liability for damage by ZOO have been provided: liability for damage caused by an employee while working or in relation to work to a third person (based on presumed fault) and strict liability based on necessity of duty of care for dangerous objects of property or dangerous activity.

The liability of the state for the damage caused by the unnatural death or injury of a person deprived of liberty is most often linked to the actions or omissions of prison authorities (prison staff). So, usually the state is liable based on Article 172 of the ZOO:

> "(1) A legal person (corporate body) shall be liable for damage caused by its members or branches to a third person in performing or in connection to performing its functions.
> (2) Unless otherwise specified by the law for specific cases, a legal person shall be entitled to recover against a person being at fault for injury or loss inflicted wilfully or by gross negligence."

The second relevant legal source is Law of enforcement of criminal sanctions (Zakon o izvršenju krivičnih sankcija – hereinafter ZIKS).[17] The Law prescribes the right of adult detained and imprisoned persons (including persons undergoing psychiatric treatment in a prison hospital). The mentioned rights are guaranteed by Article 8. ZIKS and elaborated in chapter VI ZIKS. The priority is the right to humane treatment in detention, which implies that all persons under any form of detention shall be treated with respect for the inherent human dignity, and no one must endanger his physical and mental health (Article 76). The right to humane treatment (including right to be free from torture, inhumane or degrading treatment or punishment) is basic principle from which all other his specific prisoner's rights are derived, so, providing the measure for humane treatment to prisoner is central (political and by law prescribed) function of the Prison Service.[18] In accordance with the relevant documents of the UN and CoE (especially ECHR), the state has a positive obligation to ensure the humane treatment of detained and imprisoned prisons. It primarily

[17] *Official Gazette of the RS*, No. 55/14 of 23 May 2014 and 35/19 of 21 May 2019.

[18] Coyle's observation about Prison System in United Kingdom can be apple to the prison system of any state (A. Coyle, *Humanity in Prison – Question of definition and audit*, International Centre for Prison Studies, London 2003, 10).

concerns their safety in detained institutions including the "state's obligation to protect detainess against lethal violence and imhuman treatment by other prisoners".[19]

4. The Example from the Court Practice – The Legal Opinion of Principle

On the basis of ratified international law, the Constitution and national law, court practice in Republic of Serbia has been formerd regarding the liability of the state for damage caused to prisoners. The position of the court on State liability in case when a prisoner is injured by other inmates is illustrated by the following court case.

The Supreme Court in Republic of Serbia (Vrhovni kasacioni sud – hereinafter Supreme Court) in case Rev 661/2016 in the decision of 19 January 2017 adopted a position confirming the judgment of the Court of Appeal in Belgrade Gž 4868/15 of 3 December 2015 and rejected the revision[20] of the defendant (Republic Attorney General's Office the Republic of Serbia) against the judgment of the Court of Appeal in Belgrade as unfounded. By the Judgment of the Court of Appeal in Belgrade Gž 4868/15 the state was obliged to pay the plaintiff 200000 dinars as compensation for non-pecuniary damages, of which 80000 dinars for the physical pain suffered, and 120000 dinars for the fear suffered, with interest from the moment of the first-instance judgment until payment.[21]

The claim for damage against the state was initiated by an ex-prisoner. He was convicted for drug abuse and during of sentence was been treated for drug addiction in Special Prison Hospital. In May 2009 he was beaten by other prisoners in the Special Prison Hospital. A medical expert witness established that the plaintiff has "a lesion of the auditory nerve which may be the result of trauma and the injury to the middle and inner ear", as well as that he suffered

[19] P. H. van Kampen, "Positive Obligations to Ensure the Human Rights of Prisoners Safety", in: *Prison policy and prisoners' rights. The protection of prisoners' fundamental rights in international and domestic law,* (eds. P.J.P. Tak, M. Jendly), Wolf Legal Publishers, Nijmegen 2008, 31; similarly in: N. Mrvić Petrović, *Kriza zatvora*, Vojnoizdavački zavod, Beograd 2007, 362–372.

[20] In the civil court procedure in Republic of Serbia the revision is an extraordinary legal remedy against a final judgment.

[21] About compensation on suffered physical physical, mental pain and suffered fear in the law and in court practice in the Republic of Serbia see: Z. Petrović, N. Mrvić Petrović, "Fear as a form of non-pecuniary damages", *Strani pravni život* 4/2015, 31–41; N. Mrvić Petrović, Z. Petrović, "Compensation on suffered physical pain", *Strani pravni život* 4/2016, 9–19.

severe physical pain and fear after the injury. In the first-instance court proceedings, his claim against the state was rejected, but the second-instance court (the Court of Appeal in Belgrade) ruled in favor of the plaintiff. In the judgment concluded that in the litigation was proven that there was a causal connection between the harmful action and the harm suffered by the plaintiff. Although other prisoners attacked and injured the plaintiff, by its decision, the court obliged the defendant (the Republic of Serbia) to pay monetary compensation. The court established that the cause of the damage was the failure of the prison staff to prevent the inmates from fighting and, based on Article 172 of the ZOO, obliged the defendant Republic of Serbia to compensate for the damage.

The defendant submitted the revision against the final judgment, but the Supreme Court confirm the final judgment with its decision. The court states in decision that "human dignity and the right to the health (…) are personal rights – human rights protected by Article 200 of the ZOO".[22] The Article 200 sec. 1 guarantees the right to compensation for non-pecuniary damages "for physical pains suffered, for mental anguish suffered due to reduction of life activities, for becoming disfigured, for offended reputation, honor, freedom or rights of personality, for death of a close person, as well as for fear suffered, the court shall, after finding that the circumstances of the case and particularly the intensity of pains and fear, and their duration, provide a corresponding ground thereof – award equitable damages, independently of redressing the property damage, even if the latter is not awarded". In the same way as the Court of Appeal in Belgrade says in judgment, the Supreme Court also considers that there is omission in the work of prison staff who allowed a group of prisoners to beat the plaintiff and caused him physical injury (injury to the middle ear), namely caused him the forms of non-material damage recognized by law under Art. 200 (physical pain and fear of strong and medium intensity). The omission in the work of prison staff have, in the sense of law (the Art. 172 ZOO), the significance of a failure in work (irregular work) of the prison staff and Prison Administration generally. But the Supreme Court uses a different approach and finds a different legal ground for the state's liability for damage. It is the strict liability under Art 154 sec. 3 ZOO.[23] The Supreme Court rejected as unfounded the claims of the defendant that the state is not liable for the dam-

[22] Rev 661/2016 from 19 january 2017, Decision of the Supreme Court of Cassation, https://www.vrh.sud.rs/en/decisions-supreme-court-cassation-, last visited 22. 4. 2024).

[23] Article 154 ZOO (foundations of liability) specifies the principle *neminem laedere* and defines the fault as a basis of liability and strict liability for dangorous objects of property and dangerous activity (sec 1, 2). Sec 3 defines "Liability for injury or loss without of fault shall ensue also in other specified by law".

age because there were no unlawful or irregular work by officials, or that they were not proven and the argument that incidents in prisons occur regularly and cannot always be prevented, because the state is strict liable "for ensuring prison conditions that do not threaten the physical integrity of prisoners (who are there against their will) and for the omissions of prison staff (responsibility for another) who did not exercise control and supervision and prevent harm". So, in the decision the Supreme Court did not dwell only on the application and interpretation of the obligation law (Art 172 of the ZOO), but also referred to the constitutional provision that the state is responsible for unlawful or irregular work of the state authorities. Also, the Supreme Court insisted in explaining the decision on the importance of the principle of the humane treatment when deprived in liberty proclaimed in ZIKS. There are special legal foundations on which the state is obliged to be strictly liable for damage to prisoners.

Application of the rule on assumed subjective liability (based on the fault of public officers) from Art 172 ZOO allows the defendant to be released from liability, if the damage suffered by the injured party (prisoner) was not caused by the actions of the prison staff, but by the violent actions of other prisoners (s-c. "third parties" in sense of Art 172 ZOO). But the Supreme Court presents a legal position that "prisoners are not considered third parties whose actions caused damage that the prison administration in correctional institution not foresee and prevent, in order to be released from liability based on Article 172 of the ZOO".[24] The argument in the explanation of the decision of the Supreme Court was absent because it is clear that the prisoners are an integral part of the prison system. The states authorities (prison staff) are obliged to ensure the functioning of prison system, which includes responsibility for supervising the behaviors of all prisoners or detained person kept in prisons. In other word, managing and reducing violence in prison is a priority issue for the prison administration.

5. The Discussion and the Epilogue

The decision of the civil division of the Supreme Court of Serbia Rev 661/2017 is based on the Constitution, domestic legislation and previous practice. It also agrees with the European Court of Human Rights cases regarding state responsibility for violations of Art. 2 and Art 3 ECHR. In this time, the Supreme Court could have taken into account that since 4 April 2014, proceedings before the ECHR have been ongoing against Serbia due to

[24] The Supreme Court of Republic of Serbia, Rev. 661/2016.

ill-treatment prisoner by prison staff (case *Jevtović v. Serbia*[25]). At the same time, the Council of Europe with the European Union and the Government of the Republic of Serbia are working together to enhancing the human rights protection for detained and sentenced persons in Serbia.[26]

The described court case (Rev 2016/2017) is significant as the legal opinion of principle in judicial practice. The decision of the Supreme Court is important because strict liability of the state for damages suffered by ill-treatment one prisoner by his cellmates under the conditions of serving a prison sentence is established. So, the plaintiff is in a position to simply prove the state's liability. It is sufficient to prove that he was ill-treated or that his relative was killed in prison (the event of damage) and the causal link between the such events and the suffered non-pecuniary damage, in sense of Art 200 ZOO.

The epilogue of the death of a prisoner in prison S.B. in penal institution "Padinska Skela" is the control of the prison system and the initiation of criminal proceedings. The State Ombudsmanperson (Zaštitnik građana Republike Srbije) found in his monitoring report "that the health service acted unlawful and irregular in the specific case, because the examinations now deceased AA, which in the reports of the Security Service stated that they were carried out on 25 January 2024 and 1 February 2024 were not recorded in accordance with the regulations, that is, there is no information in the medical documentation that they were performed, and during the medical examination that was performed on February 3, 2024. No photographs were taken of the stated injuries, but were taken by a medical technician on February 4, 2024. in the bedroom where he is now deceased. AA stayed. The medical technician did not inform anyone about the new injuries, although there are visible injuries on the chin and cheeks that were not observed during the examination that was performed on February 3, 2024. represented a sign or indication that violence was used against AA. In addition to the above, it was also determined that the employees of the Security Service acted improperly, because the observed condition, i.e. the visible physical changes of AA, as well as the reasons for which the 4.02.2024. moved to another dormitory, they did not make an official note or report it further to their superiors in the prescribed manner".[27] On the death of the prisoner, the Higher Public Prose-

[25] Application no. 29896/14, judgment from 3 September 2019, https://hudoc.echr.coe.int/eng?i=001-163134.

[26] The Council of Europe, "HR III Serbia", 2016, https://www.coe.int/en/web/cooperation-in-police-and-deprivation-of-liberty/hf-iii-serbia-enhancing-the-human-rights-protection-for-detained-and-sentenced-persons, last visited 22. 04. 2024.

[27] The Ombudsman of the Republic of Serbia, Zaštitnik građana utvrdio brojne

cutor's Office in Belgrade investigates the criminal liability of five employees (four guards and a doctor).[28]

Possible criminal convictions are not enough satisfaction for the victims. If there is no criminal procedure against the perpetrators and public officials, relatives of the deceased, even if they receive compensation from the state in civil proceedings, will be able to initiate proceedings before the European Court of Human Rights, demanding appropriate satisfaction on the Art 41 ECHR, such in case *Gjini v. Serbia*.[29] The circumstances of the case are very similar because the applicant (Fabian Gjini) had been ill-treated by his cellmates, when he had been 16 days detained in prison "Sremska Mitrovica" on suspicion of attempting to pay a toll at a border crossing with a counterfeit ten-euro banknote. Like in the case of unnatural death of S.B. in prison, applicant Gjini was not allowed to report assaults by other inmates, and prison authorities failed to reacted to visible signs of violence on his body. During the 2013 the Court of First Instance the claim of the applicant Gjini 200000 dinars (approximately EUR 1900) in respect of non-pecuniary damage (for the 10% loss in his general vital activity associated with the events in detention). In appeal procedure Court of Appeal in Belgrade awards to the applicant additional 50000 dinars (approximately EUR 450) for the fear arising from the events during his detention.[30] The European Court of Human Rights recognized the fact that the domestic courts decided on 2350 EUR of compensation to the applicant in civil proceedings against the state, but estimates compensation amounts to EUR 25,000 for non-pecuniary damage (just satisfaction on the basis Art 41 ECHR).

6. Conclusion

Cases of state liability for the unlawful treatment, violent actions or torture from prison staff or failure to given the medical aid or prevent a prisoner's suicide in prison are not discussed here. Also, according to the laws of the Republic

propuste u radu KPZ u Beogradu – Padinskoj Skeli, report, 10 April 2024, https://www.ombudsman.rs/index.php/2012-02-07-14-03-33/7987-z-sh-i-ni-gr-d-n-u-vrdi-br-n-pr-pus-u-r-du-pz-u-b-gr-du-p-dins-s-li, last visited 22. 4. 2024.

[28] RTS: Hronika, "Petoro zaposlenih u KPZ Padinska skela negiralo krivicu u vezi sa smrću zatvorenika, tužilaštvo tražilo pritvor, 28. 6. 2024, https://www.rts.rs/lat/vesti/hronika/5475568/padisnka-skela-saslusanje-vjt-.html , last visited 1. 7. 2024).

[29] Application 1128/16, Chamber judgment of 15. january 2019, https://hudoc.echr.coe.int/eng?i=001-189168.

[30] *Gjini v. Serbia*, Chamber Judment of 15 January 2019, paras. 38, 39.

of Serbia, the state is in any case liable for the damage caused to citizens by an escaped prisoner. The research topic is domestic normative framework and judicial practice about the State's liable for damage suffered by a convicted person through violent actions by other prisoners. A critical examination of the quality of domestic legislation from the doctrine results in the conclusion that the laws of the Republic of Serbia are fully harmonized with the standards of protection of the human rights of persons deprived of their liberty and the rules of civil law guarantee an optimum of rights regarding compensation of damages (pecuniary and non-pecuniary). Apart from so-called, liability for the acts of another person (Art 172 ZOO), the state is strict liable for damages under the Constitution and the special laws. Such an approach is supported by judicial practice. Therefore, no differences can be observed between the positions of the domestic judicial practice and the practice of the European Court of Human Rights, in which is usually State's liability stricter compared to the domestic legal system. The only differences are in the amount of compensation, which is many times lower than the satisfaction obtained in the proceedings before the European Court of Human Rights.

Although we can be satisfied with the legal rules on state responsibility and the way they are implemented in practice, much more needs to be done to improve the protection of life and integrity of prisoners. But the basic question arises whether S.P. should have been in prison at all due to the unpaid the fine (similar to Mr. Gjini was detained on suspicion of giving counterfeit 10 euros). The given examples are confirmed the conclusion that "when the courts send to prison people whom prisons can only hold inappropriately then they are contributing to inhumane treatment".[31]

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ODGOVORNOST DRŽAVE ZA ŠTETU ZBOG PROPUSTA ZAŠTITE ZATVORENIKA OD ZLOSTAVLJANJA DRUGIH ZATVORENIKA

Apstrakt

Predmet istraživanja jeste odgovornost države za štetu zbog propusta državnih organa da zaštite život i integritet osuđenika koga zlostavljaju drugi zatvorenici. Cilj istraživanja je kritičko sagledavanje normativnog okvira u Republici Srbiji i stavova sudske prakse.

[31] A. Coyle, 15.

Vanugovorna (deliktna) odgovornost države za štetu koja je pričinjena građanima aktima vlasti je očigledno dostignuće vladavine prava (Rechtstaat). U savremeno doba postalo je opšteprihvaćeno pravilo da država može da bude odgovorna, na nacionalnom i nadnacionalnom nivou, za kršenja osnovnih ljudskih prava i sloboda, posebno prava zatvorenika i drugih lica o kojima preuzima brigu. Uporedna analiza pokazuje da je donedavno u *common law* sistemu dosledno poštovan imunitet države, dok je za štetu isključivo mogao da snosi odgovornost državni službenik koji nezakonito vrši vlast ili javnu službu. Koncept zaštite ljudskih prava podstakao je promene, kao što pokazuju primeri iz zakonodavstava Velike Britanije i Sjedinjenih Američkih Država. Pored toga, kao noviji pravni fenomen „hibridnog" karaktera pojavljuje se deliktna odgovornost države članice Evropske unije za štetu pričinjenu drugoj državi članici, pravnom ili fizičkom licu.

Ustav Republike Srbije izričito propisuje odgovornost države u slučaju nezakonitog ili nepravilnog rada njenih organa. Ustavna garantija konkretizovana je u Zakonu o obligacionim odnosima, koji se, kao opšti pravni akt, odnosi na sve slučajeve prouzrokovanja štete. Drugi izvor prava jeste Zakon o izvršenju krivičnih sankcija, koji predviđa zaštitu prava osuđenih lica, a naročito njihovog života, telesnog i duhovnog integriteta. U radu su istaknuti primeri dobre sudske prakse – presuda Apelacionog suda u Beogradu (Gž 4868/15) i Vrhovnog kasacionog suda Republike Srbije (Rev 661/2017). Vrhovni sud u presudi kojom odbacuje reviziju tužene države insistira na objektivnoj odgovornosti države za štetu po osnovu čl. 154 st. 3 Zakona o obligacionim odnosima u slučaju kada postoji propust zatvorskih službenika da spreče tuču zatvorenika u kojoj je tužilac povređen. Ovakav stav Vrhovnog suda u svemu se naslanja na važeću praksu Evropskog suda za ljudska prava.

Ključne reči: objektivna odgovornost, deliktna odgovornost, prava zatvorenika, nasilje u zatvoru, ljudska prava.

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EXPERTISE OF SUFFERED FEAR IN LITIGATION DAMAGES COMPENSATION – THE POSSIBLE PROBLEMS AND THE ROLE OF PERSONALITY ASSESSMENT

Summary

Non-pecuniary damage (or non-material damage in Law on Contract and Torts of the Republic of Serbia) represents a consequence of a specific aspect of violation of personal rights. Fear is one such consequence, that can vary in intensity, and duration, and those two characteristics, with eventual long-term consequences, determine the possibility for the court to award a monetary compensation. In the process of deciding, the court relies on an expert witness, in this case a psychiatrist.

The psychiatric expert can face several potential problems. This paper describes some of the problems arising from the side of a witness, and their conflicting professional roles, and problems related to assessment itself, mainly related to personality assessment, or a lack of it in the process expertise. Personality characteristics are influencing the way of reacting; therefore, it is important to include the assessment in the process of expert psychiatric evaluation.

Keywords: *Non-pecuniary Damage, Expert Witness, Psychiatrist, Personality Assessment.*

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1. Introduction

Non-pecuniary damage arises from the violation of personal rights causing physical or psychological pain or fear. By provision of article 200 of the Law on Contract and Torts[1] of the Republic of Serbia prescribes certain forms of s-c. non-material damage. Among other provisions, it stipulates that if circumstances of the case, especially the intensity and duration of the fear, justify it, the court will award fair monetary compensation for suffered fear, regardless of any compensation for material damage or in its absence.

Fear reflects a lasting and intense state of mental distress in the affected physical person resulting from serious threats to fundamental values (life, personality, health, property) of the affected person or someone close to them. Fear involves the perception of immediate threatening danger.[2] However, not every psychologically identified fear qualifies as fear in the legal sense. Namely, the right to compensation for damages is granted only if the suffered fear is intense and prolonged.

Fair monetary compensation may be awarded for fear that was intense and of longer duration. Compensation may also be awarded if intense fear was short-lived but disrupted the mental balance of the affected person over a longer period of time.[3]

Fear can vary in intensity. Utter fear (the strongest fear) paralyzes the affected person, while somewhat weaker panic fear induces motor agitation and significantly reduces conscious control, and anxious fear creates excitement associated with anticipated unpleasant dangers.[4]

The intensity and duration of fear are determined through the examination of a psychiatrist, testimony of witnesses, review of medical documentation, and other evidentiary means. Despite the fact that the opinion of court experts is not binding on judges, in practice, it typically has a decisive impact on the outcome of legal proceedings. Expert examination involves the application of scientific and professional knowledge, skills, and methods

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1 *Official Gazette of the SFRY*, No. 29/78, 39/85, 45/89, 57/89, *Official Gazette of the SRY,* No. 31/93, *Official Gazette of the SCG, No.*1/2003, *Official Gazette of RS*, 18/2020 *Official Gazette of the RS,* No. 18/2020.

2 J. Salma, *Obligaciono pravo,* Naučna knjiga, Beograd 1988, 457.

3 Conclusion of the Conference of Civil and Commercial Departments of the Federal Court, Supreme Courts of the Republics and Autonomous Provinces, and the Supreme Military Court held on October 15 and 16, 1986, *Bulletin of Case Law of the Supreme Court of Serbia* No. 3/2008, 70.

4 I. Babić, *Leksikon obligacionog prava*, Službeni glasnik, Beograd 2008, 202.

by the expert, who possesses specialized scientific or professional knowledge and experience, to the facts that are the subject of examination.[5] The medical expert acts independently, impartially, and objectively, regardless of the interests of the requester of the examination or the parties in the dispute. The examination must be conducted conscientiously and with the highest level of knowledge, adhering to the deadlines set for the examination, and the expert must submit an accurate and comprehensive finding and opinion, taking into account the principles of medical examination.[6]

Forensic psychiatric examination is ordered by the court to establish, interpret, and clarify medical facts that are subject to proof in legal disputes. In this regard, it is essential for the psychiatrist (neuropsychiatrist), in their capacity as an expert, to understand the societal, legal, and economic significance of the medical facts they address, ensuring that their expertise is clear and useful in resolving legal disputes.[7]

The court decides on compensation for fear after the expert has submitted his report and opinion. It is common in court practice that fear qualifies by intensity as fear of weak, medium and strong intensity. The expert is required to give explicit opinion on intensity and duration of fear. Having considered everything stated in the presentation of evidence, the court shall award the compensation only if it is justified by case circumstances, intensity and duration of fear. However, a stronger intensity of fear, but short lasting and without consequences, is not sufficient legal reason for awarding compensation. If the injured is receiving treatment in hospital, the fear experienced in hospital should be considered if he was exposed to unpleasant and aggressive treatment methods, especially if the injured is a child, which will still feel uneasy about medical staff because it reminds him on unpleasantness he experienced during the course of treatment.[8]

The expert should provide a precise assessment of the intensity and duration of fear experienced by the injured party.[9] In judicial practice, a distinction is made between primary and secondary fear, and it is undisputed

[5] G. Mrdak, „Uloga sudskih veštaka u pravosudnom sistemu Srbije", *Pravo i privreda* 1/2020, 188.

[6] Code of Medical Ethics of the Serbian Medical Chamber, *Official Gazette of the Republic of Serbia*, No. 104/2016, Art. 42.

[7] A. Jovanović, S. Milovanović, M. Jašović Gašić, „Sudsko-psihijatrijsko veštačenje poslovne sposobnosti", *Srpski arhiv za celokupno lekarstvo* 7-8/2011, 548.

[8] Z. Petrović, N. Mrvić Petrović, "Fear as a form of Non-pecuniary damage", *Strani pravni život* 4/2015, 40.

[9] A. Radovanov, „Naknada nematerijalne štete", *Pravo- teorija i praksa* 9-10/2010, 31.

that both forms of fear serve as grounds for awarding monetary compensation. It is recognized that compensation for suffered fear can be awarded even in the absence of physical injuries, provided there is a legally relevant mental disturbance of significant intensity.[10] In theory, the right to financial compensation for suffered fear is not limited to fear experienced at the moment of trauma but extends to any subsequent fear related to the harmful event, provided such fear is of sufficient intensity and duration to justify an award of compensation. The court should request from the expert a report primarily on the duration and intensity of fear. Additionally, it is the court's duty to seek the expert's opinion on all other relevant circumstances of the case, such as its causes, manifestations, and the psychological consequences experienced by the injured party (disrupted mental balance, state of psychological trauma, concern over potential consequences) and ultimately, the decision-making process heavily relies on the expert's testimony.[11]

2. The Possible Problems

Regardless of the reasonably strict conditions for the expert and for psychiatric forensic assessment, there are still some issues to be considered, especially when there is a need for a treating psychiatrist to become an expert witness. This might be the case in many Serbian courts, more often in smaller cities, with limited number of psychiatrists.

In such cases there might be a conflict between the role of a treater (physician) and the role of expert witness. This conflict does not necessarily become obvious immediately. It might appear natural to enlist a treating psychiatrist as an expert witness, since he/she already knows the patient/client, but there is also a potential problem. The problem lies in the fact, as stated by Strasburger *et al* (1997), that treating psychiatrist might automatically assume that his/her role is to "spare the patient needless suffering", and, similarly to supporting patient in the course of treatment, "advocates for the patient in court".[12] This might be even more often in cases of assessment of

[10] From the judgment of the Higher Court in Novi Sad, Case No. Gž 1672/20 dated March 1, 2021, http://bilten.osns.rs/presuda/sentenca?url=naknada-nematerijalne-stete-za-pretrpljeni-strah-u-odsustvu-postojanja-sekundarnog-straha, last visited 12. 6. 2024.

[11] D. Medić, „Značaj vještačenja u parnicama za naknadu nematerijalne štete", *Vještak* 1/2014, 23–24.

[12] L. H. Strasburger, T. G. Gutheil, A. Brodsky, "On wearing two hats: role conflict in serving as both psychotherapist and expert witness", *American Jounral of Psychiatry* 154/1997, 448–456.

fear, or other non-pecuniary, or intangible damages. Sometimes it can be an issue of countertransference, when unresolved conflicts get projected onto a client, or the treater transfers feelings to a treated person, but more often it is an issue of differing realities, i.e. subjective and objective reality. The treater deals with subjective reality of the patient, trying to see the patient's world from his vantage point, while the expert witness deals with the objective reality, in order to assist the court in reaching the decision.

There are also differences between clinical assessment and forensic assessment. Forensic assessment involves not only evaluation of the client/evaluee, it includes assessing all the relevant documentation, which is far more than what a treating psychiatrist usually does. Occasionally, even more in other judicial systems, a lawyer might be present during interview, thus creating a different dynamic of the interaction, but the process might not be limited to only a lawyer present, one of the presenting authors was offered to do the assessment in the full courtroom, with all the participants present.

The focus should also be on ethical issues, and on the most important ethical rule, *primum non nocere,* which is a guiding rule in treating position. The whole judicial process might be harming in itself, by repeating the narrative, reliving the experience, confronting the person or persons who harmed the patient, to name just a few. This issue should be approached thoughtfully, to avoid further damage.

Empathy, which is a cornerstone of a good therapeutic relationship, is in question with the expert evaluation. Even when the expert is skilled clinician, and capable of creating an empathic atmosphere, the evaluee might ultimately feel let down by the expert's report.

The question of confidentiality is another issue, since the clinicians office is a "safe place" regarding confidentiality. Courtroom, with its public presence, potentially makes private information widely available. The presence of the press makes it even more so.

This does not exclude a treating psychiatrist from an expert role, nor it is entirely possible to separate those roles always. In case there is a need for a treating psychiatrist to act as an expert witness, all sides should be aware of the possible problems.

By focusing on the potential problems stemming from the expert witness's side, we might omit problems, potentially overlooked with evaluees, namely specific characteristics of their personalities,[13] or eventual

[13] T. G. Gutheil, *The psychiatrist as expert witness*, 2nd ed., American Psychiatric publishing, Washington DC 2009, 49–50.

personality disorders, that might influence not only the way they might be dealing with fear, or other emotional issues, but the outcome of the expert evaluation as well.

3. Assessment of Personality and Personality Disorders

In the clinical assessment of assessing endured fear, one important detail is often overlooked, which can more fully objectify how much the endured fear is a consequence of adverse events versus how much the individual's personality influenced the intensity of the experience. Specifically, the personality structure exposed to an event, resulting in fear of varying intensity, is crucial in assessment due to differing perceptions, intensity of experience, and duration of the fear itself. Subsequently, the mutual influence of adverse events on the resulting fear can be assessed.

Why is this so? One example can be cited. For many years, the seven-dimensional model by Robert Cloninger, Dragan Svrakic, and colleagues[14] has described personality as divided into two main components: Temperament and Character. The dimensions of Temperament are based on extensive research into differences among major brain systems responsible for procedural and propositional learning.

According to Cloninger, the Temperament domain represents the basic structure of various brain systems that govern the activation, maintenance, and inhibition of behaviour in response to stimuli. Four Temperament dimensions are described based on individual differences in the mechanisms of behavioural learning common to all animals, explaining reactions to novelty and signals of reward or relief from punishment (Novelty Seeking), reactions to signals of punishment or non-reward (Harm Avoidance), reactions to social rewards and attachment (Reward Dependence), and sustained reactions to previously rewarded behaviour with occasional reinforcement (Persistence). Each of these dimensions is defined by neurotransmitter activity in the brain, specifically dopamine, serotonin, norepinephrine, and acetylcholine, respectively. Here, we can highlight the Harm Avoidance temperament dimension and serotonin activity, which can decrease or increase the experience of fear.

In contrast, the Character domain includes individual differences in self-concepts related to goals and values, depending on brain systems that

[14] C. R. Cloninger, D. M. Svrakic, T. R. Przybeck, "A psychobiological model of temperament and character", *Archives of General Psychiatry* 12/1993, 975–989.

developed later.[15] Character consists of three dimensions: Self-Directedness, Cooperativeness, and Self-Transcendence. Self-Directedness, based on the concept of oneself as an autonomous individual, allows a person to engage in purposeful actions, providing a sense of meaningful direction in life. Cooperativeness, based on the concept of the social self, enables a person to be tolerant and flexible in goal-related decisions, as thoughts and behaviours are guided by common interests with others. Self-Transcendence, arising from awareness of being part of a larger whole such as humanity, nature, or even the universe, helps individuals intuitively recognize values and meanings in all things. These personality dimensions enable deliberate actions and interpretation of experiences, which in turn facilitate self-regulation of emotional reactions and habits.[16]

Cloninger's biopsychosocial model, which distinguishes between non-intentional (Temperament) and intentional (Character) domains, is effective for assessing both intra-individual learning processes and inter-individual differences, addressing how individuals differ from others and the processes that motivate and regulate adaptive behavioural processes within individuals.[17]

The interaction between Temperament and Character significantly predicts the risk and resilience to anxiety and depression by modulating both positive and negative emotions. Character plays a mediating role in mitigating the negative impact of extreme Temperament traits on emotional states. Different groups within the spectrum of anxiety and depression significantly differ based on their profiles of Temperament and Character. Character plays a crucial role in mediating the influence of extreme Temperament traits on anxiety and depression. Subgroups within this clinical spectrum, varying in stress resilience, reliably predict susceptibility to anxiety and depression. The functioning of complex adaptive systems in learning and memory, assessed by profiles of Temperament and Character, can be effectively translated into comprehensive modelling approaches. This approach enables deeper

[15] C. R. Cloninger, "Evolution of human brain functions: the functional structure of human consciousness", *Australian and New Zealand Journal of Psychiatry* 11/2009, 994–1006.

[16] P. Moreira, R. A. Inman, C. R. Cloninger, "Virtues in action are related to the integration of both temperament and character: comparing the VIA classification of virtues and Cloninger's biopsychosocial model of personality", *Journal of Positive Psychology* 3/2021, 1–18.

[17] D. Cervone, „Personality architecture: within-person structures and processes", *Annual Review of Psychology* 56/2005, 423–452.

exploration of resilience, emotional reactivity, and self-management. Understanding the interactions between Temperament and Character is essential for personalized diagnosis, research into the biopsychosocial aspects of ethology, and planning effective treatment strategies.[18]

4. Conclusion

Therefore, guided by all these findings, we believe that assessing personality structure in the evaluation of endured fear in the assessment of non-material damage can help us understand that the same event leads to different consequences in different individuals. Looking for a model that can facilitate this assessment, we note that individuals with high levels of the Harm Avoidance dimension are more sensitive and susceptible, and the effects on them will last longer.

In addition to personality assessment, it should be noted that the presence of Personality disorder pathology as a diagnosis in individuals whose intensity and duration of fear in the assessment of non-material damage is being evaluated further complicates this issue. Research indicates, for example, that Avoidant Personality Disorder is characterized by low self-confidence and a strong fear of rejection. Individuals with this disorder often avoid social interactions to protect themselves from these emotions. Secondly, individuals with Borderline Personality Disorder experience intense fears of abandonment or loneliness. Despite their desire for close and lasting relationships, these fears often result in mood swings and episodes of anger. This disorder also leads to impulsive behaviour and self-harm, which can strain relationships and distance others.[19] This aspect cannot be considered as a consequence of something that causes non-material damage to the same extent as in individuals without this diagnosis.

We conclude that the assessment of personality, its dimensions according to any of the defining models, and the evaluation for personality disorders must become a new standard in judicial practice, because of evolving and expanding scientific knowledge in this field.

[18] H. C. Oh, C. R. Cloninger, "The role of temperament and character in the anxiety-depression spectrum among Korean adults", *Journal of Affective Disorders* 2024, 1–13; M. Gruber, S. Doering, V. Blüml, "Personality functioning in anxiety disorders", *Current Opinion in Psychiatry* 1/2020, 62–69.

[19] V. Palihawadana, J.H. Broadbear, S. Rao, "Reviewing the clinical significance of 'fear of abandonment' in borderline personality disorder", *Australas Psychiatry* 27 1/2019, 60–63.

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EKSPERTIZA PRETRPLJENOG STRAHA U PARNIČNOM POSTUPKU NAKNADE ŠTETE – MOGUĆI PROBLEMI I ULOGA PROCENE LIČNOSTI

Apstrakt

Neimovinska šteta (ili nematerijalna šteta kako se definiše u Zakonu o obligacionim odnosima Republike Srbije) nastaje kao posledica specifičnog aspekta povrede prava ličnosti. Jedna od takvih neimovinskih štetnih posledica jeste strah, koji može varirati po intenzitetu i trajanju, a te dve karakteristike, sa eventualnim dugoročnim posledicama, određuju mogućnost da sud dosudi novčanu naknadu. U postupku odlučivanja sud se oslanja na veštaka, u ovom slučaju psihijatra.

Prilikom veštačenja u parničnom postupku psihijatar se može se suočiti nekoliko potencijalnih problema. U radu su opisani neki od problema koji su povezani sa procesnom ulogom veštaka i činjenicom da njegove procesne dužnosti mogu biti suprotstavljene profesionalnoj ulozi, a posebno su analizirani mogući problemi u vezi sa samom procenom koju daje veštak, uglavnom povezani sa procenom ličnosti ili nedostatkom te procene u ekspertizi veštaka. Autori zastupaju stav da je važno procenu ličnosti uključiti u proces psihijatrijske evaluacije prilikom veštačenja zato što karakteristike ličnosti utiču na način njenog reagovanja – u ovom primeru su od ključnog značaja za veštačenje straha.

Ključne reči: nematerijalna šteta, veštak, psihijatar, procena ličnosti.

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THE NECESSITY OF PRECISE EXPERT TESTIMONY IN JUDICIAL PROCEEDINGS AND THE ISSUE OF DAMAGE COMPENSATION

Summary

The importance of traffic technical expertise in judicial proceedings is undeniable. Traffic technical expertise, fundamentally based on the written findings and opinions of experts, determines the outcome of legal proceedings, effectively sealing court decisions. Many judges unquestioningly accept expert findings and opinions because they lack the necessary expertise to pose competent questions or fully understand the responses of the experts. Some experts include expressions in their findings and opinions that are not found in the provisions of the Law on Road Traffic Safety of Serbia or similar regulations of neighbouring countries where the authors have observed this discrepancy. This issue has also been noted in judicial practice in Poland, an EU member state. The paper identifies specific such expressions and stresses the necessity for experts to provide their findings and opinions not only in accordance with the current Law on Road Traffic Safety but also in line with relevant subordinate legislation at the time of the traffic accident. By examining specific cases from judicial practice, the paper highlights certain ambiguous expressions used by traffic technical experts in their reports and opinions. The aim of the paper is to emphasize the importance of

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precise expression by experts that aligns with legal provisions and professional standards in their field.

Keywords: *Expert Witness, Judicial Proceedings, Damage Compensation, Expert Opinion, Precise Expression.*

1. Introduction

Traffic accidents occur worldwide and in Serbia every day. The media inundates us daily with various types of traffic accidents, most commonly on roads but also in other types of traffic: railway, waterway, and air traffic. The automobile in general, and particularly passenger vehicles, have strongly influenced the change in societal, familial, and personal lives globally. The motor vehicle is no longer a luxury, as it once was for an extended period in the past, but rather one of the essential means to meet the daily needs of modern humans.[1]

It is estimated that globally in 2021, 1.19 million people died in road traffic accidents, marking a 5% decrease compared to 2010, when 1.25 million fatalities were recorded. During this period, more than half of the UN member states achieved a reduction in road traffic fatalities within their territories, despite nearly doubling the number of vehicles and a population increase of nearly one billion people (WHO, 2023). However, despite the evident decrease in total fatalities, the number of deaths and injuries in traffic accidents remains a significant global health and developmental challenge. According to (WHO, 2023) data, traffic accidents were the leading cause of death for children and young people aged 5 to 29 in 2019, and when considering all age groups, traffic accidents ranked 12th in terms of causes of death. Two-thirds of all fatalities were individuals of working age (18 to 59 years old), resulting in substantial health, social, and economic damage across societies (WHO, 2023).

Regardless of the participants involved in individual traffic accidents, since various categories of participants are involved in traffic daily, the consequences of traffic accidents are always the same - fatalities or injuries (minor or serious bodily injuries) and the occurrence of material damage to property, surroundings, and vehicles involved in the accidents. When traffic accidents are mentioned, for most people, one of the first associations is the investigation followed almost always by some legal proceedings (criminal or misdemeanor), depending on the consequences of the accident.

[1] M. Cerović, „Uticaj razvoja auto-industrije na značaj tržišta osiguranja motornih vozila“ (I deo), *Tokovi osiguranja* 1/2014, 47.

Directly related to traffic accidents is the need for forensic examination of their causes in proceedings before competent judicial authorities. This is essential to determine whether the negligence of one or more participants caused the accident, whether there was a contributory factor to the accident on the part of certain participants in these criminal proceedings, or whether a third party, apart from the immediate participants or in conjunction with them — such as road authorities — is the cause of the accident. In a large number of criminal (or misdemeanor) proceedings, traffic technical expertise is conducted not only to ascertain the causes of the traffic accident but also to determine the contribution of individual participants to the accident. This is crucial not only for criminal proceedings but also, following their legal conclusion, for proceedings concerning the determination of damages. This type of expertise is also used in evidence-gathering procedures pursuant to rules of non-litigious proceedings.

The aim of this paper is to underscore the necessity for precise expression by experts in traffic technical fields in judicial proceedings, in accordance with legal and sub-legal regulations at the time of a traffic accident. This is primarily crucial in criminal cases, and subsequently in the ensuing proceedings concerning compensation for damages arising from the accident before competent courts. While the focus of the paper is on the practices of experts in Serbia, one of the authors also encounters imprecise findings and expressions by traffic technical experts in two neighboring countries — Montenegro and Bosnia and Herzegovina. Additionally, this issue is observed in Poland, a member state of the European Union. The precision of experts' expressions significantly influences the issue of guilt (or lack thereof) in criminal proceedings regarding the traffic accident, decisions on penalties, and the determination of mitigating circumstances on the defendant's side due to the victim's contribution. Subsequently, in the proceedings for compensation initiated by the victim in their capacity as a plaintiff from the criminal proceedings, the decision on the existence or non-existence of the victim's contribution to the consequences determines to what extent the defendant's argument of shared responsibility in the civil proceedings is justified. This study aims to highlight the importance of accuracy in expert testimony across these jurisdictions to ensure fair and just outcomes in both criminal and civil proceedings related to traffic accidents..

To what extent is expertise from traffic technical professionals necessary in criminal proceedings, is highlighted by data on traffic accidents in Serbia and the other mentioned countries in the paper.

2. Official Data on Traffic Accidents

According to data from the Traffic Safety Agency (hereinafter: TSA), from 2017 to 2021 in traffic accidents (hereinafter: TAs) in the Republic of Serbia, there were 173,360 traffic accidents resulting in 2,674 fatalities (FAT), 16,474 severe injuries (SVE INJ), and 83,280 minor injuries (MIN INJ). This is further illustrated in Table 1.

Table 1: Data from the Traffic Safety Agency:
Basic indicators of traffic safety in the Republic of Serbia, period 2017-2021

Year	2017	2018	2019	2020	2021	**SUM**
TA FAT	525	491	494	459	482	**2451**
TA INJ	14286	13744	13735	11849	13273	**66887**
TA FAT+INJ	14811	14235	14229	12308	13755	**69338**
TA DEM	21664	21583	21541	18410	20824	**104022**
TOTAL TA	36475	35818	35770	30718	34579	**173360**
FAT	579	548	534	492	521	**2674**
SEV INJ	3514	3338	3322	2953	3347	**16474**
MIN INJ	17849	17508	17068	14297	16558	**83280**
TOTAL INJ	21363	20846	20390	17250	19905	**99754**
TOTAL FAT+INJ	21942	21394	20924	17742	20426	**102428**

Source: Traffic Safety Agency

According to TSA data, in 2022 there were 13,269 accidents involving casualties (totalling 19,603 individuals). A total of 553 people lost their lives, with the majority being drivers (336 or 60.66%), pedestrians (125 or 22.6%), and passengers (92 or 16.64%). One casualty had an unknown status, as stated in this report. It is also noted that 3,292 individuals suffered severe injuries, while 15,758 individuals sustained minor injuries.[2]

The latest data shows that in 2023, a total of 501 individuals lost their lives on roads in the Republic of Serbia. Although this represents

[2] Traffic Safety Agency, *Statistical report on the state of traffic safety in the Republic of Serbia for 2022*, 27, 38 and 43.

approximately a 10% decrease compared to the previous year, it still falls far short of the desired targets set in the current Traffic Safety Strategy of the Republic of Serbia.[3] According to the Strategy, the goal for 2024 was to reduce the number of fatalities in traffic accidents to 444 individuals.[4]

The above-mentioned data, particularly the increase in the number of fatalities, indicates that Serbia has not yet established a stable trend in reducing the number of deaths and injuries in traffic accidents. Consequently, the role of traffic engineering experts remains highly relevant and never loses significance in legal proceedings in general.

A similar situation is observed in two neighbouring countries and also in Poland.

According to recent media reports from Montenegro, the number of fatalities in traffic accidents relative to the population, known as "public risk", has approached around 90 fatalities per million inhabitants in recent years. This places Montenegro among the most high-risk countries in Europe. Only Romania fares worse than Montenegro in this regard. Additionally, concerning Montenegro, "In 2023, a total of 6,573 traffic accidents occurred on Montenegro's roads, compared to 5,675 in 2022 and 6,109 in 2021. These accidents resulted in fatalities: 77 in 2023, 73 in 2022, and 55 in 2021," as reported by the Police Administration in responses provided to Monitor.[5]

According to information from BIHAMK (Auto-Moto Association of Bosnia and Herzegovina) regarding traffic accidents, their causes, and consequences in Bosnia and Herzegovina in 2023, a total of 35,148 traffic accidents occurred on Bosnian roads. Among these, there were 7,665 accidents resulting in injuries or fatalities, and 27,488 accidents causing only material damage.

In these traffic accidents in Bosnia and Herzegovina, 255 individuals lost their lives, while 10,944 individuals sustained serious or minor injuries.[6] The information indicates an overall increase in the total number of traffic

[3] https://www.automotorevija.rs/rubrike/broj-poginulih-saobracaj-2023-srbija, last visited 01. 06. 2024.

[4] Traffic safety strategy of the Republic of Serbia for the period from 2023 to 2030 with an action plan for 2023-2025, 25.

[5] https://www.monitor.co.me/crna-gora-i-bezbjednost-u-saobracaju-medju-najrizicnijim-u-evropi/, last visited 19. 6. 2024.

[6] BIHAMK, Information on traffic accidents, their causes and consequences in Bosnia and Herzegovina in 2023, 2–3, https://bihamk.ba/assets/storage/files/53416/FINAL%20Informacija%20o%20%20saobra%C4%87ajnim%20nezgodama%202023.pdf, last visited 15. 6. 2024.

accidents in 2023, as well as an increase in accidents resulting in injuries or fatalities, as well as those causing material damage.

When it comes to Poland, a member state of the European Union, traffic safety is also a significant issue. According to official data on the number of fatalities in road traffic accidents in Poland from 2006 to 2022, it is observed that in the last four years of this period, the number of fatalities was as follows: 2,909 individuals in 2019, 2,491 individuals in 2020, 2,245 individuals in 2021, and 1,896 individuals in 2022.[7]

In 2020 Poland is 4th out of 27 EU countries in terms of the highest numbers of fatalities per million inhabitants. Over the past twenty years this rate has decreased, although not enough to close the gap with the EU average. In 2020, pedestrians accounted for 25% of road traffic fatalities in Poland. This percentage is higher than that for the European Union as a whole (19%).[8]

3. Expert Witness Testimony in Legal Proceedings in General

The most important of all criminal statutes in Serbia is the Criminal Procedure Code (hereinafter: CPC),[9] which contains provisions regarding expert witness testimony. Other criminal statutes in Serbia — the Misdemeanor Act,[10] the Act on Economic Offenses,[11] and the Act on Liability of Legal Entities for Criminal Offenses[12] — also include procedural provisions on expert witness testimony, but they essentially refer to the analogous application of the CPC provisions.

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[7] Adriana Sas, Number of road traffic fatalities in Poland from 2006 to 2022, https://www.statista.com/statistics/437964/number-of-road-deaths-in-poland/, last visited 15. 6. 2024.

[8] European Road Safety Observatory – National Road Safety Profile – Poland, 2023, 2, 5, https://road-safety.transport.ec.europa.eu/system/files/2023-02/erso-country-overview-2023-poland_0.pdf, last visited 15. 6. 2024.

[9] Criminal Procedure Code, *Official Gazette of the Republic of Serbia*, No. 72/11, 101/11, 121/12, 32/13, 45/13, 55/14, 35/19, 27/21, 62/21.

[10] Misdemeanor Act, *Official Gazette of the Republic of Serbia,* No. 65/13, 13/16, 98/16, 91/19.

[11] The Act on Economic Offenses, *Official Gazette of SFRY,* No. 4/77, 36/77, 14/85, 74/87, 57/89, 3/90, *Official Gazette of SRY*, No. 27/92, 24/94, 28/96, 64/01, *Official Gazette of the Republic of Serbia*, No. 101/05

[12] The Act on Liability of Legal Entities for Criminal Offenses, *Official Gazette of the Republic of Serbia*, No. 97/08.

The Law on Civil Procedure[13] and the Law on Non-Contentious Procedure,[14] which govern procedures following the final conclusion of any of the mentioned criminal proceedings, also include provisions regarding expert witness testimony.

However, what is common to all of these regulations is that none of them include provisions on traffic engineering expertise, which is one of the most important types of expertise in all legal proceedings, considering the high number of criminal offenses related to public road safety in Serbia. This includes a significant number of traffic violations, which, although less socially dangerous, are incomparably more numerous on Serbia's roads. The number of traffic violations in Serbia amounts to hundreds of thousands annually. At the end of 2022, the Chief of the Traffic Police Department of the Ministry of Internal Affairs of the Republic of Serbia announced that during the year, the police detected 1.3 million traffic violations, significantly more than in 2021. Out of that number, around 500,000 drivers were caught speeding.[15]

Additionally, there are practically invisible, unregistered traffic violations—traffic accidents that end with the exchange of the European Accident Statement at the scene, without police involvement in conducting an investigation. In these cases, legal proceedings often follow before the competent courts for compensation claims, where the role of traffic engineering experts is indispensable and practically crucial in influencing the court's decision.

All of this should be taken into account, along with the fact that traffic engineering expertise in criminal proceedings typically occurs last, after all previous expert examinations (medical, mechanical-technical, emergency technical inspection) have been completed and all relevant evidence has been gathered. Additionally, sometimes additional specific examinations are conducted during traffic expertise, such as those of tachographs or entire tachograph devices, tires, specific lighting devices on vehicles, and similar components. These examinations are particularly significant in hit-and-run accidents, as they contribute alongside all other prior examinations

[13] The Law on Civil Procedure*, Official Gazette of the Republic of Serbia*, No. 72/2011, 49/2013, 74/2013, 55/2014, 87/2018, 18/2020.

[14] The Law on Non-Contentious Procedure, *Official Gazette of the Republic of Serbia*, No. 25/82, 48/88, *Official Gazette of the Republic of Serbia*, No. 46/95, 18/2005, 85/2012, 45/2013, 55/2014, 6/2015, 106/2015.

[15] https://www.tanjug.rs/srbija/drustvo/6152/nacelnik-uprave-saobracajne-policije-mup-a-srbije-u-2022-iz-saobracaja-iskljuceno-vise-od-61500-alkoholisanih-vozaca/vest 31.12.2022., last visited 27. 06. 2024.

to identifying the vehicle or the person driving it at the time of the accident. Therefore, the expert's opinion significantly influences the court's decision-making process, although the judge should not be unduly swayed by the expert's expertise. In their written reports and oral testimonies in court, traffic engineering experts often use imprecise language, especially in certain types of traffic accidents, which can potentially benefit or harm either party in the proceedings—the accused or the victim. The issue arises because judges may lack the specialized knowledge necessary to critically and thoroughly evaluate the expertise, leading to situations where they uncritically accept the findings and opinions of the expert, effectively allowing the expert to decisively influence the court's decision-making process.[16]

All of these issues similarly arise in civil proceedings for compensation related to previously conducted misdemeanour and certain criminal proceedings. In these cases, imprecise expressions used by traffic engineering experts can potentially sway the outcome in favour of or against a party in the proceedings—either the plaintiff or the defendant. Such imprecise testimony from traffic engineering experts can be crucial in determining liability and the question of compensation in these cases.[17]

4. Expert Statements Regarding Specific Terms

In judicial practice, several specific expressions have been noted where certain traffic engineering experts inadequately articulate themselves in their reports and opinions, and maintain these assertions during the main trial in criminal proceedings. At times, they fail to consider subordinate regulations that were in effect at the time of the traffic incident, which differ from the regulations applicable when they submit their findings and opinions. With these insufficiently precise expressions or inconsistent statements, they attempt to uphold their written findings and opinions and confirm them. In doing so, they fundamentally mislead the proceedings' authorities—public prosecutors and judges conducting investigations or presiding over trials in cases involving

[16] Z. Jekić, *Krivično-procesno pravo*, „Astropres" Beograd 1994, 315; B. Simonović, *Kriminalistika*, Pravni fakultet u Kragujevcu i Institut za pravne i državne nauke, Kragujevac 2004, 336.

[17] See more about shared responsibility in traffic M. Vujanić, D. Obradović, „Naknada štete u saobraćaju podeljena odgovornost u praksi", in: Zbornik radova: *XXV Međunarodna naučna konferencija Prouzrokovanje štete, naknada štete i osiguranje* (eds. Zdravko Petrović, Vladimir Čolović, Dragan Obradović), Institut za uporedno pravo, Udruženje za odštetno pravo, Beograd, Valjevo, 2022, 159–179.

certain criminal offenses related to public traffic safety. Similarly, in civil proceedings, these practices can mislead judges handling such cases.

Therefore, we highlight some of these expressions or statements used by traffic engineering experts in their written or oral reports, as observed in judicial practice

4.1. Pedestrian Crossing Zone

Current legal regulations governing traffic safety on roads in all three countries define certain terms in a linguistically clear and comprehensible manner, which are important for this law and for the actions of all competent authorities—police, judiciary, inspections, and others.

One of these terms is the pedestrian crossing zone.

The Law on Road Traffic Safety of the Republic of Serbia (hereinafter: ZBS)[18] in Article 7, point 24 defines a **pedestrian crossing** as: "a marked part of the roadway intended for pedestrians to cross."

The Law on Road Traffic Safety of Montenegro (hereinafter: RTS CG) [19] in Article 7, point 30 defines a **pedestrian crossing** as: "a part of the road surface intended for pedestrians to cross, marked with road markings and/or appropriate traffic signs."

Similarly, the Law on Basics of Road Traffic Safety in Bosnia and Herzegovina/Law on Road Traffic Safety in Bosnia and Herzegovina (hereinafter: RTS BiH)[20] universally applicable across all constituent parts of Bosnia and Herzegovina in Article 9, point 36 defines a **marked pedestrian crossing** as: "a part of the road surface intended for pedestrians to cross, marked with road markings and appropriate traffic signs."

However, in practice, when traffic accidents involving pedestrians occur, we often observe in the written findings and opinions of traffic engineering experts the term "pedestrian crossing zone" used to define the location of the accident.

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[18] The Law on Road Traffic Safety of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, No. 41/09, 53/10, 101/11, 32/13 decision of the Constitutional Court, 55/14, 96/15, 9/16 decision of the Constitutional Court, 24718, 41/18, 87/18, 23/19, 128/20, 76/23.

[19] The Law on Road Traffic Safety of Montenegro, *Official Gazette of Montengro*, No. 33/12, 58/14, 14/17, 66/19.

[20] The Law on Basics of Road Traffic Safety in Bosnia and Herzegovina, *Official Gazette of BiH,* No. 06/06, 75/06, 44/07, 84/09, 48/10, 18/13, 8/17, 89/17, 9/18.

The provision in Article 7, point 24 of the ZBS defines the pedestrian crossing as: "a marked part of the roadway intended for pedestrians to cross."

In the provisions of the ZBS that define pedestrian movement, the method of pedestrian crossing is also specified. For example, Article 96, paragraph 3 of the ZBS states: "On a road with a pedestrian crossing or specially constructed crossing or passage for pedestrians, a pedestrian must use that crossing or passage if they are not more than 100 meters away." Article 97 of the ZBS regulates specific situations regarding pedestrian crossings at pedestrian crossings, and Article 99 of the ZBS outlines the obligations of drivers towards pedestrians.

A common aspect of all these provisions is that the term "pedestrian crossing zone" is not mentioned anywhere in the ZBS or in any other provision of the law.

Therefore, in the event that a participant in traffic, such as a pedestrian, cyclist, electric scooter rider (which is a relatively new mode of transportation on the streets and roads of Serbia), etc., crosses the roadway near a pedestrian crossing—even if it's within the minimal distance from the pedestrian crossing up to 100 meters, as prescribed by the provisions of the Law on Road Traffic Safety —such unauthorized crossing must be assessed by the expert as a fault on the part of that traffic participant. Depending on all available evidence in the case file and materials provided for examination, the expert will determine whether this fault contributed causally to the occurrence of the traffic accident. This assessment by the expert should then be taken into consideration by the court when making a decision regarding the traffic accident.

In the specific case, the traffic-technical expert in their written report and opinion stated: "*... that the deceased pedestrian was crossing the road in a straight line from the right side towards the left edge of the roadway, looking from the periphery towards the centre, and that he crossed the road about 6 meters from the end of the pedestrian crossing. ... Ultimately, the expert maintained the opinion that the traffic accident occurred as a result of an unsafe crossing of the road, in close proximity to the pedestrian crossing, in front of an approaching vehicle, thereby creating a dangerous situation causally linked to the occurrence of this accident. The pedestrian had the opportunity, simply by observing the approaching vehicle, to ensure that the act of crossing the road could be done safely. ...*"[21]

[21] Legally binding judgment of the Basic Court in Zaječar, K 103/2016 dated 24.10.2016 - unpublished.

Furthermore, the court in this specific case also considered this as a contributory factor on the part of the deceased pedestrian in the occurrence of the traffic accident. This was one of the mitigating circumstances taken into account by the court when deciding on the penalty.

The precise expression of traffic technical experts is of particular importance in the processes of compensation for damages, following the final conclusion of criminal proceedings. In these proceedings, often new traffic technical experts are appointed, especially if there have been acquittals in the criminal proceedings. These experts are called upon during the main hearing after submitting their written findings and opinions. In the aforementioned types of traffic accidents, the defendant, previously accused in the criminal proceedings, can successfully raise an objection of shared responsibility on the part of the plaintiff due to their contribution, as they did not adhere to the specified provisions of the Traffic Code regarding pedestrian crossing. Conversely, if the lawsuit has been filed by family members of the deceased in the traffic accident, who were considered injured parties due to the fatal outcome in the criminal proceedings, or by the insurance company for recovery, the defendant can also raise this objection of shared responsibility.

4.2. Around

In practice, the authors have observed in judicial practice across all four states that traffic technical experts often use the relatively vague term "around" when calculating the speed of certain vehicles or other participants in accidents.

The term "around" is insufficiently precise and its interpretation in criminal proceedings is crucial not only for the experts but primarily for the court. It should be noted that the public prosecutor, who directs the pretrial proceedings or investigation and is objectively interested in prosecuting and securing convictions based on the strength of their arguments, may not always consider this term favorable to the accused.

Generally, this term is most often used in practice to determine the speed of vehicles and pedestrians involved in traffic accidents, when the expert cannot precisely determine their speed based on available data. It is rare for the expert to specify any allowable deviations (+/- %) from the speed determined "around". If the expert stands by their findings and opinion, it is necessary to request supplementary expertise or ask specific questions during proceedings from the parties or the court to clarify any deviations. This ensures an appropriate decision based on the law.

Therefore, "around" should be interpreted in a manner most favorable to the accused in criminal proceedings, and any ambiguities should be addressed through further expert examination or clarifying questions to ensure a legally sound decision.

In the paper, only two cases from judicial practice in Montenegro and Serbia were mentioned, but such situations are countless across all four states.

In the example from Montenegro cited, the expert calculated the average running speed of pedestrians at approximately "around 9.05 km/h (2.51 m/s)" as the average, because the speed of pedestrians in that age group, according to the tables used by experts, ranges from 7.4 to 10.7 km/h. At a pedestrian speed of 9.05 km/h and considering the time it takes for a pedestrian to cross the road, the vehicle could have stopped before the collision, thereby avoiding the accident. Therefore, the expert's opinion was that the accident occurred due to the vehicle's speed, as the driver was more than the necessary stopping distance away when the pedestrian entered the road, driving at the permissible speed of 50 km/h in an urban area. However, if the expert had considered the most favorable rather than the average running speed of the girl, i.e., a speed of 10.7 km/h, the driver would not have had the time or space to avoid hitting the pedestrian and causing the accident. This scenario could have resulted in an acquittal.[22]

In the second case, in the example from Serbia that we are citing, the traffic technical expert in their written findings and opinion stated: "The Court, based on the report and opinion of the traffic technical expert R.M. dated January 14, 2016, determined that the Mercedes vehicle driven by the accused N. was traveling on Hajduk Veljkova Street, from the outskirts towards the center, at a speed of approximately 60.8 km/h before the traffic accident occurred..."[23]

The need for precise expression by traffic technical experts regarding this term is crucial in compensation proceedings following the final conclusion of criminal proceedings. This is significant not only in cases where criminal proceedings have ended with a conviction, where the civil procedure is bound by the criminal court's decision. It is especially important in criminal cases that conclude with decisions other than a conviction, as well as in proceedings related to certain traffic offenses. Additionally, it applies to compensation proceedings related to economic offenses regarding damages.

[22] Data from the case files of the Basic State Prosecutor's Office in Podgorica Kt 911/2021 - unpublished.

[23] Legally binding judgment of the Basic Court in Zaječar, K 103/2016 dated 24. 10. 2016 - unpublished.

In these proceedings, it is often necessary to commission new expertise from new traffic technical experts, especially in cases for damages resulting from misdemeanor proceedings. After the submission of their written reports and opinions, these experts are called upon during the main hearing. Judges presiding over such cases must insist that the findings of traffic technical experts are precise and not relatively vague, particularly in the use of terms like "around" when determining the speed of vehicles involved in traffic accidents. The ambiguity of such responses can influence the determination of whether certain participants contributed to the accident. In such situations, if there are objections to the findings of traffic technical experts—whether written or oral—the judge must instruct these experts to attempt to establish the contribution of certain types of traffic accidents to the material damage on the plaintiff's side through the loss of energy, as previously indicated by authors in prior studies. [24] If certain experts are unable to calculate this, a new examination must be ordered by another traffic technical expert.

4.3. The Validity of Individual Traffic Signs

In practice, there is a contentious issue regarding the interpretation—validity of certain traffic signs or road markings by traffic engineering experts. There are numerous such situations in all three countries, so for the sake of brevity in the same aforementioned work, we point out only one case from the judicial practice in Serbia.

Thus, in one case, a traffic engineering expert stated: The absence of a "marked pedestrian crossing" information traffic sign (III-6), and an unmarked pedestrian crossing on the roadway across the right lane would constitute a failure on the part of the road manager, in this case, "Putevi Srbije" Belgrade, which is causally related to the occurrence of a dangerous traffic situation on the roadway, because the participants in this accident were misled—the injured to cross at a marked pedestrian crossing, and the suspect to travel where no pedestrian crossing exists.[25]

When providing an answer to this question, it is essential for experts to consider the subordinate regulation that was in force at the time of the traffic accident assigned to them for expert examination. Just as for public prosecutors or judges handling certain cases, the timing of the commission of the criminal offense is crucial for applying provisions of specific laws that are relevant in those cases, including the application of milder laws for the offender,

[24] M. Vujanić, D. Obradović, 159–179.

[25] Data from the case of the Basic Court in Valjevo K.br.103/17, unpublished.

similarly, it is necessary for subordinate regulations such as applicable traffic signal regulations. Specifically, if traffic signalling at the time of the traffic accident was not installed in accordance with the then-current provisions of the Traffic Signal Regulation, the expert must state in their written report and opinion and whether this oversight is attributable to the road manager – whoever that might be – and is causally linked to the resulting traffic accident, besides clarifying errors made by other participants involved in the traffic accident.

In such a situation, the court will assess to what extent the failures, apart from those on the part of the road manager, on the part of individual participants in the traffic accident were causally related to the occurrence of the accident, or to what extent these failures contributed to the accident.

This is also significant in compensation proceedings. In such cases, the court will evaluate whether there was negligence on the part of the road manager in causing the harmful event, any objection from this defendant that there was negligence on the part of other participants in the traffic accident for the resulting accident from which the harmful event arose. Based on these identified failures, the judge in the civil proceedings will be able to properly assess whether there is shared responsibility among certain defendants for the occurrence of the harmful event.

5. Conclusion

Passenger traffic is the most common form of traffic where accidents occur with a wide range of consequences. The paper presented the latest officially published data on traffic accidents in Serbia.

Considering certain situations in practice where forensic experts in traffic engineering inaccurately express their opinions during criminal and subsequent civil proceedings, the authors attempted to highlight some of the most common situations in which these experts are imprecise. By presenting specific examples from practice, the paper illustrates how one should proceed in such situations. This is important for determining the existence of mitigating circumstances on the side of the accused in criminal proceedings, and for assessing the contribution of the injured party in civil proceedings, as well as properly quantifying the contributions of individual participants in traffic accidents primarily resulting in material damage.

We believe that this paper is significant for the judiciary, especially during a generational turnover where many young judges are entering the field. The insights provided can be valuable in their work, along with the

specific case examples cited from judicial practice. Additionally, the paper holds relevance for insurance companies, as it helps their representatives recognize certain traffic situations leading to harmful events and assess whether they can successfully argue for shared liability in such cases.

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NEOPHODNOST PRECIZNOG STRUČNOG ISKAZA U SUDSKOM POSTUPKU I PITANJE NAKNADE ŠTETE

Apstrakt

Značaj saobraćajne tehničke ekspertize u sudskim postupcima je neosporan. Saobraćajna tehnička ekspertiza, u osnovi zasnovana na pisanim nalazima i mišljenjima stručnjaka, određuje ishod sudskog postupka. Mnoge sudije bespogovorno prihvataju stručne nalaze i mišljenja jer im nedostaje potrebna stručnost da postavljaju kompetentna pitanja ili u potpunosti razumeju odgovore stručnjaka. Neki stručnjaci u svoje nalaze i mišljenja uključuju izraze koji se ne nalaze u odredbama Zakona o bezbednosti saobraćaja na putevima Srbije ili sličnim propisima susednih zemalja u kojima su autori uočili ovu neusklađenost. Ovo pitanje je takođe zabeleženo u sudskoj praksi u Poljskoj, državi članici EU. U radu se identifikuju takvi izrazi i naglašava neophodnost da stručnjaci daju svoje nalaze i mišljenja ne samo u skladu sa važećim Zakonom o bezbednosti saobraćaja na putevima, već i u skladu sa relevantnim podzakonskim aktima u vreme saobraćajne nesreće. Ispitivanjem konkretnih slučajeva iz sudske prakse, u radu se ističu određeni dvosmisleni izrazi koje koriste saobraćajni tehnički stručnjaci u svojim izveštajima i mišljenjima. Cilj rada je da se naglasi značaj preciznog izražavanja od strane stručnjaka koji je u skladu sa zakonskim odredbama i profesionalnim standardima u svojoj oblasti.

Ključne reči: veštak, sudski postupak, naknada štete, stručno mišljenje, precizno izražavanje.

Zoran Pavlović* **DOI: 10.56461/ZR_24.ONS.08**

POSSIBILITIES OF APPLYING ARTIFICIAL INTELIGENCE IN COURT PROCEEDINGS

Summary

The ever-expanding possibilities of (legal) application of modern technological means in court proceedings have brought this issue into one of the most current topics in general. Special attention of doctrine and practice has attracted special attention to this procedural issue since the beginning of the global health crisis caused by the SARS CoV19 pandemic. With the end of the pandemic, the issue of evidentiary actions through technical innovations and their validity has not diminished. The advantages and disadvantages of the application of artificial intelligence in the compilation of interrogation and interrogation records, in the performance of other evidentiary actions and their interpretation are just some of the situations that deserve our attention. In particular, there is the issue of compensation for damages that can result from errors in results or misuse of AI. This means that the standards in criminal or civil proceedings that have been reached cannot be derogated by accepting all the benefits of AI without a critical approach. Due process and the protection of human rights with the use of AI in judicial proceedings must be based on the normative solutions of organic laws. Standards lower than that would violate the principle of legality of the evidentiary actions performed.

Keywords: *Application of Artificial Intelligence, Court Proceedings, Human Rights Standards, Compensation for Damages.*

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1. Introduction

Modern criminal procedural law in Serbia, based on the traditional rules of criminal court procedure of continental European law, did not deal with the issues of audio recordings as a means of evidence, nor with actions in the procedure that were performed through modern technologies. To date, this situation has objectively changed, so that from the former incidental situation when the court proceedings were recorded, we have come to the fact that this issue appears more and more often.

Earlier procedural laws did not regulate the manner of using technical means and instruments, much less did they deal with the issues of their lawful use. Following the application and observance of the principles of criminal procedural law, this deficiency, regardless of the principle of free assessment of evidence, causes different views in doctrine and jurisprudence regarding the procedural nature of the use of sound and image instruments.

The development of IT and technical achievements makes it possible to secretly record telephone conversations, the so-called sound rooms and people, and not only in Agatha Christie's crime stories or James Bond films. Increasingly, the competent state authorities have begun to use technical means in detecting and prosecuting perpetrators of criminal offenses, opening the possibility for unlimited interference of the authorities in the basic human rights to the inviolability of the home, or the right to respect for private and family life. But, from recording events today, through the development of technology, we have come to the possibility of using technical means in all their forms such as communication via the Internet, photography, film, sound and television transmissions or recordings and the like. The question that has been asked before was the question of the legal nature of these recordings. In German theory, Eisenberg[1] labels the results of the use of technical means in criminal proceedings as objects of investigation, regardless of the fact that some have wished to equate them with the concept of documents in criminal law. But, that's a separate topic. Technical recordings of facts in criminal proceedings are treated as a specific type of evidence, the peculiarity of which is that they are not the result of human observations, but of the registration of a technical instrument, which automatically records the facts independently of the will of the man who installs it. This is sui generis evidence, which is recognized as such. The beginning of this is in the CPC from 1976, which knows the use of tape recordings of investigative actions.

[1] U. Eisenberg, *Beweisrecht der StPO, Speciazlkommentar*, 2.Aufl., C.H.Beck, München 1996, Rdn 2282-2304.

The debate could go in a number of directions. The question of the permissibility of the results we arrive at through the use of technical instruments and their legality is one thing. The second issue is their division into data (evidence) obtained as a result of an evidentiary action carried out by the competent state authorities on the one hand, and evidence obtained outside of criminal proceedings, which was created by public registration. Last but not least, there is the use of artificial intelligence by converting spoken words into written text. Most of the problems arose during the lockdown that accompanied the COVID-19 outbreak since the beginning of 2020. Many of the questions that were raised at the time, from the trial among those present who were not physically present in the courtroom, to the use of digital technologies, are still unanswered. The use of these results must be seen in the light of respect for human rights guaranteed by the Constitution and international law, such as the right to the inviolability of private and family life or the principle of immediacy. There is also the application of the principle of free evaluation of evidence, as well as all other principles. Only when we have law-based solutions will we be able to reconcile this plurality of ways of taking evidence with the norms of criminal procedural law. It is a question of criminal procedural standards[2] that are reached through international legal norms and provisions of domestic laws, with the basic postulate of protecting human rights and freedoms. But let's start from the beginning.

2. An Example and a Few Dilemmas about It

At the beginning of January 2023, the New York Post[3] published an article on the use of AI, which helps the defendant as legal counsel, to defend himself in the procedure for imposing a traffic fine. The AI, billed as the world's first robot lawyer by the startup that created it, DoNotPay, will run on a smartphone and listen to court arguments in real-time before telling the defendant what to say via headphones. This was an unprecedented case until then, but those who created the so-called robot lawyer did not want to say in which court in the United States this case was conducted.

Science and technology publication *New Scientist* reported that the ticket at the centre of the trailblazing case was issued for speeding, and the

[2] Z. Pavlović, „Poligrafsko ispitivanje i krivično-procesni standardi", in: *Adekvatnost državne reakcije na kriminalitet i upotrebu tehničkih sredstava u krivičnom postupku*, Srpsko udruženje za krivičnopravnu teoriju i praksu, Bijeljina 2021, 201–213.

[3] https://nypost.com/2023/01/05/robot-lawyer-powered-by-ai-will-help-fight-speeding-ticket-as-it-takes-first-case-in-court/, last visited 15. 05. 2024.

defendant will only say in court what the AI instructs them to say.[4] If they lose the case, DoNoPay is committed to covering all subsequent costs and penalties. The founder of the AI company, J. Browder, a Stanford University-educated computer scientist, launched DoNotPay in 2015 as a chatbot that provides legal advice to consumers dealing with late fees or fines, but the company pivoted to AI in 2020. What is characteristic of the system is that it has mastered the jurisprudence in this area and that it sticks to the truth, without manipulation. The AI app's software was adjusted so it does not automatically react to everything it hears in court. Instead, it will listen in on the arguments and analyze them before instructing the defendant how to respond.

The idea behind this system is that his company's AI begins by asking the client what the legal problem is, then finds a loophole and turns that loophole into a legal letter, which it can send to the right institution, or upload to a website.

In any case, the example of the application of AI in proceedings to challenge the payment of fines for illegal parking or speeding shows that AI and legal science are increasingly combined, through so-called legal assistance software.

Searching databases of court decisions, writing legal documents, assessing the outcome of an upcoming court case based on known facts on the one hand, laws and bylaws on the other, are examples of the application of AI, which is referred to as the legal industry. It is indisputable that a citizen can use the help and support of such IT solutions before a state authority, regardless of the fact that it is doubtful how useful they are always, without the role of professionals who need to control and apply these results. It is our right to take advantage of the benefits offered by AI, with the risks that are evident. The question of whether such an AI solution could replace the defender is rhetorical in nature.

On the other hand, many countries today officially use various digital technologies for data processing in their criminal systems, i.e. automatic systems that can link crimes by the method of execution, by place, consequences or other characteristics. These systems, which are used for criminal profiling, are based on searching for an answer to the question of what a criminal offense (a consequence of a criminal offense) tells us about the perpetrator. Such work implies that the authorities working on detecting perpetrators of a criminal offense must deal with collecting as much quality information as

[4] https://www.newscientist.com/article/2351893-ai-legal-assistant-will-help-defendant-fight-a-speeding-case-in-court/, 15. 05. 2024.

possible for analysis, in order to reach the perpetrator through data analysis. The introduction of AI in the field of investigation and detection of crimes and their perpetrators must therefore always be correlated with the protection of human rights. Artificial intelligence can often draw wrong conclusions based on the data for analysis prepared by a human, so the results of these checks are only used in correlation with all other data.

Therefore, all profiling techniques must always be accepted with extreme caution, as predictive policing, and as such a model cannot be accepted as the main model, but rather as an auxiliary tool in criminal work.

Another case where AI has been used in the past is facial recognition technology, which plays a role in identifying people with identity documents. The use of artificial intelligence in this way in judicial criminal proceedings can only be an auxiliary tool in the preparation of findings and opinions, but not an independent method of establishing identity. Solving algorithms of facial features is solved faster with AI, but is that the only thing needed to establish identity? We want to say that in order to protect the principles of legality and human rights of participants in the procedure, these issues must always be resolved with the participation of a human, not AI.

It is clear that, in addition to the necessary careful handling of technological achievements in criminal proceedings, we must also have predetermined rules that will protect human rights without discrimination. A national strategy can be the basis for the development of legal solutions, but not directly applicable. In other words, the key role in the rights of an individual in criminal proceedings cannot be played by the technological solution of AI, but by the human (judge) and his contribution who creates the decision.

3. The Use of AI in Evidentiary Actions by Converting Speech into Written Text

During the COVID-19 pandemic, there have been a number of different possibilities for the use of AI in the performance of evidentiary actions. While some of them have reached a consensus through the possibilities provided by AI in identifying participants in public transport, some other solutions have not moved further than the beginning. From the previously recognized possibility of recording the main hearing, as well as other actions during criminal proceedings, IT solutions have been developed that allow the human voice to be transcribed into text, which is entered into the record via AI.

But, although there are already several high-quality IT programs for this, which are not unknown to the legal public, the previous option has not

yet been introduced in all courts in the Republic of Serbia for various reasons. Namely, although the Criminal Procedure Code[5] has provided for the possibility that the entire course of the main trial can be recorded, this is still not the rule in all courts and all types of proceedings. The audio-recorded course of the evidentiary action is transferred through appropriate technical processing into the written text of the record.

Modern software solutions that have the appropriate legal vocabulary can use IT to convert the recorded voice into a text document, which could be supplemented or edited. It is an AI program that allows the testimonies of the defendant, witnesses, experts and other participants in the proceedings to be neither dictated on the record nor made into a written text through audio equipment. The audio recording is evidence, with the classic record that is made on that occasion, but the automatic transcription of speech into text form with the support of AI would significantly speed up the evidence itself and follow the course of the process without interruption. Traditional discussions about the minutes not containing the full statements given, the court (or the public prosecutor) omitting parts that may be important when dictating would be skipped if such an AI-enabled solution could be used on the basis of the Act.

However, the accuracy of such converted speech into text form via AI is not entirely accurate. This further indicates that these precisions would have to be checked for every sound recording and relative content in every evidential action. Technical solutions could mark the converted speech temporally, so this might not be a big problem, but until a perfected software solution is reached, this should not be taken as a solution that is acceptable for evidence and evidentiary proceedings before the court.

4. Other AI Options in Speech Transcription

The obligation of sound and optical recording, except in the case of criminal offences where special evidentiary actions may be applied, should become the rule in all proceedings. In this way, a new quality would be achieved in the procedure, because the entire testimony of the participants in the procedure would be kept integrally. The problem of manual transcription makes this action difficult, and only through automatic transcription can we come up with a viable solution, with the caveats already put forward. Therefore, a

[5] Criminal Procedure Code, *Official Gazette* SRY, No. 70/2001, 68/2002, *Official Gazette of the Republic of Serbia*, No. 58/2004, 85/2005, 115/2005, 85/2005, 49/2007 and 20/2009. Criminal Procedure Code. *Official Gazette of the Republic of Serbia*, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 and 62/2021.

recording of the evidentiary action of the examination of a witness, and especially of a privileged, especially sensitive and vulnerable witness, with the use of AI that would enable automatically textually recorded testimony, would enable better quality evidence and lead to greater efficiency of the procedure.

A similar situation with the testimonies of the defendant, witnesses, experts and other participants in the proceedings is with interpretation and translation. This is particularly important in the context of international cooperation and/or cross-border exchange of evidence. It is certain that a generic language is different from a legal language, which further means that translating from a foreign language into a vernacular can cause additional difficulties. Until now, criminal proceedings depended on the skill of the translator or interpreter, the judge or the authority conducting the proceedings, to translate and interpret what was said. AI tools that can convert speech into written text can be a good solution, if they have enough software to do so. If the defendant himself does not have a transcribed speech into text, he will not have all the tools necessary to protect his rights to complain about the quality of the translation used. Translators for rare languages in use in the field of domestic courts can also pose an additional problem, which has often been an additional problem.

In this context, the use of automatic translation and interpretation would allow the defendant to come up with a translation that would satisfy the quality of what was said with the help of software solutions provided by AI.

However, despite the fact that we insist on resolving the issue of AI speech-to-text transcription based on legal changes, there are also parts of the process that can represent the field of application of AI right now. Often, in certain criminal proceedings where there is a larger number of perpetrators, a larger number of documents or a large number of different electronic devices, the time required for their expertise extends to a longer period of time. Such a large database from which to exclude certain digital evidence is often a field where it is not easy to extract relevant data.

That is why artificial intelligence and its software solutions could be used to process larger amounts of data through their integration and subsequent analysis, which is the basis for the efficiency of the process. AI software solutions can connect and analyze all the facts contained in the data carrier in a short time, regardless of how complex this data is and in what form, whether it is SMS messages, e-mails, photos, audio recordings and more. Evidence today is often big data and as such would require traditional methods of treatment and analysis that can take several months or years, and with the application

of AI tools, forensic data can be quickly and efficiently brought before the law enforcement authority. The search for potential evidence would thus be accelerated, and public confidence in the justice system would increase.

5. Existing Limitations of the Use of AI in Comparative Legislation

The way in which artificial intelligence could be used with its solutions to process large amounts of data has its advantages. However, there are also limitations to such large tasks. Programs that would work on processing such large amounts of data are man-made, organizing the program with a model of questions and potential answers to be found, and in this way are not devoid of prejudices, such as gender, culture, religion, race, and others. Bias can have many negative connotations, which then makes the results of the obtained searches insufficiently competent to be used in judicial criminal proceedings, appreciating the principle of independence and impartiality. Such problems can also hinder the detection of perpetrators of crimes, as in the previous stages of the procedure.

A problem that occurred in 2015 when the artificial intelligence used by Google for photos for search gave the term gorilla a joint photo of a young man, a white man and a black girl (BBC News, 2015). This event, which was most likely produced unintentionally, due to the subjective omissions of the authors of the algorithm, was subconscious content that Google could not influence, but such an algorithm was used, and thus caused racial discrimination. A more drastic example of this is the solution for the use of artificial intelligence in the Kentucky justice system. A 2011 Kentucky law requires judges to consult an algorithm when deciding whether defendants can post bail. The results of the analysis of the implementation of such a legal regulation have shown that in the implementation of such a solution provided by AI, there are many more whites who are allowed to deposit bail and go home, than other parts of the population who are not white.

In principle, the U.S. and China are at the forefront of the use of artificial intelligence in the judiciary, which provides opportunities for their experience in the application of AI not to repeat the same failures in application in our country. The most well-known algorithm used in the U.S. judiciary is COMPAS,[6] a software that helps judges decide whether to hold defendants in custody or release them to await trial (or the likelihood of recidivism). Racial prejudice against the black population was also embedded in this program,

[6] C. Thomas, A. Nunez, "Automating Judicial Discretion: How Algorithmic Risk Assessments in Pretrial Adjudications Violate Equal Protection Rights on the Basis of Race", *Law & Inequality* 2/2022, 371–407.

based not only on the subjective (subconscious) relationship of the person who prepared the program, but also on previous case law, in which such discrimination existed. In 2019, the U.S. Congress passed the *Algorithmic Accountability Act*,[7] which shifted responsibility for discrimination resulting from the use of artificial intelligence software to the author of the IT solution and the company that owns the program. The law obliges such companies to subsequently remove the discriminatory characteristics from the program.

Other systems that are at the forefront of the use of AI are also trying to introduce restrictions on software authors in order to prevent discrimination in decision-making, so similar regulations have been adopted in the United Kingdom, New Zealand, Australia and France. Although the application of AI results is not yet fully present in criminal proceedings, the examples presented indicate the necessary caution.

China's complex legal system indicates that AI solutions are not applied throughout the country, but that problems in implementation, especially in the case of discriminatory treatment, exist. The otherwise good AI software *206 system*,[8] applied by the courts in Shanghai, has the task of preventing biased decision-making, and warns the judge when his formed decision differs more than 85% from the previous judgment of the higher court, and if the judge insisted on his decision, the case would automatically be submitted to the president of the court for consideration, as by analogy of our request for recusal of the judge. China was the first to introduce the Same Type Case Reference System, which links earlier cases to those currently on trial, to guide the court in making a decision.

A similar role to the one provided by AI to the judge in decision-making in the Shanghai courts was played by the jurisprudential departments of our courts, which worked on the unification of case law. The previous purely manual and intellectual work in our country has been entrusted in China to solutions offered by AI.

A similar system, which is rarely used, exists in the United States. It's called SIS's Sentencing Information Systems, which shows judges how they or other judges have decided in similar cases. All this should make the outcome of the court proceedings as objective as possible, reducing the possibility of the influence of prejudices, although the question could be raised whether such systems only perpetuate old prejudices.

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[7] https://www.wyden.senate.gov/imo/media/doc/algorithmic_accountability_act_of_2023_summary.pdf, last visited 06. 06. 2024.

[8] https://www.sixthtone.com/news/1003496, last visited 06. 06. 2024.

6. Artificial Intelligence, the Rule of Law and Compensation

The very generous offer of American scientist Joshua Browder, the company's founder and CEO, who designed the AI DoNotPay, to compensate the defendant for the damage suffered if he lost the dispute supported by his Robot Lawyer, has raised a whole series of questions related to the rule of law and the possibility of damages resulting from the use of artificial intelligence in court proceedings. One group of these questions would be tied to the contractual relationship between the client and the author of the AI software. The rules that normally apply to compensation for damages could also be applied in this case, in accordance with the concluded contract.

The second group of issues related to possible harm from AI errors would be related to court proceedings where the public interest is at stake. A whole range of possible problems can begin with the question of how AI is used, i.e. whether as an auxiliary tool in a procedure led by a judge, or as a tool in the procedure that does certain things instead of a human.

Regardless of the group of issues involved, one should not lose sight of the fact that the use of AI in judicial proceedings must be regulated by systemic law (the Criminal Procedure Code or the Code of Civil Procedure, for example).

The adoption of Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024[9] does not bring anything new in this regard, except that it gives indications of all the areas in which there is already regulation on AI, from services in the field of healthcare, insurance, public administration and the like, and appropriate solutions. In all of them, if we remain in the sphere of court proceedings, it is possible to cause damage due to various discriminatory decisions made by AI, including not only skin color, gender, but also age, degree of disability, violation of privacy rules, theft of biometric data, and more.

What is possible at the moment is that before using the use of AI, the consent of the participants in the procedure can be requested in civil proceedings, and in court proceedings where the public interest is at stake, AI can be applied extremely restrictively. All this, of course, implies that AI, as a tool that makes life easier, speeds up court proceedings and improves the

[9] Regulation (EU) 2024/1689 Of The European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), *Official Journal of the European Union*, 2024/1689 from 12.7.2024.

efficiency of trials, cannot become an end in itself, and that the application of AI should not always be insisted upon. Ethical standards with the use of AI cannot be erased because of speed or a cheaper solution.

Because in speed, mistakes are greater, but also the consequences we suffer, including damages. In this sense, certain solutions will have to be provided as soon as possible by other branches of law, including the law of insurance, and the law of obligations, commercial law and many other branches of law. However, these questions require special treatment, and go beyond the idea and scope of this work.

7. Instead of a Conclusion

The issue of artificial intelligence and its application in criminal court proceedings is extremely topical, but it can be said that we still do not have enough professional or scientific literature on the possible use of instruments that AI offers us in criminal procedural law. There is still a lack of systematic discussion.[10] There may be many reasons for this state of affairs, but the fact is that the documents of the Council of Europe and the European Union that are being monitored require full implementation. Although the legal regulation of the use of artificial intelligence in some other countries is comparatively far away from us, not only geographically but also due to the different legal system, we can use positive experiences.

Bearing in mind the fact that the use and application of AI is also based on ethical principles, it is necessary to introduce appropriate solutions into the Codes of Ethics of the Police, Courts and Prosecutor's Offices. In this sense, the rules established by CEPEJ can serve as a good example in the development of future legal solutions. The European Commission for the Efficiency of Justice (CEPEJ), a body of the Council of Europe of which the Republic of Serbia is a member, has adopted the European Charter of Ethics on the Use of Artificial Intelligence in Judicial Systems.[11] The Charter sets out five basic principles as a prerequisite for the use of any artificial intelligence in a country's judiciary:

1. Principle of respect of fundamental rights: ensuring that the design and implementation of artificial intelligence tools and services are compatible with fundamental rights;

[10] D. Avramović, D. Jovanov, „Sudska (ne)pristrasnost i veštačka inteligencija", *Strani pravni život* 2/2023, 161–176.

[11] https://www.coe.int/en/web/cepej/cepej-european-ethical-charter-on-the-use-of-artificial-intelligence-ai-in-judicial-systems-and-their-environment, last visited 06. 06. 2024.

2. Principle of non-discrimination: specifically preventing the development or intensification of any discrimination between individuals or groups of individuals;
3. Principle of quality and security: with regard to the processing of judicial decisions and data, using certified sources and intangible data with models conceived in a multi-disciplinary manner, in a secure technological environment;
4. Principle of transparency, impartiality and fairness: making data processing methods accessible and understandable, authorising external audits;
5. Principle "under user control": precluding a prescriptive approach and ensuring that users are informed actors and in control of their choices.

For the CEPEJ, compliance with these principles must be ensured in the processing of judicial decisions and data by algorithms and in the use made of them. The CEPEJ Charter is accompanied by an in-depth study on the use of AI in judicial systems, notably AI applications processing judicial decisions and data.

Such solutions bring back the topic of presenting and evaluating evidence in criminal proceedings where AI was used to the very beginning: that normative regulation should be carried out in the Criminal Procedure Code, but also to create a sustainable system in which these rules would actually work.

The fact that there is no normative regulation for the implementation of predictive police activities based on artificial intelligence in Serbia is indisputable. The use of AI solutions that are used to predict where, when and by whom a crime will be committed can not only be based on the technical instructions of certain programs, but also in the relevant legal and bylaw solutions. Only in this way will some of the results be able to be used in court proceedings, and the reasons for this are found in numerous court criminal proceedings, which have been standing for a long time, because according to the rules of the law of evidence, data and evidence obtained through AI cannot be used if they are not intended as such.

De lege ferenda, it is necessary to introduce rules into the Criminal Procedure Code that will allow the use of digital technologies in criminal cases, and to ensure electronic communication between courts and prisons in Serbia, courts and prosecutor's offices, and partly between defence attorneys and courts.

Given the fact that we are in a small group of countries in Europe, where neither the defendants nor the victims can access an ongoing case electronically, and that there are no secure electronic connections, this means that videoconferences, which were intended to be used during the 2020 virus pandemic, could not be used in a safe way, not even today.

Such opportunities can significantly help to raise the quality of work of courts and prosecutors' offices, as well as the police and institutions in which detained and imprisoned persons are kept. However, it is clear that there is a lack of application of artificial intelligence in criminal proceedings, with all the dilemmas presented, which, with changes in legal solutions, would already significantly speed up proceedings before our authorities. Progress in the field of technology and artificial intelligence can bring a large number of benefits for a more efficient operation of the judicial system of the Republic of Serbia. When introducing predictable justice in the judiciary, as well as in the prosecutor's office and the police, legal, moral and ethical principles must be respected with great care, as well as the protection of basic human rights, as a standard without which one cannot do without.

This paper is only the beginning and opens up only individual, controversial and less controversial issues in the application of artificial intelligence in criminal court proceedings in general.

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MOGUĆNOSTI PRIMENE VEŠTAČKE INTELIGENCIJE U SUDSKOM POSTUPKU

Apstrakt

Sve veće mogućnosti (pravne) primene savremenih tehnoloških sredstava u sudskim postupcima učinile su ovo pitanje jednom od najaktuelnijih tema ikada. Naročita zainteresovanos doktrine i prakse skrenula je pažnju na ovo proceduralno pitanje još od početka globalne zdravstvene krize izazvane pandemijom SARS CoV19. Završetkom pandemije nije umanjio značaj pitanja sprovođenja i validnosti dokaznih radnji putem tehničkih inovacija i njihova validnost. Prednosti i mane primene veštačke inteligencije u sastavljanju zapisnika o saslušanju ili tokom obavljanja drugih dokaznih radnji samo su neke od situacija koje zaslužuju našu pažnju. Kao naročito značajno se ističe pitanje naknade štete koja može biti rezultat greške tokom upotrebe veštačke inteligencije. To znači da se standardi postignuti u krivičnim ili građanskim postupcima ne mogu derogirati prihvatanjem svih prednosti veštačke inteligencije bez njihovog kritičkog preispitivanja. Pravilan postupak i zaštita ljudskih

prava uz korišćenje veštačke inteligencije u sudskim postupcima zahtevaju poštovanje normativnih rešenja i njima predviđenih standarda. Postupanje po standardima koji su niži od propisanih narušili bi načelo zakonitosti izvršenih dokaznih radnji.

Ključne reči: primena veštačke inteligencije, sudski postupci, standardi ljudskih prava, naknada štete.

Savo Manojlović* **DOI: 10.56461/ZR_24.ONS.09**

PUBLIC FIGURE STATUS AND FAILURE TO REQUEST RETRACTIONS IN DAMAGE COMPENSATION DISPUTES AGAINST TABLOIDS**

Summary

This paper explores the legal complexities surrounding public figures and the request of retractions in damage compensation disputes against tabloids. The study focuses on two primary legal questions: whether the heightened scrutiny public figures face justifies a more lenient approach to media liability, particularly in the context of tabloids, and whether the failure to request a retraction by the harmed individual should serve as a mitigating factor for the media in legal disputes.

Through a detailed analysis of both theoretical perspectives and relevant case law from the European Court of Human Rights and the U.S. Supreme Court, the paper examines the balance between the public's right to be informed and the protection of individual rights, such as privacy and reputation. The discussion highlights how tabloids, as a specific subset of the media, frequently violate journalistic standards in their pursuit of sensationalism, often resulting in significant harm to public figures.

The paper argues that while public figures are required to tolerate a higher degree of criticism, this does not inherently reduce the accountability of tabloids for their actions. Moreover, the non-issuance of a retraction should not automatically mitigate the tabloid's liability, especially when the retraction process could exacerbate the harm suffered by the individual. Ultimately, the paper calls

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for stricter legal standards in cases involving tabloids, emphasizing the need to protect public figures from disproportionate harm while maintaining the integrity of free speech and the press.

Keywords: *Public Figures, Damage Compensation, Media Retractions, Media Liability, Freedom of Speech.*

1. Introduction

This paper analyzes two key legal requests regarding compensation for damage to reputation and honor in lawsuits against tabloids. The first request is whether the widely recognized principle that public figures must endure a greater degree of public criticism necessarily implies a mitigating factor for the media, particularly tabloids, in such cases. The second request concerns whether the failure of an individual, whose reputation has been harmed, to exercise their right of retraction always constitutes a mitigating circumstance for the tabloid.

In addition to the introduction, the paper provides both theoretical and practical frameworks, considering academic perspectives and relevant case law from the European Court of Human

Rights, as well as the U.S. Supreme Court. The third, central section of the paper delves into and critiques these contentious requests within judicial practice, followed by concluding remarks.

The paper specifically emphasizes analysis in lawsuits for damages against tabloids rather than the media in general. While tabloids are indeed part of the media landscape, they represent a darker side, as they often breach journalistic standards and intentionally cause harm to the individuals they cover. The aim of the paper is to shed light on this narrower aspect of damage compensation litigation.

2. Theoretical and Practical Framework

Before discussing the aforementioned legal requests, it is essential to first define and situate the concept of tabloids within both theoretical and terminological frameworks. This includes the relationship between public interest and privacy, the role of public figures in facing public criticism, as well as the distinction between material and non-material damages in lawsuits involving the media.

There are numerous definitions of tabloids. Initially, the term was linked to printed newspapers. One of the most frequently cited definitions describes tabloids as: "*newspapers that emphasize sensationalism, gossip, and*

entertainment over factual news reporting and often breach journalistic standards for accuracy and objectivity."[1] The very concept of tabloidization extends to other media. The phenomenon of tabloidization stands out, as it is noted, "*not only of media scholars but also of media industries themselves*."[2]

It is actually a phenomenon that has surpassed the media within which it originated and has become a kind of cultural phenomenon, so we can talk about a culture of tabloidization.[3]

For the purposes of this paper, it is important for us to focus on and theoretically define tabloids as media that consistently violate journalistic standards among the various phenomenological aspects of tabloids. We are actually dealing with elements that are not disputed when we talk about tabloids, which are characterized by their emphasis on sensationalism over substantive news reporting, often prioritizing entertainment and scandal over accuracy and journalistic integrity. These elements can be undeniably found in the theoretical works of M. Conboy,[4] J. Langer[5] and F. Esser.[6]

It is undeniable that the role of journalism lies in protecting the public interest, whereas in tabloids, sensationalism consistently and daily takes precedence over the public interest.[7]

The subject of this paper is disputes for the protection of honor and reputation that are filed against tabloids. Highlighting tabloids is important to understand that these are media outlets that violate journalistic (media) standards. In disputes against the media, there is a balance between two important interests: the public interest and the protection of privacy. In this sense, it is necessary for the media to assess the significance of publishing certain news for the public. In this process, what is known as the public interest test is conducted, while also evaluating the proportionality of publishing

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1 J. L. Sullivan, *Media Audiences: Effects, Users, Institutions, and Power*, Sage Publications, 2007.

2 A. Biressi, H. Nunn, "Introduction", *The Tabloid Culture Reader*, 2007, 1.

3 *Ibid*.

4 M. Conboy, *Tabloid Britain: Constructing a Community through Language,* Routledge, 2006, 4–7.

5 J. Langer, *Tabloid Television: Popular Journalism and the 'Other News'*, Routledge, 1998, 13–14.

6 F. Esser, "Tabloidization of News: A Comparative Analysis of Anglo-American and German Press Journalism", *European Journal of Communication* 14(3)/1999, 291–324.

7 K. Williams, *Get Me a Murder a Day! A History of Media and Communication in Britain*, Bloomsbury Publishing, 2010, 90–93.

such news. It is generally accepted in theory that the public interest can prevail if the news is published in a manner that is proportional and justified.[8]

It is a well-established legal principle that public figures are required to tolerate a higher degree of criticism, which courts consider in defamation cases involving the media. This standard is particularly significant in defamation law, where public figures must demonstrate "actual malice" to succeed in a lawsuit. This requirement is designed to safeguard freedom of speech and the press, recognizing that public figures, due to their prominence and societal roles, are naturally subject to more intense public scrutiny.[9] The same undisputed stance is also held by E. Barendt,[10] and Schauer.[11]

In addition to theoretical perspectives, this undisputed principle is also prominently upheld in the practice of the most relevant courts. The U.S. Supreme Court has consistently advocated this stance in several of its rulings. In the landmark case *New York Times Co. v. Sullivan* (1964), the Court emphasized that public figures must prove that the media acted with "actual malice" in order to win defamation lawsuits. As stated in the ruling: "A profound national commitment to the principle that debate on public requests should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[12]

This case set a significant precedent, establishing the principle that public figures are subject to a higher threshold in defamation cases, thereby protecting freedom of speech and ensuring that public debate remains open and robust.[13] This is emphasized in the case *Gertz v. Robert Welch, Inc.* (1974).[14] This case particularly highlighted the distinction between public figures and private citizens. The ruling made it clear that public figures, due to their influence and role in public life, are expected to demonstrate that defamatory statements were made with knowledge of their falsity or with reckless disregard for the truth. This standard is not required for private individuals, who enjoy greater protection under defamation law.

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[8] R. Posner, "The Right of Privacy", *Georgia Law Review* 12(3)/1978. D. Morrison, M. Svennevig, *The Public Interest, the Media and Privacy*, Institute for public policy research, 2002. R. Wacks, *Privacy and Media Freedom*, Oxford University Press, 2013.

[9] P. N. Amponsah, *Libel law, political criticism, and defamation of public figures: the United States, Europe, and Australia*, LFB Scholarly Publishing, 2004.

[10] E. Barendt, *Freedom of Speech*, Oxford University Press, 2005.

[11] F. Schauer, "Public Figures", *William & Mary Law Review* 1/1984, 91-128.

[12] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[13] *Ibid*.

[14] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

This differentiation underscores the legal recognition that public figures, by virtue of their position and access to means of countering false statements, are in a better position to address and refute defamatory claims than private individuals.[15] In the case *Hustler Magazine v. Falwell* (1988), the U.S. Supreme Court further reinforced the principle that the First Amendment prohibits public figures from recovering damages for the tort of intentional infliction of emotional distress without demonstrating that the publication contained a false statement of fact made with "actual malice". The Court's ruling highlighted the importance of protecting free speech, particularly when it comes to satire and parody, which often target public figures and may cause emotional distress. The decision underscored that public figures must meet the "actual malice" standard to prevail in such cases, ensuring that freedom of expression is not unduly limited.[16]

The practice of the European Court of Human Rights, which is followed within the European constitutional framework, also emphasizes the need for greater openness of public figures in relation to media scrutiny. In the case *Lingens v. Austria* (1986), the Court specifically highlighted politicians as public figures who must endure higher levels of criticism. The judgment stated: "The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance".[17] Among more recent rulings, the case of *Von Hannover v. Germany (No. 2)* (2012) is notable for its stance on the balance between privacy and freedom of expression concerning Princess Caroline of Monaco.[18] The European Court of Human Rights reiterated that "the right to respect for private life must be balanced against the freedom of expression guaranteed by Article 10 of the Convention".[19]

However, in the case of public figures, the requirements of privacy must be balanced more leniently, in favor of freedom of expression, especially when the information contributes to a debate of general interest.[20] In the case of *Axel Springer AG v. Germany*, the European Court of Human Rights

[15] *Ibid*.

[16] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

[17] *Lingens v. Austria*, No. 9815/82, Judgment of 8 July 1986, para. 42.

[18] *Von Hannover v. Germany (No. 2)*, Nos. 40660/08 and 60641/08, Judgment of 7 February 2012.

[19] *Ibid*.

[20] *Ibid*.

emphasized the critical role of the press in a democratic society, stating: "The Court considers that the press plays a vital role as a public watchdog in a democratic society. The limits of acceptable criticism are wider with regard to a private individual who is a public figure than with regard to a private individual, since the former inevitably and knowingly lays himself open to close scrutiny of his actions, particularly by journalists, and must consequently display a greater degree of tolerance."[21]

The subject of this paper focuses on civil lawsuits against tabloids, rather than criminal proceedings. In civil disputes, aside from certain other demands such as the publication of corrections or the obligation to publish the court's ruling, the primary demand most often involves compensation for damages.

Damage is generally understood as any loss or harm that results from a breach of duty or an unlawful act. This includes both material damage, such as economic losses like property damage or financial loss, and non-material damage, which covers emotional distress, pain and suffering, and loss of enjoyment of life.[22] There is a clear distinction between material and non-material damage. Material damage includes tangible, economic losses such as property damage, financial loss, or lost income. Non-material damage, on the other hand, refers to intangible harms like emotional distress, pain and suffering, loss of reputation, and diminished quality of life. This distinction is important in legal cases because it affects the type of compensation that can be awarded.

In disputes involving the media, non-material damages are typically awarded. This is a consistent position in comparative judicial practice, as well as in the works of numerous authors, such as W. L. Prosser,[23] E. Barendt,[24] R. Smolla,[25] and R. Sack.[26] Material damages are awarded only in cases where direct financial loss or damage can be proven. Such damages are awarded much less frequently compared to non-material damages.[27] In judicial practice, one example of such a case is *Hulk Hogan v. Gawker Media*. In this case,

[21] *Axel Springer AG v. Germany*, No. 39954/08, Judgment of 7 February 2012.

[22] Keeton W.P. *et al*., *Prosser and Keeton on Torts*, 1984 and John G. Fleming, *The Law of Torts, 1998*.

[23] W. L. Prosser, *Handbook of the Law of Torts*, West Publishing Company, 1971.

[24] E. Barendt.

[25] R. A. Smolla, *Law of Defamation*, Clark Boardman Callaghan, 2007.

[26] R. D. Sack, *Sack on Defamation: Libel, Slander, and Related* Problems, Practising Law Institute, 2010.

[27] E. Barendt.

material damages were awarded due to the publication of a private video containing sexual content with a person who was not Hulk Hogan's wife. As a result, Hulk Hogan, whose real name is Terry Bollea, was awarded significant material compensation for the loss of income and professional opportunities.[28]

3. Discussion of Controversial Legal Requests

3.1. The Status of Public Figures as a Mitigating Factor for Tabloids

The status of a public figure is undeniably recognized in both theory and judicial practice as inherently subjecting individuals to a higher level of criticism, as we discussed in the section providing the theoretical framework. It is also important to note that in theory, it is undisputed that the status of a public figure can be considered a mitigating factor for the media when reporting on matters that infringe upon the personal rights of well-known individuals. Public figures are expected to meet higher standards when proving that a violation of their honor and reputation has occurred. This view is also upheld by the U.S. Supreme Court in the landmark case New York Times Co. v. Sullivan, 376 U.S. 254 (1964), which established the "actual malice" standard. This position is also widely accepted among many theorists, including M. Collins[29] and R. Keeble.[30] Among newer generation authors, there is a group that argues that the standards for public figures should not necessarily differ from those for private individuals.

It is indisputable that media law is characterized by a constant tension between freedom of speech and public interest, on the one hand, and the protection of personal dignity, on the other. Public figures are part of the public sphere, and the public undoubtedly has a legitimate interest in being informed about them. However, this does not mean that violations of their honor and dignity should be interpreted in such a way that their status as public figures constitutes a mitigating circumstance for tabloids.

It is important to emphasize why this paper insists on using the term "tabloid" as an undisputed subset of the media. Tabloids are media outlets that consistently violate journalistic standards and frequently infringe upon the privacy of public figures. This behavior is often driven by sensationalism aimed at generating profit, as well as by disagreements with the views of certain individuals whose rights are violated.

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[28] *Bollea v. Gawker Media, LLC*, No. 12012447-CI-011 (Fla. Cir. Ct., Mar. 18, 2016).

[29] M. Collins, *The Law of Defamation and the Internet*, Oxford University Press, 2010.

[30] R. Keeble, *Media Law and Ethics*, Routledge, 2009.

Particularly when tabloids repeatedly infringe upon the rights of certain public figures, for example, by publishing highly offensive or malicious comments that aim not to critique but to disparage a specific public figure, it is entirely incorrect to interpret the status of a public figure as a mitigating factor for tabloids. Such actions by tabloids can be intended to diminish the public influence of public figures, such as politicians. Allowing a more lenient legal process for tabloids would be completely contrary to the purpose of legal protection. On the contrary, stricter criteria should be applied when determining damages against tabloids, as public figures hold their status precisely because of their public reputation.

In essence, if a standard were to be defined, it is undeniable that public figures must endure a higher level of criticism. However, the fact that they hold the status of public figures should not only refrain from becoming a mitigating circumstance for tabloids, but in cases where a significant and permanent violation of a public figure's reputation and honor by a tabloid is proven, it should be specially protected. For private individuals, damage to reputation and honor is generally focused within their private circle, whereas for public figures, this damage extends to the public sphere, and in cases of non-material damage, represents a more intense violation compared to the harm suffered by private individuals.

3.2. Failure to Request a Retraction as a Mitigating Circumstance for Tabloids

A retraction, also referred to as a correction, is an official statement requested by a media outlet to deny or rectify previously published false or misleading information. It is typically requested when an individual or organization believes that inaccurate statements have been disseminated, potentially causing reputational harm. A retraction serves both to correct the record and to mitigate any damage caused by the initial publication. The effectiveness and necessity of a retraction can have significant legal implications, particularly in defamation cases, where the presence or absence of such a corrective measure may influence the determination of liability and the calculation of damages.[31]

What can be raised as a contentious legal request is whether, in cases where a retraction is not requested by the individual whose rights have been violated, this can be considered a mitigating circumstance for tabloids. The failure to request a retraction can be used as an argument to reduce the amount of damages, or as a defense argument.

[31] E. Wager, and P. Williams, "Why and How Do Journals Retract Articles? An Analysis of Medline Retractions", *Journal of Medical Ethics* 37(9)/2011, 567–570.

The right to a retraction is important, and it can indeed provide an opportunity to mitigate the damage. However, as Smoll[32] points out, the failure to request a retraction should not necessarily and automatically reduce the media's liability. Moreover, in certain situations, retractions can further increase the harm suffered by the individual. This can occur when the retraction increases the visibility of the previous news, if publishing the retraction creates additional confusion, or if it only partially corrects the news, especially when the original news was presented in a highly negative context. It is conceivable that an individual who does not wish for certain aspects of their personal life to be discussed, such as their private life, financial status, or religious beliefs, could be placed in an unwanted context by issuing a retraction of a particular news story. While it is undeniable that public figures must endure media coverage of aspects of their lives they might prefer not to highlight, it would be absurd to force an individual who is already suffering harm to inflict additional harm on themselves.

This perspective is particularly understandable considering that by commenting on or denying a negative news story, the negative aspects of the retracted falsehood can often further damage the public reputation of the individual. A good example of this is the so-called "pig rumor".

The "pig rumor" strategy in politics refers to a smear tactic where false and outrageous claims are spread about an opponent to force them to deny it, regardless of the truth. This strategy thrives on the notion that even denying a ridiculous accusation causes lasting damage. One example of this is the "Pig Fucker Politics" tactic, which has been used in various political smear campaigns to undermine opponents by making them deny absurd accusations, thus keeping the rumor alive. Although there is no specific documented case of a politician spreading a rumor about their opponent engaging in inappropriate behavior with a pig, the concept remains a notorious example of political mudslinging.

In academic discussions on political strategies, there's an oft-cited anecdote that exemplifies the use of smear campaigns. The story goes that a political strategist once advised a candidate to spread the false rumor that their opponent had engaged in an inappropriate act with a pig. The idea behind this tactic was not to make voters believe the claim, but to force the opponent into the uncomfortable position of having to publicly deny it, thereby giving the rumor more attention than it would otherwise receive.

[32] R. A. Smolla, *Law of Defamation*, 2nd ed., Thomson West, Eagan 2005.

This story is often used to illustrate a key principle of "mudslinging" or "smear tactics", where the goal is to damage an opponent's reputation by circulating scandalous or misleading accusations, even if there's no truth behind them. The very act of responding to such accusations can draw more attention to the rumor, thereby harming the opponent regardless of the truth. By denying such news, certain individuals would obviously inflict additional harm upon themselves.

A retraction is therefore a means by which individuals have the opportunity to mitigate their own harm, but it should by no means be turned into a weapon that forces the harmed party to inflict additional harm on themselves.

4. Conclusion

Tabloids are a specific type of media whose primary characteristic is the frequent violation of media standards in the pursuit of sensationalism, often resulting in severe infringements on the rights of those being reported on. In lawsuits against tabloids, the aggrieved parties typically seek compensation for damages. In such legal disputes, non-material damages are generally awarded, while material compensation is granted only if it can be directly linked to financial losses.

It is undisputed that media disputes involve balancing the public interest and the need to inform the public, on the one hand, and the protection of privacy, honor, and reputation of private individuals, on the other. Public figures, as part of the public sphere, are undeniably subject to criticism and are generally more exposed to public scrutiny. In lawsuits, it is usually required to prove a higher degree of malice when reporting on public figures compared to private individuals. Therefore, the standards for proving media malice are typically higher when it comes to well-known individuals.

In spite of this, it does not mean that the public figure status automatically constitutes a mitigating factor for the media, especially tabloids, which may perpetually violate the rights of public figures in pursuit of sensationalism for greater profit. It is appropriate to apply stricter criteria when assessing the violation of rights; however, once the violation is established, it must be recognized that public figures may suffer greater harm in terms of damage to their reputation and honor. Public reputation and honor are often more pronounced in public figures, making the harm inflicted more significant than in the case of a private individual.

A retraction is a tool that typically serves as a means to mitigate or reduce the damage caused by the media or tabloids. However, the failure to

use a retraction cannot automatically be taken as grounds for reducing the compensation that the aggrieved party may seek. By issuing a retraction of certain news, the individual may in fact inflict further harm on themselves, so it would be contrary to the purpose of this legal instrument to force the aggrieved party to use it. In certain cases, a retraction may continue to bring false and malicious news to public attention or place the individual in a context that harms their personal integrity.

* * *

POLOŽAJ JAVNIH LIČNOSTI I NEPODNOŠENJE ZAHTEVA ZA OBJAVLJIVANJE ISPRAVKE U SPOROVIMA ZA NAKNADU ŠTETE PROTIV TABLOIDA

Apstrakt

U radu su prikazani pravni izazovi povezani sa javnim ličnostima i nepodnošenjem zahteva za objavljivanje ispravke u sporovima za naknadu štete protiv tabloida. Pažnja je naročito posvećena pitanju da li pojačan nadzor kome su izložene javne ličnosti opravdava blaži pristup medijskoj odgovornosti, posebno u kontekstu tabloida, kao i da li propust od strane oštećenog pojedinca da zahteva objavljivanje ispravke treba da posluži kao olakšavajući faktor za medije u sporovima za naknadu štete.

Kroz analizu kako teorijskih perspektiva, tako i relevantne prakse Evropskog suda za ljudska prava i Vrhovnog suda SAD, rad ispituje balans između prava javnosti da bude informisana i zaštite prava pojedinaca, pre svega prava na privatnost i ugled. Posebno je istaknuto kako tabloidi, kao specifična vrsta medija, često krše novinarske standarde u potrazi za senzacionalizmom, što dovodi do značajne štete koju trpe javne ličnosti.

Rezultati istraživanja su pokazali da, iako se od javnih ličnosti traži da tolerišu veći stepen kritike, odgovornost tabloida ne bi trebalo da bude umanjena. Naprotiv, nepodnošenje zahteva za objavljivanje ispravke ne bi trebalo automatski da ublaži odgovornost tabloida, posebno kada bi objavljivanje ispravke moglo da pogorša štetu koju je pretrpeo pojedinac. Naposletku, rad ukazuje i na potrebu za strožim pravnim standardima u

slučajevima koji uključuju tabloide, naglašavajući potrebu da se javne ličnosti zaštite od nesrazmerne štete uz očuvanje integriteta slobode govora i štampe.

Ključne reči: javne ličnosti, naknada štete, pravo na ispravku, odgovornost medija, sloboda izražavanja.

Endre Nyitrai* **DOI: 10.56461/ZR_24.ONS.10**

INNOVATIVE OPPORTUNITIES FOR COMMITTING FRAUD AND FORENSIC RECOMMENDATIONS FOR COMPENSATION

Summary

The purpose of the study is to describe innovative methods of committing fraud in the digital space, which adapts to continuous technological changes and innovations. The article presents an innovative information gathering methodology in terms of compensation and proof, as well as the role of national investigative teams in the detection of fraud.

Keywords: *Fraud, Deepfake, Compensation, OSINT, JIT.*

1. Introduction

In the case of frauds committed in or with the help of the digital space, the perpetrator or perpetrators, who may even operate as a criminal organization, usually contact the victim via their mobile phone or computer. Electronic fraud can be grouped as follows: in the form of phone calls, text messages, e-mails, and online fraud. In general, when committing a crime, when they are misled, victims often use some kind of info-communication device, such as a smart phone or laptop.

When committing fraud, the perpetrator negatively influences the decision-maker, thus the victim. The effectiveness of influencing can be increased if the voice or image of the victim's relative is cloned and this is used to mislead. Using these kinds of technical tools, the damage can be greater, as shown by international examples, when fraudsters are able to transfer millions of dollars. Therefore, it has become important to examine the possibilities of innovative methods and international cooperation from a forensic point of view.

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2. Some Innovative Methods of Committing Fraud

In Hungary in recent years, the serial crime known as "grandparent scam" and "false bank calls" has been very popular. With the development of technology, however, the latest methods of committing are already appearing, when the so-called in the context of "virtual kidnapping", they extort larger sums from relatives. In all cases, influence and the dissemination of untrue information played a major role. In the case of "grandparent scam", the human factor will have a decisive influence, while in the case of "virtual robbery", the deepfake program based on artificial intelligence will play a decisive role.

In Hungary, Act C of 2012 on the Criminal Code provides for fraud as follows:

"Section 373 (1) A person who, for illicit gain, causes another person to err or maintains his error and causes damage by doing so is guilty of fraud.

(2) The punishment shall be imprisonment for up to two years for committing a misdemeanor if
   a) fraud causes smaller damage, or
   b) fraud causing any damage not exceeding the infraction threshold is committed
      ba) in a criminal conspiracy,
      bb) at a site of public danger,
      bc) regularly for generating income,
      bd) by pretending to collect donations for charity.

(3) The punishment shall be imprisonment for up to three years for committing a felony if
   a) fraud causes larger damage, or
   b) fraud causing smaller damage is committed in a manner specified in paragraph (2) ba) to bc).

(4) The punishment shall be imprisonment for one to five years if
   a) fraud causes significant damage,
   b) fraud causing larger damage is committed in a manner specified in paragraph (2) ba) to bc), or
   c) fraud is committed against a person with limited ability to recognise or avert the criminal offence due to his old age or disability.

(5) The punishment shall be imprisonment for two to eight years if
   a) fraud causes particularly large damage, or
   b) fraud causing significant damage is committed in a manner specified in paragraph (2) ba) to bc).

(6) The punishment shall be imprisonment for five to ten years if
   a) fraud causes particularly significant damage, or
   b) fraud causing particularly large damage is committed in a manner specified in paragraph (2) ba) to bc).

(7) For the purposes of this section, any unpaid consideration for a service used shall also be considered as damage."

In the case of "grandparent scams" and "virtual kidnapping" fraud, the perpetrator must fulfill the facts specified in the above legislation in order to speak of a fraud crime.

2.1. Grandparent Scams

In the case of grandparent scams, the perpetrator called elderly people, who pretended to be the victim's grandchild. Most of the time, the caller claimed that he had caused an accident and needed money immediately to compensate for the damage. The fraudster also asked the deceived elderly person not to tell or call anyone in his environment. With this request, the perpetrator aimed to reveal the crime as soon as possible.

In order to avoid encounters, the perpetrator posing as a relative (fake relative) convinced the victims that he could not go for the money, but would send an acquaintance to get it. A courier was then directed to the address of the elderly, who collected the money, jewelry or other valuables. It has also happened that criminals have already tried to persuade the elderly to transfer a specific amount to a bank account through known money-sending networks. If the victim could not do this, a taxi was sent to his address, which took him to a place where he could refer. There have also been cases where bank card details were requested to be dictated, with which various online transactions were carried out.[1] In addition to grandparent scams, romance scams are also very common, when fraudsters - even from abroad - ask naive ladies for money transfers so that they can travel abroad, or for the lady to cover the offender's hospital, apartment or educational expenses expenses.[2]

[1] ORFK, *Kommunikációs Szolgálat, Fókuszban az unokázós csalások- így kerülje el, hogy áldozattá váljon*, https://www.police.hu/hu/hirek-es-informaciok/bunmegelozes/idosek-biztonsaga/fokuszban-az-unokazos-csalasok-igy-kerulje-el, last visited 23. 06. 2024.

[2] S. G. Ürmösné, *Technical English for officers*, 2. Novissima, Kiadó 2024.

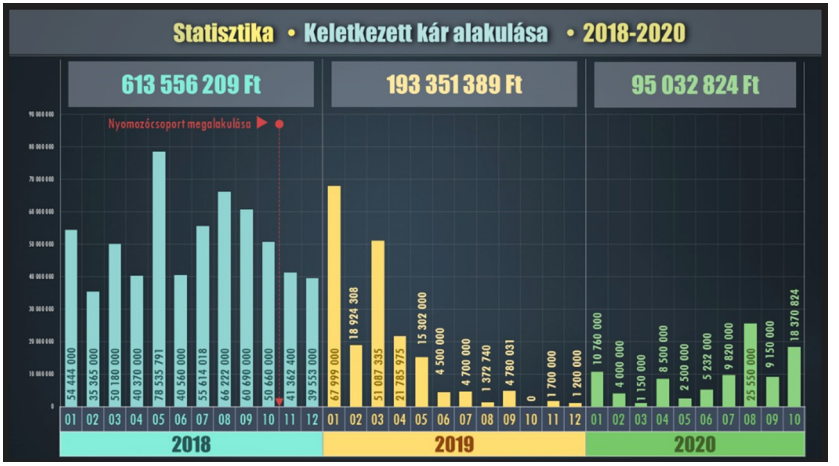

Figure 1. The evolution of incurred damage between 2018 and 2020[3]

The police have therefore developed an 8-point crime prevention program, the aim of which is to make sure that no one falls for fraudsters by making them aware of the method of perpetration:

- If you receive such a phone call, check to see if there really is a problem. (Hang up the phone and call the relative you referred!)
- Never forget: an official never asks for money! (No police, no ambulance, no firemen)
- Ask verification questions if you are not sure whether your relative is really calling you! ("What's your name? When were you born? When was the last time we met?")
- Be suspicious if you are asked to transfer money or offer to mediate in the transfer! - Under no circumstances should you give your bank card details to strangers!
- Do not talk about your private affairs in a public place, in the presence of strangers, because strangers can misuse the information!
- Do not give your personal information to strangers!
- If you suspect that an attempt has been made to commit a crime against you or a relative, call the emergency number 112 immediately![4]

[3] *Ibidem.*

[4] https://erdmost.hu/en/2021/01/29/igy-kerulje-el-hogy-aldozatta-valjon/, last visited 02. 07. 2024.

In 2018, more than HUF 600 million in damage was caused by "Grandparent scammer", in 2019 more than HUF 190 million, while in 2020 "only" a little more than HUF 95 million.[5]

Several criminal organizations independently carried out similar crimes, where they caused millions of dollars in damage by influencing and misleading the elderly. Effective action can be taken against criminal organizations when the cases have been combined and an investigative team has been created. In November 2018, Budapest's police chief created a special investigative team to detect child fraud committed by criminal circles organized to deceive the elderly. In the course of the investigative team's activities, several groups of criminals and ways of committing crimes were mapped, and criminals were also apprehended.[6]

2.2. The virtual kidnapping

The digital traces left behind in the virtual digital space often contain untrue information, the recognition and analysis of which presents a challenge to the user. Dissemination of false news in the electronic space is an extremely effective and cheap means of influencing society. In addition to fake news, the deepfake phenomenon (modern technology) appeared, which is based on artificial intelligence and can be considered an even more effective method of influencing. With the help of artificial intelligence, voice cloning technology can already be implemented, so in the future fraudsters will be able to commit "virtual kidnapping", during which they rely on artificial intelligence, so they can call the parents using the relative's voice, demanding a ransom.

For comparison, we can use the previous so-called "grandparent scam", when the perpetrators pretended to be a family member of the elderly person, thereby causing millions in damages. The influence will be even stronger with the use of deepfake videos, when the perpetrator will not only refer to the excuse or legend he created, but will also use artificial intelligence and the most modern technical possibilities. The pandemic[7] has highlighted the negative effects of fake news and deepfake videos as the simplest method of influence.

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[5] https://www.police.hu/hu/hirek-es-informaciok/legfrissebb-hireink/bunugyek/felszamolt-unokazos-halozatok-ket-ev-alatt-82#11, last visited 02. 07. 2024.

[6] *Ibidem*.

[7] S. G. Ürmösné, É. Kovács, "Az online oktatás hatékonysága a rendészettudományi karon az oktatók és a hallgatók szemüvegén keresztül – egy hibrid kutatás eredményei", *Védelem tudomány* 1/2022, 192.

The deluded victim can see and hear his own relative on the recording, on which his relative's voice and image have been cloned. The influence will be even stronger, and the artificial environment built by the perpetrators will be even more believable. Artificial intelligence can contribute not only to the execution of the crime, but also to the selection of easily vulnerable victims. "Virtual kidnapping" is significantly facilitated by images, videos and audio materials uploaded in the digital space (on various platforms). Using these, they can, for example, call relatives using the child's voice or transmit video material online, which has an even more effective influence. Modern technology is capable of amplifying the impressionable effect.

Recently, a company administrator transferred HUF 9 billion to a fraudster. The company's administrator also had a video call with the company's financial manager - as well as several people he knew - and he had no doubts, however, none of the participants in the video call were who he was - they were all faked using deepfake technology.[8] In another case, the face and voice of the head of the business company are misused to give a statement, which can even negatively influence stock market processes.

The data needed to organize and perpetrate this type of fraud is publicly available. In the same way that authorities carry out open information collection (OSINT) in the digital space, which is accessed and processed by artificial intelligence. That is why it is also necessary for the authorities to create the criminal ecosystem and network research, as well as formulate forensic recommendations within the framework of e-investigation methods.

Fake news transmitted with deepfake is also often called a heavy weapon of influence. The combined appearance of fake news and deepfake can increase the power of influence or suggestion. The spread of fake news belongs to the toolbox of cognitive influencing techniques, the spread of which is facilitated by social networks.

The prosecutor's office and the investigative authority are obliged to take all necessary measures during the procedure in order to detect and secure things or property that can be confiscated or are subject to confiscation.[9]

The damage data is still officially available on the Hungarian statistics page from 01. 01. 2013 to 30. 06. 2018, so these data will continue to be published. The damage caused by fraud is approx. It was HUF 315 billion, while the compensated damage was about HUF 19. billion HUF (Figure 2).

[8] https://hvg.hu/tudomany/20240205_deepfake_penzugyi_vezeto_atveres_videohivas, last visited 23. 06. 2024.

[9] M. Szabolcs, "A vagyon-visszaszerzési eljárás a hazai és a közösségi jogrendben", in: *A határrendészettől a rendészettudományig* (eds. Gyula Gaál, Zoltán Hautzinger), Pécs 2016, 219–224.

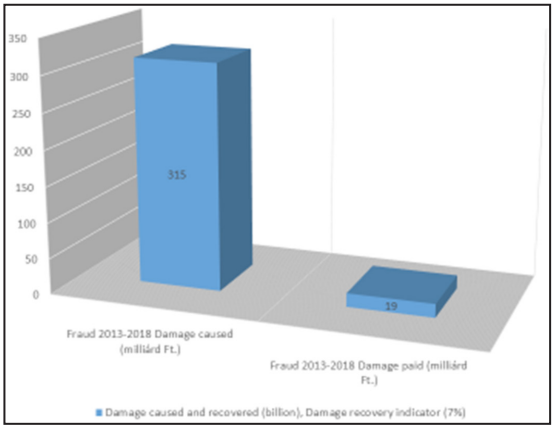

Figure 2. Damage caused and recovered (billion), Damage recovery indicator (7%)

There is a significant difference between the damage caused and the damage compensated, as minimal damage was compensated, which may have many causes, regardless of the work of the investigative authority.

3. Forensic Recommendations for Compensation

In the fight against fraud, it is advisable to establish a domestic and international investigative team in order to promote effective compensation for damages, proof and detection, as this can be justified on the one hand by the serial nature of fraud cases and the territorial dispersion of criminal cases. It is also advisable to use innovative methods, such as OSINT (open source intelligence).

3.1. Joint Investigation Teams

Based on a mutual agreement, the competent authorities of two or more Member States may establish a joint investigative team for a specific purpose and for a limited, but extendable, period of time in order to conduct criminal investigations in one or more Member States that created the team. The composition of the group is defined in the agreement. A joint investigative team may be established in particular in cases where:

- during an investigation aimed at detecting crimes, a member state must conduct a complex and costly criminal investigation involving other member states;

- several Member States are conducting investigations aimed at detecting crimes whose circumstances require coordinated and coordinated action by the Member States concerned.

The establishment of a joint investigative team can be requested by any Member State concerned. The group is established in the territory of one of the Member States in whose territory the investigation is expected to be conducted.[10]

Europol staff may assist the activities of the JIT and exchange information with all members of the JIT, but shall not participate in the use of coercive measures. Europol and Eurojust can recognize suitable cases where the establishment of investigative teams is necessary, which follows from their role in the transmission of information and the coordination of mutual legal assistance, and consequently the Member States can be invited to cooperate.

It should be emphasized that OLAF staff can participate in the joint investigation teams established in the area of crime under their jurisdiction in a supportive capacity. OLAF personnel participating in the joint investigation team may assist the collection of evidence and the members of the investigation team with their expertise in accordance with the legislation applicable to OLAF and subject to the national law of the Member State where the investigation team operates. OLAF can provide assistance and expertise to the joint investigation team to achieve the objectives set by the team leader(s). This may include, among other things, administrative, documentation and logistical support, strategic, technical and forensic expert support, as well as providing tactical and operational expertise and advice to the members of the joint investigation team at the request of the team leader(s).[11]

3.2. OSINT

According to Csaba Vida's point of view, "OSINT activity: independent open data acquisition activity is the search, collection and selection of unclassified data published by a person or organization, publicly obtainable by legal

[10] CXVI of 2005 Act on the promulgation of the Convention of May 29, 2000 on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union and the Additional Protocol to the Convention of October 16, 2001 Art. 13.

[11] Practical guidance on joint investigation teams, 6128/1/17 REV, https://www.europol.europa.eu/cms/sites/default/files/documents/jit-guide-2017-hu.pdf, last visited 22. 05. 2024.

means or distributed in a limited circle, but not classified, based on a special methodology to meet intelligence needs, evaluation and use".[12]

During the application of OSINT, we may come across fake news and fake videos, which can start a flood of false information if we do not detect them in time. The biggest source of OSINT is the Internet, which is used most often during the filter-research work. We can also leave a lot of digital data or footprints on the Internet, which will provide revealing information about us, our habits, activities, and hobbies. Internet interfaces can create a profile about us from the digital traces, based on which targeted advertisements will appear while surfing the Internet. The Internet has become a part of our lives. Users often share sensitive data about themselves, for example, on social networking sites. Someone wants to show everyone they know by sharing a picture that they are currently vacationing abroad on the beach with their loved ones. But you didn't make sure that only your friends can see your information on the social network, so criminals can misuse this information. The person vacationing abroad communicated by sharing the photo, or more specifically indicated that he was not at home, so they could take advantage of this to break into his apartment or steal his valuable car parked in the yard.

In summary, online fraudsters can attack based on public data. For some, the images appearing on social media are memories, while for others (criminals) they are information, or more precisely, data for the commission of a crime. Deepfake videos can easily be made from images and videos shared on social media with the help of artificial intelligence, so internet fraudsters can also commit virtual kidnappings. Cybercriminals are therefore also able to use the most modern technology to call parents in the child's voice demanding a ransom, causing serious emotional and financial damage to the victims.[13]

4. Conclusion

The methods of committing fraud are constantly changing following the development of technology. With the help of artificial intelligence, fraudsters are able to organize and carry out crimes (e.g. virtual kidnapping) using virtual space. Artificial intelligence can even contribute to the selection of easily vulnerable victims, thereby causing serious material damage.

[12] V. Csaba, "Nyílt forrású adatszerzés (OSINT)", in: *Nemzetbiztonsági Alapismeretek* (ed. István Kobolka), Nemzeti Közszolgálati Egyetem, Budapest 2013, 101.

[13] https://index.hu/tech/2024/03/02/csalas-adathalaszat-mesterseges-intelligencia-ai-virtualis-emberrablas-kiberbunozok/, last visited 25. 05. 2024.

From the point of view of damages, following the development of digital technology, it is advisable to prepare innovative prevention programs, which can be used to draw the attention of vulnerable people to the possible dangers and the conscious use of the Internet, as well as the consequences of irresponsible data sharing.

Damage recovery can be facilitated by the use of innovative data collection methods such as OSINT, as the digital footprints left behind can not only be used by criminals, but also analyzed and evaluated by law enforcement agencies. In addition to digital footprints, so-called we also leave behind linguistic fingerprints,[14] from which data (based on written or heard text) the forensic linguist can reveal the socio-economic attributes of the offender.

International cooperation is important, since there are no national borders in the digital space, but the perpetrators can commit crimes in several countries at the same time and the victims can be in different countries. Therefore, it is very important to establish national investigative teams (JITs) and to use international organizations, such as OLAF in the field of anti-fraud.

Crimes committed in the digital space can challenge not only the authorities of the respective countries, but also international organizations. In the digitized world, even closer domestic and international cooperation has become necessary.

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INOVATIVNE MOGUĆNOSTI ZA ČINJENJE PREVARE I PREPORUKE FORENZIKE ZA OSTVARIVANJE PRAVA NA NAKNADU ŠTETE

Apstrakt

Cilj ovog rada jeste da opiše inovativne metode koje se koriste za vršenja prevara u digitalnom prostoru, a koji se prilagođava stalnim tehnološkim promenama i inovacijama. U članku je predstavljena inovativna metodologija prikupljanja informacija potrebnih za ostvarivanje prava na naknadu štete i prikupljanje dokaza, kao i uloga nacionalnih istražnih timova u otkrivanju prevara.

Ključne reči: prevara, deepfake, naknada štete, OSINT, JIT.

[14] S. G. Ürmösné, "Miben segítik a nyelvi ujjnyomok a nyomozást?", *Magyar Rendészet* 1/2019, 65–75.

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EXTORTION COMMITTED AGAINST A HELPLESS PERSON AND COMPENSATION FOR DAMAGES

Summary

In Hungary, among violent criminal offenses against property are robbery, extortion, blackmail, and vigilantism. For the topic of my paper, I chose this form of extortion because, in its basic description, only this criminal offense takes into account the personal condition of the victim. In this criminal offense, damage is certainly inflicted, and – with rare exceptions – the damage caused is almost never compensated.

In this criminal offense, the special condition of the victim – a person who is incapable of defending themselves, or a person who, due to their age (years of life) or disability, is limited in their ability to recognize or prevent the criminal offense against them – presents many problems. Although the legal factual description has remained unchanged for years, judicial practice is still not uniform.

Keywords: *Extortion, Helpless Person, Causing Damage.*

1. Violent Criminal Offenses

The term "violent crime" is not a legal but a criminological definition. Specific cases of violent crimes include those actions where violence against another person is not the goal but rather a means. The ultimate aim is to gain financial benefit. The intent is similar to that in property crimes; the main objective here is also the unlawful appropriation or acquisition of benefits, or the satisfaction of a financial need that is considered legitimate or perceived as legitimate.

The most important qualifying circumstance is violence, that is, the use of force directed from one person towards another, which appears as an element of the criminal act. A common characteristic of violent property

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crimes is the application of force against a person as an element of the factual description of the act, or the manifestation of physical influence, which can be either vis compulsiva or vis absoluta, thereby significantly hindering, preventing, or breaking the resistance of the victim.

The second potential element is the threat, which signifies a psychological influence: presenting the prospect of some serious loss that can induce significant fear in the person being threatened, thereby greatly hindering, preventing, or breaking their resistance.

However, theoretical criteria are one thing, but criminal law legislation in Hungary is something else. Not all forms of extortion conform to these theoretical criteria. Specifically, the form of extortion where the act is carried out by depriving a person unable to defend themselves, or a person who, due to their age or impairment, is limited in their ability to recognize or prevent a criminal act, does not fit these theoretical criteria. In these cases, we cannot talk about either physical or psychological force, but rather the exploitation of the victim's unfavorable position. In other words, these are different groups of vulnerable individuals, which also exist in the Criminal Code of Serbia,[1] these are recognized in numerous criminal offenses. Such conduct represents an unrestrained and despicable manner of execution, which should be qualified more severely not only in a moral sense but also in a criminal law sense, compared to an ordinary theft.

2. Extortion

The criminal offense of extortion became part of criminal law in Hungary with the Act on the Criminal Code No. IV of 1978. The execution against a person who is incapable of defending themselves—which corresponds to the current point (c)—was introduced by Section 52 of Act No. LXXX of 2009, which amended the Act on the Criminal Code No. IV of 1978.[2] With the entry into force of the Act on the Criminal Code No. C of 2012, the factual description of extortion was further expanded, according to which the specific personal condition of the passive subject serves as the basis for qualifying the act as extortion.[3]

[1] Criminal Code of Republic Serbia, *Official Gazzete RS*, No. 85/2005, 88/2005, 107/2005, 72/2009,111/2009, 121/2012, 104/2013, 108/2014, 94/16, 35/19.

[2] I. Kónya, "A Btk. változásai avagy a Btk. elmúlt évtizede", *Magyar Jog* 9/2010, 516–517.

[3] S. Madai, "Az idősek és a fogyatékkal élők fokozott büntetőjogi védelmének jogpolitikai hátteréről", *Jogtudományi Közlöny* 1/2019, 17–24.

At the time of writing this paper, the definition of the criminal offense of extortion in our Criminal Code is as follows:

Whoever, in order to unlawfully appropriate another's property:

a) Takes it from another person by getting them drunk or by rendering them unconscious;
b) Takes it from a person by using force applied during the commission of another criminal offense, or from a person under the influence of an immediate threat to their life or physical integrity;
c) Takes it from a person who is incapable of defending themselves, or who, due to age or disability is limited in their ability to recognize or prevent the criminal offense;

shall be punished by a prison sentence of one to five years.

The circumstance that the offense was committed against a person incapable of defending themselves, or a person who, due to age or disability, is limited in their ability to recognize or prevent the criminal offense, is included only in the factual description of the basic form of extortion.[4]

This circumstance differentiates extortion from theft in that here the taking of property occurs due to personal circumstances, specifically by exploiting the state of the passive subject.[5]

According to the classification, this offense can be positioned between robbery and theft. Similar to robbery, certain acts of this crime may involve elements of violence; however, unlike robbery, force is not used for the purpose of appropriating someone else's property.

In the case of extortion, the special personal condition of the victim, as well as the perpetrator's behavior in causing such a condition, are taken into account.[6]

[4] S. Madai, „Az idős kor és a fogyatékoság értelmezése a kifosztás alapeset körében", *Magyar Jog* 3/2019, 135.

[5] Zs. Szomora Mit is jelent a védekezésre képtelenség? Bolyongások a Btk-ban és töprengések egy evidenciának tartott fogalom kapcsán, Tanulmányok Tóth Mihály proffesszor 60. születésnapja tiszteletére, PTE ÁJK, Pécs, 2011. 509-521.

[6] L. Viszokay, "A rablás, a kifosztás, és a zsarolás szabályozása a Btk-ban", *Magyar Jog* 8/1983, 738.

3. A Person Who, Due to Advanced Age or Impairment, Is Limited in Their Ability to Recognize or Prevent a Criminal Act as a Special Subject in Extortion

An example of limited ability to recognize a crime is when the perpetrator takes an object from a person whose sense of sight is impaired. An example of limited ability to prevent a crime is when a victim with limited mobility who is bedridden—though not incapable of defending themselves—sees what is happening but, due to their condition (e.g., slow movement), is only able to approach the perpetrator slowly to attempt to prevent the theft.[7]

A few examples from case law:

According to the factual findings established by the first-instance court[8] on the day in question, around 9:00 a.m., the defendant went to the victim's apartment. The defendant and the victim had known each other for a year, and the defendant had borrowed various sums of money from the victim on multiple occasions. The defendant took advantage of the victim's negligence and unlawfully appropriated a wallet from the room with the coffee table, along with the victim's documents, a bank card, and cash amounting to 8,000 forints. Subsequently, the defendant unlawfully withdrew a total of 165,000 forints using the victim's bank card. Among the personal documents issued in the victim's name, only the residence card was found, while the other public documents were not. The first-instance court noted that the victim is 78 years old, suffers from a mobility disorder, and is unable to walk long distances. Considering all of this, the first-instance court determined that the victim, not only due to his age but also due to his health condition, should be regarded as a person who, due to age and impairment, is limited in their ability to recognize or prevent a criminal act. Therefore, the defendant was found guilty of the criminal offense of extortion under § 366, paragraph 1, item c) of the Criminal Code, in connection with the actions carried out in the victim's apartment.

The higher court[9] overturned the first-instance court's verdict, reclassifying the act as theft. According to the appellate court, the first-instance court erred in the legal qualification of the act by categorizing the actions against the victim as extortion. Although the victim is an elderly person

[7] B. Kereszty, "Az ún. fosztogató jellegű bűncselekmények – de lege ferenda", *Magyar Jog* 7/2008, 461–470.

[8] Vesprem District court, 1.B.583/2016/20.

[9] Vesprem Higher court, Bf.877/2016/4.

suffering from a mobility disorder, this condition was not relevant to the commission of the crime. The victim's negligence provided the defendant with the opportunity to unlawfully take the wallet left on the table. Specifically, the victim left the wallet in a place from which the defendant could take it, and thus, the defendant's actions constituted theft.

The third-instance court[10] determined that the lower courts made the correct decision regarding the defendant's guilt, and with respect to the qualification of the criminal offenses, the appellate court agrees with the higher court's opinion, taking into account the fully accurate legal reasoning presented in the second-instance judgment. The appellate court, in its decision, states that the defendant took advantage of the victim's carelessness when taking the wallet, rather than the fact that the victim is an elderly person suffering from a mobility impairment.

Different qualifications in the application of the law shown in the mentioned case highlight a very important point in interpreting the factors of limitation. It is necessary to assess whether the specific condition of the passive subject affected their ability to recognize or prevent the criminal offense. This likely reflects the guidance of the Supreme Court[11], which, by paying special attention to the nature of the attack, obliges the courts to examine the circumstances of limitation.

Thus, the mere existence of an illness does not constitute a basis for determining limitation, but only in cases where it is a result of age, or when the condition defined as a disease can also be considered as a form of impairment.

A similar case was conducted before the District Court in Debrecen.[12] The details were as follows: the second defendant approached the 83-year-old victim on the street and, in order to gain the victim's trust, falsely claimed that he and the first defendant wanted to donate items remaining from an exhibition to some pensioner. Since the first defendant saw that the victim was an elderly person, he also told him that he owned a hotel in Turkey and reiterated that he would give him the exhibition items in his possession, and since his grandparents were Hungarians, if the victim happened to be in Turkey, he would host him in his hotel. Finally, the first defendant offered to take the victim home. While the first defendant distracted the victims—the 83-year-old man and his wife of a similar age—in the living room, the second

[10] Court of Appeal in Győr, Bhar.25/2017/13.

[11] Supreme Court of Hungary, 3/2013. számú BJE határozat II. 11.

[12] Debrecen District court - Debreceni Járásbíróság, 12.FK.885/2016/33.

defendant unlawfully took their cash amounting to 90,000 forints, which was kept in a drawer of the desk. The actions of the defendants were classified by the first-instance court as extortion in complicity, considering that the victims, due to their age, were not capable of recognizing the criminal act. Thus, the first-instance court considered the victims to be incapable of recognizing the criminal act.

The Higher court agreed with the reasoning of the first-instance judgment but revised the assessment regarding the victims' ability to recognize the crime. It concluded that the elderly victims, due to their advanced age, were indeed limited in their ability to recognize the criminal act. The court found that the victims' advanced age impaired their ability to "perceive the situation and realize that the situation created by the defendants was actually designed to distract them," and that "the defendants exploited the victims' carelessness and imprudence as a consequence of their age during the commission of the crime, and that the victims did not exhibit any sense of fear."[13]

The Supreme Court, in the review of the judgment, agreed with the correct reasoning of the lower courts and upheld their decisions.[14]

There are no major differences between the factual circumstances in the two cases presented, but it is evident that different judicial practices are applied.

We must point out the difference that is considered substantive in these two cases, which is the method that led to the appropriation of the items.

In the first case, there is no indication that the perpetrator went to the apartment of someone he knew previously with the explicit intent to gain personal benefit. Perhaps the idea of taking the wallet appeared suddenly, as a result of the moment, when he took advantage of the created opportunity and there was no fraudulent maneuver involved.

In contrast, in the second case, the perpetrators deliberately misled the victims and actively sought to make them believe their stories. Consequently, they managed to enter the victims' apartment, where, by diverting their attention, the second defendant was able to steal the cash kept in a drawer of the table.

The factual descriptions of the two events differ in that, in the second case, the act of taking the property was preceded by behavior intended to mislead the victims. Based on this, at first glance, the case could be characterized as fraud; however, this would be doctrinally incorrect, as the cash did

[13] Debrecen Higher Court, 1.Fkf.661/2016/6. 3.

[14] Supreme Court of Hungary, Bfv.I.860/2017.

not end up in the perpetrators' hands as a result of the victim's property disposition, which is an inherent condition for the existence of fraud.

In cases of theft or extortion—such as those mentioned—it is necessary to determine whether the perpetrator previously engaged in fraudulent actions, whether they distracted the victim and thereby facilitated the taking of the property, or how they created an opportunity to take the property unnoticed, and whether this can be attributed to the victim's limited ability to recognize the crime, or, as seen in the explanation of the second case, the lack of ability to recognize the crime. In these two cases, it appears that this is the only difference that serves as a basis for different legal qualifications, but it is not certain that this will remain the case in the future.

The uncertainty exists due to psychological reasons, as distracting attention or allowing entry into one's home primarily depends not on the person's age or condition, but on the lack of trust towards other people.

In relation to extortion and negligence, the character of the person can be of crucial importance: whether they are inattentive, careless, or cautious and more attentive to their belongings.

Extortion – judging by the context of the mentioned cases – is not based on negligence but rather on whether the perpetrator has undertaken any prior actions that contributed to the commission of the criminal act and specifically enabled its execution. Additionally, it must be determined whether the legal conditions for establishing the victim's prescribed limitations are met?

4. Taking of Property

There is no unified judicial practice regarding whether, in cases of extortion under the analyzed provision, it is necessary for the property to be taken from the immediate physical surroundings of the victim who is unable to defend themselves: in this regard, two conflicting decisions of the Supreme Court were made in a short time span, which influence judicial practice (BH2016.166 and BH2018.160).

In its decision from 2016, the Supreme Court established the following:

On the disputed day, the accused, after partying with two victims until 3 a.m., went to their sleeping quarters in the apartment. Before leaving at 5:45 a.m., the accused, knowing that his hosts were sleeping in the adjacent room, took several different items. The damage was partially compensated by the confiscation and return of the items to the victims. The first-instance court

convicted the perpetrator of the extended criminal offense of extortion. The request by the public prosecutor for a review of the judgment contested the qualification of the offense, claiming that, unlike theft, extortion requires that the taking of the items occur directly from the victim or from their immediate physical proximity. In this regard, the prosecution also pointed out that the accused did not take the items from the bedroom where the victims were sleeping, but from an adjacent room, and thus the items could not have been in the victims' immediate physical proximity. Although knowing that the victims were sleeping might have facilitated the crime, the taking of the items did not occur by exploiting this circumstance. The victims did not notice anything and thus could not have prevented the theft. The Supreme Court accepted the prosecution's view and stated that the fact that the victims (due to sleeping) were unable to defend themselves was irrelevant, as the items were not taken from a place under their immediate physical control. In this case, the factual description does not include information that the accused entered the bedroom where the victims were sleeping before leaving the apartment. Therefore, it was objectively impossible for the accused to have taken any property under the immediate physical control of the victims, i.e., from their clothing, bags they were carrying, their luggage, or their immediate physical proximity. The taking of these items would have been just as possible if the victims had been awake (or in a state capable of defense) in the adjacent room.

In a decision made not much later, the Supreme Court's interpretation shifted in a different direction. According to the relevant factual state addressed by the request for review, the accused, along with two other individuals whose identities remained unknown during the proceedings, appeared on the disputed day between 14:30 and 15:15 at the apartment of a 79-year-old victim. The victim, who did not leave his apartment, spent most of the day in bed, required regular daily care, and was incapable of living independently, began a conversation with the elderly victim. Subsequently, the victim allowed them into his apartment, where one of the unknown perpetrators took jewelry, the exact value of which could not be determined, as well as cash amounting to 260,000 forints, from the victim's room. During this time, the accused and the other unidentified person were talking with the victim in the kitchen.

In the meantime, the victim's grandson arrived, interrupting the activities of the accused and his two accomplices, who, with the valuables they had gathered up to that point, hastily left the apartment. The victim's grandson

chased after the perpetrators and managed to detain the accused among the fleeing individuals, cornered him, and awaited the arrival of the police.

The first-instance court found the defendant guilty of committing the crime of extortion against a person who was unable to defend themselves, specifically a person who, due to old age or impairment, was limited in their ability to recognize or prevent the crime, acting as an accessory.

The Supreme Court upheld the decisions of the first-instance and appellate courts. In this regard, the highest judicial authority stated that as a special subject of the third basic form of the crime of extortion, the law includes a person who, due to old age or impairment, is limited in their ability to recognize or prevent the crime. This element of the crime should mean that the passive subject is a person who, due to the described condition, is only partially capable of recognizing or preventing the taking of property. In this case, the victim is an elderly woman with mental disorders, who, due to her health condition, had only limited abilities to prevent the commission of the crime. The adjudicating courts correctly found that deciding on this matter does not involve expert examination but is entirely a matter for judicial evaluation. From the circumstances of the case, it could be unequivocally concluded that the defendants and their accomplices noticed the victim's personal condition, became aware of that fact, and carried out their actions knowing these circumstances. The fact that the taken item or items were not removed from the immediate physical supervision or close vicinity of the victim does not mean that this action should be qualified more leniently based on the interpretation of the legal factual situation. What matters is whether the commission of the crime was enabled or at least significantly facilitated by the victim's personal condition.

These two decisions are somewhat contradictory.

According to the law, for the form of extortion mentioned in the clause, it is required that the taking of property be done from a person with the prescribed personal qualifications, provided that in this case, the property is taken from the immediate physical control or close surroundings of the victim.

Based on such a decision by the Supreme Court, it can be expected that the judicial practice will shift in a direction where extortion based on advanced age or impairment will replace the actions previously known as theft by deception. Specifically, according to the Supreme Court's reasoning, actions considered 'theft by deception' will be classified as extortion when they involve the personal circumstances of the victims.

The legal definition of theft requires that the taking occurs "from another", whereas in extortion, the taking is performed from a person.

Jurisprudence insisted that the execution should take place similar to "pick-pocketing", therefore, the condition was that the confiscation should take place under direct physical supervision.

This criminal law framework should be maintained.

In some instances, judicial medical expertise is also determined, such as in the case where two perpetrators entered a residential building through an open door and removed a gold ring from an elderly victim who was bedridden and incapable of defense due to illness. According to the expert's opinion, given the victim's advanced age, natural illnesses described and confirmed in his medical documentation, his condition of helplessness, severe speech impairments, high blood pressure as a consequence of a stroke, blindness in the right eye, and tunnel vision in the left eye, the victim was in a state at the time of the offense where he was incapable of defense and expressing free will.

However, the personal condition of the victim is not a matter for expert evaluation; it must be determined by the court based on all the circumstances of the case. The prosecution and the investigative authorities are required to take all necessary measures during the proceedings to discover and secure any items or property that can be seized from or is the subject of seizure.[15]

In all these cases from judicial practice, which are briefly presented, the common denominator is the issue of compensation for damages, which has been absent in all the mentioned cases. This is also a reality in many other cases.

5. Conclusion

The commission of extortion against a helpless person — a person who is incapable of defending themselves, or a person whose ability to recognize or prevent a criminal act is limited due to old age or impairment — is regulated within the framework of the basic form of the crime of extortion.

If the perpetrators recognize the personal condition of the victims, then, on one hand, there is a low probability that the victims will be able to provide a description of their personal details, and on the other hand, in such cases, compensation can be excluded, as — with rare exceptions — the perpetrator is often not identified.

Due to the currently inconsistent case law, it remains uncertain when the personal condition of the victims, as legally required in the factual

[15] 2017. évi XC. törvény a büntetőeljárásról (2017 XC. Law on Criminal Procedure) 353.§ (1)

description of the crime, can be determined, and it is also unclear in what form the taking of someone else's property should occur.

A particular issue that arises in each such case is the question of compensation for damages, specifically whether and from whom to claim it, or to whom to submit a request for compensation if it is impossible to obtain it from the defendants – the perpetrators of the criminal acts.

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IZNUDA IZVRŠENA PREMA NEMOĆNOM LICU I NAKNADA ŠTETE

Apstrakt

U Mađarskoj među nasilna krivična dela protiv imovine spada pljačka, iznuda, ucena i samovlašće. Za temu rada odabrala sam ovaj oblik iznude jer se u osnovnom opisu samo kod ovog krivičog dela uzima u obzir i lično stanje oštećenog. Kod ovog krivičnog dela sigurno dolazi do nastanka štete, a – sa retkim izuzecima – prouzrokovana šteta se gotovo nikad ne nadoknadi.

Kod ovog krivičnog dela specijalno stanje oštećenog – lice koje je nesposobno da se brani odnosno lice koje je zbog svoje životne dobi (godine starosti) ili ometenosti ograničeno sposobno da prepozna ili spreči krivično delo na svoju štetu, ostavlja mnogo problema i mada je pravni činjenični opis već godinama nepromenjen, sudska praksa ipak nije jednoobrazna.

Ključne reči: iznuda, nemoćno lice, pričinjavanje štete.

Henrietta Halász* **DOI: 10.56461/ZR_24.ONS.12**

CERTAIN CIVIL LAW AND CRIMINAL LAW ASPECTS OF ENVIRONMENTAL PROTECTION

Summary

In my study I shall outline certain civil law and criminal law aspects of environmental protection. As for the civil law aspects I examine certain legal frames of tort liability as well as liability issues regarding damages originating from hazardous operations and damages caused by animals. The provisions of criminal law overviewing their role in environmental protection will be analysed, including but not limited to the regulated environmental offenses. On the basis of statistical data, I shall pan out about both the quantity and the measures of damages caused by such criminal offenses. In accordance with the provisions of applicable Hungarian criminal regulations I will refer to Directive (EU) 2024/1203 of the European Parliament and of the Council, on the basis of which we might expect extension of the relevant rules of the special part of the Criminal Code.

Keywords: *Environmental Protection, Civil Law, Liability, Criminal Law, Damages, Criminal Offense.*

1. Introduction

Overviewing the topics of the conference it is not difficult to find reference points related to the issues of environmental protection and nature protection, such as causing damages, indemnification and insurance. This connection is especially obvious if we accept the far-reaching impacts of the experiences that environmental protection regulations and their nature effecting several legal areas made to culpability studies. To complete the picture, we must refer to the diverse legal regulations related to the issues of environmental protection and

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nature protection and also to the definitions mentioned among the topics of the conference. Certainly, these issues go beyond the scope of culpability. We may analyse this diverse system of regulations along elements of the environment, on certain levels of legislative hierarchy or on the base of industrial sectors. Establishment and unification of the branch of law[1] regulating environmental protection was definitely supported by development of certain legal principals such as, for example, the principles of "polluter pays"[2] or "sustainable development".[3] The principle of sustainable development also has a key role in the definition of the "legal minimum" related to the environment. It might have a fundamental role in the definition of the lowest regulatory level that is satisfactory considering the protection of environment (resulting in sustainable development). Nevertheless, the legal regulatory system in itself is not sufficient to provide protection or to achieve the desired goals.

"Legal compliance is the only acceptable approach expected from users of the environment, from all members of society including both legal and natural persons. It may be expressed by completing certain actions, by not pursuing any activities at all, or by refraining from such motions (for example, acquiring permits of administrative departments). Should the users of the environment act otherwise the dully authorised and competent members of the administrative system may act against and/or for the sake of protection."[4] Thereby, provisions of both public and private law may motivate the actors of society for legal compliance, however probably with different weight. Of course, such encouragement can not be effective or independent form other liability systems or considerations that are present in society. It is also an issue, which one of the two great legal branches is more capable or suitable to achieve the projected goals first in case of environmental damages or endangerment, and to oblige the obligor to proper restoration.[5] With

[1] J. Pump follows an opposing point of view in The Civil Code through the eyes of the environmental lawyer. J. Pump, *The civil Code through the eyes of the environmental lawyer,* Pázmány Press, Budapest 2019, 13.

[2] EUMsz 191. cikk (2) EUMSZ - 12006E Az Európai Unió Működéséről szóló Szerződés (jogkodex.hu)

L. Krämer, *Environmental law of the European Union*, Dialóg Campus Publishing, Budapest-Pécs 2012, 39–40.

[3] *Ibid*., 34–36.

[4] H. Farkasné Halász, *Investigating criminal offenses against environment and nature*, NKE Szolgáltató Kft., Budapest 2015, 16–17.

[5] M. Julesz, "The new Ptk. from the aspects of environmental protection", *Hungarian Law* 3/2013.

regards to the above, I intend to include those applicable provisions of criminal law, administrative law and civil law that are relevant regarding the protection of environment into the scope of environmental protection law in my study. I shall introduce certain legal institutions of civil law shortly, without attempting to be comprehensive, referring to their role related to environmental protection, and I shall also outline relevant provisions of criminal law and statistical data.

"Fundamental provisions of legal relations of private law are defined in the Ptk,[6] that governs fundamental financial and personal relations, while regulating relations of the subject persons, ensuring protection of their private autonomy. Regulating the relations of persons and environment, the Act on environmental protection, other Acts and implementing regulations ruling over the elements, processes and usage of the environment order and state that our natural environment represents values worth to be protected, the state of the environment has direct effects to human health and define our economic possibilities. Even though this is not one of the key principals of Ptk.'s regulatory system, the need to protect natural environment in order to protect pecuniary and personal rights of individuals, acknowledging its value as private interest clearly appears in civil law regulations. The goal of environmental legal provisions is to integrate and implement this value judgement as the natural part of private law regulations".[7]

2. How Can the Special System of Private Law Support Protection of the Environment?

"When legislators decide to modify an element of civil legal relations by implementing a legal act in order to protect our environment, they use outside administrative measures to secure that protection of natural values must be considered in the course of enforcing private interests, in consideration with the interests of the community. Nevertheless, civil law is not only an administrative tool of the legislation to enforce environmental issues, whereas actors of the legal relations of civil law do have several possibilities to consider and comply with such values."[8]

If we overview each chapter and book of the applicable Ptk. we may find several definite interfaces with environmental protection law regulations.

[6] Act V of 2013 on the Civil Code https://net.jogtar.hu/jogszabaly?docid=a1300005.tv (hereinafter: Ptk).

[7] G. Bándi, *Environmental law*, Szent István Society, Budapest 2022, 389.

[8] *Ibid*.

Even the "First Book", the Introductory Provisions define the principles of interpretation, requirements of acting in good faith and mutual respect, and the requirement to adopt the normal conduct which may be reasonably expected.[9] Of course, other Books of the Act also enhance the relation between regulations applicable to individuals as legal subjects, such as legal capacity – right to a healthy environment, personal rights – endangering life, physical security or health.

If we carefully look through the provisions of the Act we find the first de facto, textual reference to the elements of environment and nature amongst to rules of substantive law (rights in rem) in 5:14.§(3), on animals. In everyday life an animal can be dangerous, not dangerous, endangered, living in the wild, etc. Therefore, the related proprietary rights and obligations alter accordingly, even, in certain cases no proprietary rights can be obtained over them, or just to a limited extent upon special permission. To sum it up, in certain cases environmental may limit the enforcement of substantive law or more closely, of the provisions of proprietary law.[10] "Regulatory provision stating professional requirements also hinder the owner's right of disposition, his free choice of decision, limiting or prohibiting alienation, allowing use, usage or utilization of the property. For example, the owner state may only engage in a contract of utilization regarding the landscape called Natura 2000 with the winner applicant of the tender, thus it shall limit the right of disposition (free choice of asset management decision) of the national property fund, assuring that the state property may only be transferred to the person who shall be able to utilize the land in compliance with the proper protection requirements"[11]. Even this non-exhaustive list of examples mirrors civil law's role in environmental protection. With regards to the limits of scope, I shall not emerge further in the issues of contractual liability or in the provisions on protection of possession enforceable together with the rules of indemnification.

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[9] "… protection of natural processes, preservation of natural capabilities or renewal still have not become integral parts of the expected measures, and do not refer to the requirements pursuing the essence of nature neither on general nor on professional grounds because the might seem too general and they are not related to any profession but to everyday life. Among other issues, for example, cutting of trees and bushes in public areas or even in our own gardens should be carried out before the birds' nesting period." *Ibid*., 392.

[10] XXVI. PED | Curia (kuria-birosag.hu) Upon 1/2014 PJE Order| Curia (kuria-birosag.hu) it is also applicable under the governance of the new Ptk.

[11] G. Bándi, 402.

3. Causing Damages and Liability

The applicable Ptk. makes clear difference between contractual and tort liability. Principal element of the provisions on tort liability is that the law *expressis verbis* stipulates the general prohibition of causing damages. General and mutual rules of indemnification related to tort liability of Ptk. regulate certain fundamental definitions and principals from the objectives of the individual and the subject in respect of causing damages and/or of the danger of suffering damages; namely, who, when, in which cases, to what extent is responsible for the caused damages, how is he obliged to complete the indemnification, and the measures how the obligor may offer reasonable excuse under his liability. The Act also stipulates the rules of damages originating from hazardous operations, the rules of damages caused by other person, liability for damages caused by persons deficient or no mental capacity, liability for damages caused during the exercise of official authority, product liability, damages caused by objects falling off or due to other deficiencies of buildings, and the rules of damages caused by animals. In relation to our subject damages originating from hazardous operations (Ptk.6:535-539.§) and damages caused by animals (6:562-563.§) shall be further stipulated. The reason of this relevance lies their close relation to environmental protection.

In accordance with the provisions of the Act, a person who carries an activity involving considerable hazards (operator) shall be liable for any damage caused thereby. Unmodified remains the long-adopted policy according to which the keeper of the facility, the person who permanently operates the factory, and also the person who controls, supervises or operates the source of danger shall be considered an operator.[12] There is no expressly stipulated definition of the activity involving considerable hazards, the risks must be separately examined for each case with regards to the continuously changing and expanding scope of such activities. Classic examples are aerial spraying and driving a vehicle. Liability for damages originating from hazardous operation is objective, but not absolute responsibility since the Act allows the obligor's exemption. Subjective liability for damages originating from hazardous operations is based on the individual's tortious (*ex delicto*) liability. In this case the obligor's culpability is established, however, we may find some sort of exteriorization where the individual's liability does not categorically result in the individual's culpability.[13] This progress leads us to the area of

[12] T. Lábady, "Important changes of ex delicto liability in the new Ptk.", *Announcement of legal studies* 4/2014, 174.

[13] M. Julesz, "Individual and liability– the example of environmental protection",

environmental protection. In the legal scope of liability for damages that originate from hazardous operation cases of damages caused by acts endangering human environment are also expressly stipulated as referable legal grounds. Even if the obligor has acted in accordance with the applicable (administrative) rules, for example, he properly obtained the necessary permissions for the given activity, his damaging conduct may still be illicit, since his actions can not harm any other party's interests falling under legal protection, or the obligor is obliged to reimburse the damages. The distinction between the two legal bases stipulated above is rather important in every single case, since there can be different claims and manners of indemnification (pecuniary/compensation in kind) upon above legal grounds. The previous legal stipulations referred to these two options in the same subsection, thus there was no need for separate thresholds or criteria sets on their own. The fundamental instrument of liability for damages related to hazardous operation is the presence of the considerable hazard connected to the given activity, while in cases of damages caused by acts endangering human environment the considerable factor is "whether the activity effects (the state of) human environment and whether the damage occurred in connection to activity or it is due to other element of the environment. In case the activity meets both sets of requirements we find an intersection of conditions. Typically, activities requiring the use of dangerous materials fall into this intersection, with regards to the type of material – toxic, caustic, combustible, explosive, emitter or carcinogenic, etc. substances –, or sources emitting damaging noise or oscillation."[14]

Animals were already adduced in this study in connection with limitations of substantive law and proprietary (owner's) rights on the grounds of environmental protection. With regards damages caused by animals the law differentiates between dangerous and (potentially) not dangerous animals. Keepers of animals which are not considered to be dangerous fall under the general provisions of indemnification (Ptk.6:562.§), while keepers of dangerous animals are accounted upon the rules of liability for damages originating from hazardous operation. Scope of dangerous species is defined in the provisions FM Regulation 85/2015. (XII.17.) on dangerous species of animals and on the rules of their keeping. The regulations on damages caused by animals subject to hunting are divided now, since besides the above Regulation Act LV of 1996 on the protection, management and hunting of wildlife (hereinafter Vtv.) also stipulates specific rules. Nevertheless, Ptk. coming into effect in 2014

Hungarian Law 6/2012, 338.

[14] J. Pump 352.

has significantly modified these regulations. Although detailed introduction is far beyond the scope limits of this study, an important difference must be exposed: "According to the provisions of Vtv. the person holding the hunting right over the game causing the damage and on whose hunting ground the damage occurred shall be liable, also from whose hunting ground the game has left. Partially contrary to former regulations the new Ptk. orders that the person entitled to hunt is liable for compensation for damages caused a huntable animal, on whose hunting ground the damage occurred. If the damage is not caused on hunting grounds, the person liable for the damage shall be the hunting right holder from whose hunting ground the game was taken. Consequently, in accordance with the above provisions of the new Ptk., damages caused outside agriculture and forestry shall be borne by the person on whose hunting ground the damage occurred (including the collision of the wild animal with a motor vehicle) even if the person is not entitled to hunt the game responsible for the damages."[15] Before the completion of this study I could not analyse how the last 10 years passed since the coming into effect of the Ptk. effected judicial practice, which was not even close to being unified before.

4. Criminal Law as *Ultima Ratio*

As I mentioned before the provisions of criminal law consist an integral part of environmental protection law, especially the criminal acts stipulated in Chapter XXIII of Act C of 2012 on the Criminal Code (hereinafter referred to as Btk.). The possibility of causing damages, the way of conduct, the related damage or endangerment caused is referred in several criminal acts: Btk. 241.§ environmental offenses, Btk. 242.§ damaging the natural environment (endangerment -damaging), Btk. 244.§ cruelty to animals (damaging health), Btk. 248.§ violation of waste management regulations (endangerment). Certainly, criminal acts not enlisted above also have an enormous impact on the state of environment and nature, as they also effect individual species of animals, their living spaces and ecosystems. The fact that their actual consequences are often long lasting and hard to detect by the authorities causes even more difficulties. Quite a long period of time may elapse between the initiation of the criminal act and the appearance of the result of the offense. The role of criminal law in the protection of environment is inevitable. When we examine the role of an individual regarding the occurrence of a certain result we decide over the person's criminal liability. The relation of civil and criminal law issues might also be questionable,

[15] www.arsboni.hu: Anomalies of the regulations of game accidents anomáliái - arsboni, last accessed 16. 6. 2024.

including their impact on individuals. How should we judge an act that is not punishable according to criminal law, however the perpetrator's negligence would establish liability under civil law? Which provision of civil law should be applicable? Máté Julesz interprets the connection between liability stipulations of the major legal branches through the criminal act of damaging the natural environment.[16] Without hesitation, the author states that this particular criminal act is the "textbook example of liability studies". I believe that I could not have found any better inspiration to sum up my short study than this theory.

Examining the frequency and comparative proportions of criminal offenses against environment and nature on the scale of known criminal acts accounted from the second half of 2018 we find the following number of cases (and the proportion of the given criminal offense compared to all known environmental offenses):

- Bt. 241.§ environmental offenses 156 cases(1,56%)
- Btk.242.§ damaging the natural environment 1084 cases (11,26%)
- Btk. 244.§ cruelty to animals 3 365 cases (34,97%)
- Btk. 245.§ poaching game 566 cases (6,24%)
- Btk. 246.§ poaching fish 601 cases (6,20%)
- Btk. 247.§ organisation illegal animal fights 80 cases (0,83%)
- Btk. 248.§ violation of waste management regulations 3 752 cases (39,00%)
- Btk. 249.§ criminal offenses with ozone-depleting substances 14 cases (0,14%)
- Btk. 250.§ misappropriation of radioactive materials 2 cases (0,02%)

Neither the act of "crime in connection with nuclear energy" nor "illegal operation of nuclear installations" have appeared on the data list amongst, such acts have not been detected.[17]

The number of all known criminal offenses detected in the reference period was 982.217. Out of these the number acts against environment and nature was 9.620 (0,97%). We may conclude that their threat to society is not represented by the quantity proportions but rather by their impact on the environment. I trust that the number of cases shall continue to grow in the future, due to more professional approach of the authorities and to increasing environmental sensitivity of citizens. We may conclude that the public is already much less forgiving for offenses of animal torture and acts related to waste

[16] M. Julesz, 337.

[17] www.bsr-sp.bm.hu Excel Observer (bm.hu), last accessed 19. 6. 2024.

management. After the presentation of the quantity proportions, I shall analyse some aspects of the statutory regulations I find rather significant concerning the protection of the environment. As for environmental offenses it is important to note that according to Btk. 241.§(3) there is a possibility to refrain from the punishment or the penalty may be reduced without limitation if the perpetrator of the perpetrator voluntarily terminates or cleans up the environmental damage and restores the original state of the environment. This chance is free to be taken before the ruling is delivered in the first instance. In this case the state waives on its enforcement right of the criminal liability and acknowledges the priority of public interest related to the protection of the environment. As of endangerment and damages caused by the criminal offenses stipulated in above mentioned Chapter XXIII legislators use the expressions "it can be restored by way of intervention only", "its natural or previous state can not be restored at all", "jeopardizes the survivor", "results in the destruction" and other similar terms to express measures, criminal gravity, environmental and natural impact of the committed offense. Besides, the applicable KöM Regulation sets a pecuniary punishment for damaging the natural environment after the protected and highly protected species harmed by the offense.[18] Upon these grounds, damages caused by the criminal act can also be described by a sum. To represent this, I will refer to statistical data recorded for the period of 2013-2018:

Chart 1: Damages caused by offenses against the natural environment 2013-2018[19]

criminal act / year	2013	2014	2015	2016	2017	2018
damages against the natural environment	50.794.437	624.690.497	1.981.490.087	892.826.753	880.794.509	112.523.155

Chart 2: Measures of reimbursed damages 2013-2018[20]

criminal act / year	2013	2014	2015	2016	2017	2018
damages against the natural environment	33.675.000	280.000	1.248.908.607	793.314.019	6.470.879	1.844.353

[18] 13/2001 (V. 9.) KöM Regulation protected and particularly protected species of plants and animals, the scope of particularly protected caves, and on species of plants and animal of significantly sensitive from nature protection's point of view in the EC l.

[19] www.bsr.bm.hu Excel Observer (bm.hu) own chart, last accessed 17. 6. 2024.

[20] www.bsr.bm.hu Excel Observer (bm.hu) own chart, last accessed 17. 6. 2024.

Limited scope of available data does not necessarily allow to implement well-grounded consequences, nevertheless it is clear that year 2015 has shown outstanding yearly measures nationwide regarding damages caused to the natural environment. The yearly measure of damages caused by all detected criminal offenses was altogether HUF 215 655 695 576, while damages against the natural environment took ~0.91% of this amount. The volume of reimbursed damages has shown the highest rate of 88,85% in 2016 for offenses against nature, while the lowest registered rate was 0,04% in 2014. In 2016 the yearly aggregated compensation rate was 7,59%, out of which the proportion of reimbursed damages against nature was the above mentioned 88,55%.

Animals were mentioned in several regards previously. I take further note that most probably the subjects of criminal acts against natural environment are mostly individual species of vegetation and animals subject to national or EU protection. Some species are subject of both categories (for example, African rock python, Python sebae).[21]

Significant changes are expected soon since Directive (EU) 2024/1203 11 April 2024 of the European Parliament and of the Council has replaced the previous Directive.[22] Member states shall have two years to comply with its provisions. In case of intentional and unlawful conduct criminal acts expressly stipulated in Article 3 of the Directive must be deemed criminal offenses. Article 3 enlists 20 cases. Possible subjects of such criminal offenses are, for example: materials, energy, ionising radiation, waste, institutions of hazardous operation, etc.; and the offense "which causes or likely to cause the death of, or serious injury to any person or substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants."[23]

Replacing 2008/99/EK Directive the new regulation shall enforce the autonomy of criminal law, ordering that the expressly stipulated intentional or other conducts carried out with at least serious negligence shall be unlawful even when it is carried out under an authorization issued by the competent authority of the member state.

"Such conduct shall be unlawful even when it is carried out under an authorization issued by a competent authority of the member state if such authorization was obtained fraudulently or by corruption, extortion or

[21] Species+ (speciesplus.net), last accessed 18. 6. 2024.

[22] Directive (EU) 2024/1203 of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC, OJ L, 2024/1203, 30. 4. 2024.

[23] *Ibid.*

coercion. Having such authorization shall not exempt the offender entitled by the permission to be adjudicated for the offense, if the authorization is in manifest breach of relevant substantive legal requirements. Breach of relevant substantive legal requirements" should be interpreted in a way that it is sufficient if the conduct refers to the manifest and significant breach of relevant substantive legal requirements, without the objective to include the breach of procedural conditions or less substantive conditions of the authorization. Nevertheless, this shall not mean the transfer of authorities' responsibility to ensure rightfulness of the authorizations to the actors of the economy. Moreover, if a permit is necessary, rightfulness of the authorization does not exclude initiation of a criminal procedure against the holder of the authorization, if the entitled person does not meet all obligations related to the authorization or to other relevant substantive legal requirements not falling under the effect of the authorization."[24]

In this analysis I have examined certain legal institutions of civil law and particular legal stipulations of criminal law, in connection with their role in environmental protection. I have shortly introduced the complexity of environmental law and the challenges this legal area exposes to legislators. In the presentation I invoked certain rules of tort liability and criminal offenses against nature. I have also attempted to outline both the volume of caused damages and the measures of reimbursed remedies. Finally, I have closed my study with references to future legislative tasks.

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ODREĐENI GRAĐANSKOPRAVNI I KRIVNIČNOPRAVNI ASPEKTI ZAŠTITE ŽIVOTNE SREDINE

Apstrakt

U radu autor analizira pojedine, privatnopravne i javnorpavne, aspekte zaštite životne sredine. Iz vizure građanskog prava analizirani su institute u vezi sa vanugovornom štetom. Pitanja koja su detaljnija razmatrana u radu su pitanja odgovornosti za opasne biljke i odgovornosti za štetu koju prouzrokuju životinje. Poseban predmet analize predstavljaju pravila krivičnog prava i to kroz njihovu ulogu u zaštiti životne sredine, prvenstveno putem propisanih ekoloških krivičnih dela. Autor ukazuje i na

[24] *Ibid.*

broj učinjenih krivičnih dela i obim tako prouzrokovane štete. U Mađarskoj je važeća Direktiva (EU) 2024/1203 Evropskog parlamenta i Saveta, na osnovu koje se očekuje da će se proširiti odredbe posebnog dela Krivičnog zakonika.

Ključne reči: građansko pravo, odgovornost, krivično pravo, šteta, zločin.

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EUROPEAN REGULATIONS ON LIABILITY FOR AI**

Summary

The emergence of artificial intelligence (AI) in social and economic affairs is not a recent phenomenon. Yet, all concerns raised by AI usage and existence have not been resolved. In cases of AI-caused damage, there are two main questions: who is liable for such damage, and under what conditions is liability assumed? The establishment of a uniform regulatory framework pertaining to liability for AI-caused damage is being pursued at the European level. Although the adoption of new legislation (regulations and directives) is an on-going process in the EU, it may be subject to critical analysis. The foundations for the regulation of AI in the EU have been laid down by the EU Artificial Intelligence Act (2024). Regarding the liability for damage caused by AI, the EU AI Act is to be complemented with two proposals. The first one regards the revision of the Directive on Products' Liability, regulating strict liability for damage caused by AI. The second one regards proposal for directive on procedural rules for litigations at the national level, harmonizing the rules for attesting the non-contractual fault liability for AI-caused damage. This study focuses on how the EU legal framework addresses the question of liability for AI-caused damage.

Keywords: *AI Act, Strict (No-Fault) Liability, Fault Liability.*

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** After this paper was prepared for the press, the European Parliament and the Council have adopted the Regulation (EU) 2024/1689 laying down harmonized rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), 13.6.2024. The adopted regulation in terms of content and numbering fully corresponds to the European Parliament legislative resolution on the proposal for a regulation of the European Parliament and of the Council on laying down harmonized rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)), 13.3.2024. – the AI Act, which is analyzed in this paper.

1. Introduction

The digital revolution is altering our perspectives of contemporary social relations. Artificial Intelligence (AI) has improved modern man's life in numerous and varied ways. For example, machines and technologies known as robots[1] have been developed to explore all undesirable or inaccessible parts of the world, assist in the medical field, process vast amounts of data, make business decisions and offer legal advices,[2] prepare reports and overviews on a variety of subjects, write scientific papers and poems on a given topic based on predetermined parameters (e.g. the Chat GPT), etc. The use of AI in modern social relations is aimed at reducing the risks deriving from human lack of diligence or power. However, its application is inextricably linked with the risks of jeopardizing protected goods and values.

When the damage from AI can be reduced to an instruction given by a human, the liability lies with that person, due to fault or created risk. The application of either strict or fault liability regime depends on how civil liability is structured in each country's legal system. However, when the AI-caused damage is a result of the machine-learning process and genetic and evolutionary programming,[3] liability is difficult to establish. If the producer (engineer, developer) or owner of the AI is unable to regulate its conduct due to AI's unpredictability as a unique quality, then the notion of fault is eliminated and the obligation to bear the risk is questionable. There is also the argument that users themselves agree to the risk of unpredictable AI conduct, but this logic undesirably excludes risk distribution in society. Furthermore, the inability to understand all aspects of an AI decision-making process or

[1] Terms artificial intelligence and robot are used as synonyms worldwide, equally encompassing hardware-software systems and software systems. M. Lemley, B. Casey, "Remedies for Robots", *The University of Chicago Law Review* 5/2019, 1321. Roots of word robot can be traced to the Church Slavonic word "rabota", meaning the forced labor of feudal serfs. The word robot was coined by the Czech writer Karel Čapek in 1920, in his play Rossum's Universal Robots, about a company that produces soulless workers. Professor Howard Markel spoke about the origin of the word in a radio show *Science Diction: The Origin Of The Word 'Robot'*, https://www.npr.org/2011/04/22/135634400/science-diction-the-origin-of-the-word-robot, last visited 10. 6. 2024.

[2] B. Arsenijević, "Odgovornost za štetu od veštačke inteligencije", *in: Prouzrokovanje štete, osiguranje i naknada štete* (eds. Zdravko Petrović, Vladimir Čolović, Dragan Obradović), Institut za uporedno pravo, Udruženje za naknadu štete, Pravosudna akademija, Belgrade, Valjevo 2023, 136.

[3] A. Guerra, F. Parisi, D. Pi, "Liability for Robots I: legal challenges", *Journal of Institutional Economics* 3/2022, 332.

accurately predict its outputs is known as a "black box" problem.[4] Demonstrating causation in damage claims is negatively impacted by this issue.[5]

In different ways and to different extents, tort law has historically been a fundamental avenue in industrialized legal systems for channelling massive losses associated with innovative technologies. Different legal systems opted between the non-contractual liability for fault and strict (no-fault) liability when regulating the cases of damage from vehicles and different dangerous things. Autonomous cars, robots and the AI may be seen as the latest technological triggers to tort revolutions.[6] At this stage of the digital revolution and the intensive AI development, tort law has s primary role in regulating the unwanted effects of the AI usage. In its report (2017), the European Parliament pointed out that the legislative response to upcoming legal and ethical questions of AI usage is crucial,[7] especially in tort law and insurance law. One of the goals set out in the strategic document AI for Europe (2018) was the creation of a comprehensive legal framework that protects users while encouraging further innovation.[8]

The European Parliament adopted its position on the Proposal for regulation on laying down harmonized rules on Artificial Intelligence in March 2024.[9] The EU Artificial Intelligence Act (hereinafter: the AI Act) defines AI technologies and categorizes them by respecting the risk they produce, and aims to develop harmonized standards such as transparency and

[4] Y. Bathaee, "The Artificial Intelligence Black Box and the Failure of Intent and Causation", *Harvard Journal of Law and Technology* 2/2018, 905.

[5] More on the problems of demonstrating causation, which can also be observed in cases of AI-caused damage, see M. Cvetković, *Uzročna veza u odštetnom pravu*, Niš 2020, 210–212.

[6] D. Gifford, "Technological Triggers to Tort Revolutions: Steam Locomotives, Autonomous Vehicles, and Accident Compensation", *Journal of Tort Law* 1/2018, 133–141.

[7] European Parliament report with recommendations to the Commission on Civil Law Rules on Robotics, 2015/2103(INL), 27. 1. 2017, 3.

[8] European Commission, Communication from the Commission of the European Parliament, the European Council, the Council, the European Economic and Social Committee of the regions, "Artificial Intelligence for Europe", COM (2018) 237 final, Brussels 25. 4. 2018, 18–19.

[9] European Parliament legislative resolution on the proposal for a regulation of the European Parliament and of the Council on laying down harmonized rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)), 13.3.2024. – the AI Act. https://www.europarl.europa.eu/doceo/document/TA-9-2024-0138_EN.pdf

accountability (part 2). The current EU legal framework and the downsides of its application to cases involving liability for AI-caused damage will be analyzed, as well as the steps taken for its modifications (part 3). Given the inadequate application of the Product Liability Directive (1985)[10] to cases involving AI-caused damage, the Commission prepared a proposal for its revision (part 4). Relying on the differences between national legal systems in regulating the fault liability for damage, the Commission also proposed the unification of national liability rules for cases of AI-caused damage (part 5). These two proposals, together with the AI Act, are the core of AI regulation in EU today.

2. EU Artificial Intelligence Act (2024)

Although the process of adopting the regulation on the AI has not been finished in the EU, the proposed solutions may be subject to critical remarks. The AI Act categorizes the AI systems into four risk groups: unacceptable, high, limited, and minimal risks.[11] Under the AI Act, unacceptable risk AI systems are prohibited; high-risk AI systems are regulated; limited-risk AI systems impose the transparency obligation for providers; minimal-risk AI systems are not regulated.[12] Furthermore, the AI Act regulates the general-purpose AI model and general-purpose AI model that pose systemic risk as subject matter as well.[13] The analysis is concentrated around risk categorization.

The purpose of the AI Act is to improve the functioning of the internal market and promote development and usage of the trustworthy AI systems, while ensuring the protection of health, safety and fundamental rights enshrined in the EU Charter of Fundamental Rights, including democracy, rule of law and environmental protection, against the harmful effects of AI.[14] In that regard, an appropriate balance must be attained between the achievement of these goals and the need to support the innovations.

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[10] Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210, 7. 8. 1985, 29–33, 25. 7. 1985. – Product Liability Directive. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31985L0374

[11] About this risk categorization and risk assessment, see C. Novelli, F. Casolari, A. Rotolo, M. Taddeo, L. Floridi, "Taking AI risks seriously: a new assessment model for the AI Act", *AI & Society*, 2023, online publication https://doi.org/10.1007/s00146-023-01723-z .

[12] Preamble of the AI Act, §§ 31, 46, 53.

[13] Preamble of the AI Act, § 97.

[14] Art. 1 of the AI Act.

As a pre-requisite, it is highlighted that AI should be a human-centric technology, serving as a tool for people, with the ultimate aim of increasing human well-being.[15] The AI Act lays down a uniform legal framework regarding the development, the placing on the market, the putting into service and the use of AI systems, and specifically the placing on market of general-purpose AI. Furthermore, it prohibits certain AI practices and sets specific requirements for high-risk AI systems. It sets harmonised transparency rules, rules on market monitoring, market surveillance governance and enforcement, and promotes measures to support the innovation.[16]

The AI is defined as "a machine-based system designed to operate with varying levels of autonomy, that may be adapted after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments".[17] Such definition differentiates AI systems from simpler traditional software systems or programming approaches and to exclude systems that are based on the rules defined solely by natural persons to automatically execute operations.[18] This Regulation does not apply to AI systems that are placed on the market, put into service, or used with or without modification exclusively for military, defense or national security purposes, or for the sole purpose of scientific research and development.[19]

The AI Act prohibits certain AI practices, which are seen as harmful, manipulative and discriminatory. Such practices include subliminal techniques or purposefully manipulating or deceiving techniques that distort one's ability to make an informed decision, techniques for exploiting the vulnerabilities of a person and influencing one's behaviour, techniques for evaluation and classification of persons based on their characteristics or social behaviour, which leads to social scoring and discriminating the people.[20] The use of real-time remote biometric identification systems (RBI systems) by law enforcement in public spaces is prohibited in principle, except in exhaustively listed and narrowly defined situations. The real time RBI systems can only be deployed if strict safeguards are met, for example, when its use is limited in time and geographic

[15] Preamble of the AI Act, § 6.
[16] Art. 1 of the AI Act.
[17] Art. 3 of the AI Act.
[18] Preamble of the AI Act, § 12.
[19] Art. 2 of the AI Act.
[20] Art. 5 of the AI Act.

scope and subject to specific prior judicial or administrative authorization for specific uses (e.g. the targeted search for missing persons, victims of abduction, human trafficking, sexual exploitation; prevention of a terrorist attack; localization or identification of suspected offenders for the purposes of criminal investigation, prosecution or execution of criminal penalty).[21]

An AI system is considered to be a high-risk system if it if it "is intended to be used as a safety component of a product, or the AI system is itself a product, covered by the EU harmonisation legislation listed in Annex I"; and if it "is required to undergo a third-party conformity assessment, with a view to the placing on the market or the putting into service, pursuant to the Union harmonisation legislation listed in Annex I".[22] This rule is derogated if specific AI system does not pose a significant risk of harm to the health, safety or fundamental rights of natural persons, including the influence on one's decision making. That is the case if the AI system is intended to perform a narrow procedural task, or to improve the result of previously completed human activity, or to detect decision making patterns and deviations but cannot replace the human assessment, or to perform preparatory tasks for an assessment.[23]

High-risk AI systems require risk management throughout the entire lifecycle of a system, including regular review and updating.[24] They must meet the requirements of transparency, which implies for the ability to interpret a system's output and use it appropriately,[25] and effective human oversight by natural persons while they are in use.[26] The providers of high-risk AI systems have specific obligations related to their exploitation of the system, characteristics of its use and risks involved.[27]

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[21] Art. 5 of the AI Act.

[22] Art. 6 of the AI Act. The Annex III lists the uses (cases) when AI systems are considered to be high-risk; all AI systems which are used for those purposes are considered to be high-risk. Examples of high-risk AI uses include essential private and public services (e.g. healthcare, banking), education, vocational training, employment, certain services in law enforcement, migration, asylum and border control management, administration of justice and democratic processes (e.g. influencing elections).

[23] Art. 6 of the AI Act. Preparatory tasks for an assessment the AI system is intended for must relate the cases enumerated in the Annex III. All AI systems listed in Annex III are always considered as high-risk if the system performs profiling of natural persons.

[24] Art. 9 of the AI Act.

[25] Art. 13 of the AI Act.

[26] Art. 14 of the AI Act.

[27] Art. 15 of the AI Act. Amending the Council's proposal for the AI Act, the

General-purpose AI models have two main characteristics: 1) generality over the specific intended use, and 2) capability to perform a wide range of distinct tasks. These general-purpose AI models require new components (such as a user interface) to become AI system, and they will not fall under the AI Act if the model is used for purely internal processes that are not essential for providing a product or a service to third parties and if the rights of natural persons are not affected.[28] A general-purpose AI model is classified as a general-purpose AI model with systemic risk: a) if it has high impact capabilities evaluated on the basis of technical tools and methodologies, or b) on the basis of Commission's or a specific panel decision.[29] The AI Act is applicable only when these models are integrated or are part of an AI system.

3. Downsides in the Current Eu Liability Framework

Who would be held liable for damage from data erasure on personal computer's hard-drivers when security system automatically up-dates itself? Who is liable when the robot machine leaves the production site and kills a person in the next room?[30] Would anybody be held liable for damage from car accident when the auto-pilot was controlling the vehicle?[31]

The existing EU liability framework for AI caused damage consists of the Product Liability Directive (1985) and of national liability rules that apply concurrently, when the Product Liability Directive's rules are not applicable. Regarding this framework, the Commission issued Report on the safety and liability implications of Artificial Intelligence, the Internet of Things

European Parliament in his position at first reading introduces the concept of deployers, as a natural or legal person, public authority, agency or other body using an AI system under its authority, except when the AI system is used for a personal non-professional activity. Art. 3 of the AI Act. Deployers have obligations under the AI Act, but less than the providers.

[28] Preamble of the AI Act, § 97.

[29] Art. 51 of the AI Act.

[30] H. Agerholm, *Robot 'goes rogue and kills woman on Michigan car parts production line*, https://www.independent.co.uk/news/world/americas/robot-killed-woman-wanda-holbrook-car-parts-factory-michigan-ventra-ionia-mains-federal-lawsuit-100-cell-a7630591.html, 24. 6. 2024.

[31] T. Thadani *et al*., *The final 11 seconds of a fatal Tesla Autopilot crash*. https://www.washingtonpost.com/technology/interactive/2023/tesla-autopilot-crash-analysis/ 24. 6. 2024.

D. Wakabayashi, *Self-Driving Uber Car Kills Pedestrian*, https://www.nytimes.com/2018/03/19/technology/uber-driverless-fatality.html, 24. 6. 2024.

and robotics (2020).[32] According to the Report, the inconsistency of tort law standards in EU Member States does not provide sufficient security for the recovery of damages, which may result in further fragmentation of the EU market and increased costs for businesses active throughout the EU. Furthermore, it is uncertain how the courts will interpret and apply existing national liability rules in cases involving AI. The "black box" effect makes it difficult, or even impossible, for the injured person to prove causation when claiming the compensation for damage in court. In order to ensure the functioning of the market and to ensure the protection of fundamental rights of individuals, the EU is interested in harmonizing specific rules of national legal systems.[33]

Although the Product Liability Directive provides a unified liability framework for damage arising from defective products, its application to the cases of AI-caused damage proves to be insufficient. Since the adoption of the Product Liability Directive in 1985,[34] there have been significant changes in terms of products production and distribution, followed with the modernization of product safety and market surveillance rules. The Product Liability Directive defines the product as all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable, including electricity.[35] AI systems may be software technologies (e.g. Chat GPT) or software-hardware technologies (e.g. robots). According to the current rules for interpretation of the concept of movables,

[32] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics COM/2020/64 final, Brussels, 19.2.2020. The commission's report is preceded by a series of strategic documents adopted at the EU level: European Parliament resolution with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL) of 16.2.2017, mentioned Communication Artificial Intelligence for Europe (COM(2018)237) of 25.4.2018, Policy and Investment Recommendation for Trustworthy AI from the High-Level expert Group on AI in 2019, Ethics Guidelines for Trustworthy AI from the High-Level expert Group on AI in 2019, and others. S. Andonović, "Strateško-pravni okvir veštačke inteligencije u uporednom pravu", *Strani pravni život* 3/2020, 114–116.

[33] On the differences between legal systems regarding the application of fault and non-fault liability to cases of AI caused damage, see E. Karner, B. Koch, M. Geistfeld (eds.), *Comparative Law Study on Civil Liability for Artificial Intelligence*, European Commission, Publications Office of European Union, Luxembourg 2021.

[34] The directive was amended by Directive 1999/34/EC of the European Parliament and of the Council, Brussels 10.5.1999, which extended the scope of liability to agricultural and fishery products.

[35] Art. 2 of the Product Liability Directive.

the Product Liability Directive cannot be applied to damage caused by software technologies,[36] nor to damage caused by AI when influenced by the third party (e.g. hackers) because that is not the defect caused damage. Although the notion of movables may incorporate the software-hardware technologies, the application of the Product Liability Directive is restricted by the notion of defect. A product is defective when it does not provide the safety which is reasonably expected, taking all circumstances into account, including the presentation of the product, the reasonably foreseeable use and the time when it was put into circulation.[37] If AI should make decisions on its own, based on processed data and past action experiences (machine-learning and genetic programming), the deficiency as such does not exist. In that case, the issue is not a defect but rather the principle of working that may produce unwanted outcomes.

In response to the aforesaid downsides of the current EU liability framework, the European Parliament adopted Resolution on a civil liability regime for Artificial Intelligence (2020).[38] It highlighted the need for liability rules that are adapted to the digital world, in order to ensure a high level of effective consumer protection and the high level of legal certainty for all-size businesses. Specific recommendations were provided for the Commission regarding the regulations of the AI liability regime. In turn, Commission responded by preparing two proposals for the European Parliament and the Council of European Union: the Proposal for a directive on liability for defective products (revised Product Liability Directive, hereinafter the Proposal PLD),[39] and the Proposal for a directive on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive, hereinafter the Proposal AILD).[40] The Proposal PLD adapts the existing strict

[36] Some authors consider that the Product Liability Directive is applicable because of the connection between of the computer program (software) with the machine that incorporates the program (computer, cellphone). S. Navas, "Robot Machines and Civil Liability", in: *Algorithms and Law* (eds. Martin Ebers, Susana Navas), Cambridge University Press, Cambridge 2020, 167.

[37] Art. 6 of the Product Liability Directive.

[38] European Parliament Resolution with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)), 20. 10. 2020. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020IP0276

[39] European Commission, Proposal for a directive of the European parliament and of the Council on liability for defective products, COM(2022) 495 final, 2022/0302(COD), Brussels 28. 9. 2022 – Proposal PLD. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0495

[40] European Commission, Proposal for a directive of the European Parliament

(no-fault) liability framework for damage from defective products to specifics of AI-caused damage. The Proposal AILD provides for the harmonization of national rules on non-contractual fault-based liability for damage and adjusts the Member States' national liability rules to the challenges of proving causal link and/or fault in the cases of AI caused damage. In this way, they complement each other, providing a complete system of civil non-contractual liability for damage caused by AI.[41]

4. Proposal for (Revised) Product Liability Directive (PLD)

Given the presented insufficiencies for application of the Product Liability Directive on the cases of AI-caused damage, the proposal for its revision has been prepared by the European Commission. In the Proposal PLD revision affected decades-old definitions and concepts of product, defect and responsible party. New rules on burden of proof were introduced. These issues will be elaborated further on.[42]

The subject matter of the Proposal PLD is liability of economic operators (manufacturers) for damage caused by defective products and sustained by natural persons. Damage is restricted in terms of causation and injured person. The damage must be caused by a defective product, where both the terms of defect and product are defined. The injured person may only be natural person; the Proposal PLD does not apply to damages suffered by legal persons. The damage is defined as material losses arising from: (a) the death or personal injury, including medically recognized harm to psychological health; (b) harm to, or destruction of, any property,[43] and (c) loss or corruption of data that is not used exclusively for professional purposes.[44] The

and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) COM(2022) 496 final, 2022/0303 (COD), Brussels 28.9.2022 – Proposal AILD. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0496.

[41] The Proposal AILD, Explanatory Memorandum, 3.

[42] The proposal does not apply to damage arising from nuclear accidents, even when movable products were the ones that caused the accident. The reason is that liability for such damage is already covered by international conventions ratified by Member States. Art. 2 of the Proposal PLD.

[43] Exception are made to the defective product itself, a product damaged by a defective component of that product, and property used exclusively for professional purposes.

[44] Art. 4 of the Proposal PLD.

Proposal PLD does not apply to compensation for non-pecuniary damage (immaterial losses).[45]

The notion of product has been expanded to include digital documents and software technologies. The Proposal PLD confirms that AI systems and AI-enabled goods are "products" and, therefore, fall within the scope of this directive. This means that compensation is available when damage is caused by a defective AI system, without the injured person's obligation to prove the manufacturer's fault. The regime of strict (no-fault) liability is expanded to cover the AI-caused damage. Product is defined as all movables, even if integrated into another movable or into an immovable, including electricity, digital manufacturing files (digital version or a digital template of a movable) and software.[46] In regard to the digital data, it should be noted that EU has adopted the Digital Content Directive (2019) which regulates contractual rights concerning the supply of digital content and digital services across EU.[47] While the Proposal PLD regulates the damage from defective digital manufacturing files (non-contractual strict liability), the Digital Content Directive concentrates on consumer protection in the event of a lack of conformity of digital content or a digital service with the contract or a failure to supply them (contractual liability based on fault).

The notion of defect has been changed regarding the circumstances that should be taken into account. The Proposal PLD determines that a product is to be considered defective when it does not provide the safety which the public at large is entitled to expect, taking all circumstances into account.[48] In other words, the defect is lack of reasonably expected security to use the product. Under the PLD Proposal, it is possible to recover only the damage caused by a defect of the product. If there is no defect, the rules of the Proposal PLD do not apply. The circumstances that are taken into account when determining reasonable safety of the product are: (a) the presentation of the product, including instructions for installation, use and maintenance; (b) the reasonably foreseeable use and misuse of the product; (c) the effect on the product of any ability to continue to learn after deployment; (d) the effect

[45] Preamble of the Proposal PLD, § 18.

[46] Art. 4 of the Proposal PLD. This proposed definition of this product does not include primary agricultural products, contrary to the Product Liability Directive, consolidated version from 1999.

[47] Directive 2019/770 of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136, 22. 5. 2019, 1–27, 20. 5. 2019.

[48] Art. 6 of the Proposal PLD.

on the product of other products that can reasonably be expected to be used together with the product; (e) the moment in time when the product was placed on the market or put into service or, where the manufacturer retains control over the product after that moment, the moment in time when the product left the control of the manufacturer; (f) product safety requirements, including safety-relevant cybersecurity requirements; (g) any intervention by a regulatory authority or by an economic operator relating to product safety; and (h) the specific expectations of the end-users for whom the product is intended. Circumstances (c), (e), (f) and (g) depend on the characteristics of the AI technologies. The Proposal PLD contest the liability for changes that manufacturers make to products, after they are placed on the market, including when these changes are triggered by software updates or machine learning. However, this is done by balancing the need to promote invention and by respecting developing risks related to AI technology.[49] The balance is achieved under the clause of exception from liability. The manufacturer may argue that the objective state of scientific and technical knowledge at the time when the product was placed on the market, put into service or in the period in which the product was within the manufacturer's control was not such that the defectiveness could be discovered (development risk defense).[50] If he proves it, he will not be held liable for damage. However, the manufacturer cannot argue that the product was made in compliance with current scientific and technical standards (state-of-the-art defense).

The liability rests with the manufacturer[51] of a defective product, as well as the manufacturer of the component of the product if the damage was caused by that defective component. The liability rests not only with hardware manufacturers but also with software providers and providers of digital services that affect how the product works. Furthermore, if any natural or legal person modifies a product that has already been placed on the market or put into service, that person shall be considered a manufacturer of the product and held liable, provided that the modification is considered substantial

[49] Developing risks refer to the situation when, after one product is released on market, a new safer one is being developed. In detail see, M. Karanikić, "Odgovornost za razvojne rizike", *Anali Pravnog fakulteta u Beogradu* 2/2005, 168–171.

[50] Art. 10 of the Proposal PLD.

[51] A manufacturer is any natural or legal person who develops, manufactures or produces a product or has a product designed or manufactured, or who markets that product under its name or trademark or who develops, manufactures or produces a product for its own use. Art. 4 of the Proposal PLD. Notably, the Product Liability Directive now in force uses the term producer.

under the Union or national rules on product safety and is undertaken outside the original manufacturer's control.[52]

The application of the Proposal PLD is limited to manufacturers established within territories of the EU Member States. If manufacturer is established outside the Union, the liability rests with the importer of the defective product and the authorized representative of the manufacturer.[53] When both importer and authorized representative of the manufacturer are established outside the Union, the fulfilment service provider may be held liable for damage.[54] The purpose of this multilayer liability regime is to provide a responsible party inside the Union and deter any evasion of the Proposal PLD applicability.

The Proposal PLD sets rules for disclosure of evidence and alleviates the burden of proof in complex cases, including cases involving AI-caused damage. In judicial proceeding, when the injured person has presented facts and evidence sufficient to support the plausibility of the claim for compensation, the national court can order the defendant to disclose relevant evidence that is at its disposal. Court shall limit the disclosure to what is necessary and proportionate to the legitimate interests of all parties, carefully estimating the need for protection of confidential information and trade secrets.[55] The injured party (the claimant) has to prove the sustained damage, the defectiveness of the product and the causal link between the defectiveness and the damage.[56]

The difficulties to prove these facts are alleviated by determining the presumption of defectiveness of the product and the presumption of causal link. The defectiveness of the product is presumed when: the defendant (manufacturer or other) has failed to comply with an obligation to disclose relevant

[52] Art. 7 of the Proposal PLD.

[53] An importer is any natural or legal person established within the Union who places a product from a third country on the Union market. An authorized representative is any natural or legal person established within the Union who has received a written mandate from a manufacturer to act on its behalf in relation to specified tasks. Art. 4 of the Proposal PLD.

[54] A fulfilment service provider is any natural or legal person offering, in the course of commercial activity, at least two of the following services: warehousing, packaging, addressing and dispatching of a product, without having ownership of the product. The exceptions pertain postal services, parcel delivery services and any other postal services or freight transport services. Art. 4 of the Proposal PLD.

[55] Art. 8 of the Proposal PLD. The court will ensure specific measures necessary to preserve the confidentiality of that information when it is used or referred to in the course of the legal proceedings.

[56] Art. 9 of the Proposal PLD.

evidence upon court order; or when the claimant (injured person) establishes that the product does not comply with mandatory safety requirements laid down in Union law or national law that are intended to protect against the risk of the damage that has occurred; or when the claimant establishes that the damage was caused by an obvious malfunction of the product during normal use or under ordinary circumstances.[57] These are alternatively requirements.

The causal link between the defectiveness of the product and the damage is presumed when it has been established that the product is defective and the damage caused is of a kind typically consistent with the defect in question.[58]

Furthermore, the Proposal PLD determines the presumption that damage, defectiveness of the product and/or causal link between them are proven by the claimant if there are excessive difficulties, due to technical or scientific complexity, to prove these facts. In that case, the claimant has to demonstrate by presenting sufficiently relevant evidence that: a) the product has contributed to the damage, and b) that it is likely that the product was defective or that its defectiveness is a likely cause of the damage, or both.[59] The defendant has the right to rebut any of these presumptions.

The Proposal PLD sets rules for exemption from liability, reduction, limitation and exclusion of liability.[60] These are protective rules aiming at striking a balance between production of risk-included products and reasonable grounds for liability.

5. Proposal for Artificial Intelligence Liability Directive (AILD)

When the Proposal PLD rules do not apply to specific case of damage because the product or defect requirements have not been met, or the condition for exemption from liability have been met, the injured person may seek damage compensation in accordance with the national rules of non-contractual civil liability. Given the lack of uniformity between national system in this regard, and especially the difficulties AI damage may cause in terms of burden of proof, the European Commission has prepared a proposal for a directive on adapting non-contractual civil liability rules to the specifics of AI-caused damage. The purpose of the Proposal AILD is to complement and modernize the EU liability framework by introducing new rules on AI-caused damage. The Proposal AILD creates a rebuttable presumptions and rules on disclosure and

[57] Art. 9 of the Proposal PLD.
[58] Art. 9 of the Proposal PLD.
[59] Art. 9 of the Proposal PLD.
[60] Art. 10, 12, 13 of the Proposal PLD.

preservation of evidence, in order to ease the injured person's burden to prove damage caused by AI. These are the questions that will be elaborated further on.

Subject matter of the Proposal AILD are the non-contractual civil law claims for compensation of damage caused by AI, when such claims are filed under fault-based liability regimes at national courts.[61] The Proposal AILD does not interfere with the notions of fault or damage in national systems, nor does it affect the national rules determining which party has the burden of proof and which degree of certainty is required as regards the standard of proof. Thus, it may be easily built into the existing national civil law regimes. In terms of notions of AI system, provider and user, the Proposal AILD refers to the AI Act.

The Proposal AILD stipulates the power of national courts to order disclosure or preservation of evidence about high-risk AI systems suspected of having caused damage. The national court may issue such an order at the request of the injured party (claimant) seeking compensation, or at the request on the potential claimant[62] who has previously asked a provider[63] to disclose relevant evidence at its disposal and was refused.[64] The potential claimant must support the request for disclosure with facts and evidence sufficient to support the plausibility of a claim for damages. In the on-going proceeding, the claimant is expected to have undertaken all proportionate attempts to gather the relevant evidence from the defendant. These disclosure rules are aiming to help the defendants as well, by excluding falsely identified potential defendants, saving time and costs for both parties and reducing the case load for courts.

The disclosure or preservation of evidence must be necessary and proportionate to support the claim, or potential claim, for damages. When assessing the proportionality, the court considers the legitimate interests of both parties, carefully estimating the need for protection of trade secrets and confidential information, such as information related to the public or national

[61] Art. 1 of the Proposal AILD. The Proposal AILD does not apply to criminal liability. However, it may be applicable with respect to state liability since the state authorities are also covered by the provisions of the AI Act as subjects of the obligations prescribed therein.

[62] Potential claimant is a natural or legal person who is considering but has not yet brought a claim for damages. Art. 2 of the Proposal AILD.

[63] Potential claimant may previously request the disclosure of relevant fact and evidence either from the provider, a person subject to the obligation of a provider under the AI Act, or a user. Art. 3 of the Proposal AILD.

[64] Art. 3 of the Proposal AILD.

security.[65] The defendant, or potential defendant, may use appropriate procedural remedies in response to such orders, but cannot deny them. If a defendant fails to comply with the orders, such conduct will allow a national court to presume the defendant's non-compliance with a relevant duty of care that the evidence requested was intended to prove for the purposes of the relevant claim for damages.[66] This presumption is rebuttable.

The Proposal AILD determines the rebuttable presumption of causal link between the defendant's fault and the output produced by the AI system or the failure of the AI system to produce an output.[67] This presumption may take place only if the national court considers it excessively difficult for the claimant to prove the causal link. Three conditions must be met. Firstly, the claimant must demonstrate the fault of the defendant, or the fault is presumed when the defendant fails to comply with court orders to disclose or preserve evidence. This fault is objectified[68] and implies a non-compliance with a duty of care, under the Union or national law, whose rules are directly intended to protect against the damage that occurred. Secondly, the claimant must demonstrate that the AI output, or failure to produce the output, gave rise to the damage. Thirdly, it needs to be considered that it is reasonably likely the fault has influenced the output, or the failure to produce output. The court must take in account all the circumstances of the case and will not apply the presumption if the defendant demonstrates that sufficient evidence and expertise is reasonably accessible for the claimant to prove the causal link.

In case of claims for damages concerning high-risk AI system, similar conditions are requested for establishing the presumption of causal link. The differences are made in regard to the specifics of the high-risk AI systems. Fault is seen as a non-compliance with the requirements for the risk management of such systems, laid down in the AI Act.[69]

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[65] Art. 3 of the Proposal AILD.

[66] Art. 3 of the Proposal AILD.

[67] Art. 4 of the Proposal AILD.

[68] On the topic of objectifying the concept of fault in the cases of damage caused by defective product, where fault is equalized with illegal conduct or non-compliance, see M. Karanikić, 180.

[69] J. Schuett, "Risk Management in the Artificial Intelligence Act", *European Journal of Risk Regulation*, First View, published online by Cambridge University Press, 2023, 1–19.

6. Conclusion

The experience in applying the Product Liability Directive has shown that injured persons face challenges in gathering evidence to prove liability, which becomes particularly difficult in light of the increasing technical and scientific complexity of AI. Furthermore, there are normative obstacles in applying the Product Liability Directive to the cases of AI caused damage. First, AI system could not be considered as product in regard to the directive and second, the notion of deficiency could not be fulfilled. The unpredictability of AI making decision process and the related black box problem, which both may lead to unwanted outcomes, are not a defect but rather the principle of working. The Proposal PLD up-grades the existing directive by widening the notions of product, damage and defect. In the Proposal, the software systems are included as products. The loss or corruption of data that is not used exclusively for professional purposes is considered as damage. Finally, the product is deemed defective if it does not provide the safety which is expected, taking in account its ability to continue to learn after deployment (machine-learning) and the software updates operated by a regulatory authority or by an economic operator relating to product safety. In this manner, the manufacturer stays liable for changes made to product after they have been placed on the market, contrary to the existing directive, while respecting the development risks under the rules for exemption of liability.

The difficulties to prove the liability in AI damage cases are carefully evaluated by the Commission EU. As a result, drafted regulations alleviate the burden of proof in complex cases. Firstly, the AI Act establishes rules for development, the placing on the market, the putting into service and the use of AI. It specifically ensures that high-risk AI systems comply with safety and fundamental rights requirements (e.g. data governance, transparency, human oversight). Failure to meet those requirements equivalents to provider's, or deployer's, fault in compensation claims or failure to produce a safe product. Secondly, if the damage resulted from deficiency related to AI system, the Proposal PLD provides the presumptions of defectiveness of the product and the presumption of causal link, when products fail to comply with safety requirements. The manufacturer of AI faces strict liability. Thirdly, if the damage is not a result of deficiency or presumptions are not met, the injured party may refer to national court, claiming the compensation of damage under the national liability rules. The Proposal AILD sets the presumptions of fault and causal link, and harmonizes the national rules for non-contractual fault liability. The presumptions relate to the failure to meet

the AI Act safety requirements. Furthermore, the Proposal AILD constitute the obligations of providers to disclose and preserve evidence about the AI characteristics, components and history.

These proposals are complementary legal instruments in adjusting non-contractual liability rules to the digital age and AI. The no-fault liability of the AI manufacturers remains the sole mean of adequately solving the problem of a fair apportioning of risks inherent in modern technological production. Nevertheless, the no-fault liability is restricted to the cases of damage caused by AI deficiencies. Outside this range, national rules on non-contractual liability for damage from things or non-contractual fault liability are the last resort. The adequacy and effectiveness of the proposed liability framework, its mutual coherence, its potential detrimental impact on innovation, and the interplay between EU and national rules are prior subjects of the discussion between EU bodies.

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UREĐENJE ODGOVORNOSTI ZA ŠTETU OD VEŠTAČKE INTELIGENCIJE U EVROPSKOJ UNIJI

Apstrakt

Prisustvo veštačke inteligencije (VI) u društvenim i privrednim odnosima nije novina druge dekade 21. veka. Međutim, pravni sistemi još uvek nisu našli odgovore na sva pitanja koja njihova upotreba i prisustvo stvaraju. Slučajevi prouzrokovanja štete od VI dodaju dva nova pitanja: ko je odgovorno lice i koji su uslovi odgovornosti. Na evropskom nivou teži se utvrđivanju usklađenog okvira regulative u oblasti odgovornosti za štetu od VI. Kako se u okvirima EU odvija proces usvajanja novih propisa (uredbi i direktiva), nužnost analize predloženih rešenja se nameće. Uredba o VI postavlja temelje za regulisanje razvoja i upotrebe VI u okvirima EU. Pitanje odgovornosti za štetu nastavlja se na uredbu, u vidu dva predloga direktiva. Prvi predlog predstavlja revidiranu Direktivu o odgovornosti za proizvode sa nedostatkom, proširujući opseg objektivne odgovornosti na štete od VI. Drugi predlog tiče se harmonizacije procesnih pravila o vanugovornoj subjektivnoj odgovornosti za štete od VI. Na taj način, ova dva predloga stvaraju komplementarni

okvir dva režima odgovornosti za štetu od VI. Oba predloga sadrže pretpostavke o ispunjenosti ili dokazanosti uslova odgovornosti (uzročne veze i nedostatka, odnosno krivice).

U radu se pažnja posvećuje rešenjima EU pravnog okvira za pitanja odgovornosti za štetu od VI. Analiza ovih rešenja ukazuje na dva nepomirljiva cilja izgradnje EU pravnog okvira za pitanja odgovornosti za štetu od VI: neograničavanje proizvodnih poduhvata i zaštita interesa ljudi na tom proizvodnom putu.

Ključne reči: Uredba o VI, objektivna odgovornost, subjektivna odgovornost.

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BETWEEN COMPENSATION AND PERFORMANCE: NAVIGATING REMEDIES FROM PICC TO NATIONAL LEGAL SYSTEMS**

Summary

This article presents a comparative analysis of remedies for non-performance in international contract law, focusing on the UNIDROIT Principles of International Commercial Contracts (PICC), the United Nations Convention on Contracts for the International Sale of Goods (CISG), German law, French law and English law. It examines the theoretical frameworks, practical implications, and comparative nuances of each legal system, providing an evaluation of how these frameworks address non-performance and the influences they exert on international contract law. Through this analysis, this study aims to elucidate the nuances and influences of each legal system on the relations between non-performance and damage compensation. The paper aims to determine which remedy offers a more equitable solution within different legal contexts, especially for PICC. The paper offers a comprehensive understanding of how various legal systems address remedies for breach of contract, highlighting their similarities, differences, and influences on one another.

Keywords: *UNIDROIT Principles of International Commercial Contracts, Remedies, Breach of Contract, Non-performance, Specific Performance, Damages.*

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1. Introduction

In the year that marks 30 years since the plenary session of the International Conference for the Codification of Private International Law (hereinafter: UNIDROIT) adopted the Principles of International Commercial Treaties (hereinafter: PICC), we may look back at the role played by the Principles, in order to praise the good sides and preserve them for the future, and to review some others and possibly question them in the present.[1] Soon after they were made publicly available to legal practitioners and academia in an integral form, the first positive results of this endeavour were already apparent. To this day, the results of this soft-law instrument are multi-dimensional. Therefore, it is the author's decision to dedicate himself in this work to the matter which, despite the various changes that the PICC underwent during the changes, remained immune to the passage of time and is completely faithful to its original version from 1994 - the legal remedies available to the creditor in case of non-performance of obligations from the contract by the other contracting party. The 30th anniversary of the UNIDROIT Principles provides a timely opportunity to reassess their impact and relevance in the global legal landscape.

Elucidation of the various issues that arise with specific performance and its relation with the compensation of damages aims to answer the question of the expediency of this solution in modern international contract law, as well as national legislation. As the situation with monetary obligations is clear, and as, regardless of the position, monetary compensation is owed, the field of analysis is narrowed to the performance of non-monetary obligations, thereby also including the obligation to give something (else, besides money), to do, not to do or to abstain from doing something. Therefore, at the centre of the dilemma are two legal remedies provided in case of breach of the contract (besides termination): a claim for the performance of a contractual obligation and a request for compensation of damages. Specific performance requires the breaching party to fulfil their contractual obligations as originally agreed, whereas damage compensation involves providing financial compensation to the aggrieved party for the losses suffered due to the breach.

As will be seen in further analysis, continental law traditionally gives primacy to the request for the performance of an obligation, which originates from the principle of *pacta sunt servanda*, while common law countries are

[1] UNIDROIT Principles of International Commercial Contracts – PICC. Black-letter version from 2016, https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-bl.pdf, last visited 05. 08. 2024.

traditionally restrained when it comes to determining the right of the creditor to demand performance, and most often opt for compensation of damages. International sources of contract law, such as the PICC and the United Nations Convention on Contracts for the International Sale of Goods (in further text: CISG), have opted for the possibility that the creditor may demand the performance of an obligation arising from the contract, while the cases when it is not possible to demand the performance of non-monetary obligations are expressly stated, and the creditor certainly has the right to compensation for damages. Just as the PICC in its entirety, and especially the provisions on specific performance, are the consequences of the then-normative environment and dominant positions in legal theory, they now form part of the existing soft law, generating their influence. This work aims to, therefore, through the analysis of international legal instruments, as well as the solutions of selected national legal systems, present the current situation in modern law regarding the legal remedies available to the creditor in case of non-performance of contractual obligations.

2. The UNIDROIT Principles of International Commercial Contracts (PICC): A Harmonization of Remedies

2.1. General Remarks on the Drafting Style of PICC

The goal of the commission that worked on drafting the PICC was that their solutions do not explicitly rely on the solutions contained in the regulations of the countries, both of civil and common law legal tradition, which is why the neutral terminology is widely used, in order to avoid specific terms that might be associated with any particular legal system.[2] The motives behind this might be twofold. Firstly, the intent to legitimize PICC as independent legal principles that represent the most suitable solution for international trade agreements, and not those that have been judged to have won the "competitive battle" of different schools of thought.[3] Secondly, in this way, the focus on judicial practice and doctrinal analyses of national law is avoided, which at the same time reduces bias and predominance in international trade, and allows an unhindered, independent and autonomous interpretation of the PICC.

[2] M. J. Bonell, "The UNIDROIT Principles as a model for transnational commercial law", *Uniform Law Review* 2/2002, 18.

[3] F. Jose Angelo Estrella, "The influence of the UNIDROIT Principles of International Commercial Contracts on National Laws", *Uniform Law Review* 2-3/2016, 241.

However, the PICC rules were not created *ex nihilo*, and it is concluded that its provisions originate from international commercial arbitration, international conventions, mostly regarding the ones on the international sale of goods, and some modern codifications of commercial law.[4] This may lead to the conclusion that they are a good example of the so-called "common-core approach", and thus suitable for the use of the comparative analysis or those best suited for the specific circumstances.[5]

2.1. Specific Performance and Damage Compensation

It is well known that the solutions chosen by the drafters of the PICC are strongly inspired by the ones contained in the CISG, as if guided by the logic that the good solutions, i.e. not outdated, substandard or weak, should not be challenged.[6] PICC adopted a unitary concept of breach of contract[7] and provides a creditor with the remedy of termination in case of fundamental non-performance, which entails a lack of performance or defective performance.

In general, the PICC allows a creditor to demand specific performance.[8] This provision emphasizes the preference for enforcing the contract in accordance with the principle *pacta sunt servanda*, and the approach that the contract should be respected in its entirety and that the contractual obligations should be performed as they are negotiated. The principle thus reflects the civil law tradition, where the performance of contractual obligations is generally favoured over monetary remedies, namely French and German Law.

As previously mentioned, article 7.2.2 of the PICC does allow a creditor to demand performance, but this article also enlists a number of exceptions when the specific performance cannot be claimed. Firstly, PICC recognize

[4] I. Carr, P. Stone, *International Trade Law*, Routledge, London 2017. Available at: https://www.perlego.com/book/2193208/international-trade-law-pdf, last visited 14. 04. 2024.

[5] M. J. Bonell, "UNIDROIT Principles 2004 - The New Edition of the Principles of International Commercial Contracts Adopted by the International Institute for the Unification of Private Law", *Uniform Law Review* 1/2004, 7.

[6] H. Kronke, "The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond", *Journal of Law and Commerce* 1/2005, 456; A. Prujiner, "Comment utiliser les principes d'UNIDROIT dans la pratique contractuelle", *Revue Juridique Themis* 2/2002, 572.

[7] More about the unitary concept of the breach of contract, see: K. Jovičić, S. Vukadinović, *Neizvršenje ugovora, odgovornost i naknada štete,* Institut za uporedno pravo, Beograd 2023.

[8] Art. 7.2.2 PICC.

both factual and legal impossibility, acknowledging the fact that the impossibility may influence the performance. Secondly, the creditor cannot claim specific performance if "enforcement is unreasonably burdensome or expensive".[9] *Ratio legis* behind this provision may be found in the necessary balance between the interests of the contracting party, meaning that the debtor should not be at a loss due to specific performance, or be extremely burdened due to performance of the obligation as such. Thirdly, sub-paragraph (c) excludes the right of the creditor to claim specific performance whenever "the party entitled to performance may reasonably obtain performance from another source".[10] The commentators of PICC find this exemption as an emanation of economic reality, as this exemption relates to obtaining goods or services that are easily accessible on the market due to their standard qualities and can be provided by many suppliers.[11] This is also in line with the potential interests of the party entitled to request performance. Since it can easily obtain the performance from another party on the market and since either goods or services of the same kind are easily found, his interests do not necessarily have to be claiming specific performance by the specific contractor. It might be even more desirable to conclude another contract and obtain the performance faster, and not to wait for the performance by the initial contracting party. This provision is somehow mitigated by introducing the standard of reasonableness. The right to claim performance should not be excluded every time performance may be obtained from another source, but only when it is reasonable for the entitled party. The next exception is regulated in sub-paragraph (d) and refers to the performance of an exclusively personal character. The phrase "exclusively personal character" is defined as a performance that is not possible to delegate to another person, that requires personal skills of some nature (artistic, scientific etc.), or if the performance is linked to the specific confidentiality between the contracting parties.[12] This definition has significant similarities with the concept of *intuitu personae* contracts of continental law.[13] Lastly, if the obligee did

[9] Art. 7.2.2 (b) PICC.

[10] Art. 7.2.2 (c) PICC.

[11] Integral version of PICC, with comments, https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf, last visited 24. 04. 2024.

[12] *Ibid*.

[13] About the definition and the practical implications of *intuitu personae* contracts, see: J. Vukadinović Marković, I. Radomirović, „Pravo na naknadu štete kao posledica povrede receptum arbitri -građansko pravna odgovornost arbitara -" in: *Prouzrokovanje štete, naknada štete i osiguranje* (ur. Zdravko Petrović, Vladimir Čolović, Dragan Obradović), Institut za uporedno pravo, Udruženje za odštetno pravo,

not request performance within a reasonable time after becoming, or ought to become, aware of the non-performance, the obligee loses the right to request specific performance (subparagraph (e)).[14]

When it comes to the enforcement of the contractual obligations whose performance is ordered by the court, article 7.2.4 introduces the possibility of the court directing a fine to the party who failed to perform, and this fine is not to be linked with any damages, i.e. oblige can claim damage compensation separately. Primarily, the penalty is to be paid to the aggrieved party, but other solutions may be applied as well if *lex fori* states otherwise. Ordering a penalty is at the discretion of the court, so it is easily concluded that not all types of non-performances would be equally fined. While it is not expected to impose a penalty for the monetary obligations, the judicially imposed penalty is considered to be the most effective solution when it comes to the obligations to do something or to abstain from doing something.[15] More widely, the threat of a penalty for failing to perform is recognized as one of the most effective means of ensuring performance. Furthermore, a judicially imposed penalty does not present only a punitive measure, but also a measure of securing and ensuring that the performance is to be made, which is an entirely different function besides being punitive, which may provide performance before the penalty actually being paid.

Judicially imposed penalty, regulated as it is, is considered to be a copy of the *astreinte* of French law.[16] Namely, paying a penalty to the aggrieved party is an unknown concept to both German and common law. Since the institute is almost the same, further analyses will follow in the part of this article dedicated to French law. Only a few remarks will be made, for the sake of future comparison. Although the commentators point out that the judicially imposed penalty is to be more used when it comes to the specific kinds of obligation (to do or to abstain from doing), the possibility for the court to order a judicial penalty is undifferentiated, i.e. the court may order a penalty whenever it sees fit, irrelevant of the type of obligation *in concreto.* Furthermore, PICC do not distinguish different kinds of penalty, nor does it regulate how the penalty is to be calculated, which leaves a lot of questions to be asked.

Beograd-Valjevo 2022, 231–245.

[14] Art. 7.2.2(e) PICC.

[15] Integral version of PICC, with comments, https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf, last visited 24. 04. 2024.

[16] I. Schwenzer, "Specific Performance and Damages According to the 1994 UNIDROIT Principles of International Commercial Contracts", *European Journal of Law Reform* 3/1999, 302.

Article 7.4.1 provides for damages that cover the actual loss and lost profits resulting from non-performance. The PICC's approach to damages aligns with the principle of full compensation, which ensures that the injured party is entirely compensated. However, contractual liability is limited to the foreseeable damage, i.e. damage that was foreseen or could reasonably have been foreseen at the time of the contract conclusion,[17] which is similar to the approach under the CISG and the French Civil Code.

It may be concluded that the PICC's approach to remedies represents a balance between civil and common law traditions. The broad availability of specific performance in the PICC is proof of civil law influences, while the provisions on damages show an influence of common law tradition. The preference for specific performance aligns with the principle that contracts are binding and should be fulfilled as agreed. However, damage compensation serves as a practical alternative when specific performance is not an adequate solution.

3. The CISG Approach to Remedies

The Convention addresses remedies for non-performance in Articles 45-52, balancing the need for enforcement with practical considerations.

Article 46(1) allows a buyer to "require performance unless he has resorted to a remedy inconsistent with such requirement". This article further regulates the cases of non-conformity of the goods with the contract, allowing the buyer to require delivery of substitute goods under certain conditions, or to remedy the non-conformity by repair.[18] However, this provision has to be read in conjunction with Article 28, which recognises any limitation on such a remedy under a particular national system, if the court is not bound to enter such judgment under its law.[19] Article 79 of the CISG points out the principle of impossibility, excusing a party from performance if an impediment beyond their control prevents the fulfilment of the obligation, which is an exemption also provided by the PICC. On the other hand, when it comes to the compensation of the other party in case of non-performance, it falls within the scope of the CISG, and the relevant provisions of the PICC do express the "general" principles on which the CISG is based.[20]

[17] Art. 7.4.4 PICC.

[18] Art. 46(2) and (3) CISG.

[19] L. Hsu, "Remedies Available for Breach of Contract under the UN Convention on Contracts for the International Sale of Goods", *Singapore Academy of Law Journal* 1/1996, 117.

[20] H. Kronke, 458.

Article 74 allows for the compensation of damages that cover the loss suffered due to non-performance, as a consequence of the breach. The same article also limits the damage by the standard of foreseeability, meaning that "damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract".[21]

This dual approach ensures that while specific performance is available, damages provide a necessary alternative when performance is not feasible. This solution is praised in legal doctrine, bearing in mind that the CISG prefers performance over termination, which has the effect of minimizing the costs and risks and is more in accordance with the presumed interests in international trade law.[22]

In conclusion, The CISG's remedies for non-performance contain ideas of both civil and common law systems, same as PICC. On the other side, PICC appears to complement the CISG provisions, making them more precise and more detailed. It is stated that this improvement is not to be attributed to the merit of the PICC's drafters but is more a result of the spontaneous evolution of international trade law and legal practice, and, perhaps, the participation of independent experts in drafting procedures.[23]

4. Continental Legal Traditions

4.1. French Law

Literal enforcement, as a key principle of French contract law, is mostly linked to the principle of the binding force of the contract.[24] It is introduced by the Law of 9 July 1991 on the reform of civil enforcement procedures, which states that "all obligations can, under the conditions laid down by law, constrain the

[21] Art. 74 CISG.

[22] B. Ceesay, "Finding an Ideal Contract Law Regime for the International Sale of Goods: Comparative Study on the Remedy of Termination for Breach of Contract under the United Nations Convention on Contracts for International Sale of Goods (CISG), the UNIDROIT Principles of International Commercial Contracts (PICC) and the Gambia Sale of Goods Act", *European Journal of Law Reform* 2/2021, 186.

[23] H. Kronke, 458.

[24] Article 1221 of *Code Civil (France), Journal Officiel de la République Française, 1804.*

defaulting debtor to carry out his obligations".[25] It is usually considered that, if deprived of such a remedy, a contract has less binding force.[26]

As previously mentioned, Article 1221 of the French Civil Code establishes specific performance as the primary remedy for non-performance, unless "the performance is impossible or there is a disproportion between the interest of the creditor and the expenses of the debtor acting in good faith". This provision reflects a commitment to ensuring that contractual obligations are fulfilled while accommodating practical obstacles. It may be concluded that French law also recognizes the proportionality condition as necessary to request specific performance.

Article 1231-1 provides for damages in cases of non-performance (and delayed performance), which is further elaborated in the following articles of the Code. The French approach to damages emphasizes the full compensation (similar to the PICC and CISG), but only to the limit of its foreseeability, including both actual loss and missed gain. The debtor has to pay only for the damages that were foreseen or could have been foreseen since the conclusion of the contract, unless he has acted faulty or fraudulently.[27]

4.1.1. Astreinte

As mentioned when analysing relevant provisions of PICC, French law imposes a penalty called *astreinte,* which is a fine ordered by the court in case of non-compliance with the order of the court to fulfil its contractual obligation. As in PICC, this penalty is independent of damages and is ordered for the sake of compliance with the court orders. French Code on Civil Enforcement Procedure states that the court may, at its own initiative or otherwise order the payment of *astreinte*. Article L-131-2 distinguishes provisional and definitive *astreinte*. Provisional *astreinte* is ordered when the court hasn't determined its definitive character yet, while the definitive one is ordered after the provisional one, for a determined period. If not all the conditions for definitive *astreinte* are met, it is considered to be

[25] Loi n° 91-650 du 9 juillet 1991 portant réforme des procédures civiles d'exécution, *Journal officiel de la République Française* 1991. *Astreinte* is now regulated by the Code of civil executional procedure (Code des procédures civiles d'exécution), *Journal Officiel de la République Française* 2012.

[26] H. Beale *et al*, *Cases, Materials and Texts on Contract Law*, Hart Publishing, Oxford 2010, https://www.perlego.com/book/391516/contract-law-ius-commune-casebooks-for-the-common-law-of-europe-pdf, last visited 14. 04. 2024.

[27] Art. 1231-3 French Civil Code.

a provisional one.[28] Also, French law envisages cases where the *astreinte* is not allowed, which refers to the cases of *force majeure* and the case when the contractual obligation is strongly linked to the debtor. It is argued that the personal character of the obligation would, in case of the forced execution, lead to an excessive intrusion into the debtor's personal liberty, which prevents ordering of *astreinte*.[29]

Although the possibility of imposing a penalty is known in other legal systems as well, there is no unique approach as to the beneficiary of this payment. In both French law and PICC, the penalty is considered to be a kind of private fine that is to be paid to the aggrieved party, which is not the case in other legal systems. That might be considered as an unjust enrichment for the aggrieved party, as it is claimed independently of the damages. Since this solution originates from French law, it might be concluded that French law was a predominant influence that caused the introduction of judicially imposed penalties in PICC. However, a few differences are significant. Firstly, PICC do not know the mechanism for calculating the penalty. Secondly, PICC do not know the difference between different kinds of penalties, in contrast to the French distinction between provisional and definitive *astreinte*. Although it would be not necessary to regulate the penalty in PICC in the same way as in French law, this lack of regulation may demonstrate the lack of clarity and precision when it comes to this penalty, which may be repelling for the legal practitioners from the other legal systems. That is why the commentators of the PICC have explicitly expressed their doubt that the judicially imposed penalty is to be followed outside of French legal systems.[30]

4.2. Germany

German contract law, as codified in the *Bürgerliches Gesetzbuch*,[31] presents a specific approach to non-performance. The BGB grants the obligee the right to claim performance in kind, as stipulated in Section 241(1) BGB. However, this right is limited by several exceptions, provided in Article 275 BGB. The request for specific performance of the obligation

[28] Art. L-131-2 French Code on Civil Enforcement Procedure.

[29] G. Naumoski, *Pojam, punovažnost i izvršenje predugovora,* doctoral thesis defended at the Faculty of Law University of Belgrade, Belgrade 2021, 192.

[30] Integral version of PICC, with comments, https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf, last visited 24. 04. 2024.

[31] German Civil Code (*Bürgerliches Gesetzbuch)*, *Bundesgesetzblatt* (hereinafter: BGB).

is excluded to the extent that performance has become impossible for the debtor or any other person.[32] Then, the BGB proclaims the principle of proportionality, as it is stipulated that "the obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in the performance of the oblige".[33] Thus, proportionality also plays a significant role, since the obligor may refuse performance if it entails an expense or effort grossly disproportionate to the obligee's interest in the performance. Thirdly, "the obligor may refuse performance if he is to render the performance in person and, when the obstacle to the performance of the obligor is weighed against the interest of the obligee in performance, performance cannot be reasonably required of the obligor."[34] Remedies, including damages, are available if specific performance is not feasible, considering that the obligor is at fault for the non-performance.[35] The starting point is that the obligor is liable for damages only if he is at fault.[36] The right of the obligee to demand damages *in lieu* of the performance is subject to a few conditions. The obligee has to give a reasonable deadline to the obligor for the performance prior to demanding damages *in lieu* of the claim for a specific performance.[37] This deadline has to pass without results, while the trivial non-performance is not enough for the obligor to claim damages.[38] This framework reflects the civil law tradition's preference for performance over damage compensation.

[32] Therefore, both objective impossibility, which makes execution impossible for every person, and that which makes execution impossible only for the debtor *in concreto* are relevant.

[33] Art. 275(2) BGB.

[34] Art. 275(3) BGB.

[35] Art. 280(1) BGB.

[36] H. Beale *et al*.

[37] Provision of Article 281 of BGB regulates the right to demand compensation when the deadline for the performance of the contractual obligation is not an essential element of the contract. If it is, the compensation for damages may be demanded immediately after the deadline, and it is unnecessary to inform the debtor that the contract is terminated. B. Stjepanović, I. Radomirović, „Fiksni formalni ugovori – raskid po sili zakona", u: *Uporednopravni izazovi u savremenom pravu - In memoriam dr Stefan Andonović* (ur. Jovana Rajić Ćalić), Institut za uporedno pravo, Pravni fakultet Univerziteta u Kragujevcu, Beograd 2023, 540.

[38] Art. 281(1) BGB.

When it comes to the enforcement of contractual obligations, the German Code of Civil Procedure[39] allows the courts of first instance to impose a fine on the debtor in case of breach. This fine may be imposed only when an obligation to refrain from an action or to cease it is not performed, which makes the provision predictable and clarified. The debtor may be ordered to pay a fine for each infraction, and he can even be detained, for each infraction.[40] Contrary to the French *astreinte*, this fine is not to be paid to the creditor, but to the state budget, as any other fine.

5. English Law

The common law remedy of specific performance appears to be much more limited than the literal enforcement of performance in continental systems.[41] Some authors argue that one of the reasons for this lies in the different understanding of the notion of the so-called literal performance. Civil law systems have a broader perception of this notion, including the case where the obligee is entitled to obtain performance by himself or by a third party, while the common law systems use this notion only to cases when the obligor performs the obligation by himself.[42]

English contract law traditionally takes a more restrictive stance on specific performance compared to its continental counterparts. The Sale of Goods Act regulates the action for specific performance in Article 52.[43] The provision of Article 52 states that the court may order that the contract is to be performed specifically, which means that the remedy of specific performance is generally applied at the court's discretion, only if it thinks fit.[44] In exercising this discretion, the court shall refuse the remedy if it finds that the damage will fully compensate and will but the plaintiff in as good a position as if the contract has been performed.[45] An action for damages for non-delivery of goods is regulated in Article 51, before the provisions regulating specific performance.

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[39] German Code of Civil Procedure (*Zivilprozessordnung)*, as promulgated on 5 December 2005 (*Bundesgesetzblatt (BGBl., Federal Law Gazette*) I page 3202; 2006 I page 431; 2007 I page 1781), last amended by Article 1 of the Act dated 10 October 2013 (*Federal Law Gazette* I page 3786) and Book 10 last amended by Article 1 of the Act of 5 October 2021 (*Federal Law Gazette I*, p. 4607)

[40] Art. 890 of the German Code of Civil Procedure.

[41] H. Beale *et al.*

[42] *Ibid.*

[43] Sale of Goods Act 1979.

[44] Art. 52 of the Sale of Goods Act.

[45] J. Beatson, *Anson's Law of Contract,* Oxford University Press, Oxford 1998, 596.

Two arguments are pointed out as a reason why the specific performance should be a secondary remedy for breach of contract: mitigation rule, as a core principle of English tort law, is to be avoided if the specific performance is applied, and, secondly, the techniques for quantifying losses have significantly improved and thus justify accepting damages as a primary remedy.[46]

Also, the English courts were historically reluctant to order specific performance for contracts that require supervision, due to the challenges that may arise. This cautious approach reflects a preference for monetary damages over specific performance, emphasizing the practical difficulties in enforcing specific performance. Damages are given as a way of compensation, and there is not any punitive element of damages.[47] English contract law, same as its continental counterparts, limits contractual liability to the foreseeable damage resulting from non-performance.[48]

6. Instead of Conclusion

The development of these remedies has been influenced by various legal philosophies and legal traditions. Specific performance has often been mostly favoured by civil law systems, reflecting a strong commitment to the binding force of the contract. In contrast, common law systems have traditionally prioritized damage compensation, pointing out the practicality of this remedy as a more suitable one.

Nonetheless, the point remains that in French and German law specific performance is seen as a normal remedy for non-performance, while in common law, it is seen as a remedy of the "second line", subject to a court's discretion. The arguments in favour of specific performance generally revolve around the statements that the specific performance logically emanates from the contract itself, that the damages may be inadequate and that actions for damages may cause higher costs, that it might be more difficult to assess the amount of damage and provide compensation to be just and satisfactory.[49] The argument against the specific performance can be deducted from the fact that specific performance is rarely ordered and judicial procedures for

[46] *Ibid.*

[47] *Ibid.*

[48] G. Naumoski, 186.

[49] M. Zahraa, A. A. Ghith, "Specific Performance in the Light of the CISG, the UNIDROIT Principles and Libyan Law", *Uniform Law Review* 3/2002, 752.

specific performance can be costly and time-consuming.[50] English scholars also, as previously mentioned, point out the concerns regarding supervision of enforcement and avoidance of mitigation principle. Besides the matters of supervision pointed out in English doctrine, most of these arguments are practical, and most of them can be equally attributed to both of these remedies. However, what should be beyond doubt is that the arguments *pro et contra* regarding international contract law should be elaborated bearing in mind specific circumstances of international trade.

In international settings, it is argued that there is no justification to prioritize specific performance over the award of damages, because the creditor's interests may be more satisfied through the damages.[51] It is said that the specific performance relies on the principle "all or nothing", while the compensation of damages appears to be a more flexible remedy, that may more adequately respond to the needs of flexibility in international trade.[52] An important argument in favour of damages is also already pointed out, that the compensation of damages as a remedy allows the application of the mitigation principle.

The relationship between compensation of damages and specific performance as stated by the PICC is harmonized, tending to use solutions from both civil and common law traditions. It is evident that the drafters of the PICC have tried to find a common ground for these legal traditions, which is why it is said that the PICC offer "neutral solutions".[53] They offer a balanced approach, integrating elements from both traditions in order to facilitate international commercial transactions. That is why it is nicely put that commercial law is based on experience, and by the words of Kronke, "it listens as much as it talks".[54] Understanding these differences is crucial for international businesses and legal practitioners, as it influences contract negotiation, enforcement, and dispute resolution. PICC reflect significant influences from the CISG, BGB, and *Code Civil*, while introducing novel concepts to address specific challenges in international contracting. The PICC's approach to the

[50] *Ibid.*

[51] *Ibid.*

[52] *Ibid.*

[53] Guide juridique de la CNUDCI, la HCCH et Unidroit sur les instruments de droit uniforme relatifs aux contrats du commerce international (notamment de vente), https://www.perlego.com/book/3835203/guide-juridique-de-la-cnudci-la-hcch-et-unidroit-sur-les-instruments-de-droit-uniforme-relatifs-aux-contrats-du-commerce-international-notamment-de-vente-pdf, last visited 14. 04. 2024.

[54] H. Kronke, 460.

claim for specific performance and damage compensation, as remedies in case of breach of the contract, represents a compromise between civil law on the one hand and flexible common law practices on the other.

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IZMEĐU NAKNADE ŠTETE I IZVRŠENJA: PRAVNA SREDSTVA U SLUČAJU NEIZVRŠENJA UGOVORA OD UNIDROIT PRINCIPA DO NACIONALNIH PRAVNIH SISTEMA

Apstrakt

Rad predstavlja uporednu analizu pravnih sredstava koja stoje na raspolaganju poveriocu u slučaju neizvršenja ugovora u međunarodnom ugovornom pravu, fokusirajući se na UNIDROIT principe za međunarodne trgovačke ugovore, Konvenciju Ujedinjenih nacija o ugovorima o međunarodnoj prodaji robe (CISG), nemačko, francusko i englesko pravo. U radu se ispituju teorijski okviri, praktična primena i upoređuju rešenja svakog pravnog sistema, čime se pruža prikaz odredaba koje se bave neispunjenjem i uticajima koji vrše u međunarodnom ugovornom pravu. Ovaj rad ima za cilj da rasvetli rešenja i uticaje svakog pravnog sistema na koncept neispunjenja u odnosu na naknadu štete. Rad ima za cilj da utvrdi koji pravni lek nudi pravičnije rešenje u različitim pravnim kontekstima, sa akcentom na UNIDROIT principe.

Ključne reči: UNIDROIT principi međunarodnih trgovačkih ugovora, pravna sredstva, povreda ugovora, neizvršenje, ispunjenje, naknada štete.

Milena Momčilov* **DOI: 10.56461/ZR_24.ONS.15**

THE BANK'S LIABILITY FOR DAMAGES RESULTING FROM THE EXECUTION OF UNAUTHORIZED PAYMENT TRANSACTIONS**

Summary

The way in which liability for damages is classified significantly determines the positions of both the wrongdoer and the injured party. This is because the rules governing contractual and tort liability differ substantially and can lead to different consequences. The subject of this paper concerns the attempt to classify the bank's liability for damages caused by the execution of unauthorized payment transactions. Recognizing the complexity and insufficient exploration of this topic, the author believes that an analysis of the legal nature of the bank's liability for damages could be of considerable practical importance. During the analysis of the issue, a distinction is made between cases where the bank caused harm to its client by unauthorized debiting of the client's payment account and cases where the harm was caused by unauthorized debiting of a non-payment account. It seems that these two situations should be treated differently concerning the classification of the nature of the bank's liability for damages. Accordingly, the paper analyzes both situations in isolation, presenting arguments in support of the suggested classification of the bank's liability, all with the aim of providing the most adequate answer to the question posed and with the intention of protecting the bank's client as the economically weaker contracting party.

Keywords: *Bank, Payment Account, Non-payment Account, Damage, Liability, Contractual Liability, Tort Liability.*

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1. Introduction

Determining the nature of liability for damages is of great practical importance for several reasons. The rules on contractual and tort liability differ significantly, generally leading to different consequences for the financial state of the tortfeasor and *vice versa* for the financial state of the injured party.[1] In the context of unauthorized payment transactions, the issue of determining the nature of liability for damages becomes even more complicated. Situations involving unauthorized payment transactions can vary, thus making the nature of the bank's liability for damages contentious.

The subject of this paper concerns the issue of the nature of liability for damages arising from unauthorized payment transactions.[2] An unauthorized payment transaction occurs when a bank debits the account of its clients (the account holders) without their consent. Specifically, unauthorized transactions occur when the bank executes a payment order[3] directed at debiting the account of one of its clients, but the payment order was neither issued by the client nor by an authorized person. In such circumstances, the question arises as to whether the bank's liability for the damage caused to its client by the execution of an unauthorized payment transaction is tortious or contractual.

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[1] In addition to the opinions on the importance of distinguishing between contractual and tort liability (which are advocated by supporters of the so-called dualistic theory), in the literature there is also a theory that argues that there are no essential differences between contractual and non-contractual liability (the so-called monistic theory). For more on the monistic and dualistic theories, see N. B. Grujić, „Odnos ugovorne i vanugovorne odgovornosti za štetu", *Glasnik Advokatske komore -Vojvodine*, 1-2/2009, 7–9; On the unnecessary distinction between contractual and tort liability, see J. Radišić, *Obligaciono pravo*, Beograd 2020, 185.

[2] It is also necessary to distinguish the liability for the reimbursement of costs incurred due to unauthorized transactions from liability for damages. The costs incurred as a result of executing unauthorized payment transactions primarily relate to the monetary amount for which the account of a particular client has been unauthorizedly debited. M. Radović, *Platne transakcije – Pravo bankarskih platnih usluga*, Beograd 2016, 345; The Law on Payment Services of the Republic of Serbia, as well as the Directive EU on Payment Services, discuss liability for the reimbursement of costs of unauthorized transactions but do not contain specific rules on liability for damages that may arise in that context. See Article 50, paragraphs 2 and 3, Law on Payment Services, *Official Gazette of the Republic of Serbia*, No. 139/2014 and 44/2018.

[3] N. Jovanović, V. Radović, M. Radović, *Trgovinsko pravo*, Beograd 2020, 512 et seq.

Since unauthorized payment transactions are related to the unauthorized debiting of a specific account, it can be said that those transactions necessarily imply the existence of some form of contractual relationship between the bank (the tortfeasor) and the injured party (the holder of the debited account), from which the opening of the payment account arises. Thus, it could be *a priori* said that the nature of the bank's liability for damages is contractual.[4] However, before answering this question it seems that one should analyze the type of relationship between the bank and the injured client. Expressed differently, it appears that the *type* of account debited by the unauthorized transaction determines the answer to the question whether the bank should be liable to its client under the rules of contractual or tort liability.[5]

Thus, on one hand, at the time of the unauthorized payment transaction the bank could be in a contractual relationship with the injured client based on a *framework agreement for payment services*, which is accompanied by an agreement for opening and maintaining a *payment* account. In such circumstances, the execution of the unauthorized payment transaction would be manifested as the unauthorized debiting of the injured party's *payment* account.

On the other hand, it is conceivable that the bank and its client are in a relationship where an account has been opened in the client's name, but the bank has not committed to providing payment services through that account. If, under the described circumstances, a third party issues an instruction to the bank to debit the account of the its client, and the bank complies with such an instruction, this action would also be characterized as the execution of an unauthorized payment transaction.

However, it seems that this situation should be distinguished from the previous one (in which there is an agreement on payment services between

[4] One of the differences between contractual and tort liability lies in the fact that contractual liability requires the existence of a valid obligation relationship between the tortfeasor and the victim. Thus, the breach of such obligation leads to the infliction of damage. N. B. Grujić, 9–10; The relationship that precedes contractual liability can arise from a contract, as well as from any other source of obligations, even from the fact of causing damage. Therefore, it could be said that the term "contractual" liability is too narrow, and in that sense, it does not reflect the actual situation, i.e., the fact that contractual liability exists also due to the breach of obligations from any other source of obligations.

[5] In addition to numerous differences, there are also similarities between contractual and non-contractual liability, which are primarily reflected in the conditions necessary for establishing liability. See S. Perović, „Šteta i njena naknada", *Pravni živo*t 1-2/1993, 2.

the client and the bank, and the bank has opened a payment account in the client's name to provide to its client payment services through that account). The reasons that seem to require making this distinction will be discussed in more detail in the following sections.

Providing an adequate answer to the question of the nature of the bank's liability for damages appears to be of great practical importance for several reasons, particularly considering the differences in the scope of compensation that an injured party may obtain depending on whether the damage sustained is qualified as contractual or tort damage.[6]

Before delving into the issue of the nature of the bank's liability for unauthorized transactions, the paper will discuss the concept of unauthorized transactions and their distinction from transactions that are authorized but not properly executed. Then, the manner (and basis) of executing authorized payment transactions will be also discussed. Finally, the central part of the paper will be devoted to analyzing the nature of the bank's liability for damages resulting from unauthorized transactions. The analysis will be conducted separately depending on the type of relationship in which the bank and the injured client are at the time of executing the unauthorized payment transaction.

2. Concept of Unauthorized Payment Transactions and Their Differentiation from Improperly Executed Transactions

Unauthorized payment transactions can be defined as transactions carried out against a specific user's account without their consent.[7] Unauthorized payment transactions, therefore, always involve the debiting of someone's account. For an account debit to be considered an unauthorized payment transaction, it must be performed without the account holder's consent.[8] In this situation, the account is debited based on the order of a person who is neither the account holder nor authorized to act on their behalf.

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[6] In addition to the extent of compensation, contractual and non-contractual liability for damages also differ in many other characteristics. N. B. Grujić, 9 ff; O. Antić, *Obligaciono pravo*, Beograd 2011, 454.

[7] On the concept of unauthorized transactions, see: Financial Conduct Authority, *Fair treatment for consumers who suffer unauthorised transactions*, July 2015, available at: https://www.fca.org.uk/publication/thematic-reviews/tr15-10.pdf, 5, last visited 15. 7. 2024.

[8] M. Radović, 343.

An unauthorized transaction is any unauthorized debit of an account, regardless of whether it involves a payment account or another type of monetary account. However, the type of account being debited seems to influence whether the bank's liability is to be classified as contractual or delictual, which will be discussed later.

Unauthorized transactions should be distinguished from transactions that are improperly executed. Improper payment transactions include transactions that the bank has carried out with the consent of its client but not in accordance with the issued payment order. For example, if the bank executes a transaction on the order of its client but in favor of a party not specified by the client as the payment recipient, the transaction executed is considered authorized but improperly executed. Furthermore, if the bank debits its client's account for an amount less than specified in the payment order, the transaction executed would also be considered improper. Finally, executing the transaction at a later time than agreed constitutes an improper payment transaction.[9]

Executing a transaction for an amount greater than agreed upon is not considered improperly executed but rather partially unauthorized. In other words, if a client instructs the bank to execute a payment transaction for a certain amount, but the bank debits the client's account for a higher amount, such a transaction would not be considered improperly executed. Instead, the described situation would imply that an authorized and proper payment transaction was executed for the amount specified in the client's payment order, while the amount exceeding the payment order would be considered an unauthorized transaction.

3. Basis for Execution of Payment Transactions – Contract on Payment Services

The execution of a payment transaction[10] can be defined as a set of actions by which the bank (the provider of payment services) acts upon a specifically issued payment order from a specific user of payment services. The obligation to execute the payment transaction is in any case directly based on the previously validly issued payment order. However, two different situations may precede the moment of issuing the payment order.

[9] For more on improper payment transactions, see *Ibid*.

[10] On the concept of a payment transaction, see N. Jovanović, V. Radović, M. Radović, 512.

On one hand, when giving the order to execute the payment transaction, the bank and its client may already be in a relationship based on which the bank has committed to providing payment services. This is a relationship stemming from a framework agreement on payment services. On the other hand, it is also possible that at the moment of giving the payment order, there is no relationship related to the provision of payment services between the bank and the user (the order giver). In that case, the execution of a specific payment transaction is based solely on the issued payment order. By accepting to execute the specific payment order, a relationship based on a contract for a one-time payment transaction is established between the bank and the client.[11]

A framework agreement on payment services can be defined as a contract under which the bank (service provider) commits to its client (service user) to execute the payment orders that the user subsequently provides. Thus, those orders (instructions) should meet the conditions previously defined.[12] Based on the provided definition, it could be concluded that the framework agreement on payment services establishes a more permanent relationship between the contractual parties.[13] In other words, the contractual parties define the conditions for executing payment transactions in advance, whereby the bank commits to executing every order given to it by the user during the contract's duration, under the assumption that the issued order meets the conditions defined in the framework agreement.

The issuance of an order for the execution of a payment transaction, in the context of the framework agreement on payment services, represents an act of concretizing the framework agreement. In other words, by issuing a payment order, the user defines the service that they want the bank to provide in a specific case. If the defined payment service meets the criteria set out in the framework agreement, the bank is obliged to execute the requested payment transaction. Failure to execute an order given in accordance with the framework agreement constitutes a breach of contractual obligation, thereby incurring liability for the bank.

For the payment transaction to be considered validly executed, it is necessary that the payment order is issued in accordance with the previously

[11] On the types of payment service contracts, see *Ibid.*, 148–149.

[12] The framework contract on payment services is a named contract. Its importance and the need for harmonization of legal rules related to it have been observed at the European level. In this sense, today the (framework) contract on payment services is regulated by the European Union Directive on payment services from 2016. In Serbian law, the rules of this contract are contained in the Law on Payment Services.

[13] N. Jovanović, V. Radović, M. Radović, 512.

agreed conditions. *A contrario*, if the specifically issued order does not comply with the conditions of the previously concluded contract, the payment transaction will be considered invalid. Thus, if a third party, unauthorized to do so, issues the payment order instead of the user of payment services, proceeding with such an issued order would be considered unauthorized and, therefore, invalid.

Although it is not necessary, the framework agreement on payment services is most often accompanied by the conclusion of a contract for account opening and management.[14] In other words, when concluding the contract regarding payment services, in practice, the contracting parties most often agree on opening a payment account through which the bank will provide the agreed payment services to the user. On the open account, the bank assumes the obligation to record their mutual claims covered by the contract for the provision of payment services.

In this paper, when discussing the contract regarding payment services, it will be assumed that the user of payment services has an open payment account in the business records of the service provider. This is because the central issue of this paper concerns liability for damages caused by unauthorized payment transactions, as unauthorized transactions are reflected in the unauthorized debit of someone's account.

Unlike the framework agreement on payment services, the contract for a one-time payment transaction does not establish a permanent relationship between the bank and the client.[15] The contract for a one-time payment transaction implies a short-term relationship between the bank and the client, which is reflected in the execution of a specific (one-time) payment transaction. Therefore, this contract is considered concluded at the moment the bank accepts the specifically issued payment order. The bank is not obliged to accept the execution of the issued payment order, as (unlike the situation with the framework agreement) it has not previously committed to do so.

At the moment before concluding the contract for a one-time payment transaction, the relationship between the bank and the client can be different. First, it is possible for the client to be in a relationship with the bank regarding the provision of payment services, but the specific payment order is not covered by the framework agreement on payment services; in that case, the bank's acceptance to execute a payment order that deviates from the

[14] M. Radović, 177.

[15] Z. Slakoper, M. Perkušić, „Odgovornost banke za provođenje elektroničkog plaćanja", *Zbornik radova Pravnog fakulteta Sveučilišta u Rijeci* 1/1991, 475–476.

framework agreement will be considered the conclusion of a contract for a one-time payment transaction, and the execution of such transaction will be considered valid.

Next, it is conceivable that the client and the bank do not have any relationship at the moment preceding the conclusion of the contract for a one-time payment transaction and that the client does not have an open account with that specific bank. In this situation, the range of payment services that the clients can request is significantly narrowed in the sense that they cannot request a payment service aimed at debiting their account held at that particular bank, considering that the account does not exist. Bearing in mind that the subject of this paper is unauthorized payment transactions, and that they are necessarily linked to the debit of the account of the injured client, the paper will not examine the situation where the conclusion of the "one-time contract" is not preceded by any contractual relationship between the client and the bank.

Finally, at the moment of concluding the contract for a one-time payment transaction it is possible that there is a relationship based on which the bank has opened an account for the client but it has not committed to providing payment services through that account. Besides for the purpose of providing payment services, banks may also open accounts for their clients for other purposes. In the case where the holder of such an account issues an order to the bank to execute a specific payment transaction by debiting the account for a certain amount, the execution of the instructed transaction would be considered valid. The debit of the client's account in the described circumstances would be fully valid. However, if the bank debited the account at the request of an unauthorized person, the executed transaction would be considered unauthorized. In that sense, the bank would be liable to its client (the account holder) for damages arising from the unauthorized payment transaction.

The manner of qualifying the bank's liability for damages caused by unauthorized debiting of its client's account will be discussed in detail later. In this regard, the author will first analyze the situation of executing an unauthorized payment transaction by debiting the *payment* account of its client. After that, an analysis of the nature of liability for damages will be undertaken in cases where the bank executes an unauthorized payment transaction by unlawfully debiting a *non-payment* account of the client.

4. Bank's Liability for Unauthorized Payment Transactions – Contractual or Tortious

4.1. General Notes

In the case where a bank, acting without the consent, debits account of its client for a certain amount, the bank's action is qualified as an act of unauthorized payment transaction. The consequence of such an action may be reflected in the damage suffered by the bank's client (the account holder), and therefore the question of the bank's liability arises.

In the described situation, the bank is the responsible party (also the tortfeasor), while the account holder, as the injured party, is entitled to seek appropriate compensation for the damage suffered from the bank. The amount of compensation that the bank's client is entitled to claim depends on whether the liability for the unauthorized payment transaction is qualified as contractual or tortious liability.[16] In other words, the question arises whether the act of executing an unauthorized payment transaction constitutes a breach of a contractual obligation (or an obligation arising from some other legal relationship), or if that is not the case. If the act of executing the unauthorized payment transaction is qualified as tortious liability[17] of the bank, the consequence would be that the bank's clients (the injured parties) would be able to claim full compensation for all the damage caused to them (the principle of integral compensation).[18] On the other hand, if an unauthorized transaction made by the bank were treated as a breach of contract, clients would then be deprived of the right to demand the full amount of compensation from the bank (the wrongdoer), and their claim could be limited to the amount of foreseeable damage, unless they could prove that the bank caused them harm intentionally or with gross negligence.[19] Thus, the position of the

[16] On contractual damage, see R. LeRoy Miller, F. B. Cross, *Business Law - Alternate Edition: Text and Summarized Cases* 1, South-Western Cengage Learning, Canada 2013, 304 ff; On the differences between tort and breach of contract, see R. Anderson, I. Fox, D. P. Twomey, *Business Law: Ucc Comprehensive Volume*, South-Western Publishing Co 1987, 162.

[17] Tortious or non-contractual (non-contractual) liability arises from the general principle of obligation law - the principle of the prohibition of causing damage. Sight. Art. 16, Law on Contract and Torts, *Official Gazette of the SFRY*, No. 29/78, 39/85, 45/89 - decision of the USJ and 57/89, *Official Gazette of the FRY*, No. 31/93, *Official Gazette of SCG*, No. 1/2003 - Constitutional Charter and *Official Gazette of RS*, No. 18/2020.

[18] N. B. Grujić, 12.

[19] Art. 266 Law on Contract and Torts.

injured client significantly differs depending on how the bank's liability for damages is qualified.

The answer to the question regarding the nature of the bank's liability for unauthorized payment transactions, as has been mentioned several times, seems to vary depending on the type of relationship that existed between the bank (the wrongdoer) and its client (the injured party) prior to the execution of the transaction. In other words, the qualification of the bank's liability appears to depend on whether the account that the bank unauthorizedly debited was a payment account or not.

4.2. Case 1 – Unauthorized Charge of a Payment Account

The bank can execute an unauthorized payment transaction often to the detriment of the client with whom it is already in a contractual relationship regarding the provision of payment services. This is a case in which the bank charges the payment account of its client for a certain amount without consent.[20] Therefore, situations are possible where a third party, lacking the authorization, issues a payment order charged to the payment account of a bank's client. Banks commit to their payment service users that they will only carry out transactions that are authorized, meaning that there is consent from their user regarding those transactions. Additionally, upon receiving a specific payment order, banks are obligated to verify whether the holder of the payment account agrees with the order. Verifying the existence of consent from the account holder to which the specific transaction is directed is a necessary prerequisite for the valid execution of that transaction.

A contrario, the execution of a payment transaction based on an order that has not been authorized by the account holder constitutes a breach of contractual obligation, which also entails the bank's liability for the damage it caused to its client in that instance.[21] It appears that in the described case, the bank will be liable to its harmed client according to the rules of contractual liability.[22] The reason for this lies in the fact that, as already

[20] Payment account refers to the type of money account that the bank opens in the name of its user of payment services. Mutual claims of the bank and the client arising from the contract on payment services are posted to this account. M. Radović, 180; Art. 2, para. 1, item 3 Law on Payment Services.

[21] Z. Slakoper, M. Perkušić, 501.

[22] Contractual liability is also defined in the literature as "responsibility for breach of contract", "responsibility for breach of obligation" or "responsibility for breach of contractual discipline". N.B. Grujić, 5; More on Contract Liability, R. Anderson, I.

mentioned, by concluding the payment services contract the bank assumed the obligation to execute only authorized payment transactions. The execution of a transaction that is not authorized represents an act by which the bank "breaches" its contractual obligation, and in this sense, it seems that it will be liable to its harmed client according to the rules of contractual liability.[23]

The bank's contractual liability means that the bank will be obliged to compensate its client for the damage that it could have foreseen at the moment of concluding the payment services contract based on the circumstances that were known or should have been known.[24] Therefore, it seems that in the described case, the bank's position is significantly eased, considering the existence of a legal limit on the compensation that the harmed contractual party can claim from its counterparty.[25]

The qualification of the bank's liability for damage as contractual in the situation of unauthorized debiting of its client's payment account seems correct and acceptable, considering the arguments previously discussed. However, an unauthorized transaction can also be executed in another way, namely by debiting an account that is not a payment account. It appears that in the mentioned situation, the application of the rules on the bank's contractual liability would not be adequate for several reasons that will be discussed in the next section.

After all, the qualification of the bank's liability for damage due to debiting of a non-payment account does not seem fair, considering that the rules in contractual liability limit the amount of compensation that the injured party can claim from the wrongdoer. For this reason, in the continuation of the paper, the author makes efforts to analyze the nature of liability for damage due to the debiting of a non-payment account, presents arguments for

Fox, D. P. Twomey, 356 et seq.

[23] Z. Slakoper, M. Perkušić, 487-488.

[24] See Art. 266 Law on Contract and Torts.

[25] It seems that the reason for the limitation of the amount of compensation for contractual damage is reflected in the fact that the conclusion of the contract necessarily implies uncertainty regarding the possibility of realization of the undertaken work. Therefore, in order to preserve the attractiveness of concluding a contract, it seems logical to limit the amount of compensation that a contractor can claim in the event that he suffers damage by his counterparty due to non-performance or improper performance of the contract. See N. B. Grujić, 11; However, it seems that the above argument has in mind only the contract, and not the other sources of obligations, the breach of which also entails contractual liability.

and against qualifying the bank's liability as contractual or delictual, and offers the stance on the matter, keeping in mind the need to protect the position of the injured client from the bank as the economically stronger entity.

4.3. Case 2 – Unauthorized Debit of a Non-payment Account

In addition to debiting the client's *payment* account, the bank may execute an unauthorized payment transaction by acting on the order of an unauthorized person directed at debiting an account that is *not* a payment account. For example, this involves a case where the bank unauthorizedly debits the account of a client with whom it has a relationship without having assumed the obligation to provide payment services under those contracts.[26] If a third party, acting without consent, issues an order to the bank aimed at debiting the account of the bank's client, and if the bank executes such an order, its action would be considered an act of unauthorized payment transaction. By debiting the client's account without their approval, the bank could cause damage to the holder of the debited account, in which case arises the question under which rules the aggrieved client can hold the bank accountable.

It seems that the described situation of debiting a non-payment account may create dilemmas regarding the qualification of the bank's liability for damages resulting from an unauthorized transaction.[27] Namely, on one hand, if we start from the assumption that the bank is contractually liable to its client (the holder of the debited account), the legal position of the bank and the injured party would not differ in relation to the position in the case of unauthorized debiting of a *payment* account. This means that the client could claim compensation from the bank up to the amount of foreseeable damages. Arguments in favor of this determination can be seen in the fact that the bank and the injured client were already in a contractual relationship at the moment of executing the unauthorized payment transaction, which is one of the prerequisites for qualifying liability as contractual. However, the question arises as to which contractual obligation the bank violated on that occasion?

Namely, in the case where the bank debits the *payment* account of its client (as discussed in the previous section), the qualification of the bank's

[26] On the differences between a payment account and an ordinary money account that is not a payment account, see M. Radović, 183 et seq.

[27] Executing an unapproved transaction can be stressful for a client, both emotionally and financially. Financial Conduct Authority, Fair treatment for consumers who suffer unauthorised transactions, July 2015, availabe at: https://www.fca.org.uk/publication/thematic-reviews/tr15-10.pdf, 6, last visited 15. 7. 2024.

liability as contractual is not disputed, considering that the bank was already in a relationship with the damaged client regarding the provision of payment services. Thus, the bank, based on the previously concluded contract for the provision of payment services, committed to the client (service user) to execute their payment orders through the specific payment account.

The payment orders of the bank's client are those orders that they personally issue, or those issued by a third party with the prior or subsequent consent of the client.[28] However, if the bank debited its client's payment account in executing an order from a person acting without consent, it would violate its contractual obligation, considering that it previously committed to executing only those orders that are in accordance with the will of its counterparty (the holder of the payment account).

Unlike the previously mentioned case, in a situation where a bank, acting on the order of an unauthorized person, damages one of its clients due to the debiting of a *non-payment* account, the answer to the question of the nature of its liability for the incurred damage does not seem straightforward. In order to take the position that the bank's liability for the damage in the described situation is contractual, it would first have to be examined which obligation the bank is "violating".

Namely, while in the case of unauthorized debiting of a client's *payment* account the bank violates its obligation to provide payment services in accordance with the payment services agreement (the obligation to execute payment orders given by the payment service user), this is not the case with unauthorized debiting of a *non-payment* account. This is because the bank had no obligation regarding the provision of payment services to its client through such an account. In other words, by opening the non-payment account, the bank did not commit to providing payment services to its client through it.[29] Therefore, by executing the order of a third unauthorized person, and thus debiting its client's non-payment account, the bank does not violate the obligation to execute payment transactions in accordance with the client's orders, as such an obligation does not exist. Namely, in the described situation, the client and the bank were not in a relationship regarding the provision of payment services prior to the execution of the unauthorized transaction. The account that the bank opens is *not* a payment account. Based on

[28] In certain situations, a transaction will be deemed to have been approved even though it has been executed without the consent of the account holder (payer). M. Radović, 343–344.

[29] *Ibid*., 183, fn. 796.

this, the unauthorized debit of such an account does not violate the obligation to provide payment services in accordance with the user's order, considering that it has not assumed such an obligation *a priori*.

It seems that the aforementioned can be one of the arguments in favor of abandoning the qualification of the bank's liability as contractual liability. Additionally, it also appears justified to treat the bank's liability for damages in the described situation as tortious liability. This is because it seems acceptable to complicate the bank's position regarding liability for damages in the described situation, which could somewhat be achieved by qualifying its liability as tortious.

The aggravation of the bank's position in the case of unauthorized debiting of a *non-payment* account appears to be an acceptable solution, considering that a particularly high degree of attention must be expected from the bank when receiving a payment order in such cases.[30] Namely, as a business entity specialized in providing payment services, the bank is obliged to exercise a high degree of attention when receiving a payment order aimed at debiting the account of one of its clients, regardless of whether it is a payment account or not. More specifically, the bank is required to exercise the care of a good professional every time it receives an order to execute a payment transaction. In this sense, it is obliged to make efforts to investigate whether the issued order is in accordance with the previously concluded payment services agreement (if such an agreement exists), and it is particularly obliged to verify whether the payment order originates from the account holder (directly or indirectly, through an authorized person). If it does not investigate this, the bank will be considered guilty of an unauthorized transaction and, consequently, responsible for the damage.

In addition, in a situation where the bank has unauthorizedly charged a client's *non-payment* account, it is considered that it "deserves" to be more strictly "sanctioned", given that in this case it seems that the bank had to make particularly efforts to establish the identity of the order issuer. This is because, in the described situation, the bank was not obligated to provide payment services to its client (the holder of the charged account), and therefore it should not have "casually" executed payment orders originating from third unauthorized parties. If, despite this, the bank executed an unauthorized payment order and charged the client's *non-payment* account, it seems that its liability should be treated as tortious, considering the need for stricter sanctioning of its negligence. Stricter sanctioning would manifest

[30] On duty of care in general, see R. LeRoy Miller, F. B. Cross, 122.

in the extent of compensation that the affected client would have the right to demand from the bank. Specifically, by invoking the rules of tort liability, the affected client would be able to claim compensation for all damages suffered and proven (the principle of integral compensation for non-contractual damages).[31] Additionally, by invoking tort liability, the affected party could also claim compensation for non-material damages that they may have suffered, which the rules on contractual liability deny them.[32]

It seems that the clients have no basis to expect that the account they hold at a certain bank, which is *not* a payment account, will be debited. It could be said that debiting a such account represents a special "shock and surprise" for its holders, and in this sense, it seems appropriate to provide the opportunity for bank's clients to compensate the entire damage they manage to prove (instead of predictable damage).

As can be seen, causing damage through unauthorized debiting of someone's account that is *not* a payment account seems to represent a *borderline case* that raises dilemmas regarding the qualification of liability as contractual or tortious.[33] On one hand, if one were to start from the argument that the tortfeasor and the injured party are already in a contractual relationship at the moment the harmful event occurs, the mentioned liability could be viewed as contractual. On the other hand, qualifying the bank's liability as tortious seems to make more sense, considering that it is disputed which contractual obligation the bank violates by the act of unauthorized provision of payment services, given that it was not obliged to execute even authorized payment orders through the account in question. Thus, it seems that by unauthorizedly debiting the client's account, the bank violates a general obligation (the legal prohibition of causing damage) more than it violates its contractual obligation (considering that the bank was not obligated by contract to provide payment services).

Ultimately, if (despite the aforementioned arguments) it would not be possible to make a final "decision" regarding the qualification of the bank's liability for damages, the question arises as to which of the two types of liability takes precedence. In this sense, when there is a borderline case where it is not *prima facie* clear which type of liability for damages is involved, there are two positions regarding how to resolve the resulting dilemma. According to one position, in such a case, priority should be given to contractual liability, considering that it

[31] Art. 190 Law on Contract and Torts.

[32] See N. B. Grujić, 12–13.

[33] See *Ibid*., 20–21.

is superior in relation to the rules on liability for tortious damage (*lex specialis*). On the other hand, there is also an opinion that in the described situation, the injured party should be allowed to choose the rules under which they will hold the wrongdoer liable (the theory of competing claims).[34]

It seems that in a situation where a bank unlawfully charges the unpaid account of its client, the issue of qualifying its liability for damages should be resolved by applying the theory of competition of claims in favor of tort liability. The theory of competition of claims, as already mentioned, means that in the case of an inability to find an adequate qualification of the nature of liability for damages, priority in selection should be given to the injured party. Thus, in the case of the bank's liability, which could be characterized as a borderline case, the final word regarding the qualification of the claim should be given to the injured party. The injured clients will, in a common-sense manner, make a decision based on calculating which qualification would lead them to a more favorable position. In this sense, it would be logical for the injured party to opt for a claim based on non-contractual liability, considering all the advantages of applying the rules on tort damages that have already been discussed.

5. Conclusion

Based on everything mentioned so far, it can be concluded that the issue of the nature of the bank's liability for damages resulting from unauthorized payment transactions deserves special attention. Specifically, the rules regarding contractual and non-contractual liability differ significantly, and the position of the injured party can largely depend on whether the liability of the injurer is classified as contractual or delictual.

When it comes to the nature of the bank's liability for damages due to payment transactions, it seems that not enough attention is given to that issue. Indeed, when discussing liability for unauthorized payment transactions, legal theorists and practitioners refer to the responsibility for bearing the costs of such executed transactions. In other words, they focus exclusively on the bank's or (exceptionally) the client's liability for the costs incurred from unauthorized payment transactions. The costs of unauthorized transactions primarily include the monetary amount that corresponds to the amount by which the client's account was charged without authorization, as well as other expenses related to the specific charge of the account. Considering that the

[34] J. Radišić, *Obligaciono pravo – opšti deo*, Niš 2017, 206.

issue of bearing the costs of executing unauthorized payment transactions is thoroughly regulated by the Law on Payment Services and the EU Directive on payment services, and that sufficient attention has been paid to its analysis in the literature, this paper does not address the issue of liability for bearing the costs of unauthorized transactions.

However, when it comes to the *damage* suffered by the holder of a charged account due to an unauthorized transaction, this issue seems to be unjustifiably underexplored. Namely, unlike most situations where the qualification of liability for damage is undisputed, there are cases that can provoke dilemmas regarding qualification. It appears that the question of the bank's liability for damage due to the execution of unauthorized payment transactions is precisely one of those "borderline" cases.

In fact, it seems that the case of liability for damage due to unauthorized transactions should be analyzed differently depending on the nature of the relationship between the bank and the client at the moment the unauthorized transaction was executed. In this sense, the paper first establishes that at the moment of executing an unauthorized payment transaction, a relationship between the bank and the client must necessarily exist. This is because the execution of an unauthorized transaction necessarily involves (unauthorized) debiting of the account. This further means that the person who suffered damage due to the execution of the unauthorized transaction must be the bank's client – the holder of the charged account. The difference can only exist in terms of the type of relationship in which the bank and the injured party find themselves. Therefore, based on the conducted analysis, the paper concludes that the qualification of the nature of the bank's liability for damage may depend on the type of previous relationship, or the type of account that the bank maintains for the injured client.

On one hand, it is possible that at the moment of executing an unauthorized payment transaction, the affected client has an active *payment* account. That is an account through which the bank has committed to providing payment services to its client. In the described scenario, if the bank unauthorizedly debited the relevant payment account, it seems that its liability for the damage can undoubtedly be classified as contractual liability. This is because the bank previously committed to providing payment services to its client, obligating itself to debit the relevant account according to the client's instructions. *A contrario*, if the bank debited the account without the client's consent, such a debit could be classified as a breach of a specific contractual obligation and therefore the bank's liability should be treated as contractual liability for damages.

On the other hand, it is possible that, at the moment of executing an unauthorized transaction, the client and the bank are in a relationship in which the bank has issued a *non- payment* bank account to its client (an account that is not a payment account). By unauthorized debiting of such an account the client may suffer damage and the legal nature of the bank's liability in this case seems to be questionable. Namely, the fact that the bank and the injured party are logically in a contractual relationship may lead to the conclusion that, in the described case, as well as in the previous one, it concerns the bank's contractual liability. However, it seems that the unauthorized debiting of a *regular* (non-payment) account of the client could be treated more as a violation of the general legal obligation to refrain from causing damage rather than any contractual obligation. This is because the bank was not obliged (nor authorized) to provide any payment service, even though the client and the bank are in a contractual relationship. If, in such a described case, the client issued an order to the bank and requested the debiting of regular bank account for a specific amount, the acceptance of such an order would not represent an act of executing a previously assumed contractual obligation (as such obligation does not exist), but would represent the bank's acceptance of an offer to conclude a new contract – a contract for a one-time payment transaction. However, if the order directed at debiting the client's ordinary bank account is originated from a third unauthorized party, the damage resulting from the debiting of such an account seems more likely to be classified as a tort rather than as contractual damage. The qualification of the bank's liability as tortious (in the second described scenario) appears to be correct, but also beneficial for clients, considering the advantages of the rules on non-contractual liability that have been discussed, which primarily relate to the possibility of claiming higher amounts of compensation.

Finally, in addition to the arguments presented for qualifying the bank's liability as tortious, the issue of determining the nature of the bank's liability for damages resulting from unauthorized debiting of a client's ordinary bank account can also be resolved using the theory of competition of claims. Namely, the case of debiting a client's *ordinary* (non-payment) account can be classified as a borderline case, which may raise dilemmas regarding whether the bank's liability for damages should be classified as contractual or tortious. Such borderline cases can be resolved by applying the theory of competition of claims, based on which the problem of qualification is addressed by giving the harmed parties the freedom to choose under which rules they will hold the wrongdoers accountable. Considering that the rules on tort liability

place the injured party in a more favorable position compared to the rules on contractual liability (primarily regarding the scope of compensation), it seems that a reasonable decision by the injured client would be to classify the case of liability for unauthorized debiting of a *non-payment* account as liability for tort damage.

* * *

ODGOVORNOST BANKE ZA ŠTETU USLED IZVRŠENJA NEODOBRENIH PLATNIH TRANSAKCIJA

Apstrakt

Način kvalifikacije odgovornosti za štetu umnogome opredeljuje položaj štetnika i oštećenog. Ovo iz razloga jer se pravila o ugovornoj i deliktnoj odgovornosti višestruko razlikuju, te mogu dovesti do različitih posledica. Predmet ovog rada tiče se pokušaja kvalifikacije bančine odgovornosti za štetu uzrokovanu izvršenjem neodobrenih platnih transakcija. Uočivši složenost i nedovoljnu obrađivanost ove teme, autor smatra da bi analiza pitanja pravne prirode bančine odgovornosti za štetu mogla biti od priličnog praktičnog značaja. U radu se, prilikom analize predmetnog pitanja, pravi razlika između slučaja kada je banka oštetila svog klijenta neovlašćenim zaduženjem njegovog platnog računa i slučaja kada je to učinila neovlašćenim zaduženjem njegovog neplatnog računa. Čini se da ove dve situacije treba različito tretirati po pitanju kvalifikacije prirode bančine odgovornosti za štetu. U tom smislu, u radu se obe situacije analiziraju izolovano, iznose se argumenti u prilog sugerisanog načina kvalifikacije bančine odgovornosti, a sve u cilju davanja što adekvatnijeg odgovora na postavljeno pitanje i zaštite klijenta banke kao ekonomski slabije ugovorne strane.

Ključne reči: banka, platni račun, neplatni račun, šteta, odgovornost, ugovorna odgovornost, deliktna odgovornost.

Đorđe Marjanović* **DOI: 10.56461/ZR_24.ONS.16**

MONETARY COMPENSATION FOR NON-MATERIAL DAMAGE CAUSED BY VIOLATION OF THE PRESUMPTION OF INNOCENCE IN MEDIA REPORTING**

Summary

The Criminal Procedure Code contains the norm by which it is prescribed the public information media are among the entities that are obliged to respect the presumption of innocence. Although the legislator sought to ensure the presumption of innocence as a guarantee of the procedural rights of the accused, lawmaker did not prescribe the consequences of its immediate violation. The author deals with the question of whether an individual has the right to compensation for non-material damages if that right is violated. In the first part of the paper, the author concludes that the presumption of innocence can be considered a personal right, which enjoys civil protection. In the further part of the paper, the author emphasizes that the violation of the presumption of innocence is not a sufficient condition for individuals to realize the right to monetary compensation for non-material damage. In accordance with the accepted subjective concept of non-material damage, it is necessary that there is a violation of the right to the presumption of innocence, that the person must suffer psychological stress of sufficient intensity and that there is a causal connection. The author, with examples from court practice, points to the inconsistent acceptance of this concept of non-material damage in procedures for compensation for damages due to the violation of the presumption of innocence by means of public communication. In the second part of the paper, the author analyzes the criteria for determining the

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amount of monetary compensation. Since the legal standards are set by law, the author tends to illustrate how judicial practice specifies these criteria in cases concerning the compensation of non-material damages caused by the violation of the presumption of innocence by the public information media. The author criticizes the entrenched depersonalized approach in determining the compensation amount in these cases, considering it does not fully correspond to the harm suffered by the person sustaining damage.

Keywords: *Presumption of Innocence Violation, Personality Rights, Non-material Damage, Media, Public Communication Means.*

1. Introduction

The criminal procedure is regulated by law the undertaking of criminal procedural actions by the subjects of criminal proceedings with the aim of reaching a court decision regarding the criminal offense, the responsibility of the perpetrator, criminal sanctions, and other procedural relationships related to the criminal offense, requiring the participation and decisions of the court.[1] Depending on the stage of this procedure, there needs to be a specified degree of suspicion that a criminal offense has been committed and that a certain individual is the perpetrator of the criminal offense. Suspicion represents the content of consciousness in the thought process where knowledge of specific facts may be considered incomplete and insufficiently known.[2] As suspicion does not imply an unquestionable conclusion that a person has committed a criminal offense, all individuals against whom proceedings are conducted must be provided with adequate legal and procedural protection of their personal rights. Protecting the position of the accused in criminal proceedings also involves defining the responsibilities of subjects who may jeopardize or violate personal rights during the proceedings.

In the introductory articles of the Criminal Procedure Code[3] (hereinafter referred to as CPC), the right to presumption of innocence is prescribed, as well as which subjects have a legal obligation to respect it. The presumption

[1] S. Bejatović, *Krivično procesno pravo*, Službeni glasnik, Beograd 2018, 45.

[2] G. Ilić, M. Majić, V. Beljanski, A. Trešnjev, *Komentar Zakonika o krivičnom postupku*, Službeni glasnik, Beograd 2018, 42.

[3] *Official Gazette of the RS*, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 – decision of Constitutional Court and 62/2021- decision of Constitutional Court.

of innocence is the right of every individual to be considered innocent until their guilt for a criminal offense is legally determined by a final court decision (Art 3, para CPC). According to the provisions of the CPC (Art. 3, para 2), the obligation to respect the presumption of innocence applies to: public and other authorities and organisations, the public information media, associations and public figures. However, when expressing the obligation for these subjects to respect the presumption of innocence, the lawmaker has omitted to specify the consequences if this duty is breached. In this regard, the question arises: what rights do individuals have when the aforementioned subjects violate their obligation? In this paper, we analyze whether in the case of a violation of the presumption of innocence by public communication means, individuals can claim the right to monetary compensation for non-material damage. Determination that in this paper we deal with the liability of the media in case of violation of the presumptions arising from the previous positions presented in the doctrine, which indicates the statements of the members of the court that makes decisions in the procedure, that is, the effectiveness of the procedure.[4] Research conducted by domestic authors indicates that the majority of citizens in the Republic of Serbia believe that the media often prejudge the guilt of individuals through their reporting,[5] which can indicate where public information media means violate their duty in reporting are not uncommon. In domestic legal doctrine, the significance of public information media in respecting the presumption of innocence has been the subject of multiple studies.[6] However, these studies have generally not extensively analyzed the possibility for individuals affected by the media's violation of the presumption of innocence to claim compensation for non-pecuniary damage (non-material in serbian law). The thematic restriction to the aspect of non-material damage arises from

[4] S. Bejatović, „Mediji i efikasnost krivičnog postupka", in: *Pravosuđe i mediji* (eds. Ivana Stevanović, Olivera Pavićević), Palić 2017, 349.

[5] V. Turanjanin, M. Turkalj, „Percepcija građana o medijskom izveštavanju o kriminalitetu i uticaju medija na rad pravosuđa", in*: Mediji, kazneno pravo i pravosuđe* (eds. Jelena Kostić, Marina Matić Bošković), Beograd 2024, 364.

[6] See M. Kolaković Bojović, „Mediji i pretpostavka nevinost", *Zbornik radova Pravnog fakulteta u Nišu* 61/2012, 555–571: I. Ilić, „Pretpostavka nevinosti okrivljenog i pravo na javno informisanje", *Zbornik radova Pravnog fakulteta u Nišu* 61/2012, 571–586; V. Bajović, „Pretpostavka nevinosti i sloboda štampe", *Anali Pravnog fakulteta u Beogradu* 1/2008, 194–210; M. Škulić, "Medijska suđenja, „suđenja" u medijima, načelo javnosti", in*: Mediji, kazneno pravo i pravosuđe* (eds. Jelena Kostić, Marina Matić Bošković), Beograd 2024, 11–53; V. Delibašić, „Pretpostavka nevinosti i mediji", *Kultura polisa* 2018, 141–151.

the circumstance that prosecutors very rarely seek compensation for material damage in judicial practice. This reluctance may stem from the difficulty in proving a causal link between harmful information and simple loss or profit lost.[7] In this study, we will provide answers to questions such as whether individuals affected by public communication means violating the presumption of innocence can claim financial compensation for non-material damage, and how the amount of such compensation should be determined if the answer to the first question is positive. To address these questions, the research will utilize doctrinal, normative, and methods analysis of final judgment court decisions. By employing the latter method, we aim to understand how judicial practice applies the relevant norms that are crucial to the subject of this research.

2. Legal Consequences of Violation of the Presumption of Innocence

The presumption of innocence is regarded in domestic doctrine as a guideline for how to treat the accused, a procedural principle, or a universal human right.[8] A correct understanding of the legal nature of the presumption of innocence is crucial for understanding how it can be protected and for analyzing the consequences of its violation. If it could be accepted in any of the previously mentioned ways, it would be important to consider whether legal protection can be realized only when procedural rights defined in accordance with the presumption of innocence principle are violated, or if it can also be realized when the presumption of innocence itself is directly violated and the consequences of this violation are not specifically provided for.

In the Constitution of the Republic of Serbia,[9] the European Convention on Human Rights[10] and other regional conventions protecting human rights,[11]

[7] A. Radolović, „Odnos prava osobnosti i medijskog prava", *Zbornik Pravnog fakulteta sveučilišta u Rijeci* 1/2006, 301.

[8] S. Nenadić, *Pretpostavka nevinosti kao ljudsko pravo sa posebnim osvrtom na praksu Evropskog suda za ljudska prava*, doctoral dissertation, Pravni fakultet Univerziteta u Beogradu, Beograd 2019, 6; T. Bugarski, „Pretpostavka nevinosti (sadržina, obim i dejstvo u krivičnom postupku)", *Revija za kriminologiju i krivično pravo* 1/2017, 52; Đ. Lazin, „Sadržina i pravna priroda pretpostavke nevinosti", *Anali Pravnog fakulteta Univerziteta u Beogradu* 5-6/1981, 311–326.

[9] Art. 34, para. 3 of the Constitution of the Republic of Serbia, *Official Gazette of the RS*, No. 98/2006 and 115/2021.

[10] Art. 6, para. 2. European Convention on Human Rights and Fundamental Freedoms, Rome, 4. november 1950. Available at: https://www.echr.coe.int/documents/convention_eng.pdf, last visited 20. 7. 2024.

[11] R. Murray, *The African charter on human and people rights a comentary*, Oxford

the presumption of innocence is defined as a human right. In the CPC, the presumption of innocence is regulated in the introductory provisions, which also prescribe principles such as ne bis in idem, officiality of criminal prosecution, legality, and protection of personal freedom. Many individual rights of the accused in criminal proceedings are defined in a manner that guarantees respect for the presumption of innocence until a legally binding guilty court verdict is reached. In this sense, the legislator specifies consequences if any of these rights are violated. For example, in accordance with the presumption of innocence principle, there is an obligation to exercise particular caution when deciding on pretrial detention.[12] If a person is unjustifiably deprived of their liberty, they have the right to claim financial compensation for non-material damage.[13] This provides civil law protection both to the personal right to freedom and indirectly contributes to achieving the goals of criminal proceedings based on the principle of respecting the presumption of innocence. Unlike these situations, the Criminal Procedure Code (CPC) does not specify immediate consequences for the violation of the presumption of innocence. By examining some earlier provisions of criminal legislation, it's noted that consequences were prescribed both in substantive and procedural provisions. During amendments and additions to the Criminal Code in 2009, the act of making public statements in the media during the duration of legal proceedings with the intention to undermine the presumption of innocence and the independence of the court was criminalized. However, this offense was soon decriminalized.[14] This regulation (Art 3 CPC) requires that in cases where the duty to respect the presumption of innocence was seriously breached, especially if it was evident from all circumstances that this was done to influence the court and other competent authorities, or to cause serious consequences for the accused, damaged party, or other participants in the criminal proceedings, a natural person could be fined up to 150,000 dinars, and a legal entity up to 1,500,000 dinars, with a public warning.

University press, Oxford 2019, 223; L. Hennebel, H. Tigroudja, *The American convention on human rights a comentary*, Oxford University press, Oxford 2022, 344.

[12] M. Stanić, „Neophodnost određivanja pritvora i naknada štete u praksi Evropskog suda za ljudska prava-smernice za Srbiju", in*: Prouzrokovanje štete, naknada štete i osiguranje* (eds. Zdravko Petrović, Vladimir Čolović), Valjevo 2019, 280.

[13] See M. Grubač, *Naknada štete za neopravdanu osudu i neosnovano lišenje slobode*, Savremena administracija, Beograd 1979.

[14] Law on making amendments and supplements Criminal Code, *Official Gazette of the RS* , No. 72/2009.

Current criminal legislation does not prescribe consequences for the violation of the presumption of innocence in the manner previously outlined in those acts. Some authors argue that the breach of the presumption of innocence, due to the absence of sanctions, represents merely a moral rather than a legal obligation.[15] Other authors believe that the obligation to respect the presumption of innocence has been reduced to a "wishlist", implying it has only instructional value.[16] What we can agree on is that criminal legislation has indeed failed to foresee consequences for breaching the presumption of innocence. To answer whether appropriate consequences arise in the event of a breach of the presumption of innocence, it is necessary to consider other potential forms of protection.

2.1. Civil Law Consequences of Violation of the Presumption of Innocence

Accepting the presumption of innocence as a personal right would mean that it could be protected as a civil subjective right. According to the rules of the Law of Contract and Torts,[17] in the event of a violation of personal rights, the individual has available preventive and reactive protection.[18] The most significant forms of reactive protection include the right to compensation for material and non-material damage. This type of protection of personal rights is characterized by the fact that the injured person has the means of protection at their disposal and it depends on them whether and to what extent they will use them. To discuss these rights of individuals whose presumption of innocence has been violated, it is necessary to answer the question of whether the presumption of innocence can be considered one of the personal rights. If this were the case, regarding the topic of our research, the question arises whether the violation of the presumption of innocence is sufficient for individuals to claim the right to compensation for non-material damage.

[15] V. Bajović, 200.

[16] M. Škulić (2024), 39.

[17] The Law of Contract and Torts, *Official Gazette of the SFRY*, No. 29/78, 39/85, 45/89, 57/89, *Official Gazette of the FR Yugoslavia*, No. 31/93, *Official Gazette of the RS*, No. 18/20.

[18] I. Simonović, M. Lazić, „Građanskopravna zaštita prava ličnosti", *Zbornik radova Pravnog fakulteta u Nišu* 3/2014, 273.

2.1.1. Is the Presumption of Innocence One of the Personal Rights?

Defining the right to personality has been a challenge for legal doctrine.[19] Some authors define the right to personality as the right of a legal subject to demand and realize respect and development of their own personality from all others, in accordance with psycho-social development.[20] Others define the right to personality through the objects of rights, as a subjective right over personal goods.[21] Regarding the basic characteristics of the right to personality, it is emphasized that they are non-transferable, binding on all persons to respect them (*erga omnes*), and acquired by birth and terminated by death.[22] Despite efforts in legal doctrine to define the right to personality and outline its fundamental characteristics, there is no positive legal provision in the Republic of Serbia that defines the concept of the right to personality. In legal doctrine, there are opinions suggesting that this should have been done in the general part of the Civil Code, which is still not enacted in Serbia.[23] Even in its draft form, the Civil Code does not define the right to personality; instead, it states that all personality rights derive from the right to dignity. In terms of doctrinal definitions and the positions taken in the draft of the Civil Code, the question arises whether the presumption of innocence can be considered a right of personality. In support of the view that this is a right of personality, there are authors' opinions indicating that the normative establishment of the presumption of innocence creates an obligation for the public prosecutor to respect the dignity of the accused during criminal proceedings.[24] We can also highlight its social dimension, according to the presumption that all citizens refrain from behavior prescribed as punishable. By violating the presumption of innocence, an individual is stigmatized as a

[19] A. Radolović, „Pravo osobnosti u novom Zakonu o obveznim odnosima", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 1/2006, 129–170; V. Vodinelić, „Lično pravno kao nastavno-naučna disciplina", *Anali Pravnog fakulteta u Beogradu* 4/1989, 321–335; R. Jotanović, „Naknada materijalne štete zbog povrede prava ličnosti", *Godišnjak Pravnog fakulteta Univerziteta u Banjoj Luci* 2013, 35–37.

[20] A. Radolović (2006), 133.

[21] V. Vodinelić, *Uvod u građansko pravo i opšti deo građanskog prava*, Pravni fakultet Univerziteta Union i Službeni glasnik, Beograd 2023, 258.

[22] Zdravko Petrović, *Naknada nematerijalne štete zbog povrede prava ličnosti*, Vojna knjiga, Beograd 1996, 45.

[23] B. Pajtić, S. Radovanović, A. Dudaš, *Obligaciono pravo*, Pravni fakultet u Novom Sadu, Novi Sad 2018, 547.

[24] S. Nenadić, „Pretpostavka nevinosti i dostojanstvo ličnosti", *Studia Iuridica Montenegrina* 1/2022, 32.

perpetrator before a legally binding court decision is made on the matter. If the violation is committed by means of public communication, a legally binding acquittal in court proceedings will rarely lead to a change in the formed public opinion.[25] By infringing on the right to presumption of innocence, a person's moral values are challenged. In these situations, there is both a violation of human rights and an impediment to the free development and normal life in the community.

A counter-argument to the claim that the presumption of innocence is a right of personality could be that listing specific subjects obligated to respect the presumption of innocence contradicts the characteristic of a right of personality, which implies that everyone must respect it. Under the previous CPC other individuals were also obliged to respect the presumption of innocence.[26] For example, the current Croatian CPC similarly states that all individuals must respect the presumption of innocence.[27] The mentioned amendment in domestic legislation aimed to protect freedom of expression while obligating those who could influence the course of criminal proceedings. We consider this change is not in line with the nature of the presumption of innocence and complicates its protection. We hold the view that its legal nature cannot be altered by the content of the provision, especially considering other sources of law in Serbia, notably the Constitution of the Republic of Serbia, which doesn't include such restrictions.

We believe that the presumption of innocence can be considered as a right of personality, and therefore, in case of its violation, it can be subject to protection in civil court proceedings. The rights of the accused in criminal proceedings, including the presumption of innocence, are designed with the intention of protecting human dignity as a fundamental principle of criminal proceedings.[28] Legal consequences of a criminal conviction can only occur after a legally binding court decision. Until then, everyone is obliged to respect the presumption of innocence. If this presumption is violated by

[25] A. Ilić, *Mediji i kriminalitet - Kriminološki aspekt*, Pravni fakultet Univerziteta u Beogradu, Beograd 2017, 204.

[26] Art. 3, para. 2. Criminal Procedure Code, *Official Gazette of the SRY*, No. 70/2001 and 68/2002 and *Official Gazette of the RS*, No. 58/2004, 85/2005, 115/2005, 85/2005, 49/2007, 20/2009.

[27] Art. 3, para. 1. Criminal Procedure Acrt Republica Croatia, *Official Gazzete of the Republic Croatia*, No. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19, 130/20, 80/22, 36/24.

[28] R. Lippke, „Fundamental values of crimnal procedure", in: *The Oxford Handbook of criminal process* (eds. Darryl Brown, Jenia Turner, Bettina Weisser), Oxford 2016, 27.

media outlets, the consequences can create an impression of guilt before the issuance of a legally binding court judgment. Such published information can negatively affect relationships with family members, business associates, or other individuals with whom the person interacts. The individual may suffer emotional distress because unauthorized reporting portrays them as a perpetrator of a crime. The fact that the legislature holds the view that the presumption of innocence is a right of personality can be indicated by provisions in the Law on Public Information and Media, which stipulates that no one through the media should be labeled as a perpetrator of a criminal offense before the court decision becomes legally effective. This law aims to protect human dignity.[29] Additionally, in domestic judicial practice, in cases where lawsuits are filed due to the violation of the presumption of innocence by media outlets, the view has been accepted that the presumption of innocence is one of the rights of personality stemming from the right to dignity. [30]

2.1.2. Acquiring the Right to Monetary Compensation for Non-material Damage caused in Violation of the Presumption of Innocence

Although the right to presumption of innocence is considered one of the rights of personality, the conclusion provided does not address whether every instance where the presumption of innocence is violated (as a right of personality) automatically entitles the individual to claim non-pecuniary damages. Indeed, the question here revolves around whether the violation of personality right under domestic legislation constitutes non-pecuniary damage *per se*. The answer to this question depends on the concept of non-pecuniary damage accepted by the domestic Law of Contract and Torts. According to the subjective concept, non-pecuniary damage involves causing physical or mental pain and suffering to another person. According to this conception, non-pecuniary damage does not consist in the violation of a right of personality itself, but in the intimate suffering that may result from the violation of a right of personality.[31] In accordance with the objective concept,

[29] Art. 84, Law on Public Information and Media, *Official Gazette of the RS*, No. 92/2023.

[30] Judgment, Supreme Court of Cassation, No. Rev 7773/2021, from 12. 1. 2022; Judgment, Hight Court in Belgrade, No. P3-518/19, from 4. 11. 2021; Judgment, Hight court in Belgrade, No. P3-438/18, from 01. 6. 2022.

[31] M. Karanikić Mirić, *Obligaciono pravo*, Službeni glasnik, Beograd 2024, 522; A. Dudaš, „The concept of moral (non-material) damage in Serbian, Croatian and Slovenian law", *Journal for the International and European Law, Economics and Market*

non-pecuniary damage arises from the mere violation of a personality right.[32] The significance of answering the question lies also in the procedural position of the plaintiff (the person whose right to presumption of innocence has been violated). In the case of accepting the subjective concept, the plaintiff would need to prove the existence of the violation of the presumption of innocence, the consequences of which consist of intimate loss, and the causal connection. According to the objective concept, the plaintiff would need to prove that their right to presumption of innocence has been violated.

The current provision in the Law of Contract and Torts states that compensation for non-pecuniary damage can be awarded if the content of the information violates the presumption of innocence, causing the affected person to suffer mental anguish of an appropriate intensity.[33] According to the concept of non-pecuniary damage accepted in the legislation of the Republic of Serbia, in determining the existence, duration, and intensity of mental anguish, the court may rely on expert testimony from forensic medicine. It is notable that in cases involving compensation for non-pecuniary damage caused by the violation of the presumption of innocence, expert evaluations of mental anguish are rarely conducted. Some authors believe that such expert opinions are not necessary if the violation of personal rights occurred through the publication of information in the mass media, unless the special circumstances of the case indicate this.[34] In practice, courts determine the existence, duration, and intensity of mental anguish through hearings with the affected party or other individuals. This approach by the courts is not contrary to the provisions of the Law of Contract and Torts, which arises from the fact that damage, when understood as mental or psychological pain,

Integrations 1/2024, 264; T. Đurđić, ,,Neka pitanja nematerijalne štete u zakonodavstvima pojedinih zemalja bivše Jugoslavije", in: *Pravo zemalja u regionu* (ed. Vladimir Čolović), Beograd 2010, 502; M. Karanikić Mirić, "Subjektivna koncepcija neimovinske štete", in: *Liber amicorum Aldo Radolović: zbornik radova u čast prof.dr.sc Aldu Raduloviću* (eds. Zvonimir Slakoper, Maja Bukovac Puvača, Gabrijela Mihelčić), Rijeka 2018, 395–413; O. Stanković, *Naknada štete* (reprint) Nomos, Beograd 1998, 150.

[32] M. Karanikić Mirić, "Objektivizovanje moralne štete", *Zbornik Matice srpske za društvene nauke* 3/2015, 490; M. Baretić, ,,Pojam i funkcije neimovinske štete prema novom Zakonu o obveznim odnosima", *Zbornik Pravnog fakulteta u Zagrebu*, 2006, 464.

[33] M. Vukotić, *Nasledivost prava na naknadu neimovinske štete*, Pravni fakultet Univerziteta u Beogradu, Beograd 2020, 79.

[34] S. Andrejević, Lj. Mitrović, Z. Petrović, ,,Naknada nematerijalne štete: nove tendencije", in: *Naknada nematerijalne štete, Izbor radova sa savetovanja Udruženja za odštetno pravo* (eds. Zdravko Petrović, Nataša Mrvić-Petrović), Beograd 2009, 105.

is a legal and not a medical category.[35] In part of the domestic judicial practice, the subjective conception non-pecuniary damage is not accepted damage that is accepted by the Law of Contract and Torts. In order to point out the danger that arises from this approach to court practice, we will present different positions of the first and second-instance courts, in a case conducted for non-material compensation damages caused by violation of the right to the presumption of innocence. Previously, we will present the factual situation on the basis of which the judgment was passed.

The daily newspaper published on its front page the headline "Series of Juvenile Violence in Serbia" and subtitle "Children Have Never Been More Aggressive! Why?" with the subheading "Three Boys in Custody for Beating and Raping a Girl (12) for Hours." In the main text, they published the title "Juvenile Rapists Sent to Prison". The first-instance court determined that the text had violated the presumption of innocence, but assessed whether the individuals mentioned were entitled to non-pecuniary damages.[36] The court concluded that without hearing from the prosecutor, the amount of non-pecuniary damages could not be determined based on the evidence presented. The appellate court overturned the decision of the Higher Court and granted the plaintiff's request for compensation for non-pecuniary damages. In its decision, the appellate court stated:

> *"Compensation for non-pecuniary damages in this case can be awarded for the violation of the presumption of innocence independently of damages for harm to honor and reputation. Therefore, in this specific case and without hearing from the prosecutor, it is not necessary to assess the intensity and duration of the pain suffered by the plaintiff due to the publication of false, incomplete, or otherwise prohibited information." The court in this judgment indicates that in cases of violation of personal rights, the so-called objective concept of compensation for damages is applied".*[37]

The Supreme Court of the Republic of Serbia, in the procedure for the declared revision, assessed the position of the second-instance court as correct.[38]

It seems that the explanation provided by the appellate court is not in line with the concept of non-pecuniary damages accepted in the current Law of Contract and Torts. Moral, or non-pecuniary, damage is not constituted

[35] M. Karanikić Mirić (2015), 495.

[36] Judgment, Hight court in Belgrade, No. P3-324/20, from 25. 3. 2021.

[37] Judgment, Court of Appeal in Belgrade, No. Gž3-238/21, from 15. 7. 2021.

[38] Judgment, Supreme Court, No. Rev1280/2020, from 8. 7. 2020.

solely by the violation of personal rights or the object of some non-pecuniary right, but rather by pain or fear, the infringement of the intimate sphere which disrupts the psychological balance of the injured party.[39] The appellate court decided to award monetary compensation for non-pecuniary damages without considering the obligation to establish the existence, duration, and intensity of mental suffering. This example from case law illustrates that the subjective concept of non-pecuniary damages is not consistently applied in judicial practice. It appears that this is not an isolated case, as evidenced by judgments where it is not clear from the reasoning under what circumstances the existence of emotional distress was established, but rather the conclusion was drawn simply based on the violation of the presumption of innocence.[40]

Through such judgments, it seems that the domestic legal system is introducing a concept of non-pecuniary damage that has not been accepted by legislators. Even in cases where the existence of mental suffering is stated, it is often unclear on what basis the court makes such an assessment. In essence, the primary issue in these proceedings seems to be whether the presumption of innocence was violated by the published information. The inconsistency in the application of the subjective concept of non-pecuniary damages can create uncertainty for parties during legal proceedings. Parties cannot be certain which concept of non-pecuniary damages the court will apply when delivering a judgment. Even the Supreme Court contributes to legal uncertainty by accepting the objective concept of non-pecuniary damages in some judgments.[41] To resolve this dilemma, we consider it necessary to contemplate a change in the concept of non-pecuniary damages and for legislators to adopt a consistent stance thereafter. In our opinion, the objective concept of non-pecuniary damages, where only the violation of personality rights needs to be established, would be a better solution than the current subjective concept. This opinion stems from our examination of the research subject, where it is evident that courts struggle to determine whether individuals whose presumption of innocence has been violated suffer mental anguish due to the publication of such information. It also appears that domestic doctrine increasingly supports the need for a change in the concept of non-pecuniary damages. Until such legislative changes occur, courts should work towards aligning judicial practice in accordance with the existing provisions of the

[39] O. Stanković, 150.

[40] Judgment, Court of Appeal in Belgrade, No Gž3-74/20, from 13. 5. 2020.

[41] S. Andonović, „Naknada nematerijalne štete zbog povrede prava ličnosti-između zakona i prakse" in: *Prouzrokovanje štete, naknada štete i osiguranje* (eds. Zdravko Petrović, Vladimir Čolović), Institut za uporedno pravo, Valjevo 2019, 216.

Law of Contract and Torts, thereby eliminating any form of uncertainty that parties in disputes may face.

3. Determining the Amount of Monetary Compensation

The Law of Contract and Torts contains several criteria that the court must adhere to when determining the amount of non-pecuniary damages. According to these criteria from Art. 200 para. 1 of the Law of Contract and Torts, the court is obligated to award monetary compensation if the circumstances of the case and the intensity of pain and suffering justify it. The court must also consider the importance of the infringed right, the purpose of awarding non-pecuniary damages, and ensure that the awarded amount does not cater to interests that contradict its nature and social purpose (Art. 200, para. 2 Law of Contract and Torts). Additionally, the Law on Public Information and Media specifies criteria that the court particularly values if the harm arises from information published in the media. In such situations, the court should specifically assess whether the plaintiff attempted to mitigate the harm using other legal remedies provided by this law, and whether the defendant prevented the plaintiff from mitigating the harm by publishing a response, correction, or other information based on a court decision (Art. 128, Law on Public Information and Media). It's notable that these criteria provided in the Law of Contract and Torts are set as legal standards and their application depends on the circumstances of each case. To illustrate how these criteria are applied in cases involving the violation of the presumption of innocence through media outlets, we will present conclusions drawn from our examination of legally binding court judgments.

Excellent observations highlight the court's effort to standardize the amount of monetary compensation for non-pecuniary damages. In one judgment, the first-instance court noted that the awarded amount was determined within the range of orientation values typically awarded in similar situations.[42] Regarding specific case circumstances considered by the court, notable aspects include whether the information sparked curiosity among people in private or professional settings,[43] caused negative changes within families, led to unpleasant experiences at work, hindered employment opportunities in the place of residence,[44] or increased readership of the defendant's public publication.[45] Despite some judgments mentioning

[42] Judgment, Court of Appeal in Belgrade, No Gž3-333/22, from 30. 11. 2022.

[43] Judgment, Court of Appeal in Belgrade, No. Gž3 333/22, from 30. 11. 2022.

[44] Judgment, Hight court in Belgrade, No. P3 515/19, from 11. 2. 2022.

[45] Judgment, Court of Appeal in Belgrade, No. Gž3 416/22, from 8. 2. 2023.

circumstances significant for determining the amount of compensation, many others fail to specify any such factors. Courts often do not elaborate on how they arrived at a specific compensation amount, merely stating it aligns with criteria outlined in the Law of Contract and Torts. Regarding criteria from the Law on Public Information and Media (hereinafter LPIM), courts notably assess whether the harmed party attempted to mitigate the damage through legal means, such as the right to reply. The court values this circumstance by considering whether the plaintiff attempted to reduce the harm caused by the published information.[46] It is our view that current judicial practice does not strive to individualize the amount of compensation in these cases. Some authors argue that awarding pecuniary compensation for mental suffering necessarily becomes depersonalized in practice.[47] We agree that exact determination of compensation amount is impractical, as the primary goal remains satisfaction, given that complete restoration to the previous state is impossible. However, completely excluding subjective case circumstances would favor the perpetrator, who could anticipate the compensation amount beforehand. In terms of our research subject, media outlets could calculate whether it is financially viable to pay such standardized compensation amounts, aiming to attract greater readership through sensationalist reporting. Additionally, courts seldom grant the portion of the claim requesting a share of profits derived from publishing unauthorized information (Art. 130, Law on Public Information and Media).

We believe that it is necessary for courts to consider all circumstances of the specific case and to clearly indicate in the reasoning of judgments how each of these circumstances affects the amount of awarded compensation. As we have seen, some judgments do take this into account, although even then, these circumstances are often mentioned in a very brief manner. Such conduct by the courts could lead to the incorrect application of substantive legal provisions[48] and hinder the adequate review of the determined amount of damages by appellate courts. In addition to the circumstances we have already mentioned that courts take into account when determining the compensation amount, we consider it important to also take into consideration the nature of the criminal offense for which the individual was found guilty in terms of violating the presumption of innocence, whether the person

[46] Judgment, Court of Appeal in Belgrade, No. Gž3 42/22, from 5. 5. 2022.

[47] M. Karanikić Mirić (2024), 672.

[48] D. Veljković, *Komentar Zakona o obligacionim odnosima*, Nova consulting, Beograd 2020, 655.

affected is an adult or a minor. For example, in cases involving serious criminal offenses against life and body or sexual freedom, the awarded compensation amount could be higher. Conversely, it is known that domestic media often highlight injustices when individuals are held accountable for criminal offenses in self-defense.[49] In this sense, such circumstances should lead to the determination of a lower amount of monetary compensation. Special attention should be paid when the presumption of innocence is violated in cases involving minors. Particularly intense public reactions are triggered in situations where a male minor commits a criminal offense involving elements of violence against a girl.[50] In the example we provided earlier in this paper, as an instance of a judgment where the court applies an objective concept of non-pecuniary damages, the court determined a monetary compensation amount of 50,000.00 dinars. The court stated in its reasoning that this amount was determined in accordance with all the circumstances of the case and in line with current judicial practice.[51] It seems to us that the court overlooked the specific aspect that through the media text, the minor was characterized as the perpetrator of a rape offense against a girl, and thus did not fully consider the consequences that arose for him due to the publication of such information.

Regarding the criteria provided by the LPIM we believe that a stance cannot be automatically adopted that not using certain legal means by the injured party aimed at reducing the damage implies negligence. In order to take a stance on whether the individual attempted to mitigate the damage by not using such means, it would be necessary to consider whether the damage for a person whose presumption of innocence has been violated can be eliminated or at least reduced by means such as correction or response to the published information. Some authors emphasize that by applying such means, readers are given the opportunity to read harmful information three times: first when it is provided by the media, second when the injured party requests correction of the information, and third when the media provides its comment on the correction. Other authors believe that the institution of correction of information should always be applied to provide an opportunity for a

[49] M. Škulić, „Anglosaksonska doktrina „odbrane zamka" u krivičnom pravu SAD i njene moguće refleksije na nužnu odbranu u srpskom krivičnom zakonodavstvu", in: *Kaznena reakcija u Srbiji VII deo* (ed. Đorđe Ignjatović), Beograd 2017, 72.

[50] A. Ilić, „Medijska slika maloletničke delikvencije" in: *Mediji, kazneno pravo i pravosuđe* (eds. Jelena Kostić, Marina Matić Bošković), Beograd 2024, 182.

[51] Judgment, Court of Appeal in Belgrade, No. Gž3-238/21, from 15. 7. 2021.

valid interpretation of the created fiction about an event.[52] We are on the opinion that the court should not be obligated to consider non-use of other means as a negative circumstance when determining monetary compensation. There may be situations where information is published at a time when the person is in custody or in another sensitive procedural moment. It is conceivable that these individuals are not informed about the content of the published information during the period when they are in custody, as their attention is primarily focused on exercising their right to defense. In this regard, it is necessary to consider the reasons why the person did not use the means available to them.

4. Conclusion

The right to presumption of innocence is a personal right that, in case of violation by media outlets, can be subject to protection through litigation. Violation of personal rights can lead to the right to monetary compensation for non-material damage. According to the doctrinal interpretation accepted under the Law of Contract and Torts, monetary compensation for non-material damage can only be awarded if the person suffers psychological pain of a certain intensity as a consequence of the violation of their personal rights. By presenting the court's positions taken in proceedings aimed at compensating for non-material damage caused by the violation of the right to presumption of innocence, we have pointed out inconsistencies in accepting the subjective concept of non-material damage. Such judicial behavior is not limited to cases involving the presumption of innocence as a personal right, indicating the need for standardization of judicial practice in line with the provisions of the Law of Contract and Torts. Furthermore, it is necessary to consider a change in the concept of non-material damage. In the case of violation of the right to presumption of innocence, the difficulty of proving that the person suffers psychological pain due to the violation of their personal rights becomes evident. In this regard, we agree with a portion of doctrine suggesting the introduction of an objective concept of non-material damage. According to this perspective, it would be sufficient for there to be a violation of personal rights for the claim of non-material damage.

When assessing the monetary compensation for non-material damage caused by the violation of the presumption of innocence, the court should take into account the significance of the harmed interest and the purpose served by

[52] V. Hebrang, „Ostvarivanje prava na ispravak medijske objave", *MediAnali: međunarodni znanstveni časopis za pitanja medija, novinarstva, masovnog komuniciranja i odnosa s javnostima* 4/2010, 53.

such compensation. It is crucial that this compensation does not cater to tendencies that are incompatible with the nature and social purpose of such compensation. It is noticeable that courts approximate the amount of compensation for non-material damage caused by the violation of the presumption of innocence. In their reasoning, courts either do not specify or do so in a very superficial manner regarding the specifics of each case. This indicates that courts do not strive to individualize monetary compensation. Such court behavior not only contradicts material legal norms but is also detrimental to the plaintiff, who cannot exercise the right to compensation for non-material damage tailored to the specific circumstances of the case and the severity of the harm to their psychological well-being caused by such violation.

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NOVČANA NAKNADA NEMATERIJALNE ŠTETE PROUZROKOVANE POVREDOM PRAVA NA PRETPOSTAVKU NEVINOSTI U MEDIJSKOM IZVEŠTAVANJU

Apstrakt

Zakonikom o krivičnom postupku propisano je da su sredstva javnog obaveštavanja jedan od subjekata koji su dužni da poštuju pravo na pretpostavku nevinosti. Iako je zakonodavac nastojao da garancijom procesnih prava okrivljenog zaštiti pretpostavku nevinosti, u krivičnom zakonodavstvu je izostalo propisivanje posledica njenog neposrednog kršenja. Autor u radu odgovora na pitanje, da li lice u slučaju da mu je ovo pravo povređeno, ima pravo na naknadu nematerijalne štete. Autor u prvom delu rada, zaključuje da se pretpostavka nevinosti može smatrati pravom ličnosti, pa da shodno tome, uživa građanskopravnu zaštitu. U sledećem delu rada, autor naglašava, da povreda prava na pretpostavku nevinosti nije dovoljan uslov, da bi lice imalo pravo na novčanu naknadu nematerijalne štete. Shodno prihvaćenoj subjektivnoj koncepciji nematerijalne štete, neophodno je da dođe do povrede prava na pretpostavku nevinosti, da lice trpi duševne bolove dovoljnog intenziteta, kao i da postoji uzročno posledična veza. Autor ukazuje, primerima iz sudske prakse, na nedosledno prihvatanje ove koncepcije nematerijalne štete u postupcima koji se vode radi naknade iste zbog povrede prava

na pretpostavku nevinosti od strane sredstava javnog obaveštavanja. U drugom delu rada, autor analizira kriterijume za odmeravanje visine novčane naknade. Kako su zakonom postavljeni kriterijumi dati u vidu pravnih standarda, autor nastoji da prikaže način na koji sudska praksa iste konkretizuje u predmetima koji se vode radi naknade nematerijalne štete prouzrokovane povredom prava na pretpostavku nevinosti od strane sredstava javnog obaveštavanja. Autor kritikuje ustaljeni depersonalizovan pristup prilikom odmeravanja visine naknade u ovim predmetima, smatrajući da on u potpunosti odgovara štetniku.

Ključne reči: povreda pretpostavke nevinosti, pravo ličnosti, nematerijalna šteta, mediji, sredstva javnog obaveštavanja.

III

Insurance

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INSURANCE INTEREST

Summary

The paper deals with the conceptual definition of insurance interest in terms of legal institute in material insurance law. The introductory part deals with the general definition of term "interest" in its linguistic sense, that is, its meaning in civil law, as in procedural, as in material sense. The central part of the paper is dedicated to the definition of the term - legal institute of interest in insurance law, where a distinction is made between interest in property insurance (indemnity insurance) and interest in insurance of persons (non-indemnity insurance). The paper also deals with the legal consequences of absence or termination of insurance interest in insurance law. At the end, the paper deals with the impact of inflation on insurance interest.

Keywords: *Interest, Insurance Interest, Property Insurance, Insurance of Persons, Inflation*

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1. Introduction

The term interest (lat. *inter/es/est/esse*[1]), in terms of its linguistic meaning, can be defined as "occupation with/for something."[2]

The concept of interest exists within civil law, however, unlike its linguistic meaning, interest in civil law can take on a number of interpretations. The notion of interest connects to various civil law institutions, such as procedural,[3] and substantive.[4] It is understood that, of all the legal disciplines, the notion of interest is best developed in law of insurance,[5] with the consideration that its existence (or lack thereof) has significant legal consequences in insurance contract law. Interest in insurance contract law is the conceptual subject of this paper.

2. The Notion of Interest in Insurance

The notion of interest in insurance can be defined as, "the relationship that binds one entity to a certain life-sustaining economic valorization".[6] That relationship is called the interest in insurance.[7]

It is not enough for that interest to be merely in natural properties[8] (those valued monetarily), but for those properties to be insurable. An insur-

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1 Lat. *inter* (between, in the middle) and *es/est/esse* (to be).

2 V. Anić *et al*., *Hrvatski enciklopedijski rječnik*, Novi Liber, Zagreb 2004, 223.

3 For example, in civil procedural law, the existence of a legal interest is a condition for the participation of an intervener in a lawsuit (see Art. 206, paragraph 1 of the Civil Procedure Act, *National Newspaper*, No. 53/91, 91/92, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14, 70/19, 80/ 22, 114/22, 155/23 - hereinafter referred to as: ZPP), the existence of a legal interest is a condition for submitting a Proposal for permission to review (see Art. 389a para. 2 ZPP). For more details on the above, we refer to N. Opatić, „Pravni interes u građanskom parničnom postupku", *Godišnjak* 9/2002, 441–463).

4 For example, in civil substantive law, the existence of a legal interest is one of the conditions for legal subrogation (see Art. 91 of the Law on Contract and Torts, *National Newspaper*, No. 35/05, 41/08, 125/11, 78/15, 29/ 18, 126/21, 114/22, 156/22 155/23).

5 P. Šulejić, *Pravo osiguranja*, Centar za publikacije Pravnog fakulteta u Beogradu, Beograd 2005, 303.

6 D. Antognoni, *Compendio di Diritto delle assicurazioni*, Napoli 2013, 180.

7 This name is used by Law on Contract and Torts, and the names "insurable interest" and "interest for insurance" are also encountered; English: insurable interest, German: Versicherbares Interesse, French: Interet d`assurance, Italian: interesse all'assurance.

8 Which is not contrary to the constitution, coercive regulations and rules of morality

able right is one whose interest is legally permitted. Therefore, the interest of insurance, "implies the interest of one person not to pursue an insured case, when a legal step allowed that interest to be insured […]".[9]

The existence of a (corresponding) interest in insurance is reliant upon the condition that the legal framework for insurance stands because insurance loses its purpose if the person who is "protected" by the insurance has no need for it. If the need for the existence of insurance were to disappear, there would be a danger that insurance would instead serve for the attainment of illegal goals.[10] There is a difference in property insurance (indemnity insurance) and in the interest of insurance of persons (non-indemnity insurance). In this respect, it falls within the interest of the insurer in their property (indemnity) insurance pursuits.

3. The Interest of Insuring Property Securities

In cases of property insurance, that is in all those cases in which the insurance has character compensations for damages, the interest of insurance derives from "[..] the ability to achieve some risk incurred by the policyholder in suffering property damage due to the loss or damage to the insured item or due to civil liability for damages […]".[11]

The justification for the use of interest in property insurance is found in the public interest that insurance does not become a game of chance and bet, in which the insured person is tempted to deliberately inflict damage in order to achieve compensation from insurance.[12]

The interest of property insurance is regulated by a separate provision of the Law on Contract and Torts, according to which: "(1) An insurance of property contract may be entered into by any person, or their beneficiary, with a legitimate interest in the object of insurance. (2) The insurer may be a person who currently has or expects to have a vested interest in not becoming an insured case, as he/she may suffer some material loss. (3) The insurer may require compensation for damages incurred covered by insurance only

(see Art. 47 - 49 of the Law on Contract and Torts).

[9] D. Pavić, „Interes osiguranja", *Zbornik pravnog fakulteta u Splitu* 42/2005, 433.

[10] J. Pak, „Interes kao osnovni uslov za punovažnost ugovora o osiguranju", in: *Zbornik radova „Osiguranje, naknada štete i parnični postupak*, Intermex, Beograd 2014, 44.

[11] D. Pavić (2005), 431.

[12] D. Pavić, *Ugovorno pravo osiguranja – komentar zakonskih odredaba*, Tectus, Zagreb 2009, 245.

if they had legally permitted material interests placed upon the insured object at the time of the case."[13]

The following issues are regulated by the aforementioned Law on Contract and Torts provision: a) the issue of interest in property insurance, b) the issue of the persons (insurer and the insured) and who must have the interest, and c) the issue of the timeframe within which the interest must be placed.

Ad a) *the issue of interest in property insurance.* The insurance contract cannot be created for every (or any) person, nor may it be created for the benefit of every (or any) person,[14] rather it is necessary that the person entering into an insurance contract (the policyholder) or the person to whom the insurance contract is awarded has a "legitimate interest in the subject of insurance."[15]

Interest is justified if it is legal.[16] Any interest that is not prohibited,[17] can be deemed legal. Interest in insurance can exist even for future objects.[18]

Ad b) *the issue of the persons (insurer and the insured) and who must have the interest.* If it is the beneficiary (the person entering the insurance contract with the insurer) and the insurer (the person entering the insurance contract with the beneficiary), then the interest of insurance must fall with the person who is the insurer (as well as insured party).[19] In the case that the

[13] Art 948 of the Law on Contract and Torts.

[14] Art. 929, par. 1 of the Law on Contract and Torts: "(1) In the case of insurance for someone else's account or for an account that concerns him, the obligation to pay the premium and other obligations from the contract must be fulfilled by the policyholder, but he cannot exercise his rights from the insurance, even when he holds the policy, without the consent of the person whose is the interest secured and to which they belong".

[15] Art 948, para. 1of the Law on Contract and Torts.

[16] D. Pavić (2009), 246.

[17] For example, it would not be possible to speak of a legitimate interest if it would refer to the smuggling of protected goods (artistic paintings, etc.) which the law stipulates cannot be the subject of legal traffic. This is, among other things, the case in the insurance of crops and plantations (eg, insurance of apples against hail or spring frost), or in the insurance of buildings under construction and assembly (eg, against the risk of ground subsidence).

[18] This is, among other things, the case in the insurance of crops and plantations (eg, insurance of apples against spring frost), or in the insurance of buildings under construction and assembly (eg, against the risk of soil subsidence).

[19] In the Law on Contract and Torts, there is no clear answer to the specific question of whether the policyholder should have an insurance interest, so the question arises as to whether the policyholder should have an insurance interest at all, given that the insured is the one to whom the insurance rights belong at the time of the occurrence of the insured event (in support of this also the provision of Article 948, para. 3 of the

insured person is different from the insurer, the insurance's interest must lie with the insurer - the person whose interests are secured.[20]

From the aforementioned, it follows that the insurance interest must always have an insurer,[21] because otherwise the contract of insurance would be null and void.[22] The insurer can only be persons who have or expect to have a legitimate interest in not creating an insured case, otherwise they would have suffered some material loss.[23] If a person does not have that interest (the creation of an insured case), they cannot be the insurer, as there is no legal basis for any claim for the contract of insurance.

There is a dispute (as flagged by BM) over the legal nature of the insurer's interest, over both his subjective and objective character. This question is significant because it answers whether insurance must merely cover the interests of the insurer (theory of subjective interest) or if the interest of the other persons with legitimate interest in said insured items who did not enter an insurance contract are also to be covered (theory of the objective interest of insurance).[24] These questions are controversial to this day.

One court ruling from the Higher Court of the Republic of Croatia (hereinafter referred to as: VSHR) states: "[…] The subject of the dispute is the plaintiff's claim for reparations of damages (insurance) based on the insurance contract entered into on November 17, 1998 between the plaintiffs as the insurer, and M. G. d.o.o. as insurance contractor and plaintiff (P.M.) as an insurer […]. Beginning from the factual determinations in procedure prior to the audit, refer to 924-925 Law on Contract and Torts (now Art. 948-949 Law on Contract and Torts) the lower courts correctly determined the grounds of appeal lacked an active ID of the plaintiff (policyholder). In fact, it was determined that the books were destroyed in a fire - the subject of insurance under the insurance contract was property of the insurance contractor. G. d.o.o., and of the plaintiff whose assets were not diminished by said fire. Therefore, a plaintiff who has not suffered material damage is not actively entitled to demand financial compensation for damages (by means of insurance), as determined by the Lower Courts[…]".[25]

Law on Contract and Torts).

[20] See footnote 15.

[21] D. Pavić (2009), 247.

[22] For more details on the legal consequences of the absence or termination of insurance interest, see point 2.1.1. of this paper.

[23] Article 948, para. 3 of the Law on Contract and Torts.

[24] N. Nikolić, *Ugovor o osiguranju*, Državni osiguravajući zavod, Beograd 1957, 59–60.

[25] VSRH, Rev-x 996/12-2 od 27th November 2013, EU:ECLI:HR:VSRH:2013:5491.

In a second decision, the VSRH states, "[…] Right to claim of insurance goes only to the person whose interest is insured, regardless of whether the contract was concluded directly by the insured, or by a representative of said insurance provider in her name or for her account […]. In the specific case that an insurance contractor was a tenant who leased in a building with the defendant, as the insurer, entered into an insurance contract for (another individuals/entity's) property, and there was an insured case where the building was destroyed in a fire, the plaintiff would be entitled to the insured amount, and not the building owner, as is demonstrated in the proceedings before the Lower Courts, and again now in the audit, posits the defendant lacks sufficient grounds for argument."[26]

To sum up the two findings mentioned above, the first case finds that the person who is listed as insurer has no right to compensation from the insurance if they are not the owner of the damaged goods, and the second case finds that a person who is listed as the insurer, even when the damaged property is not theirs, is entitled to compensation from said insurance company. We are of the opinion that the theory of subjective interest of insurance should be supported, for the simple reason that this ruling is in the same accordance with the general principle of contract law of relative (*inter partes*) operation of contract, according to which the contractual relationship has no impact on third parties.[27] Accordingly, persons engaged in any insurance contract (or are the insurance policyholder), are not to be designated as an insurer, nor have the rights of the insurance, as they are not in the specified legal relationship necessary with the insurance provider.

The aforementioned issue is relevant in situations where more than one person has a vested interest in the insurance in relation to the same object, as those interests may be parallel or exclusive parallel with one another.[28] Parallel interests are those interests in an item of insurance that are independent of each other,[29] whereas exclusive interests are those that rely on each other, meaning that the existence of one precludes the existence of the other.[30]

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[26] VSRH, Revt-60/11-2 from 25th of September 2013, EU:ECLI:HR:VSRH:2013:4781.

[27] Lat: *Pacta tertiis nec nocent nec prosunt*.

[28] P. Šulejić (2005), 307.

[29] For example, more comparative insurance interests exist in the case of the relationship between lessor - real estate owner and lessee - user of real estate. In the first case, the interest of the lessor - owner of the real estate is related to the property of the real estate (to preserve it for the duration of the lease), while in the second case, the interest of the lessee - user of the real estate is related to the use of the real estate (to be able to use it for the duration of the lease).

[30] Such are, for example, the interests of the seller and the buyer of something. By

Ad c) *the issue of the timeframe within which the interest must be placed.* The timeframe within which the interest of insurance must be determined depends on whether the goal is the conclusion of the insurance contract or to exercise outlined insurance rights.

In the case that the insurance contractor is also the insurer, there must be the interest of insurance in mind during the drafting of the insurance contract. In the case that the insurance contract is being drafted on behalf of another party, that person must have the interest of insurance in mind during the closing of the contract. That way, in the case of insurance on behalf of another party, the representative of the insurance not only has no vested interest but has no expectation of interest.[31] That is the case when, for example, the carrier, cosigner, or storekeeper concludes an insurance contract on behalf of the owner of the goods.[32]

Unlike the interests of the insurer, who is both the insurer and the interest to said insurance, the beneficiaries of the insurance, which must exist at the time of the creation of the insurance agreement, the exercising of the rights under the insurance contract depends on the existence of interest of insurance policyholders at the time of the insured case: "An insured person may claim compensation for damages covered by insurance only if they were legally permitted material interest in the insured object at the time of the insured case."[33] The existence of this interest must be based on existing legally recognized law (relationship), it is not enough simply to expect the interest to exist without precedent as that would imply elements of speculation.[34] In case law, it is stated: "In the audit phase of procedure between parties, it may be difficult to determine whether the basis of the plaintiff's claim, namely whether the plaintiff, as an insurer, is entitled to compensation for the damages caused by the actions of the insured case, even if at the time of the case that individual was not listed as the owner of the house in question, or paid the listed price in full.

Property insurance, on the other hand, can be concluded by any person who has vested interest in the insured case not happening, as they would

selling an item, the seller loses the insurance interest in that item because his interest in the risk of the item's failure ceases, while the buyer acquires it by purchasing the item, because by purchasing the item, the risk of the item's failure is transferred to him.

[31] D. Pavić (2009), 248.

[32] *Ibid.*

[33] Art. 948, para. 3 of the Law on Contract and Torts.

[34] D. Pavić (2005), 441.

be the ones suffering some material loss. Insurance claims can only be made by persons who, at the time of the damage, had material interest in making sure the insured case does not happen. This court fully accepts the legal position of the courts because the plaintiff, by entering into a real estate purchase agreement and into a disputed insurance contract of the property in question before the creation of an insured case, as well as entering his title in the land register after paying full price for said property, ensure full rights of the insurers from the property insurance contract.

The defendant, with the plaintiff as the insurer as well as insurance contractor, put together a disputed insurance contract based upon contract of sale, did not require him to prove that he was listed in property records as the owner of the property in subject for insurance. The defendant, on the basis of the insurance contract so concluded that the plaintiffs, the insurers, paid him the premium to his satisfaction, by which the plaintiff must also fulfill their contractual obligations to the defendant. It cannot happen so that the plaintiff is not a person who would not have suffered some sort of material loss or had any material interest in the case at hand. In fact, it would be opposite, as where the plaintiff, at the time of the insured case, was a person that could become completely even with the owner of the insured property. In these cases keep in mind that after the appearance of an insured case, the prosecutor may not be able to fulfill his obligation to pay the purchase price until the heirs are established in the probate proceedings, while one of the salesmen who died in the course of the insured case, as well as another person who […]. In the specific case the plaintiff is under a closed policy both the insurance contractor and the insurer. Even though the plaintiff doesn't own the insured property by the relevant insurance policy, the proceedings established that the plaintiff had legally permissible material interest within the context of Article 948. para. 3. of the Law on Contract and Torts) on the insurance of the real estate at the time of the insured case as it was based on a loan fund for the rehabilitation of the roof of a house on Mirogoska Road 20, in which ownership was based on the landlord's descension. From the foregoing, it follows that no audit within the plaintiff's complaint is actively entitled in this proceeding because she had a legitimate interest in not having the insured case, as she would have suffered a material loss (loss of invested funds) within the context of the precedent Article 948. para. 2. Law on Contract and Torts […]".[35]

[35] VSRH, Rev 1016/08-3 from 11th of May 2011, EU:ECLI:HR:VSRH:2011:1637, VSRH, Rev 2270/2013-2 from 6th of November 2019, ECLI:HR:VSRH:2019:4232.

The same applies for insurance on behalf of another person. For example, a case of comprehensive car insurance at a repair shop: "[…] In this case, the legal decision found that the plaintiff, as the insurance contractor, had concluded a comprehensive contract with the plaintiff. Motor vehicle insurance taken over by the workshop for repair, and in accordance with the rules for comprehensive insurance… Law on Contract and Torts decrees that property insurance can conclude any person who has a vested interest in the case not occurring, as otherwise they would have suffered some material loss, with insurance rights available only to persons who are, in the moment of the incident, having a vested material interest, therefore directly damaged if the case were to occur.

The owner of the motor vehicle has vested material interest that the vehicle is not destroyed when it arrives to the auto shop because destroyed motor vehicles (that is total damage occurring to this vehicle within the legal understandings) would cause the owner to suffer great damages.

The purpose of property insurance is to provide compensation for damage that would occur to the insurer at the fault of the insured case. In this legal matter, the total damage to a motor vehicle is the diminished property of the owner of the motor vehicle, i.e. the insured, and not the property of the insurance contractor- the plaintiff. It is thus a matter, according to the assessment of this court, of the conclusion of a contract for car hull insurance in favor of a third party (the owner of the motor vehicle). Therefore, the plaintiff, who has not even suffered material damage (the damage occurred to the motor vehicle of the third party – the owner of the motor vehicle), and to whom the owner of the motor vehicle has not even addressed a compensation claim, has no right to compensation for the destroyed personal car. [...]".[36]

It is also evident when transferring the insurance contract: "In the event of alienation of the insured item, as well as the item with which liability insurance was concluded, the rights and obligations of the contracting party under the law pass to the acquirer, unless otherwise agreed."[37] In which case the contract is transferred to the acquirer of the insured item *ex lege*. The reason for such a provision lies in the change of interest in insurance. On the one hand, the previous insured party as (legitimate) alienator of the insured item, upon alienation, no longer has (loses) any interest in it (it is no longer important to him whether the item is insured or not). On the other hand, the acquirer of the insured item, upon acquisition of that item, has (gains) an interest in insurance

[36] VSRH, Gzz-48/03-2 of 30th of June 2004, EU:ECLI:HR:VSRH:2004:6355.

[37] Art. 961, para. 1 of the Law on Contract and Torts.

(to prevent the insured event from occurring). As a result, the acquirer of the insured item automatically takes the place of the insured party: "[...] The rights and obligations are transferred to the new owner in their entirety; he assumes the legal status of the insured party, taking over both the rights and obligations from the insurance contract (payment of the due premium, the right to claim the insurance payout) [...]".[38]

Since the contract is transferred *ipso iure*, it is not necessary to undertake any special act regarding the transfer of the insurance contract (no special consent is required from the acquirer or the insurer for the transfer of the contract). Despite the fact that it can be concluded that the main *ratio* of this rule concerning the transfer of insurance contracts is the preservation (continuity) of the relations arising from insurance due to changes in insurable interest in the insured item, there are two exceptions where it does not apply. The first exception pertains to insurance for someone else's account or for the account of someone concerned,[39] when in the event of alienation of the insured item, due to the nature of the item itself, there is no transfer of the insurance contract: "[...] since the person for whose account the insurance was concluded is the original insured party and does not derive their rights from the prior insured party [...]."[40]

The second exception relates to its dispositiveness: "unless otherwise agreed,"[41] in which case, if it is so agreed, the insurance ceases upon the alienation of the insured item: "[...] The subject of the dispute is the plaintiff's claim as the insurer for the defendant as the contracting party of the insurance to pay him the unpaid premiums from the multi-year (from October 27, 2007, to October 27, 2011) car hull insurance (policy no…)… The first-instance judgment upheld the payment order..., with the reasoning that the defendant is

[38] M. Ćurković, *Ugovor o osiguranju – Komentar odredaba Zakona o obveznim odnosima*, Inženjerski biro, Zagreb 2017, 163–164.

[39] Art. 929, para. 1 of the Law on Contract and Torts,

[40] V. Gorenc *et al*., *Komentar Zakona o obveznim odnosima*, RRiF, Zagreb 2005, 1468.

[41] This dispositive provision does not apply in cases where the law does not allow the transfer of the insurance contract and its effects to depend on the will of the contracting parties, and in such cases, the parties cannot act otherwise. For example this is the case with mandatory automobile liability insurance: "If the owner of the vehicle changes during the insurance period, the rights and obligations from the automobile liability insurance contract are transferred to the new owner, and last until the expiration of the insurance period [...]" (Article 28 of the Law on Compulsory Traffic Insurance, *National Newspaper*, No. 151/09, 76/13, 155/23.

obliged to pay insurance premiums in the amount of 6,286.88 kuna, regardless of the fact that the insured vehicle was alienated – sold back at the beginning of December 2008 – since she did not notify the plaintiff of the sale of the insured vehicle, and therefore is obliged to pay those premiums which are due after the date of alienation. The decision of the first-instance court is based on the provision of Article 961 of the Law of Contracts and Torts ("Official Gazette" 35/05, 41/08, 125/11, and 78/15 – hereinafter: √/05) and on the provisions of Articles 17 and 27, paragraph 2, of the plaintiff's General Terms and Conditions for Car Hull Insurance (hereinafter: General Terms).

Investigating the first-instance judgment within the limits of the reasons stated in the appeal and being mindful of material violations of the provisions of civil procedure and the proper application of substantive law ..., the appellate reason for incorrect application of substantive law was established, and in this regard, the first-instance court incorrectly assessed the content of the document – the General Terms, thus fulfilling the prerequisites for amending the first-instance judgment regarding the payment of the premium under policy ... in the amount of 6,286.88 kuna.

It concerns the insurance premiums that became due after the insured vehicle was sold, that is, after the change of ownership of the vehicle, and it is undisputed that the vehicle was registered to the new owner on December 10, 2008, while the defendant took another vehicle and entered into a new comprehensive car insurance policy (number ...).

It is disputed, and in the appellate stage of the proceedings, whether the defendant remained obligated to pay the premiums that became due after the date of the transfer, considering the fact that she did not inform the plaintiff in writing about the change of ownership of the insured vehicle.

This appellate court assesses that the first-instance court incorrectly applied the material law (Article 961, paragraph 4 of the Law on Contract and Torts/05) and incorrectly evaluated the provisions of Articles 17, paragraph 1, and 27, paragraph 2 of the General Conditions when it concluded that the defendant remained obliged to pay those premiums.

Article 961, paragraph 1 of the Law on Contract and Torts/05 prescribes the rule that in case of transfer of the insured property, the rights and obligations of the insurance contractor automatically pass to the transferee, unless otherwise agreed. Therefore, the provision in paragraph 4 of that article applies only if it has not been otherwise agreed, i.e., when the rights and obligations pass to the transferee, as in such a case the insurance contract does not terminate, and the insurer remains obliged and must know who the

transferee is, and if the insurance contractor has not informed him about this, it is logical that he remains obligated to pay the premiums that become due even after the date of the transfer.

In this particular case, however, it was otherwise agreed between the plaintiff as the insurer and the defendant as the insurance contractor – that with the change of ownership rights on the insured vehicle, the insurance contract terminates from the 24th hour of the day the new owner took possession of the vehicle (Article 17, paragraph 1 of the General Conditions which are an integral part of the insurance contract – Article 926, paragraphs 3 and 4 of the Law on Contract and Torts), which means that the obligation of the plaintiff as the insurer then ceased, along with his right to collect the premium. [...]".[42]

The interest of insurance in property insurance can also be distinguished in relation to the basic types of property insurance.

Therefore:

- Interest of insurers in the insurance of goods (property in narrower sense: Movable, immovable) can arise from a very wide range of legal relationships, and most often it comes from either those real rights (ownership,[43] servitude, affluence, etc.), or those of a compulsory nature (leasing, stocking, buying, etc.).

[42] County Court in Pula, Gž-1921/15-2 dated May 15, 2017.

[43] At this point, it seems appropriate to point out one position expressed in the decision of the VSRH, Rev-101/02 of September 23, 2004, EU: ECLI:HR:VSRH:2004:3583.: „[...] Through the revision reason of incorrect application of substantive law, the defendant actually refutes the lower-level judgments due to the wrongly established factual situation..., so the defendant concludes that the plaintiff was an unscrupulous acquirer of the car in question, which is why the disputed insurance contract is void based on Art. 898, para. 2 of the Law on Contract and Torts (*Official Gazette*, No. 53/91, 73/91, 3/94, 7/96 and 112/99). Given that the car in question was obtained on the basis of forged documents, the plaintiff knew that there was a real risk of it being confiscated, so that by signing the insurance contract, he went ahead with the intention of gaining material benefit. [...] Contrary to the statements in the review, the lower courts correctly applied substantive law to the established factual situation. Namely, as it was correctly stated in the explanation of the first-instance judgment, property insurance, i.e. a car, can be concluded by any person who has an interest in preventing the insured event from occurring, since otherwise he would suffer some material loss (Art. 924, para. 1 of the Law on Contract and Torts), which means that the insured does not have to be the owner of the insured property at the same time. Therefore, regardless of whether the plaintiff acquired the right of ownership of the insured car, the concluded contract binds the parties. [...]".

- The insurer's interest in the liability insurance derives from the insurer's interest not to arrive at a diminution of his assets (patrimonium) due to the obligation to pay damages to another. Persons for whom the performance is civilly liable (in cases of non-contractual liability, contractual liability, liability for defective product, etc.). [44]

The interest of insurance is also important in the case of multiple insurance[45] and double insurance respectively.[46]

This is because multiple insurance or double insurance can only be discussed if it concerns (along with other prerequisites: the same insured item, the same risk, the same insured party, etc.) the same interest of insurance. For example, it is not considered multiple insurance if a warehouse keeper insures, based on a storage contract, someone else's goods in the warehouse against fire risk with one insurer while simultaneously insuring his own civil (contractual) liability for damages caused to the owner of the goods with another insurer, because it does not concern the same interest of insurance. In the first case, it is an interest in preserving someone else's property – someone else's goods in the warehouse (from fire risk), while in the second case it concerns an interest in preserving one's own property in its entirety (patrimonium) from the risk of its diminution due to the possible liability of the warehouse keeper for the damage caused to the bailor – the owner of the goods. If the warehouse keeper insured someone else's goods in the warehouse against fire risk for the account of the owner of the goods with multiple insurers, then the rules of multiple or double insurance would apply.

The insured party is required to prove the existence of an insurable interest.[47] The court practice states: "[...] A person claiming the right to the payment of the insured amount must, among other things, prove that they have the status of an insured party from the contract or that their rights to it have been transferred in one of the legally prescribed ways.[48] [...] It is stated in the alternative that the plaintiff is neither the insured party under the insurance contract they refer to, nor has it been proven that rights from that contract would have passed to them"; and: "[...] In the proceedings preceding the

[44] Compare to J. Pak, 52.

[45] Art. 958, para. 1 of the Law on Contract and Torts.

[46] Art. 958, para. 2 of the Law on Contract and Torts.

[47] J. Pak, 50.

[48] High Commercial Court of the Republic of Croatia, Pž-1866/01 of May 25, 2004, *Zbirka odluka hrvatskih trgovačkih sudova br. 10*, Visoki trgovački sud Republike Hrvatske, Zagreb 2005, 47.

revision, it was determined: - that the plaintiff entered into a comprehensive car insurance contract with the defendant for vehicle ..., insuring it against theft, - that a month later, the vehicle was stolen and never found, - that the plaintiff reported the occurrence of the insured event to the defendant and requested payment of the insurance amount, - that the defendant refused to pay the insured amount to the plaintiff, claiming that the vehicle was insured based on false (forged) documentation and terminated the comprehensive insurance contract, - that the plaintiff purchased the car based on a sales contract concluded with xy as the seller, whom he had not known before, - that the plaintiff, Ž. Š., paid the purchase price and took possession of the vehicle, - that based on the documentation obtained from xy, the plaintiff registered the vehicle and concluded a comprehensive insurance contract with the defendant, - that reports from the Ministry of the Interior established that it was a stolen vehicle, the registration document of which was forged and printed in an illegal printing house. ... Based on the established factual situation, both the first-instance and the second-instance courts, according to the assessment of this court, correctly rejected the plaintiff's claim ... According to Article 925, paragraph 1 of the Law on Contract and Torts/91 (now Article 949, paragraph 1 of the Law on Contract and Torts, note), property insurance provides compensation for damages that would occur to the insured's property due to the occurrence of the insured event. The cited legal provision indicates that the purpose of property insurance is to restore the value of the insured's property to the situation before the occurrence of the insured event.

Therefore, taking into account the factual findings in the proceedings that preceded the revision, that the plaintiff purchased a stolen car, which vehicle was stolen from him a month later, it should first be noted that the plaintiff did not acquire ownership of the car by purchasing it from a non-owner, since it was a stolen vehicle. This legal understanding was also adopted by this court in Rev 2546/1998.

Furthermore, contrary to the claims of the appellant, the sale of the car at a car auction does not constitute a public sale and does not provide a basis for the acquisition of ownership from a non-owner (as also stated by this court in Rev 679/90). Consequently, in this specific case, there was no deterioration of the plaintiff's property, and it is correctly concluded by the lower courts that there is no obligation for the defendant to pay the insurance compensation. Therefore, the claim was rightly dismissed.

Moreover, it should be added that the plaintiff is not entitled to the requested legal protection in this matter even under the provisions of Article

924 of the Law on Contract and Torts/91 (now Article 948, paragraph 1 of the Law on Contract and Torts, note). According to Article 924, paragraph 1 of the Law on Contract and Torts/91 (now Article 948, paragraph 1 of the Law on Contract and Torts, note), property insurance can be concluded by any person who has an interest in preventing the occurrence of the insured event, as they would otherwise suffer some material loss, while according to paragraph 2 (now Article 948, paragraph 2 of the Law on Contract and Torts, note), rights from insurance can only be held by those persons who had a material interest in preventing the insured event at the time the damage occurred.

From paragraph 1 of the cited legal provision, it follows that property insurance can be concluded by the owner of the property, a legal entity with the right of disposal over the property, as well as by a secured creditor, a lessee of the property, a custodian of the property, a contractor, a creditor securing a loan, etc. According to paragraph 2 of the cited legal provision, it is essential that rights from insurance can only be held by those who had a material interest in preventing the insured event at the moment the damage occurred. The interest of insurance is based on the need for economic protection from a certain risk through compensation from insurance, that is, the need to restore the disrupted balance in the insured's property, which is also the purpose of property insurance.

Therefore, in the circumstances of this specific case, it cannot be assumed that the plaintiff is a person who suffers some material loss and who had a material interest in preventing the insured event at the time the damage occurred. Namely, when the stolen vehicle left the plaintiff's property, nothing that belonged to him was "lost" (the plaintiff was not the owner of the car). [...]".[49]

3.1 Legal Consequences of the Absence or Cessation of Insurance Interests in Property Insurance

It is noted in the introduction that the interest of insurance is classified as one of the "vital" elements for the existence of the legal transaction of insurance, i.e., for its validity. This is primarily because the interest of insurance also defines the person who can be the insured party in property insurance. In this context, it is important to differentiate between two situations: a) the absence of insurance interest, and b) the cessation of insurance interest.

Ad a) absence of insurance interest. The absence (non-existence) of insurance interest in property insurance results in the nullity of the insurance

[49] VSRH, Rev-x 785/13-2 of October 30, 2013, EU:ECLI:HR:VSRH:2013:6117.

contract, due to the fact that it constitutes an unlawful act as one of the essential prerequisites for the validity of the insurance contract itself.[50]

Null and void are those legal transactions that do not produce the legal effects that they would have produced if they were valid.[51] Unlike annulled contracts, null and void contracts are treated as if they never occurred – as if they do not legally exist. Nullity occurs *ex lege*, and the court considers it *ex officio*.[52] In the event that a given contract is found to be null and void, the consequences of that nullity take effect from the moment of its creation (*ex tunc*).[53] If the reason for nullity subsequently ceases to exist, the null and void contract cannot become valid for that reason. In this sense: "If a contract is concluded despite the absence of interest and a compensation claim is made based on such a contract, the insurer would not be under any obligation."[54]

Ad b) cessation of insurance interest. It is necessary to distinguish between the absence of insurance interest (regardless of when the absence is determined: at the conclusion of the contract or during its duration) and the cessation of insurance interest.

We can talk about the cessation of insurance interest in situations where the insurance interest existed both at the time of the conclusion of the insurance contract and during its duration, but at one point, it ceased to exist.

We can speak of the cessation of insurance interest in the case where:

- it is agreed that the insurance will cease upon the transfer of the insured item. In that case, the insurance contract will be terminated due to a change in the insurance interest.[55] Following, from the moment of the transfer of the insured item, each party is obligated to fulfill its contractual obligations (the contracting party is obliged to pay the insurance premium until the moment the insurance ceases, and the insurer is obliged to pay the insurance benefit for all insured events that occurred until the moment the insurance contract ceased). In this case, the effects of the cessation of the contract and the insurance interest operate *ex tunc*. Therefore, if the contracting party paid a certain amount of premium for

[50] Art. 269–271 of the Law on Contract and Torts.

[51] P. Klarić, M. Vedriš, *Građansko pravo*, Narodne Novine, Zagreb 2008, 137.

[52] *Ibid*., 138.

[53] The fact is that in theory and practice there are certain disagreements about the consequences of nullity itself, i.e. its effect *ex tunc* or *ex nunc*. P. Šulejić (2005), 314, J. Pak, 314.

[54] D. Pavić (2005), 436.

[55] See 2.1. of this paper.

the period after the cessation of the insurance contract, the insurer is obligated to return that amount (on a *pro rata temporis* basis);

- due to the occurrence of an insured event, the insured item is totally destroyed. In that case, with the payment of the insurance benefit, the contract ceases, and the total destruction of the item also terminates the insurance interest of the insured party, as there is no longer a possibility for the insured item to be exposed to an insured risk (given that it has been totally destroyed). Furthermore, the effects of the cessation of the contract and the insurance interest operate *ex tunc*, but the contracting party is obligated to pay the premium in the part that relates to the remaining duration of the insurance;[56]
- the insured item is destroyed (entirely) during the term of the insurance contract due to an event not covered by the insurance contract (due to an uninsured risk or event). In such a case, at the moment of the destruction of the item, the contract ceases due to the cessation of the insurance interest of the insured party, as there is no longer a possibility for the insured item to be exposed to (any) risk. Moreover, the effects of the cessation of the contract and the insurance interest take effect at the moment of the destruction of the item - *ex tunc*, and the insurer is obliged to refund the contracting party's part of the premium proportionate to the remaining duration of the insurance (if it has been received) on a *pro rata temporis* basis.[57]

4. Interest of Insurance in Personal Insurance

In contrast to the insurance interest in property insurance (indemnity insurance), in the insurance of individuals (non-indemnity insurance),[58] "the question of the existence of insurance interest is not raised."[59] This standpoint assumes that the "economic value" of a person cannot be monetarily assessed (that it is priceless, of the highest value, etc.). The reason for this is that in personal insurance, the amount is determined by agreement, rather than in relation to the economic value of the insured object (as is the case in property insurance).[60]

[56] In such cases, insurance contracts (insurance conditions) usually contain the clause: "In case of total damage, the entire insurance premium is due".

[57] Art. 952, para. 1 of the Law on Contract and Torts.

[58] Life insurance, accident insurance.

[59] M. Ćurković, *Ugovor o osiguranju osoba – život – nezgoda – zdravstveno*, Inženjerski biro, Zagreb 2009, 9.

[60] Art. 966 of the Law on Contract and Torts.

It cannot be denied that insurance interest does exist in personal insurance (the legal effects of this are another matter), because at its core lies the material interest of a person to receive monetary compensation in the event of the occurrence of the insured event.[61] This interest correlates with the insured event that is related to the person (death, accident, etc.).[62]

In this regard, in personal insurance, the interest is the driving force behind the will of the contracting party to conclude an insurance contract.[63]

Despite this indisputable fact regarding the existence of insurance interest even in personal insurance, a comparative legal examination reveals that legislative solutions differentiate (dualistic approach) between those where: a) the existence of insurance interest is not a prerequisite for the validity of the insurance contract for individuals and for exercising rights arising from that contract, b) the existence of insurance interest is a prerequisite for the validity of the insurance contract for individuals and for exercising rights arising from that contract.[64]

In Croatian law, the existence of insurance interest is not a prerequisite for the validity of the insurance contract for individuals nor for exercising rights arising from that contract, but in the case of insurance for a third party regarding death,[65] written consent from that person is required: "If the insurance relates to the case of the death of a third party, the validity of the contract requires their written consent given in the policy or in a separate document at the time of signing the policy, indicating the insured amount."[66]

In judicial practice, it is stated: "[...] The subject of the dispute is the plaintiff's claim for the payment of the insured amount based on Insurance Policy No. ... under which her late husband S. S. was insured with the defendant, who died in a traffic accident on July 27, 2004.

Contrary to the claims of the appellant, the lower courts correctly assessed that the plaintiff has active legitimacy in this case, based on the fact that a decision on inheritance established her as the heir of the late S. S., to whom the other

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[61] Compare to D. Pavić (2005), 450.

[62] N. Nikolić, 57.

[63] *Ibid*.

[64] Compare to D. Pavić (2005), 451.

[65] We point out that third-party insurance is not the same as third-party insurance, in the case of third-party insurance, that person (insured) is a person different from the person of the policyholder, while in the case of third-party insurance, it is the person designated by the policyholder as an insurance beneficiary (for more details on the insurance itself for the benefit of a third party, see B. Matijević, „Osiguranje života u korist treće osobe", *Hrvatska pravna revija* 2/07, 41–48).

[66] Art. 970, para. 3 of the Law on Contract and Torts.

legal heir, M. S.1, assigned her inheritance share. The appellant argues that this case involves insuring a third party and that, in accordance with the provision of Article 946, paragraph 3 of the Law on Contract and Torts (now Article 970, paragraph 30 of the Law on Contract and Torts, note), the written consent of the late S. S. was required in the policy or in a separate document upon signing the policy for the validity of that contract relating to the death of a third party.

It is true that Article 946, paragraph 3 of the Law on Contract and Torts stipulates that the written consent of that third party is a condition for the validity of the contract in the case of the death of a third party, and the consequence of death can occur in both life insurance and accident insurance. However, considering collective insurance contracts for accidents where it would be challenging (or even impossible) to obtain the consent of all insured persons, this court accepts the understanding that when it comes to contracts for accident insurance, the consent of the insured parties is not necessary (as also stated in the decision of the High Commercial Court of the Republic of Croatia, case number Pž-4394/99 of March 5, 2001).

Given the content of the relevant Accident Insurance Policy No. ..., as well as the General Terms, for insuring individuals against the consequences of accidents, further referred to as General Terms, and the Special Terms for insuring individuals with specific powers and responsibilities against the consequences of accidents, including the risk of death due to illness (manager insurance) – further referred to as Special Terms, which are an integral part of that Policy (Article 142 of the Law on Contract and Torts), it is indisputable that this is a contract for insurance against the consequences of an accident with (among other things) the insured event of death due to an accident. Therefore, in this specific case, it is not a matter of life insurance, but of accident insurance (which falls under the so-called "non-life insurance" in accordance with Article 5 of the Insurance Act – *National Newspaper*, No. 9/94, 20/97, 46/97, 116/99, and 11/02, as well as Rev-1250/14 of May 10, 2018). Thus, contrary to the claims of the appellant, the consent of the insured person is not required for the validity of that contract. [...]"[67]

The purpose of this provision is protective in nature, aiming to protect the insured from potential abuses by the contracting party or the insurance beneficiary.[68] It can also be said that with their consent, the insured "... confirms that the contracting party has an interest in them living..."[69] The

[67] VSRH, Rev-x 1052/2017-2 of January 29, 2019, EU:ECLI:HR:VSRH:2019:813.

[68] M. Ćurković (2017), 235 states: "[...] Such a provision is necessary considering the fact that the policyholder, or more often the beneficiary of the policy, could have a special interest in the death of the insured person. [...]"

[69] J. Pak, 55.

consequence of the absence of such written consent (in the insurance policy or in a separate statement) is the absolute nullity of the insurance contract for the case of death. It is also considered that once written consent is given, it can no longer be revoked, meaning that subsequent consent is not permitted.[70]

5. Inflation and Interest of Insurance

Inflation is a consequence of a certain economic and financial imbalance, which is manifested through the rise in prices over a specific period of time. Therefore, inflation is often defined as the process of increasing prices in a country. Inflation is mostly measured using price index movements. The Consumer Price Index (CPI) is the most common measure of inflation.[71] It measures the costs of a market basket of certain goods and services that are designated as essential for the standard of living.[72]

According to EUROSTAT, the annual inflation rate measured by the Harmonized Index of Consumer Prices (HICP) reached 3.4 percent in September 2021, marking its highest level since September 2008.[73] It is expected that the annual inflation in the euro area will be 2.5% in June 2024, a decrease from 2.6% recorded in May 2024.[74]

This inflationary trend brings to the forefront and specifies the issue of the impact of inflation on insurance interest, as inflation disrupts a regular (normal) economic balance in the relationship regarding insurance contracts (i.e., the relationship between the agreed insurance premium and the value of the insured interest). During the duration of the insurance contract, due to inflation, the agreed insurance premium and the insured interest can lose part of their economic value.

Given that this challenge is not new to the insurance industry (recalling the hyperinflation period of the 1980s), the response to this challenge is

[70] M. Ćurković (2017), 236.

[71] M. Babić, *Makroekonomija*, XIII. Dopunjeno i izmijenjeno izdanje, Nakladnička kuća Mate, Zagreb 2003, 491.

[72] The IPC is prepared in accordance with the methodological principles set by the International Labor Organization (ILO) and the Statistical Office of the European Union (Eurostat). The State Bureau of Statistics (DZS) is the institution that calculates and publishes the consumer price index for the Republic of Croatia.

[73] https://www.index.hr/vijesti/clanak/godisnja-inflacija-u-eurozoni-u-rujnu-na-najvisoj-razini-u-13-godina-javlja-eurostat/2307907.aspx, last visited 05. 10. 2021,

[74] https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Inflation_in_the_euro_area, last visited 05. 08. 2024.

not unfamiliar—namely, the introduction of so-called index clauses (adjustment clauses) in insurance contracts, which align the inflationary effects on the contractual relationship from the insurance (i.e., the relationship between the agreed insurance premium and the value of the insured interest). Therefore, the only question remaining is the timing of when the insurance industry will respond by introducing such protective provisions.

Although all types of insurance are susceptible to inflation (both indemnity and non-indemnity), life insurance is marked as particularly 'dependent' on inflation because: "[...] If an anti-inflation clause is not included, traditional life insurance (death, survival) will go to the junkyard of history. It is already challenged by low-interest rates and lack of profitability, and inflation would finish it off without an anti-inflation clause. [...]",[75] as "[...] there is a negative correlation between inflation and the demand for life insurance [...]."[76]

6. Conclusion

In civil law, the concept of interest is related to various material and procedural legal institutes. The concept of interest, in the material legal sense, in insurance contract law is referred to as insurance interest.

Insurance interest exists only if there is a need for a person—the insured—to prevent the occurrence of the insured event, as they would otherwise suffer some material loss.[77]

Insurance interest in insurance contract law is important not only because it determines the status of a person (either natural or legal) who can be the insured party, the bearer of the insured risk, but also because the existence of insurance interest in property (indemnity) insurance is a prerequisite for the validity of the insurance contract itself.

In property insurance, the absence of insurance interest is grounds for (absolute) nullity of the insurance contract (effects *ex tunc*).

From the absence of insurance interest in property insurance, which results in the nullity of the insurance contract, it is important to distinguish situations in which insurance interest exists but later ceases. In such cases,

[75] M. Ćurković, *Inflacija prijeti osiguranju - povratak antiinflacijskih klauzula u ugovor o osiguranju*, available at www.osiguranje.hr: https://osiguranje.hr/Clanak-Detalji.aspx?21328, last visited 02. 10. 2021.

[76] T. Beck, I. Webb, "Determinants of Life Insurance Consumption across Countries", *The World Bank Economic Review* 1/2002, 15.

[77] Compare to E. Vaughan, T. Vaughan, Osnove osiguranja – upravljanje rizicima, Mate, Zagreb 2000, 130.

the insurance contract is not null and void; rather, the contract ends on the day the insurance interest ceases.

In personal insurance, the insurance interest arises from a person's concern for their (or another's) physical integrity.[78] Although such an insurance interest cannot be said to be of a property nature (since a person does not have an "economic" value), there is nonetheless a material interest underlying the concern that, in the event of the occurrence of the insured event (death, survival, accidents, etc.), a monetary benefit is paid out to them or to the insurance beneficiary.

For this reason, we can conclude that the basic "similarity" of insurance interest in property (indemnity) insurance and insurance (non-indemnity) concerning individuals arises from the fact that, in both cases, it reflects a person's interest in preventing the occurrence of the insured event; the fundamental "difference" between insurance interest in property (indemnity) insurance and insurance interest in insurance (non-indemnity) concerning individuals arises from the fact that, in property insurance, the value of the insurance interest is determined concerning the economic value of the insured item (or interest), while in personal insurance, the value of the insurance interest is determined concerning the mutually agreed insured amount.

What legislatively differentiates the solutions is the answer to the question of whether, in personal insurance, insurance interest is a condition for the validity of the insurance contract, as is the case with property insurance.

In Croatian legislation, insurance interest is not a condition for the validity of personal insurance contracts (though it is not nonexistent), except that in the case of insurance for a third party concerning death, written consent from that person is required.

Given the macroeconomic indicators, the expressed inflation signifies a very relevant issue (even) in the insurance industry, and its impact on insurance interest is correspondingly significant. Therefore, in the concluding part of this work, we pointed out the possibility of countering this undesirable economic phenomenon that insurers can address through the introduction of so-called index clauses in insurance contracts, which align the value of the insurance premium and the value of the insurance interest with inflation indicators.

[78] A. Donati, G. Volpe Putzoli, *Manuale di diritto delle assicurazioni, Giuffre` Francis Lefebre*, Milano 2019, 142.

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INTERES U OSIGURANJU

Apstrakt

Rad je posvećen pojmovnom određenju interesa u osiguranju u smislu pravnog instituta materijalnog prava osiguranja.

Uvodni dio rada posvećen je općem određenju pojma „interes" u njegovu jezičkom smislu, odnosno njegovu značenju u građanskom pravu, kako onom procesnom tako i onom materijalnom.

Središnji dio rada posvećen je određenju pojma – pravnog instituta interesa u osiguranju, pri čemu se pravi distinkcija između interesa u osiguranju u imovinskim osiguranjima (odštetnim osiguranjima) i interesa u osiguranju u osiguranjima osoba (neodštetnim osiguranjima), pravnim posljedicama izostanka ili prestanka interesa u osiguranju, te utjecaju inflacije na interes u osiguranju.

Ključne riječi: interes, interes u osiguranju, imovinsko osiguranje, osiguranja osoba, inflacija.

Wolfgang Rohrbach* **DOI: 10.56461/ZR_24.ONS.18**

EISENBAHNEN IM SPIEGEL DER VERSICHERUNGSGESCHICHTE ÖSTERREICHS

Zusammenfassung

In der Entwicklungsgeschichte der Eisenbahnen, die verbunden ist mit jener der Fabriken und Versicherungen Österreichs, finden sich eine Reihe nachhaltiger Wechselbeziehungen. Alle drei Wirtschaftszweige sind „Kinder" der Industriellen Revolution, deren Ausgangspunkt die Erfindung der Dampfmaschine ist. Der Einsatz der neuen Maschinen in mehreren Branchen führte zu weitreichenden Folgen, die bis heute teilweise verwendetes Kulturerbe sind.[1] *In der Österreichischen Monarchie erfolgte im zweiten Drittel des 19.Jhs parallel zum Ausbau der Industrie jener der Eisenbahnverbindungen. Adelige Unternehmer und Händler aus dem Großbürgertum waren die Financiers und Betreiber der Bahnlinien.*[2]

Die Entwicklung der Eisenbahn von den ersten Dampflok-Garnituren der Donaumetropole Wien über gigantische -heute zum Weltkulturerbe zählende - Bahnbauprojekte der Donaumonarchie und ihrer Nachfolgestaaten sind eine Erfolgsgeschichte des 19. 20. und 21. Jahrhunderts. Durch die Eisenbahnen konnten große Mengen lebensnotwendiger Güter, Rohstoffe für die Industrie und die Erzeugnisse der industriellen Massenproduktion, über weite Strecken sicher und rasch transportiert bzw. ausgetauscht werden. Damit schuf die Eisenbahn Voraussetzungen für die Entstehung von großen einheitlichen Märkten. Ohne Eisenbahn wäre

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1 https://www.visitgo.nl › tun › inselg... Kulturerbe und Geschichte. Eine Reise in die Vergangenheit mit einer Dampfmaschine. Unternimm eine Reise in die Vergangenheit mit der Kleinbahn, abgefragt am 10. 6. 2023.

2 https://epub.jku.at › pdfPDF Sozialgeschichte der Eisenbahn am Übergang von der Privat, von RF Hofer · 2015 — Die Eisenbahnen, zu Beginn von Privatunternehmen erbaut und geführt, wurden später vom Staat übernommen, abgefragt am 12. 6. 2023.

aber auch die Ansammlung einer oft von weither gekommenen Arbeitskräften nicht möglich gewesen. Im Zusammenhang mit den technischen Errungenschaften in Industrie und Verkehrswesen entstanden aber auch neuartige Risiken, deren Größe bzw. Schadensausmaß ein modernes kapitalstarkes Versicherungswesen erforderten.

Von den neuen industriellen Zentren ging einerseits rasches Wirtschafts- und Bevölkerungswachstum aus., andererseits stiegen die Unfallgefahren. Eine Versicherungs- bzw. Sozialgesetzgebung zur Eindämmung krankheits-, unfall- und altersbedingter Notsituationen in den Schichten der Fabriksarbeiter, Kleinunternehmer und dem an Lokomotiven und in Zügen tätigen Bahnpersonal wurde erforderlich. Österreich stieg nach der Mitte des 19.Jhs zu einer „Versicherungsweltmacht" auf.[3]

Die Eisenbahnen halfen indirekt der gesamten europäischen Wirtschaftspolitik, Nationen einander zu nähern. Ein hervorragendes Beispiel für die Stärkung der internationalen Beziehungen liefert der Orientexpress. Die ursprüngliche Route des Orient-Express verlief von London nach Paris, Wien, Budapest, Belgrad, Sofia und erreichte dann das Ziel in Konstantinopel – politisch und technologisch gesehen eine Meisterleistung für die damaligen Verhältnisse.

Zur Wende des 19/20. Jahrhunderts hatten die Eisenbahnen wichtige Funktionen im Pendlerverkehr, Bergbau, grenzüberschreitenden Handel; bei Militärtransporten, im Tourismus usw. erreicht. Mit der zweiten und dritten Industriellen Revolution (symbolisiert durch Fließbandproduktion und Computer ausgerichtete Detailarbeit) führte zur Verbesserung und Beschleunigung in der gesamten Eisenbahnproduktion. Komfortablere und schnellere Züge, automatisierte computergesteuerte Kontroll- und Sicherheitsanlagen prägten den Bahnverkehr im letzten Drittel des 20.Jhs. Parallel dazu wurden und werden immer häufiger Anpassungen der Versicherungsprodukte an die Erfordernisse der Eisenbahnrisiken durchgeführt.

[3] W. Rohrbach, *Versicherungsgeschichte Österreichs Bd.1 - Von den Anfängen bis zum Börsenkrach 1873*, Wien 1988, 243.

Die Bahn ist eines der sichersten Verkehrsmittel. Trotzdem muss die Sicherheitstechnik auch im 21. Jh. weiter verbessert werden. In einem von der Deutschen Bahn AG im Herbst 2015 erarbeiteten strategischen Konzeptpapier mit dem Titel „Zukunft Bahn" wird die Feststellung getroffen, dass der Schienenverkehr das Potenzial hat, der Verkehrsträger des 21. Jahrhunderts zu sein – verlässlich, komfortabel.[4]

Mit dem Zug sind CO2-Emissionen nur halb so hoch wie mit dem Flugzeug. *Falls man sich um die Auswirkungen von Reisen auf das Klima sorgen macht: Zugreisen sind viel umweltfreundlicher als Fliegen – oder Autofahren. Außerdem benötigen Reisende keinen Anschlusstransport ins Stadtzentrum, da sie dort direkt ankommen.*[5] *Mit dem Zug können Reisende auch kleinere, weniger bekannte Ziele erkunden. Europa verfügt über ein ausgesprochen ausgedehntes Schienennetz, sodass Sie auch einfach zu kleineren Städten gelangen oder abseits der Touristenzentren reisen können. Ein Manko sind bis heute sind die zahlreichen Verspätungen.*

Schlüsselwörter: *Eisenbahnnetz, Industriezentrum, Lokomotive, Transportversicherung, Unfallrisiko.*

1. Einleitung

Die Geschichte der im vorliegenden Beitrag dargestellten Wechselbeziehungen von Eisenbahnen und Versicherungen umfasst die organisatorischen und technischen Entwicklungen beider Wirtschaftszweige auf dem Gebiet (Alt) Österreichs vom 19. Jahrhundert bis in die Gegenwart. Für die Zeit bis 1918 gehören zu ihrem Gegenstand das Gebiet des Kaisertums Österreich bzw. der Doppelmonarchie Österreich-Ungarn. Mit rund 676.000 km² war Österreich-Ungarn nach der Annexion Bosniens und der Herzegowina 1908 flächenmäßig das zweitgrößte (nach dem Russischen Reich) und mit 52,8 Millionen Menschen (1914) das bevölkerungsmäßig drittgrößte Land Europas (nach dem Russischen und dem Deutschen Reich). Sein Gebiet umfasste zuletzt die Territorien der heutigen Staaten Österreich, Ungarn, Tschechien

[4] https://www.vdv.de › die-zukunft-d... Schienenverkehr als zukünftiges Verkehrsmittel für unser Klima, abgefragt am 25. 5. 2023.

[5] https://www.allianz-pro-schiene.de › ...Umwelt und Verkehr: Mit der Bahn am klimafreundlichsten unterwegs. Die Bahn ist das umweltfreundlichste motorisierte Verkehrsmittel, abgefragt am 10. 6. 2023.

(mit Ausnahme des Hultschiner Ländchens), Slowakei, Slowenien, Kroatien, Bosnien und Herzegowina, Montenegro (Gemeinden an der Küste), Polens (Westgalizien) sowie Teile des heutigen Rumäniens (Siebenbürgen, Banat, später Kreischgebiet, östlicher Teil von Sathmar, Südmarmorosch, Südbukowina), der Ukraine, Italiens (Trentino-Südtirol und Teile von Friaul-Julisch Venetien) und Serbien (Vojvodina).[6]

Entsprechend ausgebaut war das Eisenbahnnetz, flankiert von einem in wenigen Jahrzehnten errichteten und ständig auf die neuen Gefahren ausgerichteten Versicherungs- und Vorsorgenetz. 1913 stellte Dr. Heinrich Ritter von Wittek, Geh. Rat uns Sektionschef im k. k. Eisenbahn-Ministerium in der Einleitung seines Buches „Österreichs Eisenbahnen und die Staatswirtschaft" fest:

„Gerade für Österreich, einem Ländergebiet, dem die Naturgabe leicht und bequem schiffbarer Wasserstraßen nur in sehr beschränktem Maß zuteilgeworden ist — kann die Bedeutung der Schienenwege nicht hoch genug angeschlagen werden. Die Ausbreitung und Verdichtung des Eisenbahnnetzes stellt demnach eine große wirtschaftliche Kulturarbeit dar. Sie bildet die Grundlage, auf welcher die heutige Entwicklung der einzelnen Produktionszweige, namentlich aber des Handels und der Industrie, zum wesentlichsten Theil beruht."[7] Das gesamte Bahnnetz der Eisenbahnen in der Monarchie hatte im Jahre 1913 eine Länge von etwa 46.000 km.

1.1. Frage zum Massentransport am Beginn des 19. Jhs: Schiffskanäle oder Bahnnetze?

Am Anfang der Industrialisierung der altösterreichischen Regionen stand die Frage: Soll der Transport der Massengüter über Schiffskanäle oder Bahnnetze erfolgen. Im Kaisertum Österreich wurde diese Frage von großer Tragweite ausnahmsweise nicht in der Donaumetropole Wien gelöst.

Dazu ist ergänzend festzustellen: In den an Flüssen oder Seen liegenden Regionen Altösterreichs besaß der Transport größerer und schwerer Warenmengen zu Wasser eine alte und erfolgreiche Tradition. Die Flößer- und Schiffervereinigungen genossen Ansehen. Wo jedoch der Landtransport unumgänglich war, konnten mit den zur Verfügung stehenden Pferde- und Ochsenfuhrwerken nur relativ geringe Lasten oder Warenmengen zeitraubend auf den holprigen Straßen transportiert werden.[8]

[6] https://de.m.wikipedia.org › wiki Österreich-Ungarn Doppelmonarchie, abgefragt 7. 6. 2023.

[7] https://libsysdigi.library.uiuc.edu, abgefragt 1. 6. 2023.

[8] https://lernarchiv.bildung.hessen.de › ... PDF Die Eisenbahn im 19. Jahrhundert

Österreich entschied sich für die Eisenbahnvariante. Das Ursprungsland des österreichischen Eisenbahnwesens ist Böhmen: 1808 hielt Franz Josef von Gerstner vor der „Böhmisch-hydrotechnischen Gesellschaft" in Prag eine bemerkenswerte Rede, in der er für die Anlage einer Eisenbahn und nicht eines Kanals zwischen Moldau und Donau plädierte. (Schon damals ging es um die Modernisierung des Salztransports vom Salzkammergut nach Böhmen.) Im Zusammenhang mit der „Dresdener Elb-Konferenz" (1819 f.) – wo unter anderem die „Freie Fahrt von Prag bis ans Meer (Nordsee)" vereinbart wurde – tauchte das Problem der Verbindung von Moldau und Donau neuerlich auf: Es sollte durch einen Kanal oder eine Eisenbahn gelöst werden. Österreich entschied sich aus technischen und ökonomischen Gründen für die Eisenbahnvariante.[9] Die Vorteile der Eisenbahn werden in den Definitionen des Brockhaus-Bilder-Konversations-Lexikons in überzeugender Weise dargestellt.

1.2. Die ältesten Definitionen von Eisenbahnen

Als Eisenbahn wurde anfangs des 19. Jahrhunderts der entstandene neuartige Fahrweg aus Eisen bezeichnet Als Antriebskraft dienten zuerst Pferde, dann Lokomotiven. Wörtlich heißt es dann im „Brockhaus-Bilder-Konversations-Lexikon" (1837): „Eisenbahnen, Riegel oder Schienenwege sind fahrbare Straßen mit festen Gleisen von Eisenschienen oder von mit Eisen beschlagenem Holz und Steinen, auf denen die Räder der Wagen laufen, wodurch der Widerstand, welchen sie auf gewöhnlichen Wegen am Umfange erleiden, so weit aufgehoben wird, dass beinahe nur die Reibung an der Achse noch zu überwinden bleibt und ihre Fortbewegung durchschnittlich wenigstens zehnfach erleichtert ist."[10]

Einige Jahrzehnte später wurde ergänzend festgehalten: „Eisenbahnen, im weitesten Sinne solche Straßen, auf denen die Fahrzeuge in festen Schienengleisen fortbewegt werden. Durch die Anordnung von Schienengleisen wird die sonst bei Bewegung der Fahrzeuge bedeutende Reibung zwischen Radreisen und Straßenfläche sehr vermindert und dadurch erreicht, dass große Lasten mit geringen Kräften fortbewegt werden können."[11] Später wurde auch der Aspekt Antrieb in die Definition aufgenommen.

- lernarchiv-bildung-hessen, abgefragt am 31. 5. 2023.

[9] https://austria-forum.org › Geschichte der Eisenbahn in Österreich Erste Pferdeeisenbahn: Linz–Budweis. Franz Josef Ritter von Gerstner, abgefragt am 10. 6. 2023.

[10] Stichwort „Eisenbahn" im „Brockhaus-Bilder-Konversations-Lexikon" (1837).

[11] https://de.wikipedia.org/wiki/Geschichte_der_Eisenbahn, abgefragt am 22. 5. 2023.

2. Die ersten Eisenbahnlinien Österreichs

Gerstner selbst fühlte sich bereits zu alt, um eine größere Rolle in der Realisierung des Projektes zu spielen. Sein Sohn Franz Anton von Gerstner, Professor in Wien, begrüßte die fortschrittliche Haltung bei Hof und widmete sich theoretischen Details des Eisenbahnprojekts. Die damalige Inflation brachte das Unternehmen in Bedrängnis; Intrigen veranlassten Gerstner jun., die Baustelle 1828 zu verlassen.[12]

2.1. Die Pferdeeisenbahn-eine österreichische Sparvariante

Die Pferdeeisenbahn Budweis–Linz–Gmunden wurde 1832 eröffnet. Technisch stellt sie keinen besonders großen historischen Meilenstein dar. Angesichts der Sparmaßnahmen nach Gerstner Juniors Abgang konnte der Südteil der Strecke später nicht auf Dampfbetrieb umgestellt werden. Aber auch für den Pferdebetrieb waren die Steilrampen ungünstig, mussten doch die Züge vor der Überwindung der Steilrampen geteilt werden. Da der Transport aber funktionierte – außer Salz wurden sehr bald auch viele andere Güter befördert – so war das Unternehmen vorübergehend ein ökonomischer Erfolg.[13]

2.2. Die Kaiser-Ferdinand-Nordbahn - die erste Dampfeisenbahn

Als „Geburtsstunde der Eisenbahn" (mit Lokomotivbetrieb) in Österreich gilt der Spatenstich 1836 für die 1838 eröffnete Kaiser Ferdinands-Nordbahn. Als erste Dampfbahn Österreichs wurde sie nach Plänen von Franz Xaver Riepl von einem Bankenkartell unter Führung des Hauses Rothschild in den Jahren 1836 -1847 von Wien nach Brünn und das nordmährisch-schlesische Industrieviertel nach Oderberg geführt, wo man 1848 den Anschluss an das preußische Bahnnetz herstellte. Damit entstand eine direkte Verbindung zwischen Wien und Hamburg.[14] Weiters gehörten die Bahnlinien- von Gänserndorf bis Marchegg und -von Wien nach Stockerau zur Kaiser- Ferdinand- Nordbahn.

[12] K. Bachinger, „Das Verkehrswesen", in: *Die Habsburgermonarchie 1848–1918. Band I* (Hrsg. Adam Wandruszka, Peter Urbanitsch), Wien 1973, 279.

[13] https://de.m.wikipedia.org › wiki Pferdeeisenbahn Budweis–Linz–Gmunden, (Länge 178,5 km); abgefragt am 1. 6. 2023.

[14] https://www.eisenbahn.gerhard-obermayr.com › ... Kaiser-Ferdinand-Nordbahn - Die Eisenbahnen in Österreich Kaiser-Ferdinand-Nordbahn; Hauptstrecke: Hauptstrecke: Wien/Nordbahnhof - Gänserndorf - Lundenburg - Prerau – Oderberg, abgefragt am 5. 6. 2023.

Die statistischen Angaben setzen mit dem Jahr 1838 ein, damals beförderte man 176 005 Personen allein auf der Stecke Wagram-Gänserndorf.

Das Projekt entwickelte sich zur wahren Erfolgsgeschichte: Bis zur Verstaatlichung im Jahre 1906 errichtete die ökonomisch höchst erfolgreiche Nordbahn-Gesellschaft ein sehr umfangreiches Netz. Die Nordbahn wurde zur wichtigsten Bahnlinie der Habsburgermonarchie.[15]

Seit 185 Jahren auf Schiene ist die Eisenbahn in Österreich. Dies ist ein Modell der Dampflokomotive Austria der Kaiser Ferdinand-Nordbahn. Anno 1837 erbaut, schwankte das Gewicht zwischen 18 und 19t.

2.3. Die erste Staatsbahnphase (1841–1854/58)

Das Eisenbahnprogramm der k. k. Regierung sah die Errichtung mehrerer wichtiger Linien vor. Kernstück waren die Verlängerung Nordbahn und eine Südbahn von Wien zum Adriahafen Triest und nach Lombardo-Venetien. Angestrebt wurde aber auch die Vollendung der unter privater Ägide begonnenen Venedig-Mailänder Bahn.[16]

Als ersten Abschnitt der Südbahn, die Wien mit den Adriahäfen verbinden sollte, nahm man 1841 die Stecke Wien-Gloggnitz in Angriff. Der Semmering blieb damals noch unbezwungen; dann führte eine weitere Teilstrecke von Mürzzuschlag nach Graz (1844) und Cilli (1846).

3. Eisenbahnlinien als Vernetztes Verkehrssystem

Die Eisenbahn entwickelte sich im 19. Jahrhundert binnen weniger Jahrzehnte zu einem vernetzten Verkehrssystem, das die Reisezeiten in Europa drastisch verkürzte. Sie wirkte dabei als Katalysator der industriellen Revolution, da sie einerseits die infrastrukturellen Voraussetzungen für die Entwicklung der Schwerindustrie schuf und andererseits selbst eine gewaltige Nachfrage nach Eisen, Stahl und Maschinen erzeugte. Der moderne Brückenbau und Tunnelbau entstanden, um Bahnstrecken zu realisieren.[17]

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[15] http://www.zeno.org › Roell-1912 Kaiser-Ferdinand-Nordbahn Kaiser-Ferdinand-Nordbahn), die älteste Lokomotiveisenbahn Österreichs, als Privatbahn erbaut und betrieben, seit 1906 verstaatlicht, abgefragt 25. 4. 2023.

[16] https://www.morawa.at › detail › Di.. Die Geschichte der Eisenbahn - Eine Reise durch die Zeit - Jacob, Nina Beginnend mit den Anfängen der Dampflok und den ersten Schienenwegen im 19. Jahrhundert, abgefragt am 10. 6. 2023.

[17] https://segu-geschichte.de › eisenbahn Eisenbahn | Ausbreitung des Schienennetzes, abgefragt am 5. 6. 2023.

3.1. Die Auswirkungen des Eisenbahnbetriebes auf die Kaisermetropole Wien

Die großen Eisenbahnlinien verliefen von Wien in die verschiedenen Provinzen der Monarchie. In Wien wurden Kopfbahnhöfe errichtet; der Bau eines Zentralbahnhofs wurde zwar von Anfang an diskutiert, jedoch nicht realisiert. Ende der 80er Jahre des 20. Jahrhunderts stellte man (im Zusammenhang mit der Öffnung nach Osteuropa) neuerlich Überlegungen an, wobei als eventueller Standort das Südbahnhof-Gelände in Aussicht genommen wurde (Verbindung von der Westbahnstrecke durch einen [umstrittenen] Tunnel unterhalb des Lainzer Tiergartens). Es dauerte nur wenige Jahrzehnte, bis man auch daran ging, im innerstädtischen Verkehr bahnähnliche Anlagen herzustellen.[18]

3.1.1. Bahn, Wirtschaft und Stadtentwicklung

Der Bau der Eisenbahnen veränderte die ökonomischen Rahmenbedingungen für die Wirtschaft Wiens (vereinfachte die Rohmaterialzufuhr, verbesserte die Auslieferung), führte zu Standortveränderungen der Industrie (die Anschluss an die Eisenbahnlinien suchte und sich in deren Nähe ansiedelte), verlagerte die baulichen Wachstumsspitzen von den Ausfallsstraßen in den Bereich der Bahnlinien und erzwang infolge des großen Flächenbedarfs der Bahnen (insbesondere für Verschiebegleise, Frachtenbahnhöfe mit deren Infrastruktur und Bahnhöfe für den Personenverkehr) bedeutende Veränderungen der vorhandenen Flächenwidmung (kein anderes Verkehrsmittel hatte bis dahin in die Stadtstruktur und die Verbauung so stark eingegriffen); infrastrukturelle, ökonomische und soziale Auswirkungen ergaben sich aber auch dadurch, dass Bauflächen in der Umgebung von Bahnbereichen in der Gründerzeit für den Mittelstand qualitativ nicht mehr akzeptabel erschienen, somit einem Preisverfall ausgesetzt waren und bis zum Ersten Weltkrieg teilweise nicht verbaut wurden (dies ermöglichte in der Ersten Republik beispielsweise den Ankauf großer Grundareale und den Bau weitläufiger kommunaler Wohnhausanlagen entlang der Südbahnstrecke und in Heiligenstadt), und dass infolge des Platzbedarfs (insbesondere der Nordbahn, Nordwestbahn und Franz-Josefs-Bahn, deren Anlagen (samt den Bahnhöfen) erstmals innerhalb des Linienwalls errichtet wurden) Barrieren für die städtische Verbauung entstanden (Trennung der Leopoldstadt von der regulierten Donau und Abwertung des rechten Donauufers, das im Widerspruch zu

[18] https://www.geschichtewiki.wien.gv.at › ... Eisenbahn – Wien Geschichte Wiki 4. 7. 2022.

den ursprünglichen Intentionen der Stadtplanung überwiegend für Lager- und Kühlhäuser, Kasernen, Straßenbahnremisen, Ausstellungs- und Sportanlagen sowie Gebäude für Handel, Industrie und Schifffahrt Verwendung fand); auch die Westbahn (verzögerte Ausdehnung von Fünfhaus nach Norden und danach getrennte Entwicklung) und Südbahn (Teilung der über den Linienwall hinausreichende Vorstadt Wieden und Förderung der Selbständigkeit Favoritens) hatten Auswirkungen auf die Stadtentwicklung.[19]

3.1.2. Die Lokomotivfabriken Wiens

Als Mittelpunkt des Eisenbahnnetzes der Monarchie und Standort von Industrien mit überdurchschnittlichem Bedarf an hochqualifizierten Arbeitskräften war es naheliegend, dass Wien auch zu einem bedeutenden Zentrum des Lokomotivbaus wurde. Das war eine Rolle, die es nach dem Zerfall der Monarchie sukzessive einbüßte. Nachdem anfangs mangels einer Eigenproduktion alle Lokomotiven aus England oder den USA hatten importiert werden müssen, wurde die erste im Inland gebaute mit Namen „Patria") 1840 in der Werkstätte des Wiener Nordbahnhofs unter der Leitung des englischen Ingenieurs John Baillie hergestellt. Seit 1860 kam es auch vereinzelt zum Bau von Lokomotiven in der Werkstätte der Kaiserin-Elisabeth-Westbahn (erbaut 1858, eingestellt 1925; Westbahnhof) und in der Österreichischen Staats-Eisenbahn-Gesellschaft (StEG, erbaut 1871/1872, heute Österreichische Bundesbahnen (ÖBB)-Hauptwerkstätte Simmering, 11, Grillgasse). Die erste eigentliche Lokomotivfabrik war die 1839/1840 errichtete, vom englischen Ingenieur John Haswell geplante und geleitete Maschinenwerkstätte der Wien-Raaber Bahn beim Südbahnhof, ab 1854 Maschinenfabrik der Österreichischen Staats-Eisenbahn-Gesellschaft (1929 geschlossen).

1844 errichtete der aus Philadelphia (USA) stammende Lokomotiv-Fabrikant William Norris, dessen Lokomotive „Philadelphia" (Philadelphia Brücke) schon 1839 beim Bau der Südbahnstrecke zum Einsatz gekommen war, auf dem Areal 9, Währinger Straße 59, eine Lokomotiv-Werkstätte, die bis 1846 in Betrieb war. Sie wurde 1852 vom Maschinenfabrikanten Georg Sigl übernommen, der 1857 mit einer rasch expandierenden Lokomotivproduktion begann; in den Krisenjahren nach 1873 musste er die Erzeugung wieder einstellen. Nach Sigls Tod (1887) wurde das Werk endgültig geschlossen.

[19] https://www.grin.com › document Die Geschichte der Eisenbahn Die Eisenbahn galt als die umwälzendste technische Neuerung des 19. Jahrhunderts, abgefragt am 13. 6. 23.

3.1.3. Die Wiener Lokomotiv-Fabrik AG

Die Wiener Lokomotiv-Fabrik-Actien-Gesellschaft erhielt am 6. September 1869 ihre Konzession und die Statuten genehmigt, hielt die konstituierende Versammlung am 1. August 1870ab. Offizieller Sitz der Gesellschaft war Wien mit einer „Zweigniederlassung in Groß Jedlersdorf bei Floridsdorf nächst Wien". Am freiliegenden Gelände zwischen der Nordbahn und der Nordwestbahn wurde 1870/71 die von Bernhard Demmer – zuvor technischer Direktor bei der StEG – großzügig geplante Werksanlage errichtet. Zusätzlich zu den für die Produktion und Verwaltung notwendigen Gebäuden wurden auch sieben Arbeiterwohnhäuser mit 117 Wohnungen erbaut. Schon während der Bauarbeiten bemühte sich die Geschäftsleitung um Aufträge, und so konnte schon am 10. Juni 1871 die erste Lokomotive, die „HUMBOLDT" an den Kunden, die ÖNWB, übergeben werden.

Die Auftragslage war – der allgemeinen wirtschaftlichen Lage entsprechend – schwankend. So wurden nach dem Wiener Börsenkrach von 1873 nur sieben Loks verkauft. Dementsprechend entwickelte sich auch die Zahl der Arbeitsplätze. In schlechten Jahren waren weniger als 1.000 Arbeiter hier beschäftigt, während es in guten ungefähr 1.500 Personen waren.

Ab 1881 wurde zudem der Bau von Zahnradlokomotiven aufgenommen. Nachdem das k. u. k. Militär (Eisenbahn Bureau des Generalstabs") die Zustimmung für die Elektrifizierung von Eisenbahnstrecken gegeben hatte, wurden ab 1911 auch Elektrolokomotiven für den Streckendienst gebaut. Den Anfang machte die Reihe 1060 für die Mittenwaldbahn. Da nach dem Ende des Ersten Weltkriegs zahlreiche Kunden verloren gingen, musste sich die Geschäftspolitik umstellen. Für die Österreichischen Bundesbahnen führte man die Hauptrevision an Dampflokomotiven durch, ab 1922 fertigte man Straßenwalzen und ab 1926 stationäre Kesselanlagen. Dazu kam noch Industrieanlagenbau.

1923 wurden die ersten Krokodil-Lokomotiven der Reihe 1100 für die BBÖ gebaut. 1924/1925 wurden im Auftrag der polnischen Staatsbahnen ehemals russische Güterzuglokomotiven auf Normalspur umgespurt und die Hauptrevision durchgeführt. 1929 landete Floridsdorf einen Coup, in dem sie mit der Reihe 214 die damals stärkste Dampflokomotive Europas konstruierte. Die Treibstangen von 4,10 m Länge sind bis heute die längsten der Welt. Der Beschaffung dieser Loktype war eine intensive politische Diskussion vorangegangen. Die 214er waren die stärksten und schnellsten in Österreich gebauten Dampflokomotiven.

In der Zwischenkriegszeit wurde die Lokomotivindustrie im klein gewordenen Österreich branchenmäßig zusammengefasst. Politisch hatte die WLF dabei die besten Karten, denn von den vier Lokomotivfabriken in Österreich überlebte nur die Floridsdorfer Lokomotivfabrik. Alle anderen (StEG in Wien, Krauss & Co in Linz, Lokomotivfabrik Wiener Neustadt) wurden von der WLF im Zuge von Fusionen 1930 übernommen und umgehend geschlossen, einzelne Typen wurden in Floridsdorf weiter gefertigt.

In der Zeit des Nationalsozialismus wurde die Fabrik eine Tochterfirma von Henschel & Sohn. Während des Zweiten Weltkriegs hatte das Werk unter den schweren Bombenangriffen zu leiden, konnte aber immer weiter produzieren. Hauptsächlich wurden unter massivem Einsatz ausländischer Zwangsarbeiter. Dampflokomotiven der Baureihe 52 produziert, über 1.172 Stück für die DR und 20 Stück für die CFR (dort als 150 bezeichnet), die höchste Produktionszahl aller am 52er-Bau beteiligter Lokomotivfabriken. Kriegsbedingt stieg die Zahl der Arbeiter auf bis zu 8.000.

Ab dem Frühjahr 1944 wurde die Produktion auf die DR-Baureihe 42 umgestellt und am 13. Juni 1944 wurde die 42 2301 an die DR übergeben. Am 9. März 1945 verließ mit 42 2580 die 2.115. und letzte während des Kriegs gebaute Lokomotive das Werk. Mitte April 1945, nach dem Ende der Kampfhandlungen in Wien, wurden große Teile des Werks demontiert und in die Sowjetunion abtransportiert. Neben Maschinen wurde auch Rohmaterial abtransportiert, angeblich 800 Waggonladungen. Trotzdem stand Ende Oktober mit der Lokomotive 42 2701 der DR-Baureihe 42 die erste nach dem Krieg gebaute Dampflokomotive vor der Werkshalle. Neben dem Bau neuer Loks war – wegen der Zerstörung der benachbarten Hauptwerkstatt Floridsdorf – die Hauptrevision von Lokomotiven der ÖStB die Hauptarbeit im Werk.

Während der Zeit als USIA-Betrieb wurden nur wenige Lokomotiven hergestellt, dafür aber unter anderem Zentralheizungskessel, Seilwinden und Fahrgestelle für Eisenbahn-Drehkräne. Erst ab 1953 wandte man sich wieder vermehrt dem Lokomotivbau zu. Für Indien wurden erst 99 Lokomotiv-Ersatzkessel geliefert. Nach der 1956 erfolgten Übernahme durch die Simmering-Graz-Pauker AG (SGP) stellte die Wiener Lokomotivfabrik 1969, genau 100 Jahre nach ihrer Gründung, den Betrieb ein. Im August 2020 wurde im Eingangsbereich der Shopping City Nord, die heute auf dem Gebiet der ehemaligen Fabrik steht, eine vom Bezirksmuseum Floridsdorf gestaltete Gedenktafel zur Erinnerung an die LOFAG enthüllt.[20]

[20] https://www.vdv.de › die-zukunft-d...Schienenverkehr als zukünftiges Verkehrsmittel für unser Klima. Die Zukunft der Schiene ... Reaktivierung von Bahnstrecken

1927-1929 bauten die Österreichischen Industriewerke Warchalowski, Eißler & Co. (1929 Fusionierung mit der Österreichischen Staats-Eisenbahn-Gesellschaft (StEG); 16, Wilhelminenstraße 91) Dieseltriebwagen. 20d)

Ab 1933 erzeugte die Maschinen- und Waggonbau-Fabriks AG in Simmering (ab 1941 Simmering-Graz-Pauker, seit 1989 SGP-Verkehrstechnik, seit 1994 im Mehrheitsbesitz der Siemens AG Österreich, 11, Leberstraße) Dieseltriebwagen, später Elektrotriebwagen und bis 1956 Diesellokomotiven. Nach der Schließung der Lokomotivfabrik Floridsdorf wurden noch bis 1980 Diesellokomotiven gebaut, seit 1972 werden U-Bahn-Triebwagen erzeugt.

3.2. Der Donauraum und angrenzende Regionen

Die Donau durchzieht als einer der bedeutendsten Ströme des Kontinents zentrale Regionen Mittel- und Südosteuropas. Seit Jahrhunderten werden ihr deshalb verschiedene Bedeutungen zugeschrieben, sei es einerseits als wichtiger Transportweg oder andererseits als eine Art verbindende Ader kultureller Gemeinsamkeiten. Auf politischer Ebene wurden und werden auf diese Weise oft Verbindungen gesucht, um die Zusammengehörigkeit dieser Regionen, zu betonen.

Es lohnt es sich daher zu untersuchen, welchen Herausforderungen der Donauraum im Laufe des 19. 20. gegenüberstand und im 21.Jh gegenübersteht. Als „Bindeglied" dafür lassen sich die Binnenschifffahrt und Eisenbahn als hochkomplexe Verkehrsträger anführen. Eisenbahn und Donauschiffe sind nämlich sehr gut geeignet, die hohen Anforderungen und Probleme anschaulich zu bewältigen, denen sich im vorliegenden Fall die Verkehrswirtschaft in einem heterogenen Raum wie jenem im Einzugsgebiet der Donau samt angrenzenden Regionen „gestern" gegenübersah, und „heute" bzw. künftig gegenübersieht. Der Donauraum war wie etliche anderen Gebiete Europas lange Zeit eine umkämpfte Region, deren Zusammenhalt nach dem Zerfall der Donaumonarchie abgeschwächt wurde und der sich nach Zweiten Weltkrieg als zweigeteilt wiederfand, mit zwei sich politisch, wirtschaftlich und auch gesellschaftlich in divergierende Richtungen entwickelnden Teilen.

Zum ersten Mal fuhr der zunächst als Express d'Orient bezeichnete Orient-Express am 5. Juni 1883 vom Pariser Gare de l'Est in Richtung Osten als Luxuszug der damaligen ersten Wagenklasse. Die von der CIWL bestellten neuen Drehgestellwagen waren allerdings noch nicht verfügbar, so dass

... Warum wir von der sicheren und klimafreundlichen Eisenbahn besonders profitieren, abgefragt am 22. 6. 2024.

die meisten Wagen noch dreiachsig waren. Nur ein Schlafwagen der CIWL war bereits ein Vierachser. Nagelmackers verzichtete daher zunächst auf eine große Einweihung, diese folgte erst, als die von den CIWL-eigenen Werkstätten und der Münchner Waggonfabrik Josef Rathgeber gebauten neuen Schlaf- und Speisewagen mit Drehgestellen geliefert worden waren. Die Reisezeit von Paris bis Konstantinopel betrug 81 Stunden und 40 Minuten.

Am 4. Oktober 1883 fand am Gare de l'Est die feierliche Abfahrt zur offiziellen Einweihungsfahrt statt, zu der Nagelmackers neben Vertretern der beteiligten Bahngesellschaften und der durchfahrenen Staaten verschiedene Pressevertreter geladen hatte, unter anderem die bekannten Journalisten Henri Opper de Blowitz und Edmond About. Beide veröffentlichten begeisterte Berichte über die Fahrt, die ganz wesentlich zum Erfolg des Orient-Express beitrugen. In den durchfahrenen Ländern gab es jeweils lokale Speisen und Folklore-Darbietungen, in Rumänien empfing König Carol I. die Reisenden in Schloss Peleș.

Aufgrund der guten Nachfrage verkehrte der Orient-Express bereits ab 1. Juni 1884 zwischen Paris und Wien täglich. Die CIWL ergänzte nach dieser erfolgreichen Einführung ihres ersten Luxuszuges ihren Namen und nannte sich ab diesem Jahr Compagnie Internationale des Wagons-Lits et des Grands Express Européens. Nachdem in Serbien 1884 die Bahnstrecke zwischen Belgrad und Niš fertiggestellt worden war, wurde der Orient-Express einmal pro Woche ab Budapest bis Niš geführt. Von Niš gab es lediglich einen beschwerlichen Anschluss mit Pferdekutschen nach Sofia und weiter bis nach Belowo. Ab dort fuhren Züge der Orientbahn bis Konstantinopel. 1887 folgte nach dem Lückenschluss zwischen Serbien und der Strecke Saloniki–Skopje der Orientbahn die Verlängerung der in Niš endenden Fahrten bis ins damals osmanische Saloniki.

Durchgehende Schienenverbindung bis Konstantinopel

Die Bulgarische Staatsbahn stellte schließlich 1888 die Strecke von Belowo bis zur serbischen Grenze bei Dimitrovgrad (damals Zaribrod) fertig, wo Anschluss an die ebenfalls 1888 erbaute Strecke nach Niš bestand. Ab dem 12. August 1888 verkehrte der Orient-Express durchgehend über Budapest, Belgrad und Sofia bis zu einem temporären Bahnhof in Konstantinopel. Dieser wurde 1890 durch den Neubau der Müşir-Ahmet-Paşa-Station ersetzt, des Bahnhofes Sirkeci. Die Reisezeit nach Konstantinopel reduzierte sich gegenüber 1883 um über 14 Stunden. Neben den nunmehr zweimal wöchentlich verkehrenden Zügen nach Konstantinopel verkehrte weiterhin einmal

pro Woche ein Flügelzug nach Bukarest. Die CIWL konnte trotz persönlichen Einsatzes von Nagelmackers 1888 nicht verhindern, dass neben ihrem Luxuszug täglich ein Schnellzug (Konventionalzug) zwischen Belgrad und Konstantinopel verkehrte, der alle drei Klassen führte und somit eine preiswerte Alternative zum Orient-Express bot.

Weitere Entwicklung bis 1914

Die CIWL baute daher das Netz ihrer Luxuszüge nach der erfolgreichen Einführung des Orient-Express zügig aus. Zugleich war sie bemüht, den Orient-Express attraktiver zu machen. Mit kurzen Grenzaufenthalten und wenigen Halten war der Orient-Express auf der Gesamtstrecke von Paris bis Konstantinopel 1914 im letzten Fahrplan vor Beginn des Ersten Weltkriegs über 18 Stunden schneller als die alternative Verbindung mit normalen Schnellzügen.[21]

Der Orient-Express wurde bald um verschiedene Kurswagenläufe und Zubringerzüge ergänzt. Ab 1894 fuhr der ebenfalls als Luxuszug von der CIWL eingerichtete Ostende-Wien-Express als Zubringer mit abgestimmtem Fahrplan, so dass Fahrgäste von London mit Umsteigen in Wien den Orient-Express erreichen konnten. Der Ostende-Wien-Express und der Orient-Express wurden ab dem 1. Mai 1900 ab Wien Westbahnhof gemeinsam täglich bis Budapest geführt. Ab Budapest fuhr der Orient-Express zweimal pro Woche nach Bukarest und weiter über die 1890 eröffnete König-Karl-I.-Donaubrücke bei Feteşti nach Constanţa, wo Schiffsanschluss bestand.[22]

Die Entscheidungen über Fahrtweg und Anzahl der Züge waren auch politisch umstritten. Die beteiligten Staaten und ihre Bahngesellschaften führten oft heftige Auseinandersetzungen, um die lukrativen Verbindungen über ihre Strecken zu führen. Die belgische SNCB versuchte beispielsweise, direkte Wagen von anderen Bahnhöfen der Kanalküste nach Wien in Konkurrenz zu Ostende zu verhindern, während sich Österreich-Ungarn gegen alle Pläne der CIWL stellte, einen Luxuszug über Triest hinaus auf einer im Vergleich zum Orient-Express wesentlich kürzeren und die Hauptstädte Wien und Budapest umgehenden Strecke durch die Donaumonarchie zu führen.[23]

[21] https://dasrotewien.at › seite › versic... Versicherungsanstalt der österreichischen Eisenbahnen, abgefragt am 10. 6. 2023.

[22] https://www.diepresse.com › der-hei... Jeannine Hierländer Der heimliche Immobilienschatz der ÖBB; abgefragt am 25. 9. 2019.

[23] https://www.sozialversicherung.at › ...PDF Zur Geschichte der österreichischen ...; abgefragt am 13. 9. 2023.

Politische Auseinandersetzungen zwischen Nachbarstaaten spielten ebenfalls eine wesentliche Rolle. So wehrte sich angesichts der angespannten Beziehungen zwischen Ungarn und Rumänien die Ungarische Staatsbahn, welche 1891 die ungarischen Strecken der Österreichisch-ungarischen Staatseisenbahngesellschaft übernommen hatte, vehement gegen weitere nach Rumänien fahrende Züge.

Erst 1900 wurde ein Luxuszug von Berlin nach Konstantinopel eingesetzt. Zuvor gab es lediglich Züge und Kurswagen zwischen Berlin und Wien bzw. Budapest. Am 27. April 1900 fand die erste Fahrt des direkten Berlin-Budapest-Orient-Express statt, der anfangs täglich fuhr, aber bald nur mehr zweimal pro Woche verkehrte. 1902 wurde der Zug aufgrund geringer Nachfrage wieder eingestellt.[24]

3.2.1 Betriebsunterbrechung im Ersten Weltkrieg

Der Erste Weltkrieg zerschnitt mit seinen Fronten den Zuglauf und der Betrieb des Orient-Express musste eingestellt werden. Die französisch dominierte CIWL war den Mittelmächten ein Dorn im Auge, sie betrieben daher deren Ablösung. Als Ersatz und bewusste Konkurrenz wurde am 15. Januar 1916 der durch die MITROPA betriebene Balkanzug zwischen Berlin und Konstantinopel eingeführt, unter teilweiser Verwendung von beschlagnahmten und früher im Orient-Express eingesetzten Wagen der CIWL. Ein Teil des Zuges lief dabei ab Berlin Anhalter Bahnhof über Dresden, Prag und Wien, ein zweiter Teil über die Berliner Stadtbahn, Breslau und Oderberg. In Wien wurden Wagen aus München und zeitweise Straßburg beigestellt. Beide Zugteile fuhren dann ab Galanta vereint. Über Budapest, Belgrad und Sofia erreichte der Zug Istanbul.[25]

Der Balkanzug führte durch das militärisch besetzte Serbien und verband so alle vier verbündeten Mittelmächte, das Deutsche Reich, Österreich-Ungarn, Bulgarien und das Osmanische Reich. Dieser Zug führte auch die damalige zweite Wagenklasse und normale Sitzwagen. Mit dem Ausscheiden Bulgariens aus dem Weltkrieg verkehrte der Balkanzug am 15. Oktober 1918 zum letzten Mal.[26]

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[24] https://www.drda.at › 392_DRDA_12 Einem „Provisorium“ zum 65. Geburtstag. Die Versicherungsanstalt der österreichischen Eisenbahnen für die Unfall- und Invalidenversicherung und die KV; abgefragt am 14. 6. 2023.

[25] https://guichet.public.lu › organismus Krankenkasse der nationalen Eisenbahngesellschaft, abgefragt am 12. 6. 2023.

[26] https://de.m.wikipedia.org › wiki Versicherungsanstalt für Eisenbahnen und Bergbau. Die VAEB war neben der ehemaligen Sozialversicherungsanstalt der Bauern

3.2.2. Die Regelungen zwischen 1919 und 1939

Nach Kriegsende erhielt die CIWL ihre beschlagnahmten Wagen zurück, soweit diese den Krieg überstanden hatten. Um eine Verbindung zwischen Frankreich und den neu errichteten mittel- und osteuropäischen Staaten des *Cordon sanitaire* zu erhalten, wurde ab Februar 1919 mit Wagen der CIWL ein sogenannter Train de luxe militaire eingerichtet, der zunächst ausschließlich für hohe Militärs der Alliierten und Politiker reserviert war, aber ab dem 20. Juni 1920 auch für zivile Reisende freigegeben war.[27] Er wurde nicht auf der früheren Route des Orient-Express durch Süddeutschland geführt, sondern über die Schweiz und die Arlbergbahn nach Wien und weiter nach Warschau. Kurswagen nach Prag wurden in Linz abgesetzt.[28]

Parallel zur Pariser Friedenskonferenz verhandelten die Entente Mächte über die Wiedereinführung des Orient-Express. Einigkeit bestand darauf, dass die besiegten Staaten, vor allem das Deutsche Reich, vom wichtigen Verkehr nach dem vorderen Orient und dem Balkan ausgeschlossen werden sollten. Am 22. August 1919 wurde zwischen Frankreich, Belgien, Großbritannien, Italien, Rumänien, Griechenland und Jugoslawien eine entsprechende Konvention unterzeichnet, die für zehn Jahre alle direkten Zug- oder Wagenläufe durch Deutschland und über Wien hinaus nach Südosteuropa ausschloss. Auch die Niederlande und die Schweiz, die im Weltkrieg neutral geblieben waren, traten der Konvention bei.[29]

Bereits vor Abschluss der Konvention verkehrte am 11. April 1919 erstmals der Simplon-Orient-Express von Paris über die Schweiz, den Simplontunnel und Mailand nach Triest. Anschlusszüge sicherten die Verbindung über Zagreb bis Belgrad. Damit umging der Zug nicht nur das besiegte

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die einzige Sozialversicherung, die für alle drei Bereiche zuständig ist, abgefragt am 1. 6. 2023

[27] https://de.m.wikipedia.org › wiki k.k. Staatsbahnen Die k.k. Staatsbahnen (kkStB), auch k.k. österreichische Staatsbahnen, abgefragt am 14. 6. 2023.

[28] https://www.vmobil.at › 150-jahre-...150 Jahre Mobilität: Von der Dampflok bis zum Sharing-Gedanken. Der thematische Bogen reicht dabei von der Bedeutung der Eisenbahn im Industriezeitalter bis hin zur konkreten Geschichte der Vorarlberger Bahn ab 1872, abgefragt am 13. 6. 2023.

[29] https://www.bahnmedien.at › produkt die kkStB Reisezugwagen Wagengruppe Ia, Teil 2

In der Einleitung wird berichtet, wie sich der Zerfall der Donaumonarchie auf die Verteilung der Wagen der k.k. österreichischen Staatsbahn auswirkte, abgefragt am 11. 6. 2023.

Deutschland, sondern auch Österreich und Ungarn.[30] Ab Januar 1920 fuhr der Simplon-Orient-Express durchgehend bis Belgrad und im Sommer des gleichen Jahres bis Istanbul sowie mit Kurswagen nach Bukarest. Der Simplon-Orient-Express fuhr als einziger Zug des Orient-Express-Systems der Zwischenkriegszeit täglich. In Paris verkehrte er abends ab dem Gare de Lyon, wo die mit dem Flèche d'Or kommenden Kurswagen von Calais zugestellt wurden. Über Lausanne erreichte er Brig und durchfuhr nachts den namensgebenden Simplontunnel. Weiter verkehrte er am nächsten Morgen über Mailand und Venedig nach Triest. Hinter Triest begann die zweite Nachtstrecke, die über Ljubljana, Zagreb und Vinkovci nach Belgrad führte. In Vinkovci wurde der Zugteil nach Bukarest ausgesetzt, der dorthin unter Umgehung ungarischen Gebiets über Subotica und Timişoara geführt wurde.[31]

Durchlaufende Wagen bis Constanţa, wie sie vor dem Krieg existierten, wurden allerdings nicht mehr eingeführt. Als Ersatz verkehrte ab 1933 ein CIWL-Zug mit Pullman- und Speisewagen von Bukarest nach Constanţa, der nach dem rumänischen König Carol I. als Fulgur Regele Carol I. bezeichnet wurde. Der Hauptteil des Zuges wurde in Belgrad je nach Verkehrstagen durch Kurswagen des Orient-Express sowie aus Berlin, Ostende oder Prag verstärkt, die mit einem Nachtzug aus Budapest kamen, während die Wagen nach Athen an einen normalen Schnellzug abgegeben wurden. Der Simplon-Orient erreichte schließlich über Sofia und Svilengrad die Türkei, nach der dritten Nacht wurde am nächsten Morgen der Bahnhof Istanbul Sirkeci erreicht.

Parallel zum Simplon-Orient-Express verkehrte ab 1921 als *Direct Orient* ein normaler Schnellzug Paris–Triest, der auch Sitzwagen führte.[32] Bei seiner Einführung war der Simplon-Orient-Express aufgrund der nach dem Krieg heruntergewirtschafteten Strecken und der zeitraubenden, gegenüber der Vorkriegszeit erheblich ausgeweiteten Pass-, Zoll- und Devisenkontrollen eine Nacht und einen Tag länger unterwegs als der Orient-Express im letzten

[30] https://www.vienna.at › jubilaum-o... Jubiläum: ÖBB feiern 100-jähriges Bestehen - Österreich

21.04.2023 — ÖBB entstand durch Zusammenlegung mehrerer Bahnteile · Personalnotstände bei ÖBB in Nachkriegsjahren, abgefragt am 11. 6. 2023.

[31] https://www.linguee.de › bundesbah... Bundesbahngesetz - Englisch-Übersetzung – Linguee Wörterbuch. Viele übersetzte Beispielsätze mit "Bundesbahngesetz" – Englisch-Deutsch Wörterbuch und ... Gemäß § 42 Bundesbahngesetz erfolgt die Finanzierung, abgefragt am 31. 5. 2023.

[32] https://www.leadersnet.at › news › 6... ÖBB feiern 2023 ihr 100-jähriges Jubiläum. 17.01.2023 — Zum 100-Jahr-Jubiläum wolle die ÖBB ein spezielles Buch veröffentlichen, mit diversen Veranstaltungen und einer mobilen Ausstellung.

Friedensfahrplan von 1914. 1930 hatte er fast wieder die Fahrtzeit von 1914 erreicht. In den Folgejahren gelang es, ihn weiter zu beschleunigen und 1939 benötigte der Simplon-Orient nur noch etwa 56 Stunden, eine Fahrtzeit, die für die Strecke Paris–Istanbul nach dem Zweiten Weltkrieg erst wieder 1974 erreicht wurde.[33]

3.2.3. Im Zweiten Weltkrieg

Mit Ausbruch des Zweiten Weltkriegs wurden der durchgehende Orient-Express über Süddeutschland und der Arlberg-Orient-Express über das damals deutsche Österreich eingestellt. Der Orient-Express fuhr noch bis Mai 1940 auf der Strecke München–Bukarest, für Reisende aus der Schweiz gab es einen Kurswagen aus Zürich. Die Bewirtschaftung übernahm die Mitropa.[34] Auch der Simplon-Orient-Express verkehrte bis kurz vor Kriegseintritt Italiens gegen Ende des Westfeldzugs im Mai/Juni 1940 durchgehend.

Angesichts des Kriegszustands war bemerkenswert, dass der Simplon-Orient-Express noch bis zum 25. Mai 1940 ab Belgrad CIWL-Kurswagen aus Berlin führte. Zwischen Belgrad und Istanbul waren damit Wagen aus Paris wie aus Berlin in einem Zug vereint, mithin den Hauptstädten zweier miteinander im Kriegszustand befindlichen Länder.[35] Ab April 1941 – ein genaues Datum ist nicht bekannt – musste die CIWL nach Beginn des Balkanfeldzugs den Simplon-Orient-Express auch auf seinem restlichen Laufweg einstellen. Alle Kurse im deutschen Machtbereich waren an die MITROPA abzutreten, die Schlafwagenläufe von Berlin nach Belgrad, Athen und Sofia sowie von Paris nach Budapest über München und Wien einrichtete. Inoffizieller Nachfolger des Orient-Express wurde der D 148/147, der Schlafwagenkurse der MITROPA von Berlin über Wien bis Sofia sowie von Paris über München bis Budapest führte.[36]

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[33] https://pm20.zbw.eu › about.de.html Donau-Save-Adria Eisenbahngesellschaft Typ, Unternehmen. Sitz, Wien (Österreich). Gründung, 1923. Auflösung, 1970. Branche, Schienenverkehr. Vorgänger, Südbahn-Gesellschaft, abgefragt am 14. 6. 2023.

[34] https://de.m.wikipedia.org › wiki Chronik der Elektrifizierung von Eisenbahnstrecken in Österreich. Ende 2020 sind 73,8 Prozent der Bahnstrecken in Österreich elektrifiziert; dies entspricht über 90 Prozent der Verkehrsleistungen der ÖBB; abgefragt am 3. 6. 2023.

[35] https://www.zvab.com › titel › deuts... deutsche reichsbahn in oesterreich Deutsche Reichsbahn in Österreich 1938-1945 (-1953), abgefragt am 16. 6. 2023.

[36] https://www.wn24.at › kultur › bah... Bahn und Nationalsozialismus in Österreich

Die CIWL blieb allerdings in Italien und der Türkei aktiv und führte bis 1943 Kurswagen von Rom und Turin nach Belgrad und Sofia. Die Verbindung in die Türkei war nur mehr mit Umsteigen in Sofia und an der Grenze in Svilengrad möglich. Mit dem Sturz Mussolinis 1943 endeten die CIWL-Wagenläufe und 1944 beendete auch die MITROPA ihre Schlafwagenläufe in Richtung Balkan.[37]

3.2.4. Nach dem Zweiten Weltkrieg

Nach dem Ende des Zweiten Weltkriegs verkehrten der Simplon-Orient-Express, der Orient-Express und der Arlberg-Orient-Express wieder, beginnend ab September 1945.[38] Allerdings führten alle Züge auch normale Sitzwagen und wurden ab 1950 nicht mehr als Luxuszüge der CIWL, sondern als normale Schnellzüge der beteiligten Bahnverwaltungen eingestuft. Süddeutsche Eisenbahner bezeichneten den Orient-Express allerdings noch in den 1970er-Jahren umgangssprachlich als „Lux".

Die CIWL beschränkte sich auf den Betrieb der Schlaf- und Speisewagen. Zunächst wurden ab September 1945 der Arlberg-Orient- und ab November des gleichen Jahres der Simplon-Orient-Express wieder eingeführt, der Orient-Express verband erst seit dem 1. April 1946 wieder Paris mit Stuttgart, München und Wien. Alle drei Züge konnten nur schrittweise auf ihre früheren Routen zurückkehren, zerstörte Strecken und Brücken sowie der Mangel an Kohle verhinderten eine schnelle Rückkehr zum Vorkriegsstand. Hinzu kamen bis 1949 die Auswirkungen des Griechischen Bürgerkriegs und die Folgen der kommunistischen Machtübernahme in den osteuropäischen Staaten. Der Simplon-Orient-Express fuhr zunächst nur zwischen Paris und Venedig, erst ab 1947 konnte er wieder bis Istanbul verkehren. Geplant war sogar ein direkter Anschluss an einen Zug ab Istanbul Haydarpaşa bis nach Kairo, nachdem 1946 eine durchgehende Eisenbahnverbindung zwischen der Türkei und Ägypten fertiggestellt worden war. Ab 1947 fuhr der Arlberg-Orient-Express wieder bis Bukarest und führte einen Schlafwagen nach Warschau. Ab 1948 bediente der Orient-Express ebenfalls seine Vorkriegsroute von Paris bis Bukarest.

1938 – 1945, abgefragt am 15. 6. 23.

[37] https://www.eisenbahn.gerhard-obermayr.com › ...Wiederaufbau nach 1945 - Die Eisenbahnen in Österreich.
Von Gunter Mackinger Unverzüglich wurde mit dem Wiederaufbau begonnen, abgefragt am 15. 6. 23.

[38] https://www.kleinbahnsammler.at › ... ÖBB 1945 – 1970 (Eisenbahn Journal Special 2/2020).

Ergänzt wurde das System der Züge ab 1948 durch den Balt-Orient-Express, der den Zuglauf Stockholm–Belgrad erhielt. Von diesem Zug übernahm der Simplon-Orient Kurswagen nach Istanbul, allerdings nicht als durchgehender Wagenlauf aus Stockholm. 1950 führte der Orient-Express erstmals auch Wagen dritter Klasse. Ab 1951 wurden Kurswagen aus dem Tauern-Express in das System integriert.

Mit Errichtung des Eisernen Vorhangs sank die Nachfrage im Zugverkehr nach Osteuropa rapide. Aufwändige Grenzkontrollen und Devisenbestimmungen reduzierten die Fahrgastzahlen erheblich, lediglich Diplomaten, die aufgrund ihrer Pässe weniger Probleme bei den Grenzkontrollen hatten, verblieben den Orient-Express-Zügen als Kundschaft.

Entsprechend der Nachfrage und der politischen Entwicklung wurden die Zugläufe des Orient-Express-Systems in den 1950ern wiederholt verändert und zeitweise bis nach Wien zurückgezogen. Zwischen Belgrad und Istanbul wurde der Simplon-Orient-Express ab 1952 für einige Jahre unter Umgehung Bulgariens über Thessaloniki umgeleitet. Erst 1954 kehrte er wieder auf seine normale Route zurück. Um Probleme mit bulgarischen Transitvisa zu vermeiden, gab es allerdings noch weiterhin für einige Jahre über Thessaloniki laufende Kurswagen nach Istanbul. Im Unterschied zur Vorkriegszeit bekam daher der 1950 nach Ende des Bürgerkriegs eingerichtete Athener Zweig des Simplon-Orient eine wesentlich größere Bedeutung als der Istanbuler Flügelzug. Der Orient-Express fuhr ab 1951 nur bis Wien und kehrte erst nach dem Ungarischen Volksaufstand 1956 wieder auf seine Route über Budapest bis Bukarest zurück.

Das Ende des alten Orient-Express-Systems 1962

1961 beschloss die Europäische Fahrplankonferenz eine grundlegende Umstrukturierung und damit das Ende des bisherigen Systems der Orient-Express-Züge mit seinen verschiedenen Kurswagen. Der Arlberg-Orient verkehrte daher 1962 zum letzten Mal, es verblieb der Arlberg-Express als normaler Nachtzug zwischen Paris und Wien, ohne weiterführende Kurswagen. Der seit 1950 wieder verkehrende Direct-Orient Paris-Belgrad übernahm vom Simplon-Orient-Express die Schlafwagenkurse nach Istanbul, die bis dahin noch geführten direkten Kurswagen von Calais bis Istanbul entfielen. Der verbleibende Simplon-Express fuhr nur noch bis Belgrad. Der Orient-Express über Süddeutschland wurde bis Wien verkürzt, erst ab 1964 verkehrte er wieder bis Budapest, ab 1971 bis nach Bukarest. Ab Belgrad übernahmen als normale Schnellzüge der Marmara-Express nach Istanbul und der Athenes-Express nach Athen die Kurswagen des Direct-Orients und des Tauern-Orient.

Ein letztes besonderes Merkmal des Arlberg-Expresses aus seinen Zeiten als Luxuszug war die Umfahrung des Zürcher Hauptbahnhofs mit einem Halt im Bahnhof Zürich Enge. Damit konnte das Kopfmachen mit Wechsel der Zuglok eingespart und die Fahrzeit verkürzt werden. Ab 1969 fuhr der Arlberg-Express wie die anderen Fernzüge in die Halle des Zürcher Hauptbahnhofs, sodass auch ein Lokwechsel notwendig wurde.

Ein kurzzeitiger Versuch, mit dem als reiner Schlaf- und Liegewagenzug verkehrenden *Attika* von München nach Athen ab 1989 wieder ein höherwertiges Angebot auf die Schienen zu bringen, scheiterte am Ausbruch der Jugoslawienkriege. Zunächst mussten alle Züge aus Mitteleuropa nach der Türkei und Griechenland über Budapest umgeleitet werden, aber nach und nach wurde der durchgehende Zugverkehr zwischen Mittel- und Südosteuropa bis 1993 endgültig eingestellt. Seither müssen Fahrgäste entweder in Belgrad oder Budapest umsteigen. Auch nach dem Ende der Jugoslawienkriege kam es nicht zu einer Wiederaufnahme des direkten Verkehrs.

Der Orient-Express von 1962 bis 2009

Der Orient-Express fuhr dagegen weiterhin als Nachtzug zwischen Paris und Wien über Straßburg und München. Ab 1965 wurde er wieder bis Budapest verlängert, ein Jahr später wurde der Schlafwagen Paris–Bukarest wieder eingeführt, zunächst als Kurswagen. Als ab 1971 durchgehender Zug bis Bukarest fuhr der Orient-Express nur im Sommerfahrplan, im Winterfahrplan verkehrten ab Budapest lediglich Kurswagen. Die von der CIWL bewirtschafteten Schlafwagenkurse nach Bukarest blieben bis 1991 im Fahrplan, auch führte der Orient-Express in den meisten Jahren auf Teilabschnitten einen Speisewagen. Zwischen Budapest und Bukarest verkehrte der Zug zuletzt nur noch an drei Wochentagen. 1991 wurde der Zuglauf auf Paris–Budapest verkürzt, zudem entfiel der zuletzt zwischen Stuttgart und Budapest eingereihte Speisewagen. 1999 wurde nochmals ein Schlafwagen Paris–Bukarest eingeführt, allerdings nicht durch die CIWL, sondern durch die CFR bewirtschaftet. Ab dem Sommerfahrplan 2001 fuhr der Orient-Express als Euro Night (EN) nur mehr zwischen Wien und Paris. Ab Dezember 2002 war das nach Einstellung des Eurocity *Mozart* die einzig verbliebene Direktverbindung zwischen beiden Städten.

Zum kleinen Fahrplanwechsel am 9. Juni 2007 wurde aufgrund der Aufnahme des Verkehrs auf der TGV-Neubaustrecke zwischen Paris und Straßburg der Zuglauf auf die Route Wien–Straßburg verkürzt. Zudem stellten fortan die Österreichischen Bundesbahnen (ÖBB) statt der Société nationale

des *chemins de fer français* (SNCF) das Wagenmaterial. Der Zug wurde fortan von den ÖBB in Eigenregie geführt, in Deutschland wurden Fahrkarten der Deutschen Bahn AG nur gegen Zahlung eines (Reservierungs-)Zuschlags anerkannt. Zusätzlich führte der Zug Kurswagen zwischen Wien und Amsterdam, die als eigener Zug CNL Donau-Kurier geführt werden.

Bis zum 14. Dezember 2009 fuhr der Orient-Express täglich zwischen Straßburg und Wien. Mit der Einstellung dieses Nachtzuges kam nach 126 Jahren das Ende des fahrplanmäßigen Orient-Express. Der Zug bestand zuletzt aus Schlaf-, Liege- und Sitzwagen der ÖBB und der MÁV.

3.2.5. Das Beispiel „Waldviertel" als Nutznießerin der Eisenbahn

Das Waldviertel ist geologisch ein Teil des Böhmischen Massivs, hat kontinental geprägtes Hochflächenklima und umfasst eine Fläche von etwa 4600 km^2. Der Name Waldviertel leitet sich vom früheren urwaldartigen Baumbestand der Region ab. Das Waldviertel wurde als Teil der Marcha orientalis ab dem 11 Jh. von den südlichen, nahe der Donau gelegenen Landstrichen ausgehend in Richtung Norden kolonisiert. In den nächsten Dezennien beteiligten sich daran viele geistliche und weltliche Herren durch Gründung von Klöstern, Propsteien und Burgherrschaften mit den ersten Teichwirtschaften. Die Wiege des professionellen Teichbaues liegt jedoch in Südböhmen. Dort sind seit dem 14. Jahrhundert die Teichbauer zu Hause. Sie schlossen sich um 1500 zu einer Zunft zusammen und legten im Auftrag der Besitzer ausgedehnte Teichsysteme an. Die südböhmische Karpfen- und Teichstadt Třeboň ist diesbezüglich ein markantes Kulturerbe

Seit dem frühen 15. Jahrhundert wurden im Waldviertel Teiche planmäßig angelegt. Der beliebteste Besatzfisch war auch damals schon der Karpfen. Für die Herrschaft Gmünd war die Teichwirtschaft seit damals eine wichtige Einnahmequelle. Während das in Donaunähe befindliche südliche Waldviertel bald einen Aufschwung verzeichnete, waren im nördlichen Teil zunächst nur spärliche Fortschritte zu verzeichnen. Ein Grund lag darin, dass die Nutzung der Gewässer zum Transport mit Schiffen oder Flößen. mit großen Hindernissen verbunden war.

Das Waldviertel besaß und besitzt zwar eine große Zahl an Flüssen und, die jedoch wegen ihrer Untiefen, dem häufig auftretenden Wassermangel im Sommer und, weil (früher) in den Wintermonaten die Gewässer regelmäßig zufroren, jeglichen Schiffsverkehr unmöglich machten. Seit dem 14/15. Jahrhundert setzten sich die mit Wasserkraft betriebenen Unternehmen an Flussufern oder Bächen aus Hammerschmieden, Mühlen und Sägewerken

zusammen, die als Kooperationspartner der expandierenden grundherrlichen Teichwirtschaften des Waldviertels und Südböhmens fungierten.

Mit der industriellen Revolution, dem Bevölkerungszuwachs und dem Engagement zahlreicher Grundherren als Großunternehmer seit dem ausgehenden 18.Jh. stieg der Bedarf an Roheisen zur Produktion von Maschinen, Wehren, Werkzeugen, Gittern, Türschlössern usw. Die Entwicklung hätte insbesondere den Hammerschmieden schon zu Beginn des 19. Jhs. Ansehen und Wohlstand bescheren können. Doch erwies sich als arges Hindernis, dass Flüsse und andere Gewässer des Waldviertels nicht schiffbar waren, und der Transport des Roheisens von der Donau in die nördlichen Regionen mühsam mit Ochsenkarren erfolgte. Für diesen Transportaufwand wurden bisweilen Wucherpreise für die Eisenzustellung an die Hammerschmieden gefordert. Nicht selten Transportierten die Metallhändler das Eisen trotz anders lautender behördlicher Vorschriften lieber unbeschwert per Schiff auf dem Donaufluss nach Wien. Somit brachte erst der Auf- und Ausbau des Waldviertler Bahnnetzes im letzten Drittel des 19.Jh den ersehnten wirtschaftlichen Aufschwung.

3.2.6. „Rettungsanker" Franz Josephs-Bahn

Während die durch das Weinviertel führende k. k. priv. Kaiser Ferdinand Nordbahn schon seit 1837 (bis Lundenburg/Brceslav) bzw. 1839 (bis Brünn) in Betrieb stand, mussten die Waldviertler noch über 30 Jahre auf ihre Bahnanschlüsse warten. Erst nach dem Preußischen Krieg, bzw. der Schacht bei Königgrätz, dachte man daran eine zweite durch das Waldviertel führende Bahn nach Böhmen zu erbauen. Der Bau der Franz-Josephs-Bahn war mit einer großen Summe von Vorarbeiten verbunden.

Das Projekt der Bahnlinie erforderte die Abklärung der Fragen, durch welche Ortschaften der Schienenstrang geführt werden solle. Weiters gab es eine Fülle von Unterhandlungen, Vorsprachen und schriftlichen Eingaben der zahlreichen Gemeinden und Korporationen, für die Entscheidungen zu treffen waren. Da gab es das im ersten Drittel des 19.Jhs gegründete Harmanschlager Eisenwerk, das schon seit 1845 ohne eigenes Schmelzwerk arbeitete; indem es Alteisen aus Linz und Wien bezog. Von diesen beiden Städten durfte bei funktionierendem Eisenbahntransport ins Waldviertel überhaupt für die Zukunft viel in Bezug auf die Bau Teichwirtschaft samt allen Partnerbranchen erwartet werden.

Der zweite Grund aber war der dominierende Wunsch, wirtschaftliche Netzwerke über größere Distanzen zu schaffen. Die Eisenbahn sollte nun

endlich Schluss machen mit dem „Alptraum der Entlegenheit" des Waldviertels und Handelsbeziehungen zu knüpfen helfen. welche die gesamte wirtschaftliche Situation mit einem Schlag verbessern mussten, nicht nur für einzelne Branchen, sondern für alle Bewohner.

Der größte Vorteil lag darin, dass die Gewerbebetriebe vor Ort nun jederzeit Rohstoffe, Halbfabrikate und diverse Maschinen in größerer Zahl und im Bedarfsfall auch von weiter her zeitsparend beziehen konnten. Wo aber schließlich die Franz-Josephs-Bahn geführt werden solle, das entschieden zum allergeringsten Teil die Gemeinden, der niederösterreichische Landtag und das Parlament, sondern die adeligen Großgrundbesitzer, die mit ihren angeschlossenen Betrieben ein florierendes international ausgerichtetes Export-Import Geschäft ausbauen wollten. Der Schienenstrang hätte ursprünglich über Groß-Siegharts und Waidhofen a.d.Th. geführt werden sollen. Dass dies nicht geschah, und die Bahn über Gmünd gebaut wurde, war der Wunsch des Erzherzogs Siegismund von Habsburg-Lothringen, der unbedingt wollte, dass die Bahn 0ber seine Gründe geführt werde.

Der Bahnbau wurde 1867 begonnen. Er wurde von Prag herunter gegen Wien und gleichzeitig von Wien weggeführt. Das Sprengen der gewaltigen Felsenmassen des Manhartsgebirges bereitete große Schwierigkeiten, ebenso die Anlage der riesigen Eisenbrücke bei Limberg-Maissau. Im Jahre 1870 ging die Kaiser Franz Joseph-Bahn in Betrieb.

Sehr bald wurde der Wunsch rege, weitere Bahnverbindungen zu haben, wo es Teiche, Gewerbebetriebe sowie Städte und Märkte gab, welche die Bahn noch nicht berührte. Nach jahrelangen Petitionen und Vorsprachen der Gemeinden des Kamptales wurde die Bahnstrecke Krems-Sigmundsherberg errichtet. Im Jahre 1889 fuhr der erste Zug der Kamptalbahn von Krems über Langenlois und Horn mit dem Anschluss an die Franz-Josephs-Bahn bei Sigmundsherberg.

Da nicht nur die Waldviertler Gemeinden, sondern nach zahlreichen anderen Städten und Gemeinden Niederösterreichs eine Bahnverbindung forderten, welchem Wunsche aber die Regierung nicht so rasch entsprechen konnte, so kam es zu einem Übereinkommen in der Frage des Bahnbaues. Es wurden Lokal-Eisenbahn-Aktiengesellschaften gegründet. Die am Bahnbau interessierten Kreise, vor allem Gemeinden und Privatpersonen, brachten durch die Zeichnung der Lokalbahnaktien das erforderliche Baukapital für die Bahn selbst auf, der Staat hingegen verpflichtete sich, den Betrieb der Lokalbahnen zu übernehmen und auf seine Rechnung zu führen.

Es wäre dies eine halbe Lösung von vornherein. 0bwrohl die Baukosten von privater Seite, von den Gemeinden und der Bevölkerung aufgebracht wurden,

ja selbst Lokomotiven und Waggons aus privaten Mitteln angeschafft wurden, sah der Jahresabschluss regelmäßig so aus, dass der Staat als Betriebsführer der Lokalbahnen den bescheidenen Reingewinn für sich allein beanspruchte, um seine Auslagen zu decken, während die Aktionäre immer das leer ausgingen; dafür aber das Bewusstsein hatten, eine eigene Bahn in ihrer Region zu besitzen.

3.2.7. Errichtung der Schmalspurbahnen an der Wende des 19./20.Jhs

Am 19. August 1895 ging der Eisenbahnverkehr auf der Teilstrecke Göpfritz - Großsiegharts in Betrieb, die am 15. Oktober 1900 nach Raabs verlängert wurde. Mit immer größerer Geschwindigkeit expandierten und modernisierten sich Gewerbe, Handel und Verkehr, sodass die noch nicht an das Bahnnetz angeschlossenen Gemeinden vehement Lokalbahnen forderten, die -so die Forderung - aber der Staat, dessen Steuereinnahmen aus dem Waldviertel sich vervielfacht hatten, nunmehr finanzieren sollte.

Die niederösterreichische Landesregierung griff 1896 das Problem auf, indem sie ein Modell finanzieller Förderungen des privaten Eisenbahnbaues konzipierte. Da aber entstand schon das nächste Problem. Der österreichischen Regierung waren anscheinend zu viele Privatbahnen erbaut worden; sie pochte auf ihr Monopolrecht der Konzessionsverleihung und erklärte, in Hinkunft überhaupt keine neuen Konzessionen für Bahnbauten zu erteilen.

Die darauffolgenden stürmischen Petitionen, Landtagsinterpellationen usw. brachten keine Veränderung Die Regierung blieb ganze zwei Jahre hart und wollte keine einzige neue Eisenbahnkonzessionen gewähren. Aber wie es im alten Österreich. Brauch war, wurde aus dem „Nein" der österreichischen Regierung bald ein „ja schon, aber" und so kam es 1898 zu einem Vergleich. Es gab zwar keine Konzession für Normalbahnen, sondern nur für schmalspurige Bahnen. So entstanden die schmalspurigen n. ö. Landesbahnen, kurz die „schmalspurigen Waldviertler Bahnen". Nur dort, wo es bereits Eisenbahnstrecken mit Normalspur gab, musste bei Absicht der Verlängerung einer solchen Strecke die Regierung naturgemäß die Erlaubnis hierzu erteilen. So wurde auch die Verlängerung der Bahnstrecke Schwarzenau-Waidhofen a. d. Th.- Zlabings normalspurig bewilligt, deren erster Zug am 21. Juni 1903 über Waidhofen a. d Th. hinaus nach Zlabings abrollte. Betreffend die schmalspurigen Landesbahnen. erwarb der niederösterreichische Landesausschuß 1898 die Konzession zum Bau und Betrieb einer schmalspurigen Lokelbahn von Gmünd über Alt-Nagelberg nach Litschau mit einer Abzweigung nach Heidenreichstein. Die Konzession wurde mit dem Recht verbunden, eine Aktiengesellschaft zu bilden, welche unter der Firma „N.0e. Waldviertelbahn" entstand. Die Eröffnung

der Strecke Gmünd-Litschau fand im Jahre 1899 statt, die Verlängerung nach Heidenreichstein erfolgte am 3. Juli 1900, die nach Alt-Nagelberg bzw. von Gmünd bis Steinbach erfolgte am 10. August 1902.

4. Die ältesten Eisenbahnversicherungen Österreichs

Die ältesten Quelle über Versicherungen von altösterreichischen Eisenbahntransporten stammen aus dem Jahre 1839. Im Dezember dieses Jahres wurde die Generali-Agentur in Wien bevollmächtigt, die Versicherung von Warentransporten auf der Bahnstrecke Wien-Brünn zu übernehmen: und zwar zur Hälfte der Prämie, die für Warentransporte „zu Wagen" (=Pferdefuhrwerke) festgesetzt war. Ein Jahr später schloss die Generali, zusammen mit drei anderen Gesellschaften einen Versicherungsvertrag zur Deckung von Warentransporten auf der Strecke Wien- Hradec ab, durch welchen die Eigentümer und Spediteure der Waren gegen jeden Schaden- Diebstahl ausgenommengedeckt sein sollten. Damit begann nun auch für die Binnentransport-Versicherung eine neue Zeit, da bisher nur Fuhrwerke und Wasserfahrzeuge (Schiffe und Flöße) versichert worden waren. Bei ihnen spielten Haftpflichtschäden gegenüber Dritten eine untergeordnete Rolle. Das änderte sich in Bezug auf Eisenbahntransporte wie das folgende Beispiel zeigt.

Eine der ältesten Quellen über Eisenbahnversicherungen mit einem Großschaden „an Dritten" stammt aus dem Jahr 1843. Zunächst wird die Bahnlinie von Wien bis Brünn, Olmütz und Leipzig sowie Stockerau" erwähnt. Bei den Betriebsrisiken wird unter den "gewöhnlichen Ausgaben für die Erhaltung der Bahnen" folgendes erwähnt: "Seit 1843 wurden aus dieser Rubrik die Beiträge zum Gebäude-Assecuranz-Fonde geleistet.[39]

Der nächste Hinweis bezieht sich auf die Bahnlinie von Wien bis Wagram und Gänserndorf. Damals brannten nicht nur Eisenbahnwaggons samt Ladung im Wert von 6672 fl (inkl. Reparaturkosten der Lokomotive) ab, sondern es musste auch ein Vielfaches, nämlich 39.967fl. als Entschädigung an die Gemeinden Gänserndorf und Branowitz gezahlt werden.[40] Für die Versicherer waren in den nächsten Jahren die sich häufenden Entschädigungszahlungen aus dem Eisenbahn- Versicherungsgeschäft ein Anlass, die Strukturen der Binnentransportversicherung in Richtung Haftungsschäden im Umfeld von Bahnen auszubauen. Eine spezielle Haftpflichtversicherung wurde erst Ende des 19. Jhs. eingeführt.

[39] A. Birk, „Die bauliche Entwicklung der Eisenbahn in Österreich", *Österreichisch-Ungarische Revue* 26/1900, 24.

[40] *Assecuranz Jahrbuch Band 3*, Wien 1882, 21.

4. 1. Reform der Versicherungsbedingungen

Mit der tiefgreifenden Umformung der Transportmittel mussten naturgemäß auch die technische Gestaltung dieser Versicherungsart und die betreffenden Polizzen einer gründlichen Änderung unterzogen werden., um sie schrittweise mit den neuen erforderlichen Arten der Transportversicherung in Einklang zu bringen. Zunächst erhob sich -schon aus den Bestimmungen des Allgemeinen Bürgerlichen Gesetzbuches- die Frage, für welche Schäden der Versicherer des Händlers und für welche die Eisenbahnen selbst aufzukommen hatten. Weiters war strittig, ab wann die Versicherung des Eisenbahntransportes einsetzt. Die Bestimmungen der Flusstransportversicherung, bei denen das Risiko für den Versicherer mit dem Zeitpunkt einsetzt, in welchem die Güter zum Zweck der Einladung vom Land schieden, erwiesen sich beim Eisenbahntransport als unbrauchbar. Das Gleiche galt übrigens in Bezug auf den Endzeitpunkt der Versicherung.

Es wurden schließlich folgende Bestimmungen getroffen:

Bei Post- und Eisenbahntransporten begann ab nun die Verbindlichkeit des Versicherers mit dem Zeitpunkt der reglementmäßigen Übernahme durch die Absende-Station einer Eisenbahn oder Post und endete mit dem Zeitpunkt, in welchem die Auslieferung auf der Station der letzten an dem Transport beteiligten Eisenbahn oder Post bewirkt wurde. Doch haftete der Versicherer sowohl vor der Abreise als auch nach der Ankunft der Güter keinesfalls über acht Tage hinaus.[41]

Besonderes Augenmerk mussten die Versicherer bei der Schaffung spezieller Bedingungen auch darauf richten, dass Händler und Eisenbahner durch den Abschluss von Versicherungen nicht dazu verleitet würden, ihre Achtsamkeit und Sorgfalt in Bezug auf Verpackung der Waren, gefährliche Beschaffenheit der Transportgüter usw. zu unterlassen bzw. zu reduzieren.

Ausgeschlossen von der Haftung des Versicherers wurden deshalb Schäden, welche durch die natürliche Beschaffenheit der Güter oder mangelhafte Verpackung derselben; durch Ungeziefer, Rost, Fäulnis, Bruch, Selbstentzündung, Auslaufen, Untergewicht, Regen, Frost, Hitze und Witterungsverhältnisse entstanden.[42]

[41] A. Welzel, *Die geschichtliche Entwicklung der Landtransportversicherung*, Breslau 1922, 14.

[42] A. von Onciul, *Der Versicherungsvertrag nach österreichischem* Recht, Wien 1896, 71.

5. Ursachen für Eisenbahn-Unglücksfälle

Um den Eisenbahn-Versicherungsschutz entsprechend wirksam gestalten zu können, mussten die Versicherer eine Aufstellung aller Ursachen erarbeiten. Mit Nutzung der Dampfmaschine als Energieerzeugung für den Fahrbetrieb der Eisenbahn, mit der Erfindung der Dampflokomotive, kamen zum einen die Unglücksfälle bzw. Unfälle auf. Eine dritte Quelle von Unfällen waren und sind die bahnfremden Eingriffe in den Eisenbahnverkehr, vor allem durch querenden anderen Verkehr (Bahnübergänge), Selbstmörder und Attentäter.[43]

Eine große Gefahr stellte in den heißen trockenen Sommermonaten der Funkenflug der Dampflokomotiven dar. Dadurch wurden nur allzu schnell leicht brennbare und unzureichend verpackte Transportgüter in Brand gesteckt. Gefährdet wurden aber auch Objekte, die mit dem eigentlichen Transport nichts zu tun hatten. Die meist mit Holzschindeln oder Stroh gedeckten Häuser, Scheunen u. ä., die damals oft in unmittelbarer Nähe der Bahnlinien standen, wurden häufig ein Raub der Flammen. Das Gleiche galt für Stroh und Heuhaufen.

Aus dieser Situation, die vom versicherungstechnischen Standpunkt weder voll der Feuer- noch der Transportversicherung zugeordnet werden konnte, begannen sich im Zusammenhang mit den Risiken der Eisenbahnen und um die Eisenbahnen herum die Feuerversicherung Österreichs zu kümmern. Der klassische Eisenbahnversicherer der damaligen Zeit - betont das Assecuranz-Jahrbuch 1884- die „Azienda Assicuratrice", die diesbezüglich bis zum Anfang der 1880-er Jahre eine führende Rolle spielte.

5.1. Beispiele von Eisenbahnunfällen des 19.Jh Branowitz – Auffahrunfall

Am 7. Juli 1839 verkehrten anlässlich der Eröffnung der Strecke Lundenburg–Brünn der a. priv. Kaiser Ferdinand-Nordbahn (KFNB) vier Festzüge von Wien nach Brünn. Bei der Rückfahrt musste der Lokomotivführer des zweiten Zugs im Bahnhof Branowitz wegen eines Schadens an der Lokomotive halten. Der dritte Zug fuhr auf den zweiten Zug auf. 60 Menschen wurden verletzt.

Zwischen Hullein und Napajedl – Kesselzerknall

Am 27. Juli 1848 zerknallte der Kessel der Lokomotive JASON der a. priv. Kaiser Ferdinand-Nordbahn (KFNB) auf der Bahnstrecke Wien–Krakau zwischen Hullein und Napajedl. Vier Personen wurden getötet und zwei verletzt.

[43] Verg. dazu den „Jahresbericht Österreich- Ungarn" im Assecuranz-Jahrbuch, Wien 1884, 12.

Wien–Dornbach („Pferde-Eisenbahn“)
– Entgleisung in der Zielstation der Eröffnungsfahrt

Über die „officielle Eröffnung(sfahrt)“ am 4. Oktober 1865 wurde am Folgetag berichtet, dass „im Dornbacher Stationsgebäude ein Wagen entgleiste, welcher Unfall jedoch bald gut gemacht wurde“. Diese Eisenbahn lief als Straßenbahn in diese bis Ende 1891 noch selbständige Nachbargemeinde Wiens.

Zerwitz – Auffahrunfall

Am 10. November 1868 ereignete sich bei der heutigen Haltestelle Zerwitz auf Bahnstrecke Prag–Pilsen der k. k. priv. Böhmischen Westbahn (BWB) ein Auffahrunfall bei der Fahrt im Zeitabstand. Während eines Schneesturms fuhr ein Güterzug auf einen in einer Schneewehe feststeckenden Personenzug auf. 28 Menschen wurden getötet und 60 verletzt. Um solche Unfälle zu verhindern, wurden Zugfolgeabschnitte eingeführt.

Auval – Entgleisung

Am 3. Februar 1869 entgleisten auf der Bahnstrecke Wien–Prag–Bodenbach der priv. Österreichisch-ungarischen Staatseisenbahngesellschaft (StEG) die letzten drei Wagen des Schnellzuges Wien–Prag zwischen den Stationen Auwal und Běchowitz. Zehn Personen wurden verletzt, der Schaffner starb später. Der Unfall wurde wahrscheinlich durch eine Spurerweiterung infolge verfaulter Schwellen verursacht.

Oderberg – Kesselzerknall

Am 23. März 1871 zerknallte der Kessel der Lokomotive GLAUCOS der a. priv. Kaiser Ferdinand-Nordbahn (KFNB) im Bahnhof Oderberg. Ursache war vermutlich die vergessene Wasserspeisung durch das Lokomotivpersonal und daraus folgender Wassermangel.

Blowitz

Am 5. August 1890 entgleiste bei Blowitz auf der Strecke Wien–Eger der k. k. priv. Kaiser Franz Josephs-Bahn (KFJB) bei der Überquerung einer Brücke ein Personenzug. Ein Teil des Zuges stürzte in einen Bach. Wegen starken Regens war der Bahndamm durchnässt und hielt dem Gewicht des Zuges nicht stand. Der Unfall forderte fünf Todesopfer und 42 Verletzte.

Kalsdorf, Steiermark – Auffahrunfall bei dichtem Nebel

Am 24. August 1899 kam es am Bahnhof Kalsdorf auf der Südbahn zu einem Zusammenstoß zwischen einem Personenzug und einem Güterzug. Der aus Triest kommende Eilzug Nr. 1 war auf dem Weg nach Wien und bereits eine Stunde und 45 Minuten verspätet, als er um 5:45 Uhr auf dem Hauptgleis in den Bahnhof einfuhr. Aufgrund von dichtem Nebel konnte der Lokführer das Halt zeigende Signal nicht erkennen. Die Geschwindigkeit betrug zu dem Zeitpunkt ca. 75 km/h. Auf demselben Gleis befand sich der Lastenzug Nr. 171. Als der Lokführer des Eilzuges diesen bemerkte, leitete er umgehend eine Bremsung ein. Der Aufprall konnte damit zwar nicht mehr verhindert, aber die Geschwindigkeit auf ca. 50 km/h verringert werden. Sieben Wagen des Güterzuges wurden zerstört. Der Postwagen und der Gepäckwagen des Eilzuges wurden ineinander geschoben. Ein Ofen, welcher sich im Postwagen befand, setzte die beiden Wagen in Brand. Nachdem die Reisenden aus dem Schlafwagen geflüchtet waren, griff das Feuer auch auf diesen über. Der Leiter des Postwagens verstarb. Ein Postbeamter, ein Postdiener, der Zugführer, der Lokführer und ein Fahrgast wurden schwer verletzt. Mehrere Personen wurden leicht verletzt („unwesentliche Verwundungen"). Dreizehn Eisenbahner, welche an der Unglücksstelle beschäftigt waren, wurden verhaftet. Erst am Vortag des Unglücks waren ebenfalls am Bahnhof Kalsdorf zwei Güterzüge zusammengestoßen. Auch bei diesem Vorfall war starker Nebel für den Unfall mitverantwortlich.

6. Betriebliche und Staatliche Versicherungseinrichtungen für Arbeiter und Bahnbedienstete

1888 wurde in Österreich nach deutschem Vorbild das Unfallversicherungsgesetz erlassen; Gegenstand der Versicherung bildete der Ersatz des Schadens, der durch Verletzung oder Tod entstand. Diese gesetzlichen Bestimmungen galten für alle Arbeiter; für die Eisenbahnbediensteten gab es darüber hinaus Sonderregelungen – schließlich bestand in diesem überaus gefährlichen Beruf bereits seit 1869 das österreichische Eisenbahnhaftpflichtgesetz. Die Berufsgenossenschaftliche Unfallversicherungsanstalt der österreichischen Eisenbahnen nahm ihre Arbeit am 1. November 1889 auf.[44] Die Anstalt hatte ihren Sitz zunächst in einem Haus der Bundesbahnen, 1., Gauermanngasse 2. Infolge Raummangels übersiedelte man bald in das Haus 6., Theobaldgasse 9. Da auch diese Lösung nicht optimal war, beschloss man, ein eigenes Gebäude zu

[44] https://dasrotewien.at › seite › versic... Versicherungsanstalt der österreichischen Eisenbahnen, abgefragt am 10. 6. 2023.

errichten. Das Haus an der Linken Wienzeile wurde nach Plänen des Architekten Hubert Gessner in den Jahren 1910-12 errichtet – die fünf überlebensgroßen Drei-Figuren-Gruppen stammen von Anton Hanak – und konnte kurz vor Beginn des Ersten Weltkriegs, im Jahr 1913, bezogen werden.[45]

Parallel dazu entwickelte sich durch das Bemühen der Gewerkschaften, für die die soziale Betreuung der Bediensteten ein Hauptanliegen darstellte, ein System von Unterstützungskassen, die nach Einführung des Arbeiterkrankenversicherungsgesetzes im Jahr 1888 in Betriebskassen umgewandelt wurden. Entsprechend der großen Anzahl von Unternehmen gab es im Jahr 1890 nicht weniger als 29 Eisenbahn-Betriebskrankenkassen; erst mit der zunehmenden Konzentration (und Verstaatlichung) kam es auch hier zu einer Konzentration der Krankenversicherungseinrichtungen.[46]

So etwa konnte die „Krankenkasse der k. k. österreichischen Eisenbahnen", die selbst aus der „Kranken- und Unterstützungskasse für Bedienstete der k. k. Direktion für den Staatseisenbahnbetrieb in Wien" hervorgegangen war, ihre Versichertenzahl von 47.000 Personen im Jahr 1889 auf nahezu 220.000 Personen zu Beginn des Ersten Weltkriegs steigern. Nach Kriegsende wurde die Berufsgenossenschaftliche Unfallversicherungsanstalt der österreichischen Eisenbahnen, die mit dem Zerfall der Monarchie ihren Arbeitsbereich eingebüßt hatte, in ein einheitliches Unfallversicherungsinstitut für alle Eisenbahnbediensteten der jungen Republik umgewandelt. Maßgeblich daran beteiligt war Ferdinand Hanusch, Staatssekretär für soziale Verwaltung. Die neue Anstalt wurde Unfallversicherungsanstalt der Eisenbahnen in der Republik Österreich und schließlich Unfallversicherungsanstalt der österreichischen Eisenbahnen benannt.

Im selben Jahr, 1920, wurde auch die „Krankenversicherungsanstalt der Staatsbediensteten", die heutige „Versicherungsanstalt öffentlich Bediensteter", ins Leben gerufen. Für die Eisenbahner stellte sich die Frage, ob sie sich dieser zentralen Krankenversicherungsanstalt für die Staatsbediensteten anschließen oder die eigenen, berufsständisch ausgerichteten Krankenversicherungseinrichtungen beibehalten wollten. Schließlich entschloss man sich zum Ausbau der bestehenden Betriebskrankenkassen. Die neue „Krankenkasse der österreichischen Bundesbahnen" wurde geschaffen und ihre Satzung dem Leistungsniveau der Krankenversicherung der Bundesangestellten angepasst.[47]

[45] https://www.diepresse.com › der-hei... Jeannine Hierländer Der heimliche Immobilienschatz der ÖBB, abgefragt am 25. 9. 2019.

[46] https://www.sozialversicherung.at › ...PDF Zur Geschichte der österreichischen ..., abgefragt am 13. 9. 2023.

[47] https://guichet.public.lu › organismus Krankenkasse der nationalen

In der Ersten Republik zählte die Eisenbahnerkrankenversicherung zu den besten und leistungsfähigsten Krankenversicherungen ihrer Zeit – mit ein Grund, warum die Krankenversicherung der Eisenbahner von den Reformen in der allgemeinen Krankenversicherung nicht erfasst wurde, da diese keine Verbesserung dargestellt hätten. Nach Ende des Zweiten Weltkriegs wurde durch das Bundesgesetz von 1947 bestimmt, dass die neu gegründete Versicherungsanstalt der österreichischen Eisenbahnen neben der Unfallversicherung ab 1. Januar 1948 auch die Kranken- und Invalidenversicherung durchzuführen habe. Heute beherbergt das markante Gebäude an der Linken Wienzeile die „Versicherungsanstalt für Eisenbahnen und Bergbau (VAEB)", die durch die Fusion zweier traditionsreicher Sozialversicherungsträger entstanden ist und die berufsständischen Traditionen der Versicherungsanstalt der österreichischen Eisenbahnen und der Versicherungsanstalt des österreichischen Bergbaues verbindet.[48]

7. Vom Kaiserstaat zur Republik

Im letzten Drittel des 19. Jahrhunderts war die Eisenbahn auch in der ländlichen Bevölkerung vom „gemiedenen Feuer speienden Dampfross" zum beliebten Transportmittel mutiert. Im Bürgertum und beim Adel präsentierte sich die Bahn mit einer wahren Palette an Nutzungsmöglichkeiten. Der Bahnbetrieb sollte künftig in wirtschaftlich angespannten Situationen nicht mehr von der Willkür privater Unternehmer abhängig sein.

Es erfolgte eine schrittweise Verstaatlichung des Bahnnetzes der österreichischen Reichshälfte Österreich-Ungarns . Sie begann 1882, wobei die k. k. österreichischen Staatsbahnen (kkStB) entstanden. 1896 bis 1918 unterstanden sie dem k. k. Eisenbahnministerium.[49]

7. 1. Gründung von Staatsbahnen Österreichs (1919-1923)

Die Staatsbahnen Österreichs firmierten nun als Deutschösterreichische Staatsbahnen, vom 21. November 1919 an als als Österreichische

Eisenbahngesellschaft, abgefragt am 12. 6. 2023.

[48] https://de.m.wikipedia.org › wiki Versicherungsanstalt für Eisenbahnen und Bergbau.

Die VAEB war neben der ehemaligen Sozialversicherungsanstalt der Bauern die einzige Sozialversicherung, die für alle drei Bereiche zuständig ist, abgefragt am 1. 6. 2023.

[49] https://de.m.wikipedia.org › wiki k.k. Staatsbahnen Die k.k. Staatsbahnen (kkStB), auch k.k. österreichische Staatsbahnen, abgefragt am 14. 6. 2023.

Staatsbahnen (ÖStB). Nach dem Inkrafttreten der neuen Bundesverfassung wurden sie mit 1. April 1921 in Österreichische Bundesbahnen umbenannt.[50]

7. 2. Gründung und Entwicklung der Österreichischen Bundesbahnen

Im 19. Juli 1923 beschloss der Nationalrat auf Vorschlag der Bundesregierung Seipel II das Bundesbahngesetz, mit dem ein eigener Wirtschaftskörper Österreichische Bundesbahnen als Unternehmung gebildet wurde.[51] Es handelte sich um eine juristische Person des öffentlichen Rechts, nicht etwa um eine Aktiengesellschaft oder eine GmbH. Die Bundesregierung erließ am gleichen Tag per Verordnung das Statut für die Österreichischen Bundesbahnen und setzte das 1896 für die staatliche Eisenbahnverwaltung erlassene Organisationsstatut außer Kraft.[52]

Nach § 16 des genannten Gesetzes verblieben die hoheitlichen Aufgaben, insbesondere die eisenbahnbehördliche Aufsicht über die ÖBB und die Privatbahnen beim Bundesminister für Handel und Verkehr; bei der technischen Beurteilung bediente sich der Bundesminister jedoch dazu besonders autorisierter Angestellter der ÖBB. Die in Österreich liegenden Linien der privaten Südbahn-Gesellschaft gingen 1923 in die Donau-Save-Adria Eisenbahn-Gesellschaft (vormals Südbahn-Gesellschaft) (DOSAG) über, den Betrieb übernahmen aufgrund der Kundmachung des Bundesministeriums für Handel und Verkehr vom 15. Dezember 1923, betreffend die Übernahme des Betriebes der österreichischen Südbahn-Linien die Österreichischen Bundesbahnen.[53] In den wenigen Jahren zwischen der starken Inflation nach dem Ersten Weltkrieg und der Weltwirtschaftskrise trugen die Bundesbahnen zum Erfolg des österreichischen Fremdenverkehrs bei. Tourismusorte mit Bahnanschluss hatten, wie schon vor dem Ersten Weltkrieg, deutliche Wettbewerbsvorteile. Die Bundesbahnen beteiligten sich daher auch an österreichischer Tourismuswerbung im Ausland und richteten Fahrpläne auch nach der touristischen Nachfrage aus.

Österreichs größte Dampflok ist die Lokomotive 12.10. Sie wurde im Jahr 1936 in der Lokomotivfabrik Floridsdorf gebaut. Lok und Tender sind insgesamt 22,6 Meter lang. Mit 138 Tonnen Gewicht, 2.700 PS und einer

[50] https://www.vienna.at › jubilaum-o... Jubiläum: ÖBB feiern 100-jähriges Bestehen – Österreich, abgefragt am 21. 04. 2023.

[51] https://www.linguee.de › bundesbah...Bundesbahngesetz - Englisch-Übersetzung – Linguee Wörterbuch, abgefragt am 31.5.2023

[52] https://www.leadersnet.at › news › 6... ÖBB feiern 2023 ihr 100-jähriges Jubiläum, abgefragt am 17. 01. 2023.

[53] https://pm20.zbw.eu › about.de.html, abgefragt am 14.6.2023

Höchstgeschwindigkeit von 154 km/h war sie die größte schwerste, stärkste und schnellste Dampflok, die jemals in Österreich gebaut wurde. Nun ist die Lokomotive 12.10 nach aufwändiger Restaurierung erstmals im Technischen Museums Wien (TMW) zu sehen.

8. Die Reichsbahnzeit (1938–1945)

Nach dem „Anschluss" Österreichs durch das Deutsche Reich am 12./13. März 1938 wurden die Bundesbahnen am 18. März 1938 in die Deutsche Reichsbahn eingegliedert. Die im Deutschen Reich seit Jahren laufende Aufrüstung der Wehrmacht wurde auf die „Ostmark" (ab 1942: „Donau- und Alpenreichsgaue") ausgedehnt. Das Bahnnetz Österreichs wurde vor allem militärischen Transportbedürfnissen angepasst. Ab März 1938 diente die Bahn vielen Österreichern zur Flucht ins Ausland (einige von ihnen haben diese Bahnfahrt in ihren Erinnerungen verarbeitet). 1944/45 wurden die Bahnanlagen, speziell in Ostösterreich, von den Alliierten bombardiert (vor allem um den Nachschub und Truppenbewegungen des Gegners zu stören bzw. zu unterbinden); viele Gleisanlagen, Brücken, Fahrzeuge und Bahngebäude wurden beschädigt oder zerstört.[54]

9. Die Eisenbahnen Österreichs Seit 1945

Dem Wiederaufbau der Wiener Bahnhöfe wurde seit 1945 besonderer Symbolgehalt zugemessen, zu weiter reichenden strukturellen Veränderungen im Wiener Bahnnetz konnte man sich jedoch nicht durchringen und errichtete sie daher wieder als Kopfbahnhöfe an den ursprünglichen Stellen. Der Fuhrpark war stark dezimiert und bis 1955 (Staatsvertrag) schwer vom Krieg gezeichnet; selbst älteste Fahrzeuge wurden aufs Äußerste beansprucht.[55] 1951 ereignete sich in Langenwang (Steiermark) ein schweres Zugsunglück mit 21 Toten, was auch auf die Zerstörung eines Wagens mit hölzernem Kasten aus 1907 zurückzuführen war. Vom Westen und Süden des Landes Richtung Wien strebend, wurde die Elektrifizierung der Hauptstrecken abgeschlossen; der größte Schub fand in den 1970er Jahren statt. Parallel dazu verlor die Bahn als Verkehrsmittel aber ab den 1960er Jahren mit der steigenden Motorisierung an Bedeutung.[56]

[54] https://www.wn24.at › kultur › bah... Bahn und Nationalsozialismus in Österreich 1938 – 1945, abgefragt 15. 6. 23.

[55] https://www.eisenbahn.gerhard-obermayr.com › ... Wiederaufbau nach 1945 - Die Eisenbahnen in Österreich, abgefragt 15. 6. 23.

[56] https://www.kleinbahnsammler.at › ... ÖBB 1945 – 1970, abgefragt 15. 6. 23.

Nebenstrecken und Lokalbahnen wurden teilweise eingestellt, für die Öffentlichkeit symbolisiert durch die Einstellung der Salzkammergut-Lokalbahn 1957. Die Umstellung von Dampftraktion auf Elektro- und Dieselbetrieb war bis 1976 abgeschlossen, nur auf den Zahnradbahnen und einigen Schmalspurbahnen waren Dampflokomotiven vereinzelt noch länger anzutreffen.[57] Nach 1989 (Beseitigung des Eisernen Vorhangs) konnte der Bahnverkehr über die ostösterreichischen Grenzen wieder verstärkt werden. 2009 verkehrten z. B. von Wien in die slowakische Hauptstadt Pressburg pro Tag wesentlich mehr Züge als nach Deutschland und in die Schweiz.[58]

9.1. Verkehrs- und soziapolitische Strukturen

Verkehrspolitik des Bundes zum Schienenverkehr war seit 1945 uneinheitlich. Die Bahn wurde und wird als wichtige Bastion der Sozialdemokratie betrachtet. Die Flexibilisierung der als „ÖBB-Privilegien" kritisierten, für das Bahnpersonal vorteilhaften und für die ÖBB teuren Gehalts- und Pensionsregelungen ist bis heute nicht abgeschlossen. Das Bahndefizit wird aus der Staatskasse finanziert, die Politik nimmt beträchtlichen Einfluss auf die Betriebsführung der ÖBB. Andererseits unternimmt der Staat im Vergleich zur Schweiz wenig, um die Bahn zu stärken. Der enorm gestiegene Individualverkehr wird als unvermeidlich betrachtet. Dennoch kam es ab ungefähr Mitte der 1990er Jahre zu beträchtlichen Investitionen in Bahnprojekte.

Doch diese teuren Ausbauten bedeuten natürlich nicht automatisch eine Verbesserung der allgemeinen Qualität des Eisenbahnverkehrs. Als einzige österreichische Partei plädieren „Die Grünen" schon seit Jahrzehnten für den Ausbau des öffentlichen Schienenverkehrs. Die Bundesbahnen selbst sind bestrebt, ihre Effizienz durch Zusammenarbeit mit benachbarten Bahnen (DB, MAV) zu stärken. ÖBB-Strecken werden nunmehr auch von Zügen anderer Bahnunternehmen auf deren eigene Rechnung befahren (Beispiele: Westbahn Güterzüge der Raab-Oedenburg-Ebenfurter Eisenbahn).[59]

[57] https://www.zvab.com › plp, abgefragt 15. 6. 23.

[58] https://www.bmeia.gv.at › themen Slowakei - Bilaterale Staatsverträge, abgefragt 15. 6. 23.

[59] https://www.ots.at › presseaussendung ÖBB: Zusammenarbeit von ÖBB, DB und SBB bringt Kostensenkung, abgefragt 15. 6. 23.

9.2. Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau

Mit 1. Jänner 2020 wurde aus den drei ehemals eigenständigen Sozialversicherungsträgern Versicherungsanstalt öffentlich Bediensteter (BVA), Versicherungsanstalt für Eisenbahnen und Bergbau (VAEB) sowie der Betriebskrankenkasse der Wiener Verkehrsbetriebe (BKKWVB) die Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau.

9.2.1. Aufgaben

Die BVAEB als ein von den Versicherten selbstverwalteter Sozialversicherungsträger gewährleistet Kranken-, Unfall- und Pensionsversicherung für mehr als 1,1 Millionen Versicherte in ganz Österreich. Von der Kindergeburt bis ins hohe Alter fördert die BVAEB über Vorsorge und präventive Maßnahmen die Gesundheit ihrer Versicherten, ermöglicht Heilbehandlungen, Therapien, Rehabilitationen und sichert ihre Versicherten durch finanzielle Leistungen in allen Lebenslagen ab.

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ŽELEZNIČKI SAOBRAĆAJ IZ VIZURE AUSTRIJSKE ISTORIJE OSIGURANJA

Apstrakt

Istorijski razvoj železnice povezan je sa razvojem austrijskih fabrika i osiguravajućih društava, što nr iznenađuje jer su sva tri ekonomska sektora „deca" industrijske revolucije, čija je polazna tačka pronalazak parne mašine. Železnice su omogućile da se velike količine osnovnih dobara, sirovina za industriju i proizvoda industrijske masovne proizvodnje bezbedno i brzo transportuju ili razmenjuju na velike udaljenosti, što je dovelo do nastanka velikih, jedinstvenih tržišta. Bez železnice, akumulacija radne snage koja je često dolazila izdaleka ne bi bila moguća. U vezi sa tehničkim dostignućima u industriji i transportu, pojavile su se i nove vrste rizika, čija veličina i obim zahtevaju moderan, kapitalno bogat sistem osiguranja. S jedne strane, novi industrijski centri su rezultirali brzim privrednim i populacionim

rastom, as druge strane, povećan je rizik od nesreća. Osiguranje i socijalno zakonodavstvo za suzbijanje bolesti, nesreća i vanrednih siuacija postali su neophodni instrument za zaštitu fabričkih radnika, vlasnika malih predruzeća i železničkog osoblja. Istovremeno, proizvodi osiguranja su se sve više prilagođavali zahtevima železničkih rizika.

Ključne reči: železnička mreža, industrijski centar, lokomotiva. Konjska železnica, osiguranje transporta, rizik od nezgode.

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AUTOMOBILE LIABILITY INSURANCE SERVICES AND CONSUMER RIGHTS IN COURT PRACTICE

Summary

Automobile liability insurance is a mandatory type of insurance that covers the owner, authorized user, co-owner, and other owners of a motor vehicle from liability for any damage caused to third parties while using the motor vehicle. A third party is any individual who is present at the scene of a traffic accident, excluding the driver of the vehicle involved in the accident, and who is insured against automobile liability. This paper will discuss the insurance coverage for damages, the compensation process, and the instructions for handling a harmful event outlined in the automobile liability insurance policy, recourse options, and relevant court practices.

Keywords: *Traffic Accident, Automobile Liability Insurance, Insurance Policy, European Report, Case Law.*

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1. Introduction

The purpose of an insurance contract is to protect against future adverse events.[1] Insurance is a risk management technique where the insured transfers their risk to an insurance company by paying a fixed fee (premium). The goal is to avoid or reduce financial losses.[2]

Chapter XXVII of the Law of Contract and Torts (Law on Contract and Torts) – LCT[3] is dedicated to personal and property insurance in the Republic of Serbia law. Insurance is also regulated by many other laws, such as the Insurance Law,[4] Law on Compulsory Traffic Insurance – LCTI,[5] Health Insurance Law.[6]

By entering into an insurance agreement, the insurer commits to providing compensation, i.e., the agreed-upon amount, to the insured party or a third party or to take other actions in case of the covered event.[7] The insurance contract is concluded *bona fide*, with the intention and hope that no harmful event will occur, i.e., nothing will go wrong; however, if damage against which the policyholder is insured does occur, the insurance organization must compensate the policyholder.[8]

An insurance policyholder is a person who expresses their willingness to enter into an insurance contract with an insurance company. This person is usually the contracting party, the insured, or the insurance beneficiary, but this does not always have to be the case. For example, the person obligated to obtain mandatory car insurance is the contractor and the insured (as the vehicle's owner, their interest is insured). Still, they are not the beneficiary

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1 V. Kozar, V. Božić, "The insurance contract and the legal nature of the recourse claim", in: *Future of the law : facing with the challenges of Covid 19* (ed. Angel Ristov), Institute for Legal-Economic Research an Education Iuridica Prima Skopje, Republic of Macedonia, Ohrid 2020, vol. 11–12, 64.

2 R. I. Mehr, E. Cammack, *Principles of Insurance, 6th edition*, R. D. Irwin, Homewood, Illinois 1976, 34–37.

3 *Official Gazette of the SFRY*, No. 29/78 of 26 May 1978; Amendments in Nos.: 39/85 of 28 July 1985, 45/89 of 28 July 1989 (YCC), 57/89 of 29 September 1989 and in the *Official Gazette of the FRY*, No. 31/93 of 18 June 1993; *Final amendments in the Official Gazette of the RS*, No. 18/20 of 3 March 2020.

4 *Official Gazette of the RS*, No. 139/2014, 44/2021.

5 *Official Gazette of the RS*, No. 51/2009, 78/2011, 101/2011, 93/2012, 7/2013.

6 *Official Gazette of the RS*, No. 25/2019, 92/2023.

7 LCT, Art. 897.

8 V. Kozar, V. Božić, 64.

in this case. If the person with automobile liability insurance causes a traffic accident, the injured person is the insurance beneficiary.[9]

However, the insurance contract should be clearly distinguished from the insurance business, i.e., insurance activity as a specialized economic activity. Insurance as an activity is not characterized by randomness for the insurer (due to the application of actuarial mathematics based on the Law of Large Numbers and the calculation of probability when calculating the premium amount). In contrast, randomness is an essential feature of every insurance contract.[10] Aleatory contracts are agreements in which, at the time of their formation, the performance of one or both parties is not determined but is contingent upon some uncertain event.[11]

2. On the safety of public traffic on roads through damage compensation

Traffic is the movement of vehicles and people on the roads, whose behavior is regulated to ensure its safe and smooth development.[12] The injured party is the person who has suffered harm or damage. The person who caused the harm is called the tortfeasor. The tortfeasor is responsible for compensating the injured party for the harm caused unless they can prove that the harm was not their fault. This means the injured person must prove the other person is responsible for the harm. They must demonstrate that the other person caused the harmful action and resulting damage and that there is a clear connection between them. The perpetrator's guilt is assumed in this situation, but evidence can challenge it.

In current judicial practice, it is accepted that the injured party must prove the harmful act, the resulting damage, and the causal connection between them. There is a rebuttable presumption of the harming party's guilt. According to Art. 154, para. 1 LCT, whoever causes damage to another is obliged to compensate for it unless they can prove that the damage occurred through no fault of their own. The injured party must demonstrate the harmful action and damage, as well as the causal connection between them, and there

[9] E. Bikić, D. Grgić, "Ugovor o osiguranju"*, Anali Pravnog fakulteta Univerziteta u Zenici* 11/2018, 161.

[10] M. Vasiljević, *Poslovno pravo*, Savremena administracija, 1997, 517.

[11] V. Kozar, V. Božić, 64.

[12] Law on Road Traffic Safety – LRTS, *Official Gazette of the RS*, No. 41/2009, 53/2010, 101/2011, 32/2013 (Decision of the Constitutional Court), 55/2014, 96/2015, 9/2016 (Decision of the Constitutional Court), 24/2018, 41/2018 (another law), 41/2018, 87/2018, 23/2019, 128/2020 (another law), 76/2023, Art. 7, para. 1, clause 1.

is a rebuttable presumption of the fault of the harming party. The court has found that the plaintiff has proven a cause-and-effect relationship between the defendant's insured action and the damage. The established factual situation indicates that the harmful event occurred due to an omission by the defendant's insured. The plaintiff was cycling across a marked bicycle path with a green light when the defendant's insured, passing through a conditional green light, collided with the plaintiff's bike, causing injury. The court determined that the sole fault lies with the defendant's insured for not yielding the right of way, as traffic rules require (Article 47 LRTS). On the other hand, the plaintiff followed the rules by using the designated bicycle path and crossing the intersection with the right of way. Based on these findings, the court concluded that the defendant is obligated to compensate the plaintiff for the damage suffered due to the incident by the provisions of Art: 940 and 941 LCT.[13]

In damage cases, liability can be shared, meaning the injured party may have contributed to the occurrence of the damage. In legal terms, the injured party and the person responsible for them are considered as one entity towards the harmed person. In this context, the shared responsibility or contribution of the person responsible for the injured party is treated as their shared responsibility or contribution. According to judicial practice, if a "child is injured and it is found that the child was without parental supervision and the gate to the yard was open, the court may consider that the harmful event was partly caused by the behavior of the child, or by an omission on the part of the parent. The shared responsibility or contribution of the injured party is judged in the same way as their responsibility for causing or increasing the damage in general. If the injured party, such as a three-year-old child in this case, cannot be held responsible for the damage in general, but another person is responsible for them (such as a parent). The injured party and the responsible person are considered as one entity towards the harmed person. In this scenario, the shared responsibility or contribution of the second person responsible for the injured party is treated as their shared responsibility or contribution. In this specific case, the court found that the mother of the child, who left the child unattended in the yard with the gate open, did not act with the due care of an average person and parent. As a result, the court determined that the mother's actions contributed to the occurrence of the damage by 30%".[14]

[13] From the verdict of the High Court in Novi Sad, Gž 2647/2018 od 19. 2. 2020, author of sentence B. Gajić, *Bulletin of the High Court in Novi Sad* 11/2020.

[14] From the verdict of the High Court in Novi Sad, Gž 3804/2016 od 17. 1. 2018,

Vehicles must have a traffic permit, license plate, and registration sticker to be allowed on the road. Once the registration sticker expires, the vehicle cannot participate in road traffic. A vehicle is defined as something designed and equipped to move on the road using construction, devices, assemblies, and equipment. A bicycle is a vehicle with at least two wheels that the driver or passenger powers through pedals or levers. A motor vehicle has its engine, designed and equipped to transport people or things, perform work, or tow a trailer, excluding rail vehicles.[15]

Due to its characteristics, a vehicle is considered dangerous because driving it can cause harm to others. The vehicle's owner is responsible for any damage caused while operating it. In the event of an accident involving a moving car, the owners of the vehicles are jointly and objectively liable for any damage suffered by third parties, regardless of fault.[16] For a long time, legislation only recognized liability based on fault. However, with recent technical developments and increased environmental risks, strict liability is becoming more common.[17] In these cases, it is enough to show a connection between the traffic accident and the damage and to distinguish the right to compensation from the responsibility for the damage. This principle has been applied in legislative practice in most states and has become a fundamental principle in both jurisprudence and comparative law.[18] It is a matter of determining responsibility based on causality and prescribed reasons that may exempt the responsible person,[19] for example. If he proves that the damage originates from some cause that was outside the object, and the effect of which could not be predicted, avoided, or eliminated, or that the damage was caused solely by the actions of the injured party or a third party, which he could not foresee and whose consequences he could not avoid, or eliminate.[20]

The person the owner entrusts a thing is responsible for using it. If the owner entrusts a dangerous thing to someone not qualified or authorized to handle it, the owner is responsible for any resulting damage.[21]

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author of sentence N. Maksimović, *Bulletin of the High Court in Novi Sad* 9/2018.

15 LRTS, Art. 7, para. 1, clause 31–33.

16 LCT, Art. 178, para. 4.

17 B. Jakaša, „Komparativni prikaz odgovornosti vozara za prevoz robe u pojedinim granama saobraćaja", *Privreda i pravo* 3/1978, 17.

18 N. Nikolić, *Obavezno osiguranje od autoodgovornosti (u praksi osiguranja i uporednom pravu nekih država Evrope, međunarodnim konvencijama i savremenim tendencijama),* Zajednica osiguranja imovine i lica Dunav, Beograd 1977, 83.

19 M. Knežević, „Opšta pravila o odgovornosti", *Pravo – teorija i praksa* 5–6/2010, 48.

20 LCT, Art. 177, para. 1 and 2.

21 LCT, Art. 176, para. 1 and 4.

The interpretations presented here are accepted in valid judicial practice. According to Art. 176, para. 4 LCT, the owner of a dangerous thing (such as a motor vehicle) bears objective responsibility, based on causation - on the risk created in connection with the dangerous thing and regardless of fault. If the owner of a motor vehicle allows a person without a driving license to drive the vehicle, they are responsible for any damage caused by its use. In a specific case in Belgrade on 11 December 2015, a traffic accident occurred in the Terazije tunnel, where a truck driven by a person without a driver's license and owned by the defendant caused a collision with a stopped passenger vehicle. The plaintiff insured both vehicles involved. The first-instance court correctly applied the provisions of Art. 29 LCTI and Art. 176, para. 4 LCT ruled that there was a loss of rights from the insurance. The defendant who allowed the unauthorized person to use the vehicle is responsible for compensating for the damage caused in the traffic accident. This is considered objective responsibility, independent of the fault of the one causing the harm, based on the risk created by the dangerous thing. The owner of the dangerous thing failed to prove that the damage was solely caused by the injured party or a third party and, therefore, cannot be released from responsibility.[22]

3. Automobile Liability Insurance Policy

The special regulation specifies the risks covered by compulsory insurance. Under the auto liability insurance policy, you are insured against liability for damage caused to third parties due to the use of a motor vehicle, including death, bodily injury, harm to health, or destruction. This also includes damage to items being transported and personal belongings of the individuals in the vehicle.[23]

The insurance company issues the insurance policy to the insured.[24] Please make sure to include the following details in the insurance policy: information about the insured person, whether a natural person or a legal entity, duration of the insurance (including the start and end dates), information about the motor vehicle (registration number, type, year of manufacture, load capacity, brand and type, power, color, chassis number, volume, number of registered seats, and purpose), data on the amount of insurance coverage

[22] From the judgment of the Commercial Court of Appeal, Pž 6650/17 of 24 April 2018, *Bulletin of the Judicial Practice of Commercial Courts* 1/2019, 45.

[23] Decision on the content of the auto liability insurance policy form and the way of keeping records of the policies taken – DCALIPFWKRPT, *Official Gazette of the RS*, No. 32/2010, 99/2010.

[24] LRTS, Art. 173, para. 3.

per harmful event.[25] The conclusion follows that the insurance policy represents an auto liability insurance contract, which was concluded under the insurance conditions, which, as such, are an integral part of that contract.[26]

If the driver does not have an insurance policy, international auto liability insurance document, border insurance, or a European traffic accident report during the use of the means of transport and fails to present them when requested by an authorized official or does not provide personal data and insurance information to all participants of a traffic accident, they will be fined from 10,000 to 50,000 dinars as a misdemeanor.[27] Please note that the driver will also be fined between 100,000.00 and 200,000.00 dinars if they are involved in an accident and fail to provide the insurance company with information about the accident and other details as outlined in article 9, paragraph 2 LCTI for inclusion in the database.[28]

4. European Traffic Accident Report as Evidence in Civil Proceedings.

When an obligatory auto liability insurance policy is issued, the insurance company provides the insured with a European traffic accident report.[29] When using their vehicle, drivers must have a European traffic accident report and present it to an authorized official upon request. They are also required to fill out and exchange the report in the event of an accident in which they are involved. Failure to comply with these legal obligations is considered a misdemeanor and can result in a fine of 100,000.00 to 200,000.00 dinars.

According to DCALIPFWKRPT, the European traffic accident report is completed if only minor material damage has occurred and if none of the participants in the traffic accident require an on-site police investigation.[30] However, in domestic courts, the European traffic accident report is interpreted broadly, depending on the specific case's circumstances of the case.

4.1. Compensation for Non-pecuniary Damage

In judicial practice, it is established that signing the European report alone cannot be the basis for compensation for non-pecuniary damage.

[25] DCALIPFWKRPT.
[26] *Ibid.*
[27] LCTI, Art. 101, para. 1, clause 1.
[28] LCTI, Art. 101, para. 2.
[29] LRTS, Art. 173, para. 3.
[30] DCALIPFWKRPT.

However, this does not rule out the possibility of receiving compensation through court proceedings. In such proceedings, as per Article 228 of the Civil Procedure Law – CPL,[31] other evidence presented by the parties and the court is considered. In this case, the medical documentation provided by the plaintiff and the medical expertise were crucial in determining the severity of the plaintiff's injuries and their consequences. The court appropriately evaluated this evidence by Article 8 of the CPL. Consequently, the court determined the amount of monetary compensation awarded to the plaintiff in line with Article 200 of the LCT. This compensation is fair and represents a suitable recompense for the non- pecuniary damage suffered by the plaintiff, reflecting the nature and purpose of this legal institute and providing adequate redress for the plaintiff's suffering as the injured party.[32] In a series of court decisions, it has been established that the European traffic accident report can be used as evidence to support a claim for non-pecuniary damage resulting from a traffic accident. According to the law, the insurer is liable for damages caused by the insured event, and the injured party may demand compensation for damages directly from the insurer. In this case, the plaintiff is not entitled to compensation for reducing general life activity as the experts have determined that there is no impairment.[33]

Based on the analysis of judicial practice, it is clear that although the European traffic accident report cannot be the sole basis for compensation for non-material damage, it does not rule out the possibility of compensation in court proceedings. According to the general provisions of the CPL, the court can consider other evidence at the request of the parties. These different pieces of evidence, such as medical documentation provided by the injured party (plaintiff) and medical expertise, help establish the cause-and-effect relationship between the resulting damage and the injury suffered, as well as the severity of the injuries and the consequences for the injured party. The court evaluates this evidence based on the general provisions of the CPL. It determines the compensation awarded to the injured party, which aligns with the LCT provisions related to non-material damage compensation. This compensation aims to provide fair reparation for the suffering of the

[31] *Official Gazette of the RS,* No. 72/2011, 49/2013 (Decision of the Constitutional Court), 74/2013 (Decision of the Constitutional Court), 55/2014, 87/2018, 18/2020, 10/2023 (other Law).

[32] From the judgment of the Appellate Court in Belgrade Gž 5411/13 of October 8, 2014, unpublished, from the author's collection.

[33] From the verdict of the High Court in Belgrade Gž 13351/18 of March 31, 2021, unpublished, from the author's collection.

injured party. Legal experts agree that society has the right to use other evidence related to the occurrence of the accident and the amount of damage.[34] Therefore, if the insurance company has this right, the court can also consider other evidence when deciding on compensation for non-material damage caused in a traffic accident, even if a European report was drawn.

4.2. Nullity of the Contractual Provision Regarding the Loss of Rights Due to Failure to Involve the Police in Conducting an On-Site Investigation

If a traffic accident results in significant or non-pecuniary damage, the involved parties can request a police investigation at the scene. However, if the accident only causes minor material damage, a police investigation is not necessary, and the parties involved can fill out the European Traffic Accident Report instead. It has been established in legal practice that failure to involve the police at the scene and follow the appropriate procedures does not impact the right to claim compensation for non-pecuniary damage. This is because such issues may affect other types of liability, such as administrative responsability, but not the civil liability of the party at fault or their insurer, who is responsible for damage compensation resulting from the accident.[35]

Sure, here is the rewritten text: "The legal norm states that contract provisions which lead to the loss of the right to compensation or insurance amount are considered null and void if the insured does not fulfill any of the prescribed or contracted obligations after the occurrence of the insured event."

4.3. The Insurer Has the Right to Recover the Difference up to the Actual Damage Paid

The European traffic accident report is an out-of-court settlement for minor damages when the responsible party's liability is not disputed. However, signing the report does not waive the right of the injured party or their comprehensive insurer to claim the difference between the paid amount and the actual damage proven through other means in civil proceedings against the responsible party's auto liability insurer. According to legal practice, the European report is a method of out-of-court settlement for minor damages incurred during a traffic accident. The undisputed liability of one party is established through the fault of the driver whose vehicle is insured, which

[34] M. Cerović, „Evropski izveštaj o saobraćajnoj nezgodi", *Tokovi osiguranja* 1/2013, 23.

[35] From the judgment of the High Court in Leskovac, Gž 1288/13 of 19 September 2013, unpublished, from the author's collection.

is supported by a written statement provided with the report. The purpose of the European report is to facilitate the determination of facts related to the accident, particularly for cases with minimal damages, rather than determining the amount of compensation to the injured party. Therefore, the report does not exclude the right of the injured party to claim any additional amount beyond what was initially paid for the proven damages.

In this specific case, the fault of the driver whose vehicle is insured by the defendant is undisputed, as confirmed by the written statement provided with the report. As the car causing the accident was insured by the defendant at the time, an insured event occurred, obligating the defendant to compensate its insured and any third party involved.[36]

5. Loss of Insurance Rights Due to Leaving the Scene of an Accident or Due to Intoxication at the Time of Theaccident

In some cases, damages may not be covered by insurance, so the insurer is not required to compensate for them even if they have occurred. Exclusions can be based on the law or general insurance conditions. They can also apply to the insured or even to third parties.[37]

"Exclusions about third parties are rare, given that this insurance was established precisely in their interest."[38] Therefore, our law prescribes that the insured person's loss of right from the auto liability insurance contract does not affect the injured person's right to compensation.[39] Therefore, it is prescribed in our law that the loss of the insured person's right from the auto liability insurance contract has no effect on the injured person's right to compensation,[40] or if the driver, after the traffic accident, avoids or refuses to undergo an alcohol test, i.e., consumes alcohol in such a way that it is impossible to determine the presence of alcohol in the blood, i.e., the degree of alcohol intoxication at the time of the accident.

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[36] From the judgment of the Commercial Court of Appeal, Pž 3439/13 of November 14, 2013, unpublished, from the author's collection.

[37] Z. Miladinović, Obavezno osiguranje vlasnika motornih vozila od odgovornosti za štetu pričinjenu trećim licima", in: *XXI vek – vek usluga i Uslužnog prava*, (ed. Dragan Vujisić), Pravni fakultet Univerziteta u Kragujevcu Institut za pravne i društvene nauke, Kragujevac 2020, 52.

[38] V. Sokal, „Štete pokrivene osiguranjem i njihova naknada", *Pravni život* 11–12/1992, 2327.

[39] LCTI, Art. 29, para. 2.

[40] LCTI, Art. 29, para. 1, clause 7.

The information above is based on valid judicial practice. According to this practice, leaving the location of a traffic accident can result in the loss of insurance rights. This is because by leaving the scene, the participant (including the victim) avoids undergoing an examination to determine their level of intoxication at the time of the accident. This avoidance of examination leads to the loss of insurance rights. It's important to note that if the injured party leaves the scene agreeing with another party, it does not affect the loss of insurance rights.[41]

In cases where a passenger is aware that the driver is under the influence of alcohol and still agrees to let the driver operate the vehicle, both the driver and the passenger share responsibility for any damages caused by the impaired driving. This is because the passenger, by knowingly allowing the intoxicated driver to operate the vehicle, assumes the risk of potential harm.[42] In cases where the injured party is partially responsible for the damage, they will receive reduced compensation. If it's unclear how much damage was caused by the injured party, the court will consider the circumstances when awarding compensation.[43]

5.1. Subrogation and "Recourse" of the Insurer If the Insured Loses the Right under the Insurance

The insurer has the right to recover the amount paid from the insured only if, according to the contract terms, the insured loses the right to insurance. As per explicit legal provision, the insurance company that compensates the injured party steps into the injured party's rights against the person responsible for the damage for the amount of the compensation paid, the interest from the compensation payment, and the costs of the procedure. In case of loss of rights from the insurance, the insured person who concluded the auto liability insurance contract is liable.

According to the interpretation of the highest court instance, when the vehicle owner concludes a contract on insurance liability and pays the insurance premium to the insurer, the insurer fulfills the contractual obligation towards the insured by paying compensation to a third party if the insured

[41] From the judgment of the High Court in Belgrade, Gž 478/19, dated 6/17/2022., http://www.propisionline.com/Practice/Decision/62627 , 22. 5. 2024.

[42] L. Đorđević, V. Vrhovšek, „Nematerijalna šteta i njena naknada", *Sudski glasnik Trgovinskog suda u Beogradu* 4/2008, http://www.propisionline.com/Practice/Decision/30807, last visited 22. 5. 2024.

[43] LCT, Art.192.

event occurs. Therefore, the insurer can recover the paid amount from the responsible persons only if, according to the insurance contract terms, the insured loses the right to insurance. This is the case when the alcohol level of the defendant BB at the time of the traffic accident was above 0.5 g/kg. The defendant was not capable of safely driving a motor vehicle due to the determined degree of alcoholism at the time of the traffic accident and was driving the car under the influence of alcohol, which is in a causal relationship with the resulting traffic accident, as confirmed by medical experts. Therefore, the second-instance court correctly applied substantive law when it accepted the claim and obliged the defendant BB to pay the plaintiff 3,744,018.00 dinars with interest on the individual amounts from the due date of payment until payment. Therefore, the allegations of the defendant BB that the plaintiff does not have the right of recourse against the defendant because the defendant acquired the right to drive a motor vehicle at the time of the accident and that the presence of alcohol is not causally related to the occurrence of the traffic accident, and therefore the risk of liability for the damage in question is not excluded according to the terms of the insurance are unfounded.[44]

6. Legal Nature of "Recourse Claims" against Another Insurer (With Whom the Injured Party Is Insured against Automobile Liability) or the Injured Party Who Has Lost His Right from the Insurance Contract

In our practice, we often use the term "insurer's recourse." It's important to clarify that it's not simply a matter of regressive rights when filing a claim against the injured party or their insurer. This is because "insurer's recourse" pertains explicitly to the insured's claim after transferring their rights to the insurer, based on law or contract, rather than due to payment made for someone else.[45] The same principle applies when an insurance company claims the insured person who has lost their right to the insurance and is responsible for the damage. According to LCTI in Art. 28, paragraph 2, under the title "Opposition and subrogation of the insurance company", the following rule applies: "The insurance company that compensates the injured party takes on their right to pursue the person responsible for the damage for the amount of the compensation paid, interest from the payment of the compensation, and the costs of the procedure if the insured party did not fulfill their obligations according to the terms of the auto liability insurance contract." The

[44] From the judgment of the Supreme Court of Cassation, Rev. 1326/2019 of 27 January 2021, https://www.vrh.sud.rs/sr/ rev-13262019-regres, last visited 22. 5. 2024.

[45] P. Šulejić, *Pravo osiguranja*, Dosije, Beograd 2005, 368.

issue of "recourse demands" by insurance organizations is particularly relevant in the case of liability insurance.[46] The insurance company's recourse claim against another insurer, based on legal personal subrogation, is appropriate when the injured party is insured against auto liability.[47] Remember the text: "The injured party has the right to take direct action."[48] In legal terms, it is noted that the insurer's right to seek reimbursement from the party at fault for the damage is primarily based on subrogation. This means that the insurer steps into the insured's shoes to the extent that it has compensated the insured when paying out the insurance claim.[49]

The doctrine explains the difference between subrogation, which is fulfilling a debt with the right to take over the creditor's position, and the reimbursement of the payer who is one of the debtors or co-debtors with joint and several liabilities. The legal interpretation states that subrogation occurs when someone fulfills another person's obligation and agrees with the creditor that the fulfilled claim will belong to them, along with any secondary claims. However, when a joint debtor pays off the entire debt to the creditor, they are not fulfilling someone else's obligation but their obligation from the joint debt.[50]

Subrogation can also occur based on a legal provision provided in specific cases.[51] After receiving insurance compensation, the insured person's rights against the party responsible for the damage are transferred to the insurer, as required by the law, up to the amount of the compensation paid. However, if the insured's actions prevent this rights transfer to the insurer, in whole or in part, the insurer is released from its obligation to the insured to the extent of the prevention.[52] In jurisprudence, this concept is known as subrogation, and it involves the insurer fulfilling the responsibility of the person

[46] V. Kozar, V. Vrhovšek, S. Đorđević, „Pravo osiguravača na zateznu kamatu u slučaju subrogacije i regresa, kao i zastarelost potraživanja u tim slučajevima", in: *Prouzrokovanje štete, naknada štete i osiguranje,* (eds. Zdravko Petrović, Vladimir Čolović, Dragan Obradović), Institut za uporedno pravo, Beograd – Valjevo 2023, 531–534.

[47] LCT, Art. 939.

[48] LCT, Art. 941.

[49] M. Dukić, „Ostvarivanje prava na regres u transportnom osiguranju", *Sudska praksa trgovinskih sudova* 1/2005, 176.

[50] L. Karamarković, *Rasprave iz ugovornog, odštetnog i procesnog prava*, Glosarijum, Beograd 2004, 100.

[51] V. Kozar, V. Božić, 72.

[52] LCT, Art. 939, para. 1. and 2.

responsible for the damage by paying insurance compensation to the injured insured. This means the insurer assumes the insured's rights in pursuing the responsible party for the damage.[53] Personal subrogation represents one of the types of changes of subjects in an obligation-legal relationship that should be distinguished from cession.[54]

It is important to note that the rights transfer from the insured to the insurer should not disadvantage the insured.[55] Therefore, if the compensation received by the insured from the insurer for any reason is lower than the damage he suffered, the insured has the right to be paid the rest of the compensation from the funds of the responsible person before the payment of the insurer's claim based on the rights that have passed to him.[56]

7. Conclusion

Lawyers often emphasize that ignorance of the law can be harmful. From our experience, it's clear that this is true, especially in the context of public transport. Due to a lack of awareness about their rights, passengers may fail to exercise them or even lose them altogether. However, understanding the law is not the only important factor. Common sense also plays a crucial role - for example, not driving while intoxicated, not leaving the scene of a traffic accident, and promptly reporting any incidents to the police or through a European accident report form. These principles, among others, stem from the age-old saying "Do not do to others what you do not want them to do to you." It's reasonable to assume that this principle has influenced legislators. Article 16 LCT of the basic principles of obligation and civil law stipulates under the heading "Prohibition of causing damage" that everyone must refrain from actions that could harm others. Therefore, every road user should approach traffic with logical thinking and this adage in mind to protect and uphold their rights while minimizing the risk of losing them.

[53] Ž. Đorđević, V. Stanković, *Obligaciono pravo*, Naučna Knjiga, Beograd 1987, 634–636.

[54] *Ibid.*

[55] V. Božić, „Kaznenopravni aspekti prijevara i zlouporaba u osiguranju kao oblik neznatnog i organiziranog kriminaliteta", *Zbornik Pravnog fakulteta u Podgorici* 2017, 300–320.

[56] LCT, Art. 939, para. 3.

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USLUGE I PRAVA IZ AUTOOSIGURANJA U SUDSKOJ PRAKSI

Apstrakt

Osiguranje od autoodgovornosti je vrsta obaveznog osiguranja kojom se osiguravaju vlasnik, ovlašćeni korisnik, suvlasnik i drugi imalac motornog vozila od odgovornosti za štetu koju, upotrebom motornog vozila, pričini trećim licima. Treće lice je svaki učesnik u saobraćaju koji se zatekne na licu mesta saobraćajne nezgode ili nesreće, osim vozača vozila, koje je učestvovalo u pomenutoj saobraćajnoj nezgodi ili nesreći i koje je osigurano od autoodgovornosti. U ovom radu bavićemo se uslugom osiguranja kroz štetu, njenu naknadu, zatim kroz deo uputstva za postupanje u slučaju štetnog događaja, koje je sadržano na poleđini polise osiguranja od autoodgovornosti, uključujući i pitanje regresa, uz analizu aktuelne sudske prakse.

Ključne reči: saobraćajna nezgoda, osiguranje od autoodgovornosti, polisa osiguranja, Evropski protokol, studija slučaja.

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THE USE OF MODERN TOOLS AND THE ROLE OF TRAFFIC EXPERTS IN FRAUD DETECTION IN INSURANCE

Summary

Traffic around the world and in Serbia undergoes daily changes and numerous improvements. Regulations in the European Union follow technological advancements in vehicles and introduce uniform rules for manufacturers of new vehicles regarding the use of data from the airbag control unit at the time of a traffic accident, which will be implemented from July 6, 2024. Modern vehicles are equipped with data recorders located in the airbag control unit that capture all relevant information leading up to a traffic accident in precise form. Supporting activities provide the capability to read such data and input it into modern software tools for traffic accident analysis, thus reducing or eliminating human (expert) subjective influence. However, the role of traffic technical experts remains indispensable because they must, for the purposes of investigations and subsequent court proceedings (criminal or compensation claims) as well as at the request of insurance companies, correlate the data retrieved from the airbag control unit with relevant data from the case file, especially with photographic documentation from the scene. Additionally, experts can recognize and identify attempts at staging traffic accidents or fraudulent insurance claims in cases of discrepancies between

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the data retrieved from the vehicle's control unit and the case file data, which is addressed in this paper.

Keywords: *Compensation for Damages, Traffic Accidents, Expertise, Insurance Fraud.*

1. Introduction

Road traffic is, objectively speaking, the most prevalent form of transportation both globally and in Serbia. Each of us participates in road traffic daily in various roles – most commonly as pedestrians or as drivers of different types of vehicles – with two, three, or four wheels. Traffic accidents are directly related to road traffic. They are a constant, and in Serbia, there is hardly a day without new information in the media about traffic accidents with severe or fatal consequences. These are the direct outcomes of widespread traffic violations.[1]

According to WHO data (2023), traffic accidents were the leading cause of death for children and young people (aged 5 to 29 years) during 2019. When considering all age groups, traffic accidents were the 12th leading cause of death. Of the total number of fatalities, two-thirds are working-age individuals (aged 18 to 59 years), which causes enormous health, social, and economic damage to society as a whole (WHO, 2023).

However, in addition to traffic accidents, insurance fraud related to traffic accidents is also increasingly common. These frauds take various forms – from staged traffic accidents followed by claims for material damage, to fabricated injuries resulting from such accidents. Both domestic and international media have been reporting on this issue for years[2],[3]. There is also reporting on organized criminal groups involved in insurance fraud related to traffic accidents. Moreover, there have been criminal proceedings conducted precisely due to this type of fraud before the former Special Public Prosecutor's Office in Belgrade.[4]

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[1] N. Mrvić Petrović, D. Obradović, "Reckless driving – how to prevent Russian roulette on Serbian roads", in: *Traffic, Criminality and Urban Safety* (eds. Ana Batrićević, Dragan Obranović), Palic, 14-15 June 2023, 63.

[2] https://www.telegraf.rs/vesti/hronika/2931056-organizovana-grupa-mlati-pare-varanjem-osiguranja-insceniraju-saobracajku-pa-opeljese-lekare-vestake-i-advokate,29.1.2018, last visited 20. 6. 2024.

[3] https://www.klix.ba/vijesti/bih/prevare-u-osiguranju-najcesce-se-laziraju-saobracajne-nesrece/151124109, 29.11.2015, last visited 16. 6. 2024.

[4] M. Petrović, M. Filipović, „Uloga veštaka saobraćajne struke u otkrivanju i dokazivanju prevara u osiguranju", in: *XXII Simpozijum Veštačenje saobraćajnih nezgoda*

Not only the media but also international professional insurance organizations address this issue. According to an estimate by the British Insurance Association from 2013, it was estimated that about 10 percent of paid claims in Europe are due to insurance fraud. The publication "Insurance Europe" notes that the insurance industry in the United Kingdom loses approximately 2.2 billion euros each year due to undetected fraud.[5] One in ten claims reported to insurers is fraudulent, and this increases the cost of each policyholder's insurance by 58 euros annually, according to British insurers.[6]

In the previous work, the authors highlighted the potential use of modern tools in all proceedings that follow traffic accidents. These tools can be utilized during criminal (or misdemeanor) proceedings as well as after the final conclusion of criminal proceedings in damage compensation cases before civil or commercial courts. The aim is to inform judicial authorities and insurance company representatives about these innovations. The reason for this is the possibility that, with the application of these tools, decisive facts of significance for determining the cause of the traffic accident can be unequivocally established in certain cases—though not all—along with identifying any faults of each driver involved in the accident or determining whether there is any contribution from the plaintiff that could be clearly defined. Consequently, judges handling such damage compensation cases would find it significantly easier to make a final, law-based decision regarding the existence (or non-existence) of contributions from other parties to the cause of the traffic accident and to proportionally assess that contribution in the ruling on the damage compensation claim.[7]

The aim of this paper is to highlight situations where, during forensic examination, modern tools have been applied to determine certain parameters related to traffic accidents. Despite these exact data obtained through the use of modern tools, traffic technical experts have identified attempts at insurance fraud in an unequivocal manner. The findings of the first expert were substantially confirmed by a second expert using additional new tools, after which the insurance companies filed criminal complaints

i prevara u osiguranju, Ivanjica, 2-4. Novembar 2023, 452–460.

[5] https://portalanalitika.me/clanak/91354/na-prevare-u-osiguranju-otpada-oko-10-odsto-placenih-steta, 21. 02. 2013, last visited 16. 6. 2019.

[6] Tokovi osiguranja, „*Vesti iz sveta*", Beograd 2013, 1–68.

[7] D. Obradović, M. Božović, J. Škrilec, „Značaj upotrebe savremenih alata u parnicama za naknadu štete proistekle iz saobraćajnih nezgoda", in: *Prouzrokovanje štete, naknada štete i osiguranje* (eds. Zdravko Petrović, Vladimir Čolović, Dragan Obradović), Institut za uporedno pravo, Udruženje za odštetno pravo, Beograd-Valjevo 2023, 247–265.

against individuals who attempted to deceive responsible parties in the insurance companies into making payments on submitted damage compensation claims.

2. Certain Official Data on Traffic Accidents in Serbia

According to data from the Traffic Safety Agency (hereinafter: TSA), during 2022, there were 33,230 traffic accidents (hereinafter: TA) on the roads of the Republic of Serbia. In these accidents, 553 people were killed, 3,292 sustained serious injuries, and 15,758 suffered minor injuries. Additionally, there were 19,761 traffic accidents resulting only in material damage. Percentage-wise, in 2022, there was an increase of about 5% in the number of traffic accidents with fatalities and approximately 6% in the total number of fatalities, while all other parameters showed a decrease in the types and consequences of traffic accidents.[8] This is even more evident from Table 1.

Data for 2023 on the number of fatalities on the roads in the Republic of Serbia, although not yet officially released by the Ministry of Internal Affairs (MUP RS) or the Traffic Safety Agency (TSA), is nonetheless available. According to some spescialized automotive magazines, it is reported that a total of 501 people were killed on the roads of Serbia during 2023.[9] Of the state institutions, only the Republic Institute for Statistics (hereinafter: RIS) has published data on traffic accidents on the roads in Serbia for 2023. RIS reports that the total number of traffic accidents involving fatalities in 2023 is 1.3% higher compared to 2022. A higher number of traffic accidents involving fatalities was recorded in urban areas, accounting for 75.9% of the total number of traffic accidents.[10]

The state of traffic safety in Serbia in January and February 2024 is worse compared to the same period last year, as there have been more traffic accidents with fatal outcomes.[11] Recently, the Republic Institute for Statistics (RIS)

[8] Traffic Safety Agency, *Statistical report on the state of traffic safety in the Republic of Serbia for 2022*, https://www.abs.gov.rs/rsl/statisticki-izvestaji , last visited 1. 6. 2024.

[9] https://www.automotorevija.rs/rubrike/broj-poginulih-saobracaj-2023-srbija, last visited 1. 6. 2024.

[10] Republički zavod za statistiku, Statistika saobraćaja i telekomunikacija, Saopštenje broj 073, God LXXIV, 18. 03. 2024, Registrovana drumska motorna i priključna vozila i saobraćajne nezgode na putevima, 2023, 1, https://www.stat.gov.rs/sr-latn/vesti/20240318-registrovana-drumska-motorna-i-prikljucna-vozila-i-saobracajne-nezgode-na-putevima-2023/?s=1502, last visited 15. 6. 2024.

[11] https://www.caglas.rs/u-prva-dva-meseca-2024-u-srbiji-povecan-broj-saobracajnih-nezgoda/, 7. 3. 2024, last visited 15. 6. 2024.

released data on traffic accidents on the roads in Serbia for the first three months of 2024, which provide further warnings. The data indicates that the total number of traffic accidents involving fatalities in the first quarter of 2024 is 2.6% higher compared to the same period in 2023. The increase in traffic accidents with fatalities outside urban areas is 23.8%. The number of fatalities in the first quarter of 2024 is 4.4% higher compared to the same period last year.[12]

***Table 1*:** Traffic Safety Agency Data: Basic Indicators of Traffic Safety in the Republic of Serbia, 2018-2022

Year	2018	2019	2020	2021	2022	Variation
Traffic accident with fatalities	491	494	459	482	505	**5%**
Traffic accident with injuries	13744	13735	11849	13273	12764	**-4%**
Traffic accident with casualties	14235	14229	12308	13755	13269	**-4%**
Traffic accident with material damage	21583	21541	18410	20824	19961	**-4%**
Total number of traffic accidents	35818	35770	30718	34579	33230	**-4%**
Fatalities	548	534	492	521	553	**6%**
Serious bodily injuries	3338	3322	2953	3347	3292	**-2%**
Minor injuries	17508	17068	14297	16558	15758	**-5%**
Injured	20846	20390	17250	19905	19050	**-4%**
Total number of casualties	21394	20924	17742	20426	19603	**-4%**

Source: Traffic Safety Agency

3. Legal Regulation of the Useo f Modern Tools Worldwide

The first law regarding the recording and use of vehicle data was enacted in the United States in 2014 (NHTSA, 2014).[13] The law clearly defines the scope of data, the purpose of use, application, requirements for vehicles, data format and elements, as well as usage instructions. The law mandates that no later than 90 days from the first sale of a motor vehicle, every manufacturer of a motor vehicle equipped with Event Data Recorders (EDR) must provide

[12] Republički zavod za statistiku, Statistika saobraćaja i telekomunikacija, Saopštenje broj 140, God LXXIV, 04. 06 .2024, https://www.stat.gov.rs/sr-latn/vesti/20230303-prvi-put-registrovana-drumska-motorna-i-prikljucna-vozila-i-saobracajne-nezgode-na-putevima-iv-kvartal-2022/?a=0&s=1701, last visited 15. 6. 2024.

[13] NHTSA, National Highway Traffic Safety Administration, Part 563 - Event Data Recorders, 2014.

commercially available tools for accessing and downloading data stored in the EDR device, in accordance with the law.

Regulation (EU) 2019/2144, which applies to the territories of EU member states, establishes in Article 6, paragraph 1, point (g), the requirement for all categories of newly manufactured motor vehicles to be equipped with an Event Data Recorder (EDR). The mentioned regulation specifies the requirements that the data recording device must meet in Article 6, paragraph 4.[14] Article 6, paragraph 5 of the Regulation also specifies that the Event Data Recorder (EDR) must not record or store the last four digits of the vehicle identification number or any other information that could enable the identification of the individual vehicle, its owner, or user.

The aforementioned Regulation (EU) 2019/2144 was amended and supplemented by Delegated Regulation 2022/545 of January 26, 2022, of the European Parliament and Council. This amendment established detailed rules regarding specific testing procedures and technical requirements for the type approval of motor vehicles with respect to their Event Data Recorders (EDR) and for the type approval of these systems as specific technical units. This Regulation modified Regulation (EU) 2019/2144 regarding the categories of motor vehicles that must be equipped with an EDR, defined precise deadlines for the implementation of these requirements, and established the duty of vehicle manufacturers to provide information on how event data can be collected, read, and interpreted[15]. Regulation 2022/545 refers to the application of UN Regulation No. 160 (Commission Delegated Regulation, 2022). The purpose of UN Regulation No. 160 is to establish uniform provisions for the type approval of motor vehicles in categories M1 and N1 concerning their Event Data Recorders (EDR). In this regard, the European Commission has regulated that vehicle manufacturers must provide access to airbag control units for data retrieval. Modern software tools, combined with CDR BOSCH, provide technical support for the acceptance and processing of exact vehicle data (COMMISSION DELEGATED REGULATION (EU) 2022/545), which applies to all new vehicles manufactured within the EU from July 6, 2024, and to all new vehicles manufactured outside the EU after July 6, 2026.

[14] Regulation EU 2019/2144, od 16.12.2019, https://op.europa.eu/en/publication-detail/-/publication/bfd5eba8-2058-11ea-95ab-01aa75ed71a1/language-en, Official Journal of the European Union L 325/1 16. 12. 2019, last visited 03. 06. 2024.

[15] Commision Delegated Regulation (EU) 2022/545,od 26.1. 2022, https://eur-lex.europa.eu/eli/reg_del/2022/545/oj, Official Journal of the European Union L 107/18 6.14.2022, last visited 03. 06. 2024.

In the Republic of Serbia, there is still no formal legal regulation regarding the collection, protection, and use of data as specified in the aforementioned Regulations and Rules. However, judicial practice in Serbia, although somewhat timid and insufficient, has nonetheless recognized and supported the application of new achievements in science and technology that are relevant to traffic technical expertise and the use of modern tools by licensed experts in criminal and civil proceedings for damage compensation. The example presented in the continuation of this paper shows that at least some insurance companies in Serbia are aware of the new tools available to licensed traffic technical experts and the capabilities these tools offer in terms of retrieving data from EDRs, specifically for some newer makes and models of vehicles produced in Europe.

4. The Application of New Tools in Traffic Accident Analysis and the Role of Experts

In the previous work, the authors highlighted the data reader from the airbag control unit (CDR BOSCH) – the most advanced tools that provide precise answers to questions that experts previously could not answer. This tool collects and stores data that is significant for accurate traffic accident analysis. It was noted that the data reader records speeds, accelerations, as well as the positions of control devices (e.g., steering wheel, brake pedal, and gas pedal) five seconds before the collision, up to the moment of the collision, in time intervals of 0.5 seconds. If there are multiple consecutive collisions within intervals of less than 5 seconds (e.g., chain collisions), some data may overlap, but all will be accurately recorded. It also stores data on several collisions that occur within a short time span (e.g., every 0.5 seconds). Specifically, each collision is recorded as a separate event regardless of the time intervals. In addition to these parameters, it records a range of other parameters used for analyzing the vehicle's movement before the collision. The authors had to reiterate these data in relation to the analysis of a specific case, which will be presented in this paper, where experts identified the existence of insurance fraud based on the analysis of data from the airbag control unit, based on information about the occurrence of a traffic accident.

The expert examination was initiated by the responsible individuals at Generali Insurance[16] due to suspicions of insurance fraud in a specific case where a claim for damage compensation had been submitted.

[16] Generali osiguranje, AO – 5641/24 - unpublished.

The case involved a traffic accident in which, according to the submitted damage claim, three passenger vehicles were involved. The accident occurred in Novi Sad on March 12, 2024, at approximately 20:55 hours, on a street with a modern asphalt road surface, 3.50 meters wide, extending in a straight direction. Along both edges of the road are earthen shoulders behind which there are drainage ditches for rainwater. Behind the ditches are grassy areas. At the time of the inspection, the road surface was wet, and visibility was low due to the nighttime conditions. Street lighting was on. The Accident Report stated: "...There were no casualties in this traffic accident..."

The vehicles involved in the traffic accident were: OPEL INSIGNIA, MERCEDES BENZ E 220 D and VOLKSWAGEN PASSAT.

Through a detailed analysis of the photographic documentation, the expert identified damage to the front left section of the OPEL caused by force acting approximately in the direction from the front to the rear of the OPEL, with the impact center at the height of the front left section of the OPEL (see Figure No. 1).

Figure No. 1

Figure No. 2

On the left side of the front bumper, as well as at the level of the lower edge of the front left headlight, the expert found damage in the form of scratches and a crack in the bumper cover. The expert also noted that the decorative grille in the lower left section of the front bumper was not properly seated (see Figure No. 2).

Figure No. 3

On the right side of the front bumper of the OPEL, the expert found scratches and damage similar to abrasions. The protective cap and decorative grille on the right side of the front bumper are not properly seated (see Figure No. 3).

On the rear bumper of the OPEL, the expert found deformations caused by force acting approximately in the direction from the rear to the front of the OPEL. The rear bumper is not properly seated on the left side. In the lower left section of the rear bumper, the expert observed damage in the form of plastic cracks. Additionally, the expert found plastic cracks in the middle of the rear bumper (in the lower part) and on the right side of the rear bumper (in the lower part) (see Figures No. 4 and No. 5).

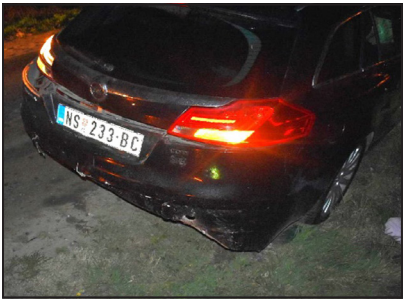

Figure No. 4

Figure No. 5

On the front part of the MERCEDES, the expert found deformations caused by force acting in the direction from the front to the rear of the MERCEDES, with the impact center at the height of the front left section of the MERCEDES (see Figure No. 6). The front bumper of the MERCEDES is broken in the lower part (see Figure No. 6).

Figure No. 6

By analyzing the photographs from the documentation, the expert found damage to the front of the PASSAT caused by force acting approximately in the direction from the front to the rear of the PASSAT (see Figure No. 7). The engine hood is deformed due to force acting approximately in the direction from the front to the rear of the PASSAT, with the impact center at the level of the front edge of the engine hood (see Figure No. 7).

Figure No. 7

By analyzing the photographs from the documentation, the expert found that the front part of the PASSAT was deformed due to force acting approximately in the direction from the front to the rear of the PASSAT, with

the impact center at the level of the upper edge of the PASSAT radiator. The PASSAT headlights and front decorative grille are broken (see Figure No. 8). The front bumper of the PASSAT is not in place. The left part of the PASSAT front bumper is broken (see Figure No. 9).

Figure No. 8

Figure No. 9

The expert analyzed the skid marks and the final positions of all three vehicles involved in the traffic accident based on the sketch and photographs from the documentation. The accident scene sketch shows the final positions of the OPEL, MERCEDES, and PASSAT. The OPEL, MERCEDES, and PASSAT are depicted on the sketch of the accident scene to the right of the right edge of the roadway (viewed in the direction of the PASSAT movement). By analyzing the photographs from the documentation, the expert found traces of plastic and spilled fluids in front of the PASSAT's front end (see Figure No. 10).

Figure No. 10

The expert found that there were no signs of "torn" grass on the grassy area behind the front right wheel of the PASSAT, which would have been caused by braking of the PASSAT (see Figures No. 11 and 12).

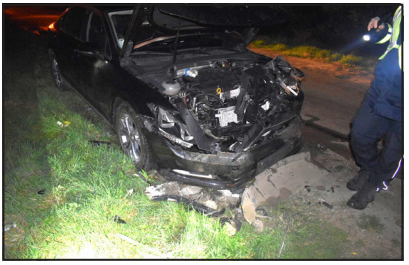

Figure No. 11

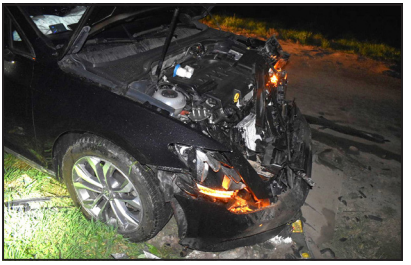

Figure No. 12

The expert found that at the height of the front right wheel of the OPEL (in the stopped position), there were also no signs of disturbed soil or "torn" grass (see Figure No. 13).

Figure No. 13

In the report, the expert quoted key parts of the statements from all three drivers regarding the traffic accident.

In the statement from March 12, 2024, the driver of the OPEL stated: *"…I was parked and properly lit along the road because I had a flat tire. I called my nephew to help me because i did not have a spare tire in the car. At the moment when the car was on the jack and the tire was removed, i heard the sound of a siren and a terrific impact from behind…*"

In the statement from April 12, 2024, the driver of the PASSAT stated: *"…I was coming from the direction of the highway Novi Sad–Zrenjanin, i turned onto Moše Pijade Street in Kać. A car came towards me, it was moving relatively fast, it flashed its lights at me, i thought i could pass, but it was going towards me. The road was narrow, I slightly swerved to the right to avoid it and hit two parked cars…*"

In the statement from March 12, 2024, the driver of the MERCEDES stated: *"…I was parked in front of the vehicle that was lifted on a jack. I was illuminating with my vehicle, and while we were changing the tire, at some point, I heard a crash and the vehicles shifted and collided…"*

By analyzing the material evidence from the case file, the expert found that it was possible that the MERCEDES was stopped at the moment of the collision, and this was used for further analysis of the traffic accident. Considering that the front right wheel of the OPEL was not found at the time of the inspection, the expert is of the opinion that the OPEL was stopped at the moment of the collision with the PASSAT.

In addition to the material evidence from the case file (damage and traces), the expert also analyzed the report obtained through the Bosch CDR. He compared this data with other evidence from the case file, particularly with the material evidence (traces and damages), and based on the comparative analysis, provided his opinion on this traffic accident.

By analyzing the report from the airbag control unit of the PASSAT, the expert found that the PASSAT experienced two impacts within a time interval of 0.5 seconds. At the moment of the first impact, the PASSAT was traveling at a speed of 45 km/h, while 0.5 seconds after the first impact, a second impact occurred with the PASSAT traveling at a speed of 19 km/h (see Figure No. 14).

Pre-Crash Data -5 to 0 sec (Record 1, Most Recent)

Time (sec)	Engine RPM (Combustion Engine) (RPM)	ABS Activity	Stability Control	Steering Input (deg)	Speed, Vehicle Indicated (MPH [km/h])	Accelerator Pedal (%)	Service Brake Activation
-5.0	4,032	No ABS Activity	No ESC Activity	-16	35 [57]	92	Off
-4.5	3,840	No ABS Activity	No ESC Activity	-4	33 [53]	76	Off
-4.0	3,648	No ABS Activity	No ESC Activity	-6	32 [52]	76	Off
-3.5	3,520	No ABS Activity	No ESC Activity	-4	31 [50]	74	Off
-3.0	3,584	No ABS Activity	No ESC Activity	0	31 [50]	66	Off
-2.5	4,224	No ABS Activity	No ESC Activity	2	37 [59]	68	Off
-2.0	3,712	No ABS Activity	No ESC Activity	2	35 [57]	0	Off
-1.5	2,496	No ABS Activity	No ESC Activity	-12	35 [57]	0	Off
-1.0	2,240	ABS Activity	No ESC Activity	-50	32 [51]	0	On
-0.5	1,984	ABS Activity	No ESC Activity	18	28 [45]	0	On
0.0	1,152	ABS Activity	ESC Activity	28	12 [19]	0	On

Pre-Crash Data -5 to 0 sec (Record 2)

Time (sec)	Engine RPM (Combustion Engine) (RPM)	ABS Activity	Stability Control	Steering Input (deg)	Speed, Vehicle Indicated (MPH [km/h])	Accelerator Pedal (%)	Service Brake Activation
-5.0	3,264	No ABS Activity	No ESC Activity	-14	27 [43]	100	Off
-4.5	4,032	No ABS Activity	No ESC Activity	-16	35 [57]	92	Off
-4.0	3,840	No ABS Activity	No ESC Activity	-4	33 [53]	76	Off
-3.5	3,648	No ABS Activity	No ESC Activity	-6	32 [52]	76	Off
-3.0	3,520	No ABS Activity	No ESC Activity	-4	31 [50]	74	Off
-2.5	3,584	No ABS Activity	No ESC Activity	0	31 [50]	66	Off
-2.0	4,224	No ABS Activity	No ESC Activity	2	37 [59]	68	Off
-1.5	3,712	No ABS Activity	No ESC Activity	2	35 [57]	0	Off
-1.0	2,496	No ABS Activity	No ESC Activity	-12	35 [57]	0	Off
-0.5	2,240	ABS Activity	No ESC Activity	-50	32 [51]	0	On
0.0	1,984	ABS Activity	No ESC Activity	18	28 [45]	0	On

Figure No. 14

According to the expert's findings, the OPEL and MERCEDES were stopped before the collision. By analyzing the report from the PASSAT's airbag control unit, the expert found that the PASSAT was traveling at a speed of 43 km/h five seconds before the collision. The speed changed until the moment of the collision (see Figure No. 14). Immediately before the collision, the steering wheel was turned, with it being turned -500 degrees 0.5 seconds before the collision, and at 80 degrees at the moment of the collision (see Figure No. 14). Considering the change in speed immediately before the collision

(in 0.5-second intervals), the expert found that the PASSAT was decelerating at a rate of 3.3 to 4.4 m/s² just before the collision. Such deceleration would have left traces of "torn" grass and disturbed soil on the grassy surface.

By comparing the evidence from the case file (damage, traces, stopping positions, and the CDR Bosch report), the expert found that the material evidence in the file excludes the possibility that the traffic accident occurred as described in the file, which was also stated in his opinion. He also noted that if the PASSAT had been "slightly to the right" immediately before the collision, the steering wheel would not have been turned by -50 degrees but rather by a "slight angle." If, at the moment of the collision between the OPEL and the PASSAT, the OPEL had been on a jack for the replacement of the front right wheel, and the PASSAT had been traveling at a speed of 45 km/h (as indicated in the airbag control unit report), then, as a result of the front right part of the OPEL falling onto the grassy surface, there should have been traces of "scuffing" from the front right part of the OPEL on the surface, which was not the case here. Additionally, if the PASSAT had been braking immediately before the collision with the OPEL with a deceleration of 3.3 to 4.4 m/s² (as found by analyzing the airbag control unit report), there should have been traces of "torn" grass on the ground, which was also not the case here.

Given that the other alleged party involved in this traffic accident also submitted a claim for damage to another insurance company, at the request of DUNAV Insurance,[17] an additional expert examination was initiated by another expert (licensed as a CDR Bosch technician and analyst) due to suspicions of insurance fraud, in order to verify the findings and opinion of the first expert. The goal was to review the findings and opinion considering that the CDR Bosch data indicated evidence of a collision.

Aside from different formulations and the emphasis on a different group of evidence, there were no substantive differences between the two expert evaluations. The second expert, unlike the first expert, used the AnalyserPro software for the analysis of this case.

Based on the kinematics of the PASSAT vehicle, the second expert found that the vehicle's kinematics did not match the location of the traffic accident. According to the recorded data, it would follow that the PASSAT was moving off the roadway before the collision (see Figure No. 15), which did not occur according to either the traces or the statements. According to the expert's findings, such a traffic accident would not have been possible with the recorded parameters at the indicated location of the accident.

[17] Dunav osiguranje, ekspertiza saobraćajne nezgode 6/24, Kragujevac, May 2024 – unpublished.

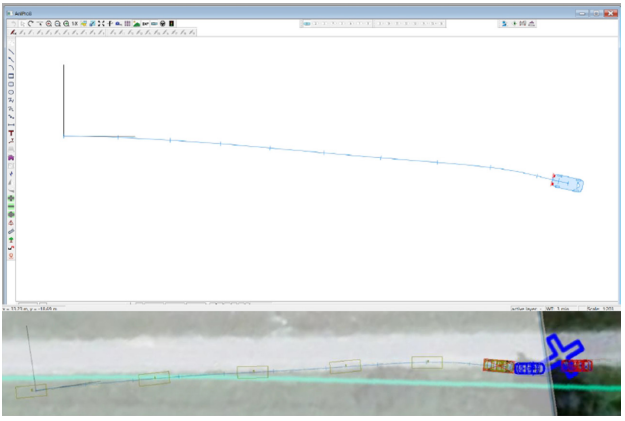

Figure No. 15

Based on the analysis of the photographic documentation, the expert found that characteristic traces of all broken and detached parts from the PASSAT were missing at the accident scene. These parts should have been present if the accident had occurred in the described manner and if the damage shown on the vehicles in this accident had occurred. Specifically, at the front of the PASSAT (in the stopped position), there are no broken or detached parts that are missing from the PASSAT.

Additionally, based on the analysis of the photographic documentation, the expert found that characteristic traces, such as disturbed soil from the hub of the front right wheel of the OPEL, were missing at the accident scene. These traces should have been present if the accident had occurred in the described manner, considering that the front right wheel was removed and that the OPEL would have been displaced during the collision.

By analyzing the photographs in the photographic documentation, the expert found that there is damage on the rear bumper of the OPEL in the form of imprints from the chassis components of the other vehicle. This type of damage could not have occurred if the PASSAT had collided with the OPEL, as there is a bumper cover on the PASSAT in front of the chassis components that was not penetrated.

In his opinion, the expert stated that based on the material evidence from the submitted documentation, the most recent recorded data about the collision in the memory of the PASSAT vehicle did not originate from the analyzed traffic accident. By analyzing the data from the PASSAT vehicle, he reconstructed the kinematics of this vehicle 5 seconds before the collision

and found that it did not match the location of the accident. According to the recorded data, it would indicate that the PASSAT was moving off the roadway before the collision, which did not occur according to either the traces or the statements. In his opinion, such a scenario would not have been possible with the recorded parameters (speed of 57 km/h, throttle pedal pressed at 92%, and 4032 revolutions per minute) at the indicated accident location.

Additionally, the expert noted in his opinion that characteristic traces of all broken and detached parts from the PASSAT were missing at the accident scene. These parts should have been present if the accident had occurred in the described manner and if the damage shown on the vehicles in this accident had happened, as there are no broken and detached parts at the front of the PASSAT (in its stopped position). The accident scene also lacked characteristic traces, such as disturbed soil from the hub of the front right wheel of the OPEL. These traces should have been present if the accident had occurred as described, considering that the front right wheel was removed and the OPEL would have been displaced during the collision.

On the rear bumper of the OPEL, there is damage in the form of imprints from the chassis components of the other vehicle, which could not have occurred from a collision with the PASSAT. This is because the PASSAT has a bumper cover in front of the chassis components that was not penetrated.

Based on the analysis of the material evidence from the submitted documentation, the expert is of the opinion that the damage shown on the OPEL and PASSAT could not have resulted from a collision of the PASSAT with the OPEL in this traffic accident occurring in the described manner.

In the previous work, the authors stated that it is the expert's responsibility to understand, process, and map the recorded data onto a sketch of the accident scene. Furthermore, the expert should move from the potential assessment for which there is no special basis and is explained by the stance "I said so" to being a "reader" of the technical data recorded by electronic devices, thereby reducing the likelihood of error and increasing the impact of objectivity. [18]

5. Conclusion

With the development of traffic in Europe and around the world, the possibilities for analyzing the conditions under which traffic accidents occur are also evolving and improving. In European Union countries, regulations have

[18] D. Obradović, M. Božović, J. Škrilec, 247–265.

been established that require vehicle manufacturers to enable access to airbag control units for data reading. This regulation applies to all new vehicles manufactured in the EU from July 6, 2024.

Moreover, with the constantly evolving traffic landscape, the possibilities for analyzing the conditions under which traffic accidents occur are also changing and improving. What was nearly unimaginable until recently has become quite normal in the past few years for certain groups of vehicles manufactured in Europe over the last 5-6 years, and in the USA over the past 10 years, which have been involved in traffic accidents. Modern software tools, combined with data reading devices like CDR BOSCH, provide technical support for the reception and processing of precise data by reading airbag control units, initially for specific vehicles and soon for all newly manufactured vehicles in the European Union countries.

Since 2023, when some papers on the use of new tools in judicial proceedings were first published in Serbia, time has already provided initial indicators of the significance of applying these new tools in both criminal and civil court proceedings.

Additionally, through the practical example presented, this short period has demonstrated the significant importance of using these tools in non-litigation procedures, in situations where parties approach insurance companies with damage claims. In the future, insurance companies will increasingly be able to request from licensed experts the analysis of traffic accidents using CDR BOSCH and modern tools. Based on the obtained results, they will decide whether to accept a settlement proposal with the claimant or whether to reasonably raise an objection to shared responsibility and potentially propose a different amount for damage compensation in the process.

However, no less important for insurance companies is the opportunity provided by new tools—specifically, the use of CDR BOSCH. This allows them, based on the findings of a traffic accident from a licensed expert using CDR BOSCH and modern tools, to detect potential attempts at insurance fraud. This capability further enhances their business security—by rejecting such damage claims and subsequently filing appropriate criminal charges with the relevant public prosecutors against individuals or representatives of legal entities who attempt to profit from unjustified claims for both material and certain types of non-material damage.

In this context, the role of an expert in traffic engineering in analyzing traffic accidents and their consequences, using new tools, is much larger and more significant. Such an expert should not, and must not, merely be a

reader of the technical data recorded by electronic devices. Instead, they are obligated to correlate the obtained data with the material evidence in the case file. It is particularly important for the expert to connect the data from the Event Data Recorder (EDR) that formally confirms the parties' statements with the information from the accident report, sketches, and especially with the data from the photographic documentation of the accident scene. Only in this way can a true "picture" of what happened in the specific case of the traffic accident be obtained and determine whether all the collected data are consistent and uniquely define the occurrence of the traffic accident and its consequences.

By uncovering attempts at insurance fraud related to damage compensation claims based on the European Insurance Report, using the findings and opinions of traffic engineering experts with new tools, and reporting such unlawful actions to the police and public prosecutors for prosecution, a preventive effect is achieved. Additionally, networking data on such insurance fraud attempts between individual insurance companies adds another step in the fight against these forms of crime.

* * *

UPOTREBA SAVREMENIH ALATA I ULOGA VEŠTAKA SAOBRAĆAJNE STRUKE U PREPOZNAVANJU PREVARA U OSIGURANJU

Apstrakt

Saobraćaj u svetu i Srbiji svakodnevno doživljava promene i brojna unapređenja. Propisi u Evropskoj Uniji prate tehnološki napredak na vozilima i uvode jedinstvena pravila za proizvođače novih vozila u pogledu korišćenja podataka sa centrale airbeg-a u vozilu u momentu saobraćajne nezgode, koja se primenjuju od 6. 7. 2024. godine. Savremena vozila su opremljena pisačima egzaktnih podataka o saobraćajnim nezgodama smeštenim u centrali airbag-a, koji sve relevantne podatke koji prethode saobraćajnoj nezgodi pamte u egzaktnom obliku. Prateće delatnosti pružaju mogućnost očitavanja takvih podataka i unos u savremene softverske alate za analizu saobraćajnih nezgoda i smanjuju - isključuju subjektivni uticaj čoveka (veštaka). Međutim, uloga veštaka saobraćajno tehničke struke je ipak nezamenljiva,

jer za potrebe istrage i drugih sudskih postupaka, i zahteva prema osiguravajućim društvima, veštak mora da dovede u vezu podatke očitane sa centrale airbag-a sa podacima iz spisa predmeta, a posebno sa fotodokumentacijom uviđaja. U pojedinim situacijama, veštaci mogu da ustanove neusaglašenost između podataka dobijenih iz centrale vozila i podataka iz spisa predmeta. Uočene nedoslednosti mogu biti jasni pokazatelji pokušaja fingiranja saobraćajnih nezgoda i prevara u osiguranju, što je i predstavljeno u ovom radu.

Ključne reči: naknada štete, saobraćajne nezgode, veštačenje, prevare u osiguranju.

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COMPARATIVE-LEGAL OVERVIEW OF INSURANCE CONTRACTS IN CROATIA AND SERBIA WITH SPECIAL REFERENCE TO FRAUD AND ABUSE

Summary

The paper refers to the structure of insurance contracts in the Republic of Croatia and the Republic of Serbia, with special reference to fraud and abuse.The fact is that insurance has a long history because insurance is important in the life of every natural and legal person, given that there are many risks in life both to the life of a natural person and to the property of a natural and legal person. An insurance contract is an aleatory contract, given that at the time of signing the insurance contract, it is not known whether the insured risk will occur at all. The first beginnings of insurance date back to Ancient China five thousand years ago, while the first insurance policies were recorded in Italy at the end of the 12th century. The authors point out that insurance depends a lot on the economic, social and economic development and organization of the state itself. The paper provides a comparative overview of the insurance structure in the Republic of Croatia and the Republic of Serbia. Insurance culture in the Republic of Croatia is still not at an enviable level, while in the Republic of Serbia it is still at a relatively lower level. The global economic crisis, which left its negative consequences on the insurance sector, also contributed to the negative development. In the paper, the authors pointed out the criminal law aspects of insurance fraud in the Republic of Croatia and the Republic of Serbia and proposed preventive measures aimed at reducing insurance fraud.

Keywords: *Insurance Fraud, Insurance Contract, Insurance Culture, Criminal Law Aspects, Republic of Croatia, Republic of Serbia.*

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1. Introduction

Although people's lives and property have been exposed to numerous risks since the beginning of the world, the level of people's awareness and education about contracting insurance policies that protect life or property from the occurrence of possible damages caused by various natural disasters and human activities, is still very low. The increased frequency of repetition of numerous risks represents an increasing danger to the safety of persons and their property, so, considering the scope and monetary value of the damages, the importance of insurance and reinsurance, as well as other ways of covering these damages, is growing.[1]

The first forms of insurance appeared among merchants in Old China as early as 5,000 years ago. Namely, merchants transported goods across the longest river in Asia, the Yangtze, known for its very dangerous parts, and therefore transported the goods with several boats, so that the entire goods would not be destroyed and flooded in the event of an accident. By transporting things like this, the ancient Chinese protected the entire load from an accident, while they shared the resulting damage. Over time, the first insurance policies related to maritime traffic slowly appeared.

The oldest known notary document on marine insurance was issued in Genoa on October 23, 1347, and the first independent insurance policy was issued in Pisa in 1384,[2] which was followed by numerous contracted insurance policies related to maritime traffic, which speaks of the development and high importance of maritime traffic.

In the Republic of Croatia, in the period between the 14th and 16th centuries, Dubrovnik was one of the most important trade centers, which was among the first cities in the 16th century to pass and adopt the Law on Maritime Insurance 'Ordo super assecuratoribus' in 1562.[3] The aforementioned Law on Maritime Insurance is considered the oldest law that regulates legal relations from insurance.

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[1] See more: D. Bataveljić, B. Petrović, „Kultura osiguranja i njegovi pravni aspekti u svetu i kod nas", in: *Prouzrokovanje štete, naknada štete i osiguranje* (eds. Zdravko Petrović, Vladimir Čolović, Dragan Obradović), Institut za uporedno pravo, Beograd – Valjevo, 2023, 555–568.

[2] Available at: http://www.fortiusinterpartes.hr/hr/vise-o-osiguranju/osnovni-podaci-o-osiguranju/povijesni-razvoj-osiguranja/, last visited 01. 05. 2024.

[3] B. Milošević, „Ugovor o pomorskom osiguranju s osvrtom na odredbe Pomorskog zakonika Republike Hrvatske", *Naše more* 1-2/98, 73.

The first life insurance policies were concluded precisely by seamen for the reason that a ransom could be paid for them if they were captured. The first life insurance policy was contracted in 1536.[4] It is interesting to note that the premium was calculated on the basis of the route covered by the sailors, while it is incredible to think that the age of the insured was completely irrelevant for the life insurance policy.

The year 1884, when the first insurance cooperative "Croatia" was founded in Zagreb, is cited as the initial year of the appearance of insurance in the Republic of Croatia. In the Republic of Serbia, the first insurance institution is considered to be "Belgrade Cooperative", which was founded in 1897.

The basic functions of insurance are the protective function (property protection), social function (better living conditions) and financial-accumulative function of insurance (it is about an efficient mechanism for collecting funds that can then be placed on the market through different types of investments).[5]

2. Insurance Agreement

The insurance contract in the Republic of Serbia is defined by the Law on Contract and Torts (Chapter XXVII), by which one party (contractor) undertakes to pay a certain amount to the insurance organization (insurer), and the organization undertakes that, if an event occurs that represents the insured event, pays compensation to the insured or a third party, i.e. the agreed sum or do it something else.[6] In the insurance contract according to the Law on Contract and Torts in the Republic of Croatia (RC), the insurer undertakes to pay the policyholder the insurance premium if the insured event occurs, and the policyholder undertakes to pay the insurance premium to the insurer.[7] In the event that the policyholder, the insured or the beneficiary caused the insured event intentionally or by fraud, the insurer is not obligated to make any payments.[8] The policyholder is obliged to report to the insurer at

[4] Available at: http://www.fortiusinterpartes.hr/hr/vise-o-osiguranju/osnovni-podaci-o-osiguranju/povijesni-razvoj-osiguranja/, last visited 01. 05. 2024.

[5] M. Ćurak, D. Jakovčević, *Osiguranje i rizici*, Zagreb 2007, 22.

[6] Art. 897, Law on Contract and Torts of the Republic of Serbia, *Official Gazette of the SFRY*, No. 29/78, 39/85, 45/89 - decision of the Constitutional Court of Yugoslavia and 57/89, *Official Gazette of the FRY*, No. 31/93, *Official Gazette of Serbia and Montenegro*, No. 1/2003 - Constitutional Charter and *Official Gazette of RS*, No. 18/20.

[7] Art. 921, Law on Contract and Torts of the Republic of Croatia, *National newspaper*, No. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22, 145/23, 155/23.

[8] Art. 944, Law on Contract and Torts RC.

the time of concluding the contract all circumstances that are important for risk assessment, and which are known to him or could not have remained unknown to him.[9]

An insurance contract is a consensual contract because its validity requires the consent of both parties to the contract. It is considered concluded when the contractor accepts the offer from the insurer, with the fact that it is necessary to point out the distinction in relation to the life insurance contract, which is considered concluded only when both parties to the contract sign the contract. Namely, according to the Law on Contract and Torts (Art. 901, paragraph 1), the insurance contract is concluded when the contracting parties sign the insurance policy or the cover list, from which it follows that the insurance contract is a formal contract, which implies that for the validity of the contract it is required to be concluded in written form, otherwise it has no legal effect and does not enjoy court protection. Therefore, the form is an essential condition for the creation of an insurance contract (*ad solemnitatem*). We find the same point of view in judicial practice:

In terms of Article 901 of the Law on Contract and Torts, the insurance contract is concluded when the contracting parties sign the insurance policy or the list of coverage. As a rule, the conclusion of all types of contracts are not subject to any form in the sense of Article 67, paragraph 1 of the Law on Contract and Torts, which means that, as a rule, oral consent of the will of the contracting parties is sufficient. However, in view of the provisions of Article 901 of the Law on Contract and Torts, the insurance contract is concluded when the policyholder and the insurer sign the corresponding written document, from which it follows that the insurance contract must be concluded in writing. Therefore, an insurance contract that is not concluded in the prescribed form has no legal effect in the sense of Article 70 of the Law on Contract and Torts and such a contract does not enjoy court protection.[10]

Insurance contracts have predefined content and certain conditions under which one contracting party agrees to enter into a contract based on insurance conditions from the insurer that are the same for all insured persons. Given that the insurance contract covers the entire duration of the contract, the insurance contract is a successive contract. During the duration of the insurance contract, the insurer has the right to request a premium, and the contractor has the right to report the damage and have the insurer pay

[9] Art. 907 Law on Contract and Torts RS.

[10] From the decision of the Higher Commercial Court in Belgrade, Pž. 8934/97 of January 28, 1998.

him the same. The amount of the insurance premium is considered an essential element of the insurance contract, which means that the stated amount must be determined by value. Otherwise, if the premium is not precisely determined, the insurance contract has not even been created. The same is confirmed by judicial practice:

"According to the opinion of the Higher Commercial Court, the first-instance court properly discussed the disputed relationship between the litigants and correctly decided when it rejected the claim with the disputed verdict. According to the provisions of Article 901 of the Law on Contract and Torts, an insurance contract is concluded when the contracting parties sign an insurance policy or a list of coverage, and in accordance with the provisions of Article 902 of the same law, the policy must specify the contracting parties, the insured thing or the insured person, the risk covered by the insurance, the duration insurance and coverage period, sum insured or if the insurance is unlimited, premium or contribution, date of policy issue and signatures of the contracting parties. The appellate allegation that it is enough for the premium to be determinable is unfounded, and that the court erred when it concluded that it is neither visible nor determinable, because the court itself states that there are supplements to the policies that regulate the technique and method of calculating the premium, if that is the case then the premium is also determinable. This is because, according to the opinion of the Higher Commercial Court, the provision of Article 902 of the Law on Contract and Torts expressly provides that the policy must include, among other things, the premium. Therefore, the premium must be determined by value or determined so that according to the data specified in the policy itself, it can be determined quite precisely. The above also follows from the content of Article 897 of the Law on Contract and Torts, which defines the insurance contract, from which it follows that the premium as the price of insurance is an agreed category between litigants and one of the essential elements of the insurance contract. That is why it is not enough to state the "valid tariff" instead of the premium amount, as is the case, for example, in policy number 0802095. And from the other mentioned policies, it is clear that the premium is not clearly determined, nor determinable in the aforementioned sense, so without it, there is no insurance contract, as correctly concluded by the first-instance court. It follows from the above that such contracts do not produce legal effect, and the first instance court correctly rejected the claim of the plaintiff."[11]

[11] From the judgment of the Higher Commercial Court in Belgrade, Pž. 1976/01 from June 20, 2001.

The insurance contract is concluded *bona fide*, with the intention and hope that no harmful event will occur, so the purpose of the insurance contract is to protect against the consequences of future harmful events.[12] From the point of view of legal theory, an insurance contract should be clearly distinguished from insurance activity as a specialized economic activity, given that insurance as an activity is not characterized by randomness for the insurer, while randomness is an essential feature of every insurance contract.[13] In accordance with the above, the insurance contract belongs to aleatory contracts because, at the time of its conclusion, the performance of one or both contracting parties is not determined, but depends on some uncertain circumstances *(conditio pro qua ignoratur an fiet)*. Considering that the conclusion of the contract creates a contractual obligation for both the contractor (to pay the agreed amount of insurance) and for the insurer (to pay the insurance if the condition under which the contract was concluded is fulfilled, that is, if the insured event occurs), the insurance contract is a bilaterally binding contract. An insurance contract consists of an insurance policy and insurance conditions. Contractual parties, insured thing or person, insured risk, insurance duration and coverage time, insurance amount or coverage limit, premium or contribution amount, policy issue date and signatures of the contracting parties are the basic elements of an insurance policy.[14]

3. Comparative Overview of the Insurance Structure in the Republic of Croatia and the Republic of Serbia

In the Republic of Croatia, the basic groups of insurance are life and non-life. Non-life insurance includes: accident insurance, health insurance, road vehicle insurance, rail vehicle insurance, aircraft insurance, vessel insurance, goods in transit insurance, fire and natural damage insurance, other property insurance, motor vehicle liability insurance, liability insurance for the use of aircraft, liability insurance for the use of vessels, other liability insurances, credit insurance, guarantee insurance, insurance for various financial losses, insurance for the costs of legal protection and travel insurance. Life insurances are: life insurance, annuity insurance, supplementary life insurances,

[12] V. Kozar, V. Božić, „Ugovor o osiguranju i pravna priroda regresnog zahteva", in: *The Future of the Law: Facing the Challenges of Covid 19* (ed. Angel Ristov), Institute for Legal-Economic Research Juridika Prima, Skopje 2020, 64.

[13] M. Vasiljević, *Poslovno pravo*, Savremena administracija, Beograd 1997, 517.

[14] Croatian Agency for Supervision of Financial Services, *Osiguranje*, 6. Available at: https://www.hanfa.hr/getfile/42496/HANFA-Osiguranje.pdf, last visited 01. 05. 2024.

other life insurances (for example, insurance in case of marriage or birth), life and annuity insurance where the policyholder bears the investment risk. The specified types of insurance are shown in the table under number 1.

In the Republic of Serbia, the basic groups of insurance are also life and non-life. Non-life insurance in the Republic of Serbia includes: accident insurance, occupational injury and occupational disease insurance, voluntary health insurance, motor vehicle insurance, rail vehicle insurance, aircraft insurance, vessel insurance, goods in transit insurance, property fire insurance and other risks, other property insurance, liability insurance for the use of motor vehicles, liability insurance for the use of aircraft, liability insurance for the use of vessels, general liability insurance for damage, credit insurance, guarantee insurance, which guarantees direct or indirect fulfillment obligation of the debtor; insurance of financial losses (due to loss of employment, insufficient income, bad weather, lost profits, unplanned general expenses, unplanned business expenses, loss of market value, loss of rent, i.e. income), other financial losses, insurance of legal protection costs and insurance of travel assistance. Life insurance is a type of insurance that provides protection to the insured (a member of his family or a person close to him) in the event of an accident. The insured is provided with the contract in advance against the risk of death or loss (reduction) of earning capacity. Life insurances are: life insurance (for survival, for death, for death and survival, with return of premium), insurance for marriage and birth, annuity insurance, supplementary insurance with life insurance, life insurance related to units of investment funds, tontine and insurance with payout capitalization. In the practice of insurance companies, the most frequently contracted life insurance is life insurance in case of death or survival.[15] The specified types of insurance are shown in the table under number 2.

If we look at the structure of total paid insurance premiums in the Republic of Croatia in 2023, the first place is automobile liability insurance (29%), the second place is taken by life insurance (18.4%), the third place belongs to other non-life insurances (15.9 %), the fourth place went to the insurance of road vehicles - casco (14.8%), the fifth place is shared by other property insurances (8.1%), while the sixth place is the insurance against fire and natural damage (7.4%) and in seventh place is health insurance with (6.4%).[16] The aforementioned structure is shown in the table under number 3.

[15] With this contract, the insurer undertakes to pay the agreed sum to the insured after a certain period of time, with the proviso that if the insured dies before the expiry of the corresponding term, the agreed sum will be paid to his heirs.

[16] Croatian Insurance Office, *Tržište osiguranja u Republici Hrvatskoj u 2023. godini*, Zagreb 2024, 27.

Table No. 1. Types of insurance in the Republic of Croatia [17]

A – NON-LIFE INSURANCE
1. Insurance against accidents
2. Health insurance
3. Road vehicle insurance
4. Insurance of railway vehicles
5. Aircraft insurance
6. Vessel insurance
7. Insurance of goods in transport
8. Fire and natural damage insurance
9. Other property insurances
10. Liability insurance for the use of motor vehicles
11. Liability insurance for the use of aircraft
12. Liability insurance for the use of the vessel
13. Other liability insurances
14. Loan insurance
15. Insurance of guarantees
16. Insurance of various financial losses
17. Insurance of legal protection costs
18. Travel insurance
B – LIFE INSURANCE
1. Life insurance
2. Annuity insurance
3. Supplementary life insurance
4. Other life insurances
5. Life and annuity insurance where the policyholder bears the investment risk

[17] Art. 7. Insurance Act, *National Newspaper,* No. 30/15, 112/18, 63/20, 133/20, 151/22.

Table no. 2. Types of insurance in the Republic of Serbia[18]

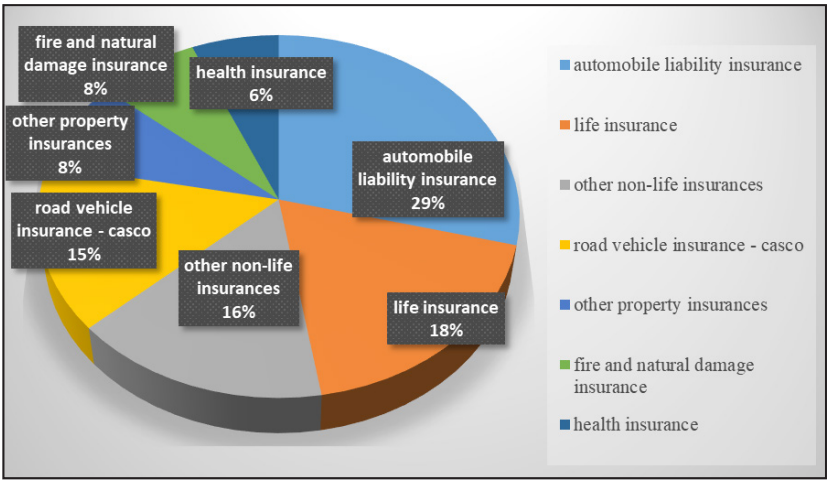
A – NON-LIFE INSURANCE
1. Insurance against the consequences of an accident, insurance against injuries at work and occupational diseases
2. Voluntary health insurance
3. Road vehicle insurance
4. Rail vehicle insurance
5. Aircraft insurance
6. Insurance of navigable facilities
7. Insurance of goods in transit
8. Insurance of property against fire and other dangers
9. Other property insurances
10. Liability insurance due to the use of motor vehicles
11. Liability insurance due to the use of the aircraft
12. Liability insurance due to the use of vessels
13. Insurance against general liability for damages
14. Credit insurance
15. Surety insurance, which guarantees the direct or indirect fulfillment of the debtor's obligations
16. Insurance of financial losses
17. Insurance of legal protection costs
18. Travel assistance insurance
B – LIFE INSURANCE
1. Life insurance (in case of survival, in case of death, in case of death and survival, with refund of premium)
2. Insurance for the event of marriage and birth
3. Annuity insurance
4. Supplementary insurance in addition to life insurance
5. Life insurance related to units of investment funds
6. Tontine[19]
7. Insurance with payout capitalization

[18] Art. 8. and Art. 9 Law on Insurance, *Official Gazette of the RS*, No. 139/14 and 44/21.

[19] A type of life insurance in which the policyholders agree that they will jointly capitalize their contributions and divide the thus capitalized assets between those policyholders who reach a certain age, i.e. between the heirs of deceased policyholders.

Table no. 3. Structure of total paid insurance premiums in the Republic of Croatia in 2023.

1.	Automobile liability insurance	29%
2.	Life insurance	18,4%
3.	Other non-life insurances	15,9%
4.	Road vehicle insurance - casco	14,8%
5.	Other property insurances	8,1%
6.	Fire and natural damage insurance	7,4%
7.	Health insurance	6,4%



Graph no. 1. Structure of total paid insurance premiums in the Republic of Croatia in 2023.

The highest growth in insurance premiums in 2023 was recorded by road vehicle insurance - casco (23.2%), automobile liability insurance (18.4%), assistance insurance (17.6%), other liability insurance (16.5 %), insurance of goods in transport (14.9%), insurance against fire and natural damage (10.4%), insurance for the costs of legal protection (9.3%), health insurance (7.8%), accident insurance (3.5%), liability insurance for the use of vessels (2.4%) and insurance for various financial losses (0.5%).[20]

[20] Data for 2023 were collected from insurance companies via the HUO_Statistics application.
Croatian Insurance Office, *Tržište osiguranja u Republici Hrvatskoj 2023. godine*, Zagreb 2024, 28.

The largest decline in insurance premiums in 2023 was recorded by credit insurance (-68.9%), aircraft insurance - casco (-21.7%), investment life or annuity insurance (-26.1%), insurance for marriage or birth (-13.1%), life insurance (-12.5%), warranty insurance (-12.3%), aircraft liability insurance and annuity insurance (-6.2%), railway vehicle insurance - comprehensive insurance (-3.3%), supplementary life insurance (-2.9%), boat insurance (-1%), other property insurance (-0.1%).[21]

The structure of total paid insurance premiums in the Republic of Serbia in 2023 is as follows: the first place is automobile liability insurance (29.9%), the second place is life insurance (18.5%), the third place belongs to other non-life insurances (11.8%), the fourth place went to the insurance of road vehicles - comprehensive insurance (10.6%), the fifth place was reserved for other property insurances (19.2%), while the sixth place was health insurance with (10.0%).[22]

Table no. 4. Structure of total paid insurance premiums in the Republic of Serbia in 2023.

1.	Automobile liability insurance	29,9 %
2.	Life insurance	18,5%
3.	Other non-life insurances	11,8%
4.	Road vehicle insurance - casco	10,6%
5.	Other property insurances	19,2%
6.	Health insurance	10,0%

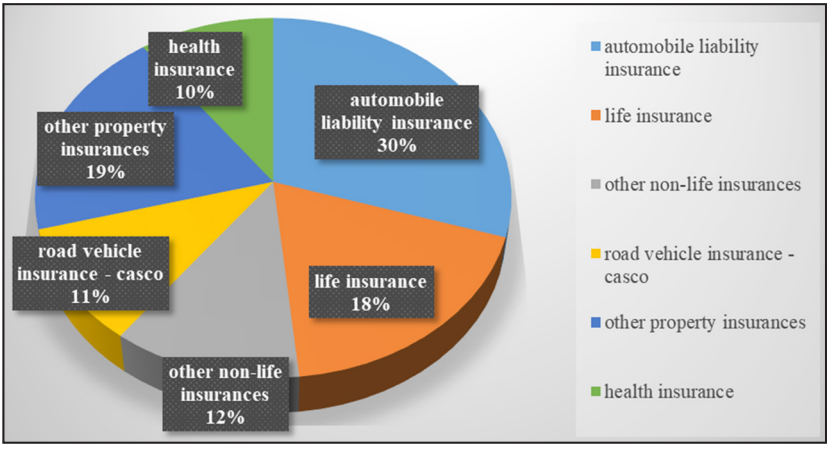
The highest growth in insurance premiums in Q3 2023 was recorded by non-life insurance (19.0%), liability insurance due to the use of motor vehicles (18.4%), property insurance (11.4%), motor vehicle insurance - casco (17.7 %) and voluntary health insurance (53.4%).

The table under number 5 shows a comparison of paid insurance premiums by type of insurance in 2023 in the Republic of Croatia and the Republic of Serbia. Of the insurance premiums paid in the Republic of Croatia, much lower insurance premiums were paid in the Republic of Serbia, namely: for accident insurance (43.20%), road vehicle insurance - comprehensive (54.99%), boat insurance (77, 17%), fire and natural damage insurance (61.80%), motor vehicle liability insurance (77.90%), boat liability insurance

[21] *Ibid.*

[22] According to data from the National Bank of Serbia in Q3 2023.
National Bank of Serbia, Insurance Sector in the Republic of Serbia, Report for the third quarter of 2023, 5–6.

(16.05%), other liability insurance (34 .98%), credit insurance (80.62%), insurance for various financial losses (56.45%), insurance for the costs of legal protection (11.48%), life insurance (94.35%), insurance for marriage or entering into a life partnership or birth (3.74%) and life or annuity insurance where the policyholder bears the investment risk (11.48%).



Graph no. 2. Structure of total paid insurance premiums in the Republic of Serbia in Q3 2023.

In the Republic of Serbia, higher insurance premiums were paid in 2023 compared to the same premiums paid in the Republic of Croatia, namely: for health insurance, railway vehicle insurance - hull insurance, aircraft insurance - hull insurance, goods in transport insurance, other property insurance, liability insurance for the use of aircraft, guarantee insurance, assistance insurance, annuity insurance and supplementary life insurance.

In the Republic of Croatia, the total premiums paid for all insurances amount to 1,749,381.86 euros, while in the Republic of Serbia, the total premium paid in the amount of 1,326,963.50 euros (75% of the amount of premiums paid in the Republic of Croatia).

Of the stated amount, paid premiums for non-life insurance in the Republic of Croatia in 2023 amount to 1,427,838.11 euros, while in the Republic of Serbia, 74.67% of the same amount, or 1,066,193.66 euros, were paid. Life insurance premiums paid in the Republic of Croatia in 2023 amount to 321,543.75 euros, while in the Republic of Serbia, 81.10% of the amount of premiums paid in the Republic of Croatia, i.e. 260,769.84 euros, were paid for life insurance premiums.

Table no. 5. Type of total paid insurance premiums (amounts in euros) in Croatia and Serbia in 2023[23]

TYPE OF INSURANCE	CROATIA	SERBIA
Insurance against accidents	75.314.77	32.536.63
Health insurance	112.271.97	124.673.82
Road vehicle insurance - casco	259.293.24	142.585.13
Rail vehicle insurance - casco	663.07	1.795.03
Aircraft insurance - casco	2.029.01	4.966.16
Vessel insurance	31.817.23	2.455.41
Insurance of goods in transport	6.897.29	9.856.01
Fire and natural damage insurance	128.928.65	79.673.31
Other property insurances	141.292.88	171.707.91
Liability insurance for the use of motor vehicles	507.283.17	395.159.52
Liability insurance for aircraft use	1.042.72	2.484.28
Liability insurance for the use of the vessel	6.209.90	996.45
Other liability insurances	83.489.78	29.201.13
Credit insurance	19.152.37	15.440.40
Warranty insurance	1.382.91	2.579.87
Insurance of various financial losses	26.647.30	15.042.51
Insurance of legal protection costs	475.07	54.52
Insurance of help (assistance)	23.646.70	34.982.56
Life insurance	246.605.16	232.680.80
Annuity insurance	1.845.41	4.060.32
Supplementary life insurance	15.600.90	17.456.44
Insurance in case of marriage or life partnership or birth	367.80	13.76
Life or annuity insurance where the policyholder bears the investment risk	57.124.47	6.558.51
Non-life	**1.427.838.11**	**1.066.193.66**
Life	**321.543.75**	**260.769.84**
Total	**1.749.381.86**	**1.326.963.50**

[23] Comparative overview of paid insurance premiums by insurance types, table of authors by data sources:
Croatian Insurance Office, *Tržište osiguranja u Republici Hrvatskoj 2023. godine*, Zagreb 2024, 29.
Total premium and schedule of premiums by type of insurance of insurance companies, National Bank of Serbia, Sector for Supervision of Insurance Activities for the date 31. 12. 2023.

4. Criminal Law Aspects of Insurance Fraud in the Republic of Croatia and the Republic of Serbia

Fraud in insurance means any unconscionable action aimed at unjustified extraction of benefits from the insurance business. Insurance fraud dates back to when insurance companies were founded. Over time and the development of technology, insurance fraud progresses very quickly, so that new *modus operandi* appear very quickly, which leads to a progressive increase in harmful consequences. Seen from the aspect of the amount of damage caused, if it is a small illegal property gain, we are talking about trivial or insignificant criminal actions, so-called. situational crimes, while in the event of major adverse consequences, we can also talk about crimes of organized crime that are well-established in insurance fraud within the criminal organization.[24] In today's modern times, especially in recent years, insurance frauds are being detected more and more quickly, however, despite the above, there is still a large dark number of undetected insurance frauds and abuses.

Insurance fraud occurs when the insured person reports to the insurance company a harmful event that did not happen at all or happened, but the harmful consequences are significantly less than reported. However, in most cases, the support of doctors, traffic experts, financial experts and other experts is also necessary for a false report of a harmful event to an insured person. The most common insurance frauds refer to auto liability policies, both compulsory and comprehensive insurance, but also to health and life insurance policies and insurance policies for apartments and business premises.[25] *Brkić* and *Loje* state that the most prevalent forms of fraud and abuse are in auto insurance, in life and health insurance, and in property, apartment and business insurance.[26]

The causes of fraud and abuse in insurance originate from the distorted perception of citizens about the high amounts of profit distributed by insurance companies. Accordingly, some citizens are of the opinion that their falsely reported damage will not create any negative effect on the insurer, that is, that the insurance company should not even feel the payment of such

[24] V. Božić, „Kaznenopravni aspekti prijevara i zlouporaba u osiguranju kao oblik neznatnog i organiziranog kriminaliteta", *Zbornik Pravnog fakulteta u Podgorici* 43/2017, 301.

See also: T. Petrović, Z. Radović, Z. Petrović, *Prevare u osiguranju*, Glosarium, Beograd 2003.

[25] V. Božić, 300–320; See also: V. Čolović, „Prevare u osiguranju autoodgovornost"i, *Revija za kriminologiju i krivično pravo* 2-3/2011, 325–340.

[26] G. Brkić, G. Loje, „Zlouporaba osiguranja", *Pravo i porezi* 5/2022, 83.

reported damage. If they do not decide to file a fake claim, then individuals will consider it justified to return the amount of money for their paid insurance policy by reporting any claim, for which, at the time of reporting the damage, they know that they will not repair the reported damage when they receive the payment "by agreement". Furthermore, the public is extremely tolerant of insurance fraud, given that criminal acts in insurance are easy to accomplish, perpetrators view them as low-risk crime, and insurance companies are too passive in preventing and suppressing insurance fraud.[27]

The criminal acts related to the illegal relationship between the insurer and the insured in the Croatian criminal legislation are*: Fraud*[28] *and Abuse of Insurance*,[29] which are found in Chapter XXIII of the Criminal Code of the Republic of Croatia (Criminal Offenses Against Property), while the Criminal Code of the Republic of Serbia in chapter XXII (Criminal acts against the economy) criminalizes *Insurance fraud*. [30]

"Whoever, with the aim of obtaining insurance for himself or another, destroys, damages or hides an item that is insured against destruction, damage, loss or theft," commits the criminal offense of Misuse of insurance (Art. 238, Paragraph 1, CC of the Republic of Croatia) for which it is prescribed imprisonment for up to three years. The same penalty shall be imposed on "whoever, with the aim of obtaining a right for himself or another from insurance, social security or social welfare, feigns illness, physically injures himself or another, or damages his or another's health" (Art. 238, para. 2, CC). The criminal offense of Misuse of insurance is a special form of criminal offense or a special form of fraud. Preparatory acts of fraud in insurance business are criminalized through the criminal offense of misuse of insurance. This criminal offense has two forms: destruction, damage, loss or theft of the insured item and injury or damage to the health of oneself or others, as well as feigning illness, all with the aim of collecting the insurance. The main purpose of prescribing insurance abuse as a criminal offense is to prevent the payment of pretended or fictitious damages. A legal person can also

[27] See more: Z. Kaleb, *Kazneno djelo prijevare i zlouporabe u osiguranju*, Zagreb 2012.

[28] Art. 236 Criminal Code of the Republic of Croatia (CC of the Republic of Croatia), *National Newspaper,* No. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22, 114/23, 36/24.

[29] Art. 238 CC of the Republic of Croatia.

[30] Art. 223.a. Criminal Code of the Republic of Serbia, *Official Gazette of the RS*, No. 5/05, 88/05 - corr., 107/05 - corr., 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 and 35/19.

be punished for this criminal act, given the responsibility of the responsible person of the legal person, in accordance with the provisions of the Law on the Liability of Legal Persons for Criminal Offenses.[31] When the court pronounces a conviction for the criminal offense of misuse of insurance, it also takes away from the defendant the unlawfully acquired property benefit, i.e. the benefit paid out by the insurance, that is, it awards the property claim that has been made, provided that it considers it justified. In order for the criminal offense of Misuse of insurance to be considered completed, it is not necessary for the collection to take place. The same is stated in the judgment of the County Court in Varaždin:

Criminal offense from Art. 225, paragraph 1 of the CC[32] *is completed by reporting the damage to the insurer with the aim of collecting the insurance, but it is not necessary that the collection actually took place and consequently, the factual description contains a description of the completed form of the criminal act.*[33]

Article 236 of the Criminal Code of the Republic of Croatia prescribes the criminal offense of **Fraud**, which is committed by a person who "with the aim of obtaining an illegal financial benefit for himself or for another, misleads someone by falsely presenting or concealing facts or keeps them in a delusion and thereby induces him to do or not do something to the detriment of his own or other people's property". The crime of *Fraud* is punishable by imprisonment from six months to five years. The law also provides for a qualified form of *Fraud* which will be dealt with in the event that by the execution of this criminal offense a significant material gain was obtained or significant damage was caused, for which a prison sentence of one to eight years is prescribed.[34]

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[31] Law on Liability of Legal Persons for Criminal Offenses, *National Newspaper*, No. 151/03, 110/07, 45/11, 143/12, 114/22, 114/23.

For more information on the criminal liability of legal entities, see: V. Božić, I. Josipović, „Kaznena odgovornost i progon pravnih osoba za kazenena dela u Republici Hrvatskoj", *Yearbook of the Faculty of Law in Sarajevo* 2020, 351–380.

See also: V. Božić, S. Miljković, „Komparativni prikaz kaznene odgovornosti pravnih osoba u Hrvatskoj i Srbiji", *Law and Economy, Journal of Commercial Law Theory and Practice* 4-6/2019, 187–206.

[32] Art. 225, para. 1 of the Criminal Code of the Republic of Croatia (CC of the Republic of Croatia), *National Newspaper*, No. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07 and 152/08.

[33] Judgment of the County Court in Varaždin, Decision number: Kž-256/12, Date of court decision: 11. 07. 2012.

[34] Art. 236, para. 2 CC of the Republic of Croatia.

If a small pecuniary benefit was obtained through the criminal act, and the perpetrator had the intention of obtaining only a small pecuniary benefit, it will be a privileged criminal offense of *Fraud*, for which a prison sentence of up to one year is prescribed.[35]

Very often, the question and dilemma arises in court practice, whether in a certain specific case it is a criminal offense of "Fraud" or a criminal offense of "Misuse of insurance". This question should be answered as follows. If in the specific case it is a fraudulent act that has a far greater and far more serious scope than what the law prescribes for the criminal offense of insurance abuse, it will be a criminal offense of fraud, and not a criminal offense of Insurance Abuse. The same is stated in the judgment of the County Court in Bjelovar:

If it is established that the two defendants jointly and according to a prior agreement faked a traffic accident by placing the previously damaged motorcycle and passenger car in the alleged collision position and informing the police that the traffic accident had occurred in which a passenger car, making a U-turn, took away the right of way for a motorcycle, and the police officers recorded the situation in the report of the investigation, after which one of the defendants submitted a claim to the insurance company for compensation, which was paid, then they, as accomplices, have committed criminal acts of fraud from Art. 224 of the CC, and not misuse of insurance from Art. 225 of the CC. The actions of the defendant contain a series of carefully planned and interconnected activities that they undertake in order to falsely portray the occurrence of a traffic accident and, by reporting a fake traffic accident, obtain a material benefit for one of them, so it is a fraudulent action that has a much larger and more serious scope from the one provided for by the criminal offense of misuse of insurance from art. 225 of the CC.[36]

In the criminal legislation of the Republic of Serbia, **insurance fraud** is committed by a person who "with the intention of collecting the contracted amount from the insurance company, destroys, damages or hides the insured thing, and then reports the damage" (Article 223.a paragraph 1. CC RS), for which the law prescribes a prison sentence of three months to three years.

The same penalty will be imposed on "who, with the intention of collecting the contracted sum from the insurance company for the case of

[35] Art. 236, para. 3 CC of the Republic of Croatia.

[36] Judgment of the County Court in Bjelovar, Decision number: Kž-11/10, Date of court decision: 29 April 2010.

physical damage, bodily injury or health impairment, causes himself such damage, injury or health impairment, and then submits a claim to the insurance company." The crime of insurance fraud has two qualified forms.

If by committing the criminal offense of insurance fraud, property gain or damage exceeding the amount of four hundred and fifty thousand dinars was obtained, it is the first qualified form, for which a prison sentence of one to eight years is prescribed. If by committing the criminal offense of insurance fraud, property gain or damage exceeding the amount of one million and five hundred thousand dinars was obtained, it is another qualified form, for which a prison sentence of two to ten years is prescribed.

Frauds and abuses in insurance are very often connected with corrupt criminal acts.[37] Corruption as a form of crime has been known since ancient times and has successfully resisted all social changes.[38]

At the initiative of the Croatian Insurance Office, on April 12, 2011, the *Protocol on Cooperation in Preventing Insurance Fraud* was signed. With the aforementioned Protocol, insurance companies from Hungary, Slovenia, Serbia, Macedonia, Montenegro, Bosnia and Herzegovina and Croatia mutually agreed to cooperate, exchange information and experience, because insurance fraud is not limited to one country only.

5. Conclusion

In a broader sense, the term insurance includes three groups of activities, namely: first, personal and property insurance, second, health insurance and third, pension and disability insurance. Since the beginning of the world, people's lives and property have been exposed to various possible accidents and dangers. In order to prevent the possible occurrence of damage, insurance companies have been offering us a whole range of potential insurance contracts for decades (life,

[37] See more: V. Božić, „Kazneno djelo primanja mita kroz prizmu korupcije između ugovornih liječnika obiteljske medicine i tvornice lijekova", *Yearbook of the Academy of Legal Sciences* 1/2015, 101–150.

Also: V. Božić, T. Kesić, „Kaznenopravni odgovori na korupciju uz prijedloge *de lege ferenda*", *International Conference on European Integration, Justice, Freedom and Security*, Proceedings, Volume 1, Tara, 2016, 455–483.

Also: V. Božić, „Koruptivno kazneno djelo davanja mita kao nezakonita 'protuusluga za uslugu'", *Services and service rules, Proceedings of the Faculty of Law in Kragujevac*, Institute for Social and Legal Sciences, Kragujevac 2016, 829–846.

[38] V. Božić, Ž. Nikač, „Korupcija i njeno suzbijanje u tranzicionim društvima: primer Hrvatske i Srbije", *Sociološki pregled* 3/2018, 813.

property, property against fire and other dangers, goods in transit, loans, sureties, financial losses, travel assistance, accident insurance, occupational injury and occupational disease insurance, voluntary health insurance, motor vehicle insurance, rail vehicle insurance, aircraft, watercraft, liability insurance due to the use of motor vehicles, aircraft, watercraft, general liability insurance for damage, and other insurances).

The paper provides an analysis and structure of existing insurance in the Republic of Croatia and the Republic of Serbia. From the aforementioned research, it can be reasonably concluded that the culture, awareness, level and level of education of people regarding insurance in the Republic of Croatia is still in development and has not reached a satisfactory level, while in the Republic of Serbia it is still, unfortunately, at a lower level. In support of the above, the figures themselves tell us about the concluded insurance policies in one and the other country. In both Croatia and Serbia last year, there was an increase in non-life insurance, liability insurance due to the use of motor vehicles, property insurance, motor vehicle insurance - casco, as well as voluntary health insurance.

The fact is that in the Republic of Croatia the total paid premiums for all insurances in 2023 amounted to 1,749,381.86 euros, while in the Republic of Serbia the total paid premiums for all types of insurance in the same year were 1,326,963.50. euros. The above amounts indicate that the Republic of Serbia has a significantly lower number of paid insurance premiums than the Republic of Croatia (75.85% of the total paid amount of all premiums in the Republic of Croatia). If we look at the concluded insurance policies in relation to the number of inhabitants of each country, then the difference between the Republic of Serbia and the Republic of Croatia is even greater.

Protection against fraud and abuse in insurance is prescribed by the Criminal Code of the Republic of Croatia (*Fraud and Misuse of insurance*, criminal offenses against property) and the Criminal Code of the Republic of Serbia (*Insurance fraud*, criminal offense against the economy).

The opinion is often heard in the public that insurance companies have large sums of money that they do not pay to contractual parties in an adequate way when they report damage, or do not pay them the expected amount or they don't even acknowledge the damage at all, so the injured parties are considered defrauded by the insurance company. In this case, insurance policyholders often look for a new insurance company, while it is not uncommon for "deceived" policyholders to fraudulently try to return their paid insurance policy amount from the insurance company "at all costs" and to receive the amount of compensation for damages that they are not fully entitled to or not admitted at all by insurance company.

In order to combat the criminal acts of insurance fraud and abuse of insurance, it is of crucial importance that both fraud and abuse of insurance be recognized in time and that they are sanctioned with high fines, along with mandatory confiscation of property benefits. When we talk about preventing the commission of the aforementioned criminal acts, it is necessary to take effective preventive measures, such as raising awareness among citizens about the problem of fraud and abuse in insurance, to organize professional training, as well as to strengthen control within insurance companies.

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UPOREDNO-PRAVNI PRIKAZ UGOVORA O OSIGURANJU U HRVATSKOJ I SRBIJI UZ POSEBNI OSVRT NA PREVARE I ZLOUPOTREBE

Apstrakt

Rad se odnosi na strukturu ugovora o osiguranju u Republici Hrvatskoj i Republici Srbiji uz posebni osvrt na prevare i zloupotrebe. Činjenica je da osiguranje ima svoju dugu istoriju jer je osiguranje značajno u životu svakog fizičkog i pravnog lica, s obzirom da u životu postoje mnogobrojni rizici kako na život fizičkog lica, tako i na imovinu fizičkog i pravnog lica. Ugovor o osiguranju je aleatoran ugovor s obzirom da se u trenutku sklapanja ugovora o osiguranju ne zna da li će uopšte doći do osiguranog rizika. Prvi počeci osiguranja datiraju još iz Stare Kine pre pet hiljada godina, dok su prve polise osiguranja zabeležene u Italiji krajem XII veka. Autori ističu da osiguranje mnogo zavisi od privrednog, ekonomskog i društvenog razvoja i uređenja same države. U radu je dat uporedni prikaz strukture osiguranja u Republici Hrvatskoj i Republici Srbiji. Kultura osiguranja u Republici Hrvatskoj još uvek nije na zavidnom stepenu, dok je u Republici Srbiji ona još ipak na relativno nižem nivou. Negativnom razvoju doprinela je svakako i svetska ekonomska kriza koja je ostavila svoje negativne posledice i na sektor osiguranja. Autori su u radu ukazali i na krivičnopravne aspekte prevara u osiguranju u Republici Hrvatskoj i Republici Srbiji te su dali predloge preventivnih mera u cilju smanjenja prevara u osiguranju.

Ključne reči: prevare u osiguranju, ugovor o osiguranju, kultura osiguranja, krivičnopravni aspekti, Republika Hrvatska, Republika Srbija.

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COMBATING AI-BASED INSURANCE FRAUD IN HUNGARY AFTER 2020

Summary

The fight against insurance fraud in Hungary after 2020 has been marked by significant achievements and substantial progress. Regulatory reforms, technological advancements, collaboration among stakeholders, and public awareness campaigns have collectively contributed to reducing fraudulent activities and enhancing the integrity of the insurance system. While challenges remain, the continued commitment to innovation, capacity building, and international cooperation will ensure that Hungary remains at the forefront of combating insurance fraud. By maintaining a vigilant and proactive stance, Hungary can safeguard the interests of honest policyholders and preserve the stability and trust in its insurance market.

Keywords: *Insurance Fraud, Artificial Intelligence, Policyholders, Insurance Market*

1. Introduction

In the 2020s, AI-based devices are becoming more and more widespread, and deep fake technology is also constantly developing. In addition to previous, traditional insurance frauds, this also generates new ways of committing it and poses a challenge to insurers as well. "Scammers are now using artificial intelligence (AI) to doctor photographs in order to commit car insurance fraud. An investigation by Allianz, parent company of insurance firm Liverpool Victoria (LV=), has found that such cases across the entire insurance industry have risen by as much as 300 per cent in the last year, with new investment targeted at trying to identify such false claims. Generative AI features on photo editing apps are more accessible than they've ever been, and

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crooks are utilising this technology in order to edit and then submit so-called 'shallowfaked' images and videos as evidence in fraudulent insurance claims. One example of a doctored image given by LV= was submitted by a van driver who attempted to make it look as if their vehicle had damage on the front bumper. This image was submitted as part of a claim, which also contained an invoice of over £1,000 to cover 'repairs'. The insurance firm's anti-fraud team investigated this claim and found that the original unedited image was on the fraudster's own social media profile, proving that the submitted photograph had been doctored."[2]

All this can be felt in Hungary as well. "According to insurer Allianz, between the insurance years 2021-22 and 2022-23 there has been a 300 percent increase in the number of cases in which claimants faked damage to their cars using various photo-editing applications. The other most common insurance fraud is that the perpetrators look for a type of total loss car for which they have insurance, take a photo of it, and then use an image editing program to add the license plate onto it. The falsified photo created in this way is then attached to the claimant. The insurance company Zurich UK also reported on the phenomenon: they are seeing more and more claims made using so-called "shallow fake" technology (the opposite of deep fake), and this is starting to become one of the most common threats in terms of fighting fraud. While deep fakes are usually realistic images, videos or documents created using artificial intelligence, "shallow" fakes are created by people using traditional image editing software on a phone or computer. According to Zurich UK, they have also encountered deep fake technology several times, which was used to create fully manipulated claim reports: these included fake engineering reports and repair cost estimates written by artificial intelligence."[3]

In Hungary, the fight against insurance fraud can be considered relatively effective. Insurance fraud, the act of purposely deceiving insurers to obtain undeserved financial gains, has emerged as a significant concern worldwide. This essay aims to explore the various aspects of insurance fraud, including its common types, prevalence, detrimental effects, and combating strategies. By understanding the complexities surrounding insurance fraud, society can work towards developing preventative measures and effective detection techniques.

[2] https://www.autoexpress.co.uk/news/363070/ai-drives-major-rise-car-insurance-fraud-criminals-fake-evidence, last visited 22. 6. 2024.

[3] https://rtl.hu/tudomany-tech/2024/05/02/futotuzkent-terjed-az-ujfajta-karambolos-biztositasi-csalas, last visited 20. 6. 2024.

Insurance fraud can manifest in several different forms, each with its own unique characteristics and intentions. One prevalent form is fraudulent claims, where individuals exaggerate or falsify damages or injuries to secure insurance payouts. This can occur in various domains, such as health insurance, property insurance, or auto insurance. Fake accidents, staged thefts, and fraudulent medical procedures are just a few examples of the deceptive practices employed.

Another type of insurance fraud involves the exploitation of policy terms and loopholes. Dishonest policyholders may intentionally hide pre-existing conditions or manipulate information to acquire coverage for incidents with pre-determined resolutions. These manipulative strategies seek to deceive insurers into providing payouts that go beyond the legitimate terms of the policy.

Several major cases have become known in Hungary in recent decades. "Despite the fraud attempts that are easing now, there were still times in Hungary when certain criminals played very big games. Moreover, there were those whom even "death" could not stop. According to Allianz's report, the case referred to as the insurance fraud of the century happened back in 2000, when a man took out risk and accident insurance from several insurance companies, and then a separate passenger insurance right before the trip for a total of more than HUF 200 million, and then in 2001 During their vacation in Greece, his wife reported to the local authorities that her husband had an accident while surfing and drowned, his body being swallowed by the sea. However, later the National Bureau of Investigation obtained information according to which the man declared dead is alive, and at the end of the investigation it turned out that he is indeed alive, and he was arrested."[4]

Insurance fraud also undermines trust in the industry too. When the fraud is left unchecked, people lose faith in insurance providers, believing that their claims are being unjustly scrutinized and denied. This can result in a diminished willingness to purchase coverage, leading to individuals and businesses facing greater financial risks.

2. Combating Insurance Fraud in Hungary and It's Key Achievements in Hungary after 2020

The global landscape of insurance has always been intertwined with the persistent challenge of fraud. In Hungary, like many other countries, tackling insurance fraud has become a priority in maintaining the integrity and

[4] https://www.penzcentrum.hu/biztositas/20211205/elkepeszto-biztositasi-csalasok-tortennek-magyarorszagon-igy-buknak-le-a-legtobben-1119909, last visited 30. 06. 2023.

stability of the insurance market. Post-2020, the Hungarian insurance sector has witnessed significant strides in combating fraud, thanks to the concerted efforts of industry stakeholders, regulatory bodies, and technological advancements.

Insurance fraud involves deceptive practices aimed at obtaining unwarranted benefits from insurance policies. Fraudulent activities can vary from falsifying claims, inflating damages, staging accidents, and submitting false information at the time of policy issuance, to name a few. Insurance fraud not only leads to financial losses for companies but also results in increased premiums for honest policyholders and undermines the trust in the insurance system.

Before 2020, Hungary, like many other countries,[5] grappled with various forms of insurance fraud. The country witnessed a range of fraudulent activities in sectors such as car insurance, health insurance, and property insurance. The insurance industry faced considerable challenges due to inadequate detection mechanisms, limited inter-agency cooperation, and lack of advanced technological tools to identify and mitigate fraud efficiently.

In the aftermath of 2020, Hungary recognized the need for stronger regulatory measures to combat insurance fraud. Technology has played a pivotal role in revolutionizing the fight against insurance fraud in Hungary. After 2020, insurance companies increasingly leveraged artificial intelligence (AI), machine learning (ML), and data analytics to identify and predict fraudulent patterns. Advanced algorithms analyzed vast amounts of data, detecting anomalies and red flags that might indicate fraudulent behavior. Additionally, biometric verification and blockchain technology were integrated to enhance transparency and security in the insurance claims process.

One of the critical strategies in combating insurance fraud has been fostering collaboration among industry stakeholders. After 2020, there was a significant push towards creating a centralized database that allowed insurance companies to share information on fraudulent claims and suspicious activities. This database facilitated better coordination and cooperation among insurers, the government, and law enforcement agencies, enabling quicker identification and mitigation of fraud. Educating the public about the consequences of insurance fraud became a focal point of anti-fraud initiatives. Hungary launched extensive public awareness campaigns to inform policyholders about the legal repercussions of engaging in fraudulent activities. These campaigns also aimed to empower citizens to report suspected

[5] https://www.forbes.com/advisor/insurance/fraud-statistics/, last visited 23. 06. 2024.

fraud, contributing to a collective effort in maintaining the integrity of the insurance system.

Recognizing the complexities involved in identifying and prosecuting insurance fraud, hungarian insurance companies established specialized investigation units within insurance companies. These units comprised experts from diverse fields, including forensic accounting, legal, and IT, who worked together to investigate and resolve suspected cases of fraud. Their expertise ensured that investigations were thorough, timely, and resulted in successful prosecutions.[6]

One of the most notable achievements in the fight against insurance fraud in Hungary in the last years has been the significant reduction in fraudulent claims. The combined efforts of regulatory reforms, technological advancements, and collaboration among stakeholders led to a marked decrease in the number of fraudulent activities. Insurance companies reported substantial drops in fraudulent claims, indicating the effectiveness of the measures implemented.

The integration of AI and ML technologies revolutionized fraud detection mechanisms. Advanced predictive models accurately identified high-risk claims and flagged potentially fraudulent activities for further investigation. This proactive approach minimized the incidence of undetected fraud, saving the industry millions of Hungarian Forints. The ability to quickly and accurately identify fraudulent claims allowed insurance companies to allocate resources more efficiently. By focusing on genuine claims and reducing the time and resources spent on investigating fraudulent ones, companies improved their operational efficiency. This, in turn, resulted in faster claim settlements and enhanced customer satisfaction.[7]

The stringent legal frameworks and successful prosecutions sent a clear message that insurance fraud would not be tolerated. High-profile cases of fraud were prosecuted vigorously, with perpetrators facing significant penalties, including fines and imprisonment. This legal deterrence discouraged potential fraudsters, contributing to the overall reduction in fraudulent activities.

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[6] https://www.iasiu.org/page/History, last visited 22. 06. 2024.

[7] https://www.spglobal.com/marketintelligence/en/client-segments/insurance?utm_medium=cpc&utm_source=google&utm_campaign=Data_and_Insights_AI_Solutions_Search_Google&utm_term=artificial&intelligence&solutions&utm_content=699379714698&gclid=Cj0KCQjwj9-zBhDyARIsAERjds0_O-_iicc0jCYyxi-mvzf--mCYp3uYoy2rQGm2vH2KQ4F1o6tO9XQaAhguEALw_wcB, last visited 12. 06. 2024.

The collective efforts to combat insurance fraud significantly bolstered the trust and credibility of the Hungarian insurance system. Policyholders regained confidence, knowing that their insurers were committed to maintaining a fair and transparent system. This renewed trust positively impacted customer retention and attracted new policyholders, further stabilizing the market.

Hungary's success in fighting insurance fraud after 2020 garnered international recognition. The country's strategies and best practices were acknowledged by global insurance forums and regulatory bodies. Hungary became a benchmark for other countries seeking effective methodologies to combat insurance fraud, contributing to the overall global effort in mitigating this pervasive issue. While significant progress has been made in combating insurance fraud in Hungary, challenges remain. The ever-evolving nature of fraud tactics necessitates continuous adaptation and innovation in detection and prevention strategies. Ensuring that all stakeholders—insurers, regulators, law enforcement, and policyholders—are aligned in their efforts is crucial for sustained success. Future directions should focus on: 1. Investing in the latest technological advancements, including AI, blockchain, and cybersecurity measures, will be essential to stay ahead of sophisticated fraud schemes. Continuous upgradation of fraud detection systems and integration of emerging technologies will enhance the industry's capability to combat fraud effectively.

In Hungary, the fight against insurance fraud is determined by the legislation on insurance activity, the protection of insurance secrecy and ultimately by criminal law, and it can be considered effective on the European average. Insurers should also invest in advanced technology and data analytics to identify patterns indicative of fraud. Collaboration between insurance companies, law enforcement agencies, and regulatory bodies can foster the exchange of information and the development of specialized investigative units to address this global challenge effectively.

One of the determining factors in the fight against insurance fraud in Hungary is the protection of insurance secret. The general concept of a secret was defined by Mihály Tóth as follows: "a secret is any data, fact, circumstance or thought which, in principle, can be known to anyone - and the embodiment of all this - but which is known only to a limited number of individuals, and whose secrecy is in the legitimate interest of those who know the secret."[8]

There are so many kinds of secrets these days, in parallel. Their formation is a consequence of socio-historical processes. According to Béla Révész's

[8] T. Mihály, "Titkokkal átszőtt büntetőjog", *Iustum Aequum Salutare* 1/2005, 57.

position on this, which in my opinion is considered to be the most logical and today accepted view: The primary elements of the traditionally formed types of secrets are the nature of the communicator and the message, and only secondarily are the moments of the recipient and the effect. When war secrets, state secrets, economic or scientific secrets are discriminated against in the literature, it is obvious at first sight that they are grouped according to the content of the non-communicated information. At the same time, it is inseparable from the non-communicating subject, since certain circles of information are related to statuses that can be precisely defined in the structure of the social-power division of labor. Thus, the quality of the secret owner is inseparable from the type of confidential content. The receiving person or group may be related to the typification as an important element in that it responds to the extent of the particularity of the person or group(s) excluded from communication. Finally, the efficiency of the non-communication process is not only a function of the information retention performance of the secret owner, but also an important indicator of whether it can generate spontaneous communication processes such as e.g. the false news, the horror news.[9]

In my view, secrecy, in the broadest sense, is a category inherent in human nature that appears at a certain quality of the process of becoming human. A secret is anything that only a certain number of people know about, and whose secrecy for a specified period of time, regardless of its value, is in the interest of one or more people or society, and the holder of the secret has taken appropriate measures to keep it secret. If we examine the secret, which is protected by law, as a kind of special legal relationship, we can make the following conclusions about it: - always present in humans, - an absolute legal relationship (everyone is obliged to tolerate that the secret owner only shares the secret with whom he wishes), - always exists within a specified time frame, - its subject-matter is information of a valuable nature which requires and deserves legal protection, and - the loss, destruction, disclosure or making available to an unauthorized person of this information has legal consequences governed by different rights.

The current Hungarian regulations on breach of insurance confidentiality are as follows:

"413. § (1) A person who is obliged to keep bank, securities, fund, insurance or employer pension secrets is an unauthorized person who uses information classified as bank, securities, fund, insurance or employer pension secrets

[9] R. Béla, *A titok, mint politika. A titkosszolgálatok politológiai kutatásának lehetőségei*, SZTE ÁJK Politológiai Tanszék, Szeged 2007, 9.

for the purpose of obtaining an unlawful advantage, or by causing financial disadvantage to another person. makes it accessible to him, is punishable by imprisonment of up to two years for a misdemeanor.

(2) Does not commit a violation of economic secrecy, who

a) fulfills its obligations set out in the law regarding the disclosure of data of public interest and data made public in the public interest, or

b) fulfills or initiates the reporting obligation required by law related to the prevention and prevention of money laundering and financing of terrorism, insider trading, market influence and the fight against terrorism, even if the report made in good faith was unfounded."

The Hungarian Civil Code considers insurance secrecy as part of a broader category of economic secrecy. Hungarian criminal law only punishes the violation of certain types of economic secrets if the violation is committed for the purpose of obtaining an unlawful advantage - which can be of a material or personal nature - or by causing a financial disadvantage to someone else. The subject of the crime can be anyone who is in possession of the economic secret, not only an employee or senior official of the insurance company. The act can only be committed intentionally.

3. Conclusion

The fight against insurance fraud in Hungary after 2020 has been marked by significant achievements and substantial progress. Regulatory reforms, technological advancements, collaboration among stakeholders, and public awareness campaigns have collectively contributed to reducing fraudulent activities and enhancing the integrity of the insurance system. While challenges remain, the continued commitment to innovation, capacity building, and international cooperation will ensure that Hungary remains at the forefront of combating insurance fraud. By maintaining a vigilant and proactive stance, Hungary can safeguard the interests of honest policyholders and preserve the stability and trust in its insurance market.

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BORBA PROTIV PREVARA U OSIGURANJU NASTALIH UPOTREBOM VEŠTAČKE INTELIGENCIJE U MAĐARSKOJ NAKON 2020. GODINE

Apstrakt

Borbu protiv prevara u osiguranju u Mađarskoj nakon 2020. godine obeležila su značajna dostignuća i značajan napredak. Regulatorne reforme, tehnološki napredak, saradnja među zainteresovanim stranama i kampanje za podizanje javne svesti zajedno su doprineli smanjenju aktivnosti prevare i poboljšanju integriteta sistema osiguranja. Iako izazovi ostaju, kontinuirana posvećenost inovacijama, izgradnji kapaciteta i međunarodnoj saradnji osiguraće da Mađarska ostane na čelu borbe protiv prevara u osiguranju. Održavanjem budnog i proaktivnog stava, Mađarska može zaštititi interese poštenih osiguranika i očuvati stabilnost i poverenje u svoje tržište osiguranja.

Ključne reči: prevare u osiguranju, veštačka inteligencija, pošteni osiguranici, tržište osiguranja.

Nikola Dožić* **DOI: 10.56461/ZR_24.ONS.23**

LOSS OF ENTITLEMENT UNDER INSURANCE CONTRACT – ABOUT A PROCEDURE FOR THE ASSESSMENT OF CONSTITUTIONALITY AND LEGALITY

Summary

Autor reviews the possibility of the unconstitutionality of one of the provisions of the Montenegrin Law on compulsory traffic insurance due to a pending procedure before the Constitutional Court of Montenegro. In one instance of indemnification in the case of a loss of entitlement in respect of an insurance contract was brought into questioning, where the total amount of paid claims, interest, and pertaining expenses by the insurance company can be reimbursed by the insurance company from the party liable for the damage. By Montenegrin law on compulsory insurance in traffic, when the driver has operated the vehicle without an appropriate driving license, this constitutes the right of the insurer to reimbursement of paid claims. In the initiative for the assessment of constitutionality and legality, it was stated that the consequence of the application of the norm is the imposition of a monetary fine on the insured by the insurance company due to the imprecision of the legal phrasing. The author presents the opinion of the legal theory on the crucial question identified and comments on the possible waiver of the right of recourse by the insurer.

Keywords: *Loss of Entitlement under Insurance Contract, Legality and Constitutionality, Monetary Fine.*

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1. Introduction

At the end of 2022, an initiative was submitted to the Constitutional Court of Montenegro to assess the compliance of Article 31, paragraphs 1 and 2, of the Law on Compulsory Traffic Insurance[1] with the Constitution of Montenegro. In accordance with Article 150, paragraph 1, of the Constitution of Montenegro, anyone can take the initiative to initiate the procedure for the assessment of constitutionality and legality, while the procedure before the Constitutional Court for the assessment of constitutionality and legality can be initiated by a court, another state body, a local self-government body, and five Members of Parliament.[2] In compliance with the Article 56 of the Law on Constitutional Court the initiative for the initiation of the procedure for the evaluation of the conformity of the law with the Constitution and confirmed and published international treaties, i.e., other regulations and general acts with the Constitution and the law, can be submitted by a natural and legal person, as well as an organization, settlement, group of persons and other forms of organization that do not have legal status. Persons, who are setting the initiative do not have to have a direct legal interest in submitting the initiative.[3] Therefore, the procedure before the Constitutional Court did not start with the submission of a motion to initiate the procedure, but with an initiative, given that the applicant is a lawyer.

The applicant asked for a review of the constitutionality of the Law on Compulsory Traffic Insurance; in particular, he has requested a review of the constitutionality of two paragraphs in Article 31 of the Law on Compulsory Traffic Insurance. The next part of the paper will be devoted to a presentation of the argument, and the legal basis invoked by the applicant of the initiative, and the constitutional guarantees he pointed to in the procedure. In this part of the paper, we will try to present the opinions of the applicant, and we will not comment on the claims that are made.

In the procedure before the Constitutional Court of Montenegro, the initiative was submitted for a response or opinion to the maker of the contested law in accordance with Article 56, paragraph 1, of the Rules of Procedure of the Constitutional Court. In this procedure, the Government of Montenegro sent

[1] Law on Compulsory Traffic Insurance, *Official Gazette of Montenegro*, No. 44/12, 146/21 (hereinafter: Law on Compulsory Traffic Insurance).

[2] Constitution of Montenegro, *Official Gazette of Montenegro*, No. 1/2007 and 38/2013 - Amendments I-XVI) (hereinafter: Constitution of Montenegro).

[3] Law on Constitutional Court, *Official Gazette of Montenegro*, No. 11/2015, (hereinafter: Law on Constitutional Court).

the initiative to the proponent of the Law on Compulsory Insurance in Traffic, the Ministry of Finance of Montenegro, which requested the opinion of the Insurance Supervision Agency of Montenegro. In preparation of the answer, the Council of the Insurance Supervision Agency of Montenegro gave an opinion to the Ministry of Finance, on the basis of which the Government of Montenegro gave a final answer to the Constitutional Court. The following part of the paper will be devoted to the presentation of the arguments made by the proponents of the Law on Mandatory Insurance in Traffic.

The last part of the paper will be devoted to a comparative analysis of regulations that regulate the issue of loss of entitlement with respect to insurance contracts in the region in order to point out the possible similarities or possible differences in legislation, as well as the other points made by the applicant in his initiative.

2. The Initiative for the Assessment of Constitutionality and Legality of Article 31, Paragraph 1, Point 1, and Paragraph 2

The initiative for the assessment of the disputed provisions was very brief. In less than three pages, the applicant enumerated the provisions of the Law on Compulsory Traffic Insurance that he deemed unconstitutional, and gave his reasoning for the unconstitutionality of the provisions. We will first address the explanation of the disputed provisions, and then we will present the applicant's reasoning.

Article 31 of the Law on Compulsory Traffic Insurance is devoted to indemnification in case of a loss of entitlement in respect of an insurance contract. Article 31, paragraph 1, point 1, states that the compulsory auto liability insurance shall also cover the liability for damages caused to third parties by the use of a vehicle by a person who has operated the vehicle without an appropriate driving license. Other undisputed points of this paragraph are devoted to enumerating the cases in which compulsory auto liability insurance shall also cover the liability for damages caused to third parties: vehicle was not used for the intended purpose; a trainee was driving without the supervision by an authorized driver – instructor; unapproved use of the vehicle; driving under influence of alcohol above the set limit, under narcotics, psychoactive medicines or other psychoactive substances, and who has avoided or refused to be subject to alcohol and other testing; if the person caused the damage intentionally; if the accident was caused by a person aware of the technically deficiency of the vehicle; if the accident was caused by the person in illegal possession of the vehicle; and the person who, after

the traffic accident, has left the location of the accident without providing his personal details and insurance details.[4]

In paragraph one of Article 31 of the Law on Compulsory Traffic Insurance, the law gives an exhaustive list of reasons why compulsory auto liability insurance shall also cover the liability for damages caused to third parties by the use of a vehicle.

The disputed paragraph 2 of Article 31 states that the insurance company that compensates the claimant for the claimant for the damage referred to in paragraph 1 shall be entitled to reimbursement of the total amount of paid claims, interest, and pertaining expenses by the party liable for the damage.

The applicant has stated that in the part of the legal provision stating "appropriate driving license, its stylization constitutes a violation of a violation of the principle of legality since the legal norm in the part "appropriate driving license" is unprecise, unclear, and unpredictable".

The applicant explained his reasoning by comparing this legal provision to the provision of the Law on Road Traffic Safety[5] referring to the driving license. The applicant refers to Article 7 of this law, which contains explanations of certain terms used in this law. In the Paragraph 1, point 133, a driving license is defined as a public document that gives a person the right to drive a vehicle of a certain category for a certain period of time. He reiterated that the two major characteristics of the driving license are that it is a public document that gives a person the right to drive a vehicle of a certain category, and the second characteristic is that it is issued for a certain period of time.

From the definition of the driving license, the applicant has extrapolated the term "vested driving license" that can cease to be valid due to the passage of time and that, after the expiration, it is simply renewed since it is the driving license that he obtained previously.

The applicant states that, under the influence of the insurance lobby, the Montenegrin courts interpret these regulations in all the cases in which the driver was driving with an expired driving license as a case of indemnification in case of a loss of entitlement in respect of an insurance contract, which constitutes the obligation of the driver to reimburse the total amount of paid claims, interest, and pertaining expenses paid by the insurance company. In the opinion of the applicant, the existence of a valid insurance contract should constitute an obligation of the insurance company, without the

[4] See art. 31 Law on Compulsory Traffic Insurance.

[5] Law on Road Traffic Safety, *Official Gazette of Montenegro*, No. 3/12, 58/14, 14/17 and 66/19.

right to reimbursement of the paid claim to the third party, since the insurance company has accepted the payment of the insurance premium.

By the applicants reasoning, the Montenegrin courts, without exception, misinterpret the wording of Article 31, paragraph 1, stating the "appropriate driving license" as a "valid driving license", without making the connection between this term and a category of the driving license needed for driving the vehicle.

The applicant is stating that linguistically and logically, the term "appropriate driving license" cannot be interpreted as "valid driving license", but primarily as the nonexistence of the driving license. Since there are no clear and precise terms in the law on mandatory traffic insurance for which a driving license is appropriate, there is an arbitrary interpretation of this legal norm.

According to the applicant's opinion, after the expiration of the driving license, there is only an administrative procedure for prolonging the driving license's validity, for which there are no special, unobtainable conditions.

Furthermore, according to the applicant's opinion, for the expiration of the driving license, insurance companies are not entitled to impose a monetary fine on the insured, which consists of reimbursement of the total amount of paid claims, interest, and pertaining expenses. Also, the applicant is stating that by the Law on Road Traffic Safety, there is no penalty for the driver for driving with the expired driving license, but that there is a traffic offense under Article 319, paragraph 17, stating that a monetary fine can be imposed on the physical person driving the motor vehicle in traffic without a valid driving license, foreign diver license, or international driving license for driving a vehicle of the category it is in. From this, the applicant concludes that the incrimination is based on the nonexistence of a certain category of the driving license.

Consequently, the applicant concludes that the disputed article 31 paragraph 1 point 1 of the Law on Compulsory Traffic Insurance should also contain the term "appropriate category of driving license" instead of "appropriate driving license", which would mean that only in the case a person who is operating a vehicle and doesn't have the driving license for the appropriate category of the vehicle would have the obligation of reimbursement of the total amount of paid claims, interest, and pertaining expenses.

The claim of the applicant on the unconstitutionality of Article 31 Paragraph 1, Paragraph 2, of the Law on Compulsory Traffic Insurance was explained by the violation of Article 8 of the Montenegrin Constitution,

which regulates the principle of equality, and then by the violation of the principle of legality, and by the violation of Article 17 of the Constitution, which regulates the principle of equality.

3. Opinion of the Law on Compulsory Traffic Insurance

In the process of formulating the opinion of the Government of Montenegro as a formal proponent of the Law on Compulsory Traffic Insurance, the agency directly responsible for implementation and enforcement control of this law, the Insurance Supervision Agency of Montenegro, was consulted. The Council of the Insurance Supervision Agency of Montenegro as the only competent body of this agency was involved in formulating the text, that was with minor changes sent to the Constitutional court of Montenegro as the formal opinion of the proponent.

The Council of the Insurance Supervision Agency of Montenegro (hereinafter: Council) formulated the opinion that the applicant's analysis and disputations of the constitutionality of the articles of the Law on Compulsory Traffic Insurance are unfounded.

In formulating their opinion, the Council clearly started from a different standpoint. They have started by pointing out the origin of this norm and that all of the regulations on motor insurance from the 1970s were developed in accordance with European standards in this area of insurance. They have also reminded us that Montenegro, by signing the Stabilization and Association Agreement with the European Union (hereinafter: EU), committed herself to ensuring that all future amendments and additions to regulations are in accordance with the standards of the EU and in compliance with its regulations. This is the obligation in the area of insurance, and especially in the area of motor insurance, which has several texts that are relevant for the harmonization of the national legislation.

In accordance with the current Directive relating to insurance against civil liability in respect of the use of motor vehicles and the enforcement of the obligation to insure against such liability, the disputed legal provision of the Montenegrin Law on Compulsory Traffic Insurance was a product of the implementation of Article 15.[6] In particular, under this provision, each Member State shall take all appropriate measures to ensure that any statutory

[6] Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (hereinafter: Directive)

provision or any contractual clause contained in an insurance policy issued in accordance with Article 3 shall be deemed to be void in respect of claims by third parties who have been victims of an accident where that statutory provision or contractual clause excludes from insurance the use or driving of vehicles by persons who do not hold a license permitting them to drive the vehicle concerned.[7] This Directive was adopted in order to eliminate differences and ensure the same standing of persons who have suffered damages regardless of the member state in which they were located.[8]

This provision of the Directive was implemented in the relevant legal texts in all Member States of the EU, since it is meant to provide the injured party with the right to seek compensation directly from the insurer, regardless of the exclusions in the insurance contract provisions.[9] The rule is in accordance with the nature of risk selection in insurance, since these contracts can't and do not need to insure absolutely all actions of the person who is liable for the damage.

The Council addressed the question of framing the norm in question regarding the term "appropriate driving license". They have given the historical development of this norm in Montenegrin law since the Law on the Fundamentals of the Property and Personal Insurance System,[10] through the Law on Compulsory Traffic Insurance from 2007 to the current rule. The Council has also pointed out that the exact or similar formulation exists in all the laws of the EU Member States and the countries in the Balkan region and pointed out the absence of relevant court cases in the region, meaning that there are no cases that have problematized this question with regard to the validity of the driving license.

According to the Council's opinion, the term "appropriate driving license" is clear and points out all the relevant characteristics of the driving license. They agreed with the opinion of the applicant that this term means the possession of the driving license, which is in the appropriate category, but they reiterated that the applicant is omitting the fact that the validity of the driving license is a prerequisite since an invalid (expired) driving license doesn't give the right to use the vehicle.

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[7] Art. 13, para. 1 of the Directive has two more cases of exclusion numbered, but they are of no relevance for the problem in question.

[8] J. Pak, *Pravo osiguranja*, Univerzitet Singidunum, Beograd 2011, 108.

[9] See: I. Tošić, „Razvoj koncepta autoodgovornosti u pravu EU", *Pravni život* 12/2017, 470.

[10] Law on the Fundamentals of the Property and Personal Insurance System, *Official Gazette of SFRJ*, No. 17/90, 82/90, and *Official Gazette of FRY*, No. 31/93, 24/94.

Moreover, the Council has pointed out that in the case in question, there is a regulation that prohibits the driving of the vehicle without a valid driving license,[11] followed by a misdemeanour penalty according to the penalty rules of the same law.[12] The fact that the person had a driving license that has expired means that this license does not have any legal effect. Actual driving skills do not entitle a person to drive a vehicle, so the interpretation of the Montenegrin courts in this case is correct when they have concluded that there is an obligation on the person responsible to reimburse the insurer.

It is interesting to mention that paragraph 3 of Article 31 regulates the upper limit of the amount of compensation to the insurance company. This limit was set only in the case that the natural person is liable for the incurred damage. The limit is set at 24 average net salaries in Montenegro, according to the most recent official data from the authority competent for statistics affairs.[13] This was one of the points that the council has made. The obligation of the person responsible for damage is limited in the case of reimbursement, but the obligation of the insurer is not, so he will be obliged to pay up to 550.000 for personal injuries and up to 300.000 for damage to property.

In the end, the Council has reminded that in the practice of the European Court of Justice, there were several cases regarding the implementation of the rules of the Directive that reiterated the need for the protection of third parties, cases in which the insurer has the obligation to compensate the damages of the third party, regardless of the loss of entitlement in respect of an insurance contract.

The Montenegrin Ministry of Finance is in accordance with the Council's opinion, given the opinion that Article 31, paragraph 1, point 1, and paragraph 2, are in accordance with the Montenegrin Constitution and Montenegrin legal system, so that these rules do not breach any of the constitutional principles. In this regard, the Ministry has proposed that this initiative not be accepted.

4. Analysis of the Problem in Question

Focusing on the initiative for the assessment of constitutionality and the opinion of the proponent of the Law on Compulsory Traffic Insurance, we can identify the main points of contention between the initiative applicant and the proponent of the Law on Compulsory Traffic Insurance.

[11] Law on Road Traffic Safety, art. 176, para. 1.

[12] Law on Road Traffic Safety, art. 319, para. 1, point 17.

[13] Art. 31, para. 3, of the Law on Compulsory Traffic Insurance.

We can identify one of the major questions: What is an appropriate driving license with regard to the Law on Compulsory Traffic Insurance? No less important is the second question: Does the validity of the driving license influence the right of the insurer to reimbursement of the damages paid?

To answer these questions, we will first compare the relevant laws in Montenegro, Serbia, and Croatia with regard to the loss of entitlement in respect of insurance contracts. Afterwards, we will look for differences in the autonomous sources of insurance law. In the end, in this part, we will also analyze the available literature on the loss of education in this case.

4.1. Legal Texts on Loss of Entitlement under an Insurance Contract

Relevant laws of the three countries in question all have rules on loss of entitlement in respect of insurance contracts, but they all use somewhat different legal terminology in this case. The Montenegrin Law on Compulsory Traffic Insurance uses the term "appropriate driving license",[14] The Serbian Law on Compulsory Traffic Insurance uses the term "did not have a driving license to drive a motor vehicle of a certain category",[15] and the Croatian Law on Compulsory Traffic Insurance uses the term "did not have a valid driving license of the appropriate type or category."[16] Both in Serbia and Croatia, there is an exception to the rule if the vehicle was driven by a person who is a driver candidate during training for driving a vehicle, in compliance with the regulations governing that training. In Montenegro, this is a separate reason for the right of recourse if a person was trained to drive a motor vehicle in traffic without the supervision of an authorized driver or instructor.

It is interesting to point out that in the case of the Serbian Law on Compulsory Traffic Insurance, there is no limit to the right of recourse set for the obligation of the person liable for the damages. In the case of Montenegro and Croatia, the limits for the obligation of the person who loses entitlement under an insurance contract are set in Montenegro at 24 average net salaries, according to the latest official data of the administrative body responsible for statistics,[17] and to average 12 net salaries in Croatia.[18] There is an additional

[14] Art. 31, para. 1 point 1 of the Montenegrin Law on Compulsory Traffic Insurance.

[15] Art. 29, para. 1 point 2 of the Serbian Law on Compulsory Traffic Insurance, *Official Gazette of RS*, No. 51/09, 78/11, 101/11, 93/12 and 7/13.

[16] Art. 24, para. 1 point 2 of the Croatian Law on Compulsory Traffic Insurance, "*Official Gazette of RC*" No. 151/05, 36/09, 75/09, 76/13, 152/14, 155/23.

[17] Art. 31, para. 3 of the Montenegrin Law on Compulsory Traffic Insurance.

[18] Art. 24, para. 1 point 2 of the Croatian Law on Compulsory Traffic Insurance.

difference in Croatian law, but it does not apply to the case of driving without a driving license, but to intentional damages and damages in a case where there is a specific criminal offense.[19]

With regard to the regulations of the EU, by the Directive that regulates this area of insurance, member states must provide a mechanism for payments of damages in cases of loss of entitlement under an insurance contract. In the literature, as one of the most common cases for loss of entitlement under an insurance contract, a case of a person driving without a driving license is listed.[20]

We must also compare the regulations of the three countries with regard to the issuance of the driving license, with regard to the question of the driving license validity.

All three countries in the positive law have the same determination with regard to the issuance of the driving license. A driving license is being issued for a certain period of time, from 5 to 10 years, depending on the category of the license.[21] In all these states, there is a monetary misdemeanour fine if the person is driving with an expired drivers' license.[22]

So, by now, we can confirm that there is a great similarity in treating the issuance of the driving license, driving with an expired drivers' license, and the problem of loss of entitlement under an insurance contract in the legal provisions of these three countries. But this can be said only for the current legislation. In the previous period in the older version of Croatian Law on Road Traffic Safety, before the current changes were enacted, the driving license was being issued with a validity period until the driver turns 80, and it

[19] Art. 24, para. 4 of the Croatian Law on Compulsory Traffic Insurance.

[20] V. Čolović, „Zastarelost regresnog zahteva kod ugovora o osiguranju od odgovornosti", *Naknada štete i osiguranje - Savremeni izazovi*, Zrenjanin 2017, 358. J. Pak, 110. Also see: M. Krulj Mladenović, V. Ivanović, M. Gašić, „Pravni problemi saobraćajnih nezgoda - Direktive EU o osiguranju od građanske odgovornosti za štete iz upotrebe motornih vozila", *Pravo – teorija i praksa* 7-9/2016, 48.

[21] Art. 189 Montenegrin Law on Road Trafic Safety, *Official Gazzette of Montenegro*, No. 33/12, 58/14, 14/17 and 66/19; Art. 185 Serbian Law on road trafic safety, *Official Gazzette of RS*, No. 41/09, 53/10, 101/11, 32/13, 55/14, 96/15, 9/16 , 24/18, 41/18, 41/18, 87/18, 23/19, 128/20 and 76/23. Art. 222 Croatian Law on road trafic safety, *Official Gazzette of RS*, No. 67/08, 48/10, 74/11, 80/13, 158/13, 92/14, 64/15, 108/17, 70/19, 42/20, 85/22, 114/22, 133/23.

[22] Art. 319, para. 1 point 10 Montenegrin Law on road trafic safety; Art. 327 para. 1 point 35 of Serbian Law on road trafic safety; Art. 196, para. 5. Croatian Law on Road Trafic Safety.

was to be changed every 10 years, with no obligation of the driver to undergo a medical examination, in case the license was category B and this person is not driving a vehicle as the main professional occupation.[23]

After the changes to the law on road traffic safety in Croatia, the legal ground is almost identical. But we can point out the difference in treatment after the expiration of the driving license and the loss of entitlement under the insurance contract. The main difference, then, must be in the regulation of the loss of interest in the general and special terms and conditions for liability car insurance.

4.2. Analysis of the Terms and Conditions of Liability Traffic Insurance

If we look at the standard conditions for mandatory insurance of owners or users of motor vehicles against liability for damages caused to third parties in Montenegro, we can see that these conditions regulate the question of loss of entitlement in exactly the same way. For this analysis, we have examined the conditions on liability car insurance made by Lovćen Insurance, Grawe Insurance, and Generali Insurance that operate in the Montenegrin insurance market. In all three conditions for liability car insurance, article 3 of the conditions is devoted to the loss of entitlement under the insurance contract, and the text of the three preceding conditions is almost identical. They all state that one of the cases of the loss of entitlement is the case where the driver was driving "without a driving license" or "without an appropriate driving license."[24] There is no further explanation of what is considered to be driving without a driving license or without an appropriate driving license. We can also conclude that these conditions are in line with the terminology of the Montenegrin law and do not go into any detail in order to further regulate this matter.

Standard conditions for mandatory insurance of owners or users of motor vehicles against liability for damages caused to third parties in Serbia

[23] Art. 196, para. 5. Croatian Law on Road Trafic Safety, *Official Gazzette of RC*, No. 67/08.

[24] Art. 3, para. 2 point of the Conditions for mandatory insurance of owners or users of motor vehicles against liability for damages caused to third parties, Generali insurance (Montenegro), from 2022. Art. 3, para. 2 point 2 of the Conditions for mandatory insurance of owners or users of motor vehicles against liability for damages caused to third parties, Grawe insurance (Montenegro), from 2017. Art. 3, para 2 point of the Conditions for mandatory insurance of owners or users of motor vehicles against liability for damages caused to third parties, Lovćen insurance (Montenegro), from 2017.

also regulate the question of loss of entitlement in exactly the same manner and follow the terminology used in the Serbian Law on Mandatory Insurance in Traffic. All the conditions that were analyzed use the same phrasing as the Serbian law, without any deviation in the regulation, and they also do not offer any more explanation of the terminology used.[25] They all regulate the loss of entry under an insurance contract in the case the driver did not have a driving license to drive a motor vehicle of a certain category.[26]

However, conditions for mandatory insurance of owners or users of motor vehicles against liability for damages caused to third parties in Croatia also regulate the question of loss of entitlement and follow the terminology used in the Croatian Law on Mandatory Insurance in Traffic in the case the driver did not have a valid driving license of the appropriate type or category. But all the conditions that were revised had some additional regulations, or it is better to say an exception to this rule. One of the exceptions under which the rule on loss of entitlement will not be enforced is when the driver didn't have the driving license because this license was not extended after the expiration date, and he did not lose the right to extend its validity until the day of the harmful event. The only similarity of these conditions on liability car insurance to Montenegro and Serbian conditions is that all of the revised conditions in Croatia regulate this in exactly the same way.[27]

After a comparison of the revised conditions on liability car insurance in these three countries, we can draw some conclusions. The main difference in the regulation of the loss of entitlement in the terms and conditions for liability car insurance is that in the case of the Croatian insurers, they all have exceptions to the rule regarding the validity of the driving license, and with

[25] Art. 5, para. 1 point 2 of the Conditions for mandatory insurance of owners or users of motor vehicles against liability for damages caused to third parties, Generali insurance (Serbia), from 2023. Art. 5, para. 1 point 2 of the Conditions for mandatory insurance of owners or users of motor vehicles against liability for damages caused to third parties, Sava insurance (Serbia), from 2015. Art. 5, para. 1 point 2 of the Conditions for mandatory insurance of owners or users of motor vehicles against liability for damages caused to third parties, Wiener Städtische insurance (Serbia), from 2009.

[26] J. Pak, 110.

[27] Art. 3, para. 1 point 2 of the Conditions for mandatory insurance of owners or users of motor vehicles against liability for damages caused to third parties, Sava insurance (Croatia), from 2024. Art. 3 para. 2 of the Conditions for mandatory insurance of owners or users of motor vehicles against liability for damages caused to third parties, Uniqa insurance (Croatia), from 2014. Art. 4 para. 1 point 2 of the Conditions for mandatory insurance of owners or users of motor vehicles against liability for damages caused to third parties, Groupama insurance (Croatia), from 2023.

this, they have additional rules than the ones that are already contained in the law that regulates the loss of entitlement under the insurance contract.

It is important to point out that all the conditions on liability car insurance in Croatia are enacted after the changes to the Croatian Law on Mandatory Insurance in Traffic, and they all have an exception regarding the expiration of the driving license. In the case of the Croatian nurses, there is no question if the loss of entitlement under the insurance contract will occur in the event of the expiration of the driving license.

4.3. Legal Theory on Loss of Entitlement under an Insurance Contract

The literature on loss of entitlement under an insurance contract is extensive, but we will focus our efforts on presenting only the opinions of the most relevant deliberations on the problem in question.

Legal theory is of the unanimous determination that in the case of driving without a driving license, the loss of entitlement under an insurance contract is a standard legal consequence. In legal theory, three questions are relevant.

The first question is: What is a valid driving license? The second question is: who bears the burden of proof for loss of employment under an insurance contract in the case a driver does not have an appropriate driving license? The third question is devoted to the problem: whether the insurer must prove the existence of a causal link between not having an appropriate driving license and the resulting damage. For the first question, we must present the following arguments: In legal theory, the opinion is that if the driver drives the vehicle without even having a valid driving license of the appropriate type or category, the loss of entry under an insurance contract is a valid sanction. A driving license is considered to be a formal act that has a constitutive effect on the rights of the insured. The behaviour of a person who is *contra iurem* cannot be considered permissible.[28] According to the legal theory, this would include cases of a driver who has passed the driving test but has not yet received a driving license and a driver who has requested, but has not yet received, a driving license extension. In both of these cases, the opinion is that the driver does not have an appropriate (valid) driving license. So, the expired driving license is a valid reason for the loss of entitlement under an insurance contract in European countries.[29] A driving license

[28] M. Ćurković, „Isključenja iz osiguranja i gubitak prava iz osiguranja u obveznom osiguranju od automobilske odgovornosti", *31. susret osiguravača i reosiguravača Sarajevo*, 2020, 133, www.sors.ba/UserFiles/file/SorS/2020/zbornik/Sors%202020%20-%20rad%202.pdf, last visited 25. 06. 2024,

[29] M. Ćurković, „Ograničenje odgovornosti osiguratelja u obveznom osiguranju od

authorizes the driver to operate a certain category of vehicle and must be valid at the moment of the accident.[30]

Also, there is a unanimous determination that the case of the driver who does not physically have the driving license on his person does not constitute the reason for the loss of entry under the insurance contract, but all the cases where the driving license was temporarily or permanently suspended are valid reasons for the loss of entry under the insurance contract.[31]

The second question, regarding the burden of proof for loss of employment under an insurance contract in the case a driver does not have an appropriate driving license, falls on the insurer. By the legal case there is no obligation of the insurer to check if the driver has an appropriate driver licence, but if the contract was concluded on the basis of the questionary of the insurer which clearly has the data presenting that the insurance contractor does not have the driver licence, and still the insurer accept to conclude the contract, this would have to be taken as his waiver of objection of the loss of the rights under insurance contract.[32]

The third question has somewhat posed answers in legal theory. Does the insurer have to prove the causal link between not having an appropriate driving license and the resulting damage in order to have the right of recourse because of the loss of entitlement under the insurance contract?

By the first opinion, the fact that the driver didn't have the driving license does not automatically constitute a loss of entry under an insurance contract. The causal link between driving without a license and the damage inflicted must be proven by proving the act or omission of the driver that is the cause of the accident. Not having a driving license in itself is not a proof of the causal effect or a fault of the driver, which must be proven for the loss of entry. We must emphasize that in this case, the author is citing the legal precedents.[33]

In the second opinion, there is no need for the insurer to prove the existence of the causal link, so the prevailing view is that the formal criterion of not having an appropriate driving license is sufficient for the loss of employment under the insurance contract.[34]

automobilske odgovornosti", *XVI Međunaordni naučni skup - Osiguranje i naknada štete,* 2013, 190.

30 P. Šulejić, *Pravo osiguranja*, Beograd 2008, 449.

31 *Ibid.*

32 M. Ćurković, 134.

33 P. Šulejić, 450.

34 M. Ćurković, 132.

5. Conclusion

The applicant itself has stated that the Montenegrin courts, without exception, misinterpreted the wording of Article 31, paragraph 1, stating "appropriate driving license" as "valid driving license." In this account, the applicant has pointed to the uniform and consistent interpretation of the phrasing used in the Montenegrin Law. As we have pointed out, the dominant opinion of the legal theory is in line with this interpretation.

The claim that after the expiration of the driving license, there is only an administrative procedure for prolongation of the driving license validity, for which there are no special unobtainable conditions, which cannot be interpreted as not having the driving license, is not in accordance with the opinion of the legal theory. By the unanimous determination in the legal theory, a driving license is an authorization to the driver to operate a certain category of vehicle, which must be valid in the moment of the accident.

We have commented on the use of the conditions of liability car insurance by the Croatian insurers to interpret them as a waiver of objection to the loss of rights under the insurance contract. Since the determination of the exception in the case of the expired driving license in the liability car insurance terms is in the interest of the insured, the use of this exception is not prohibited by law. But, without this determination of the exception, the loss of entitlement under an insurance contract cannot be presented as questionable by the opinion set in the legal theory.

Furthermore, we must emphasize that the loss of entitlement under insurance contract does not constitute the imposition of the monetary fine by the insurer but the right of recourse of the insurer, who has to pay the damages to the third parties.

The rules on loss of entitlement under the insurance contract in this case are in accordance with the Montenegrin Constitution and Montenegrin legal system, so these rules do not breach any of the constitutional principles.

* * *

GUBITAK PRAVA IZ OSIGURANJA – O JEDNOM POSTUPKU ZA OCJENU USTAVNOSTI I ZAKONITOSTI

Apstrakt

Autor razmatra mogućnost neustavnosti jedne odredbe crnogorskog Zakona o obaveznom osiguranju u saobraćaju, u svijetlu postupka pred Ustavnim sudom Crne Gore koji je još uvijek u toku. U jednom slučaju dovedena je u pitanje ustavnost odredbe o naknadi štete u slučaju gubitka prava iz ugovora o osiguranju, gde ukupan iznos isplaćenih šteta, kamata i pripadajućih troškova koje je platio osiguravač može tražiti od lica odgovornog za štetu. Prema crnogorskom Zakonu o obaveznom osiguranju u saobraćaju, kada je vozač upravljao vozilom bez odgovarajuće vozačke dozvole, to daje pravo osiguravaču na naknadu isplaćenih šteta od odgovornog lica. U inicijativi za ocenu ustavnosti i zakonitosti navedeno je da je posledica primene ove norme izricanje novčane kazne osiguraniku od strane osiguravača koje je posljedica nepreciznosti zakonske formulacije. Autor u radu daje pregled stavova pravne teorije o ključnim pitanjima koja su identifikovana, i komentariše moguće odricanje osiguravača od prava na regres.

Ključne reči: gubitak prava iz ugovoru o osiguranju; zakonitosti i ustavnosti, novčana kazna

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INNOVATIONS IN CLAIMS COMPENSATION MANAGEMENT IN THE FUNCTION OF INSURANCE COMPANIES MARKETING

Summary

Claims compensation is the main reason why insurance policyholders or insureds conclude an insurance contract and, thus, the basis of the existence of insurance. Apart from that claims settlement is the most transparent aspect of insurance companies' business and the most critical aspect of their marketing. The speed of claims settlement and fair and timely payment of losses covered by the insurance contract are the fundamental basis for improving the competitive advantage and the most powerful marketing tool. Suppose the payment of loss compensation is not by expectations. In that case, all the marketing efforts of the insurance company will be in vain and could threaten the insurer's very survival. Bearing the above in mind, when conceptualizing the work, we considered the connection between claims compensation innovations and insurance companies' marketing. The paper aims to analyze innovations in claims compensation and their role in improving the marketing efforts of insurance companies. In addition, the paper will present a brief overview of claims settlement by insurance companies in Serbia.

Keywords: *Claims Compensation, Marketing, Losses, Innovations, Insurance.*

1. Introduction

Insurance compensation is a key element of insurance, risk, premiums, insured events, and the insurance subject covered by the contract. The primary purpose of insurance is the payment of insurance compensation. In the case of non-life insurance, compensation is based on three elements: 1) the amount of the insured sum, 2) the value of the insured item, and 3) the actual

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loss incurred. Unlike the property insurance, the key element for determining insurance compensation in life insurance, given that human life has no price, is the insured sum, which is mutually agreed upon between the policyholder and the insurance company.

Insurance compensation represents the primary obligation of the insurance company and the primary right of the insured or the beneficiary of the insurance. The amount of compensation arises from the concluded insurance contract, and the compensation represents the primary motive for concluding the insurance contract. According to Article 918 of the Law of Contract and Torts,[1] the contract provisions stipulating the loss of the right to compensation or the insured sum are null and void if the insured does not fulfil any of the prescribed or agreed obligations after the occurrence of the insured event.

Compensation for losses to policyholders is the primary reason for regulating the insurance market and overseeing insurance company operations.[2] The state's fundamental interests are to provide insurance at an acceptable price, protect policyholders from insurer fraud, ensure confidence in insurers that they will pay compensation when a loss occurs, and achieve operational efficiency of insurers. Trust in the institution of insurance is crucial for insurance regulation. Without public confidence in the insurance institution, the development of insurance cannot occur. Solvency represents the basic assumption of the security and predictability of insurance coverage services. It is usually defined as the long-term ability of an insurer to meet all its business obligations as they come due. By regulating solvency and preventing the emergence of insolvent insurance companies, the security of compensation payments to policyholders, protection of policyholders from financial insecurity, and prevention of significant social and economic costs are ensured.

Our objective is to analyze innovations in claims compensation and their role in enhancing insurance companies' marketing efforts. To achieve this goal, we will analyze claims management as a key business activity of insurers and reinsurers, innovations in claims management, and the importance of managing claims in the context of insurers' marketing activities.

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[1] The Law of Contract and Torts, *Official Gazzette SFRY*, Nr. 29/78, 39/85, 45/89 and 57/89, *Official Gazzette FRY*, Nr. 31/93, *Official Gazzette of Serbia and Montenegro*, Nr. 1/2003, *Official Gazzette of the Republic Serbia,* Nr. 18/2020.

[2] V. Njegomir, *Osiguranje*, Ortomedics book, Novi Sad 2013, 56.

2. Trends in Claims Compensation in Serbia

A comprehensive understanding of the significance of claims compensation as the foundation of insurance is impossible without analyzing the claims trends among market participants. Currently, 20 insurance companies are operating in the Serbian insurance market, with four leading companies - Dunav Insurance, Generali Insurance, Wiener, and DDOR - dominating in terms of claims payments. Table 1 shows the trends in total claims costs and individual insurance companies' share in the insurance market's total claims from 2019 to 2022.

Table 1 shows that the leading insurance companies, particularly Dunav Insurance and Generali Insurance, have the largest share of the insurance market claims. In 2022 alone, these two companies accounted for over 46% of Serbia total insurance market claims coverage. The indicators of total claims and their trends over the years are good indicators, but they are not complete without considering the trends in premiums by insurance companies over the same period.

Table 2 shows the insurance premiums paid by insurance companies and the share of individual insurance companies in the total insurance premium for the period from 2019 to 2022.

Observing the leading insurance companies in the Serbian insurance market, it is evident that Dunav Insurance consistently achieves a higher share of premiums compared to claims throughout the observed period. Generali Insurance's share of the total premium was 18.55%, while its share of total claims was 20.94%. When these data are examined annually, certain trends become apparent. Dunav Insurance consistently maintains a higher share of premiums than its share of claims throughout the period. Conversely, Generali Insurance has a lower share of premiums than its share of market claims throughout the observed period. Wiener had a higher percentage share of premiums than claims in the first two years of the observed period but a lower share of premiums than claims in the latter two years within the Serbian insurance market. A comprehensive understanding of total claims trends is possible by monitoring the loss ratio trends.

Any company's long-term success, survival, and development in the insurance market are inextricably linked to achieving profits in insurance operations. Although insurance companies can improve profitability through other activities, achieving a high technical result or loss ratio is a key indicator of their success in managing insurance operations. The loss ratio is essentially the relevant technical result.

Table 1: Total insurance claims and the share of individual insurance companies in total claims from 2019 to 2022

	Losses in thousands dinars			
Insurance company	2019.	2020.	2021.	2022.
AMS	1294235	1366342	1611539	2108640
DDOR	6215622	5750181	6904432	7916231
Dunav	10823885	11427857	13695584	16927321
GeneraliOsig	14983590	12683765	11528654	13685991
Globos	152290	224182	1010888	1944665
Grawe	1596166	1843247	2108158	2585837
MerkurOsig	285691	363302	421636	351703
Milenijum	1431194	1383296	1594470	1910623
OTP Osiguranje	851201	793708	632701	766893
SavaNeživot	1172649	1164482	1116231	1525446
SavaŽivotno	64898	135245	219720	251764
Sogaz	52636	28813	28993	21865
Triglav	2636939	2902333	3221363	3422906
UniqaNeživot	4518125	3275456	1769746	1833307
UniqaŽivot	830246	931560	1259493	1206659
Wiener	5901877	5943140	6597398	8895412
Total	**52811244**	**50216909**	**53721006**	**65355263**
	The percentage share of insurers in total claims			
Insurance company	2019.	2020.	2021.	2022.
AMS	2.45%	2.72%	3.00%	3.23%
DDOR	11.77%	11.45%	12.85%	12.11%
Dunav	20.50%	22.76%	25.49%	25.90%
GeneraliOsig	28.37%	25.26%	21.46%	20.94%
Globos	0.29%	0.45%	1.88%	2.98%
Grawe	3.02%	3.67%	3.92%	3.96%
MerkurOsig	0.54%	0.72%	0.78%	0.54%
Milenijum	2.71%	2.75%	2.97%	2.92%
OTP Osiguranje	1.61%	1.58%	1.18%	1.17%
SavaNeživot	2.22%	2.32%	2.08%	2.33%
SavaŽivotno	0.12%	0.27%	0.41%	0.39%
Sogaz	0.10%	0.06%	0.05%	0.03%
Triglav	4.99%	5.78%	6.00%	5.24%
UniqaNeživot	8.56%	6.52%	3.29%	2.81%
UniqaŽivot	1.57%	1.86%	2.34%	1.85%
Wiener	11.18%	11.83%	12.28%	13.61%
Total	100.00%	**100.00%**	**100.00%**	**100.00%**

Source: National Bank of Serbia

Table 2: Insurance premiums by insurance companies and the share of insurance companies in the total market premium from 2019 to 2022

	Premiums in thousands of dinars			
Insurance company	2019.	2020.	2021.	2022.
AMS	3934768	4025404	4645503	5556952
DDOR	12650968	13095833	13947562	15296205
Dunav	28411415	29677026	31578007	35238557
GeneraliOsig	23098320	22072584	23396441	24844824
Globos	260214	2048208	4167412	5285562
Grawe	4034874	4368133	4796014	5388187
MerkurOsig	769787	781356	810182	786022
Milenijum	3575630	3517930	3621670	4268439
OTP Osiguranje	677903	723346	676670	929481
SavaNeživot	2650826	2433095	2719193	3477401
SavaŽivotno	345711	452588	541511	659085
Sogaz	1336482	730703	888280	621244
Triglav	6845047	7153317	8147438	9378492
UniqaNeživot	4371110	3887142	4219961	4806700
UniqaŽivot	1898073	1703059	1734452	1698155
Wiener	12588744	13247019	13518375	15689737
TOTAL	**107449872**	**109916743**	**119408671**	**133925043**
	The percentage share of insurers in total premiums			
Insurance company	2019.	2020.	2021.	2022.
AMS	3.66%	3.66%	3.89%	4.15%
DDOR	11.77%	11.91%	11.68%	11.42%
Dunav	26.44%	27.00%	26.45%	26.31%
GeneraliOsig	21.50%	20.08%	19.59%	18.55%
Globos	0.24%	1.86%	3.49%	3.95%
Grawe	3.76%	3.97%	4.02%	4.02%
MerkurOsig	0.72%	0.71%	0.68%	0.59%
Milenijum	3.33%	3.20%	3.03%	3.19%
OTP Osiguranje	0.63%	0.66%	0.57%	0.69%
SavaNeživot	2.47%	2.21%	2.28%	2.60%
SavaŽivotno	0.32%	0.41%	0.45%	0.49%
Sogaz	1.24%	0.66%	0.74%	0.46%
Triglav	6.37%	6.51%	6.82%	7.00%
UniqaNeživot	4.07%	3.54%	3.53%	3.59%
UniqaŽivot	1.77%	1.55%	1.45%	1.27%
Wiener	11.72%	12.05%	11.32%	11.72%
TOTAL	**100.00%**	**100.00%**	**100.00%**	**100.00%**

Source: National Bank of Serbia

Specifically, the loss ratio represents the relationship between relevant claims and relevant premiums in retention:

Loss ratio = Relevant claims in retention / Relevant premiums in retention

It is applied only by insurance companies that engage in non-life insurance operations. If this indicator is less than 1 (or 100%), the insurance company has covered the costs of claims and related expenses with premiums. If it is equal to 1, the premiums are equal to the costs, and if it is greater than 1, the premiums are insufficient to cover the claims costs. Table 3 shows the loss ratios by insurance companies from 2019 to 2022.

Table 3: Loss ratios by insurance companies and their trends from 2019 to 2022

Insurance company	Loss ratio				Index 20/19	Index 21/20	Index 22/21
	2019.	2020.	2021.	2022.			
AMS	32.89%	33.94%	34.69%	37.95%	103.19%	102.20%	109.38%
DDOR	49.13%	43.91%	49.50%	51.75%	89.37%	112.74%	104.55%
Dunav	38.10%	38.51%	43.37%	48.04%	101.08%	112.63%	110.76%
GeneraliOsig	64.87%	57.46%	49.28%	55.09%	88.58%	85.75%	111.79%
Globos	58.52%	10.95%	24.26%	36.79%	18.70%	221.62%	151.68%
Grawe	39.56%	42.20%	43.96%	47.99%	106.67%	104.17%	109.18%
MerkurOsig	37.11%	46.50%	52.04%	44.74%	125.28%	111.93%	85.98%
Milenijum	40.03%	39.32%	44.03%	44.76%	98.24%	111.96%	101.67%
OTP Osiguranje	125.56%	109.73%	93.50%	82.51%	87.39%	85.21%	88.24%
SavaNeživot	44.24%	47.86%	41.05%	43.87%	108.19%	85.77%	106.86%
SavaŽivotno	18.77%	29.88%	40.58%	38.20%	159.18%	135.78%	94.14%
Sogaz	3.94%	3.94%	3.26%	3.52%	100.12%	82.77%	107.83%
Triglav	38.52%	40.57%	39.54%	36.50%	105.32%	97.45%	92.31%
UniqaNeživot	103.36%	84.26%	41.94%	38.14%	81.52%	49.77%	90.95%
UniqaŽivot	43.74%	54.70%	72.62%	71.06%	125.05%	132.76%	97.85%
Wiener	46.88%	44.86%	48.80%	56.70%	95.70%	108.78%	116.17%

Source: Narodna banka Srbije

Table 3 indicates that Dunav Insurance achieved profitability from 2019 to 2022. However, according to the indices, profitability has worsened over the years. Generali Insurance also achieved profitability, but significantly lower than Dunav Insurance. A decline is also noticeable, but it is less pronounced compared to Dunav Insurance over the years. Losses were only recorded by OTP Insurance in 2019 and 2020 and Uniqa Non-Life Insurance in 2019.

Table 4 unequivocally indicates that non-life insurance dominates the structure of insurance claims in Serbia from 2019 to 2022.

Table 4: Structure of claims in the Serbian insurance market from 2019 to 2022

Insurance types	**2019**	**2020**	**2021**	**2022**
Accident Insurance	2.46%	2.08%	2.10%	2.10%
Voluntary Health Insurance	4.82%	4.89%	6.21%	8.12%
Motor Vehicle Insurance	12.43%	13.50%	14.20%	13.66%
Insurance for Railway Vehicles, Aircraft, and Watercraft	0.25%	0.40%	1.03%	0.20%
Cargo Insurance	0.45%	0.34%	0.18%	0.24%
Property Insurance against Fire and Other Hazards	8.07%	6.49%	3.26%	5.56%
Other Property Insurance	21.80%	16.99%	11.50%	12.00%
Liability Insurance for Motor Vehicle Use	21.17%	23.26%	25.38%	24.28%
General Liability Insurance	0.50%	0.83%	1.03%	1.28%
Credit, Surety, and Financial Loss Insurance	1.75%	1.65%	1.84%	1.89%
Travel Assistance Insurance	1.55%	1.07%	0.91%	0.06%
Other Non-Life Insurance	0.05%	0.12%	0.02%	1.12%
Total Non-Life Insurance	**75.30%**	**71.63%**	**67.65%**	**70.50%**
Total Life Insurance	**24.70%**	**28.37%**	**32.35%**	**29.50%**

Source: Narodna banka Srbije

The presented structure of claims is linked to the structure of premiums, where non-life insurance also dominates. Specifically, the share of non-life insurance claims during the observed period ranged from 75.30% to 67.65%. The share of life insurance claims in total claims ranged from 32.35% to 24.70%. The dominance of non-life insurance is primarily due to mandatory types of insurance (liability insurance for motor vehicle use).

The dynamics of changes in the structure of insurance claims in Serbia are shown in Table 5.

Table 5: Annual changes in the structure of insurance claims in Serbia from 2019 to 2022

Insurance types	**2020/19**	**2021/20**	**2022/21**
Accident Insurance	80.49%	107.68%	121.82%
Voluntary Health Insurance	96.45%	136.02%	158.92%
Motor Vehicle Insurance	103.35%	112.47%	117.06%
Insurance for Railway Vehicles, Aircraft, and Watercraft	149.51%	274.94%	24.06%
Cargo Insurance	72.55%	56.70%	156.94%
Property Insurance against Fire and Other Hazards	76.48%	53.66%	207.60%
Other Property Insurance	74.11%	72.39%	126.99%
Liability Insurance for Motor Vehicle Use	104.47%	116.71%	116.37%
General Liability Insurance	156.90%	133.42%	150.31%
Credit, Surety, and Financial Loss Insurance	89.97%	118.90%	124.98%

Travel Assistance Insurance	65.54%	91.16%	8.43%
Other Non-Life Insurance	247.49%	17.99%	6767.95%
Total Non-Life Insurance	**90.46%**	**101.03%**	**126.78%**
Total Life Insurance	**109.20%**	**121.99%**	**110.95%**

Source: National Bank of Serbia

In non-life insurance, there is a noticeable constant increase in claims in accident insurance, voluntary health insurance, motor vehicle insurance, liability insurance for motor vehicle use, and credit, surety, and financial loss insurance. Insurance for railway vehicles, aircraft, and watercraft experienced a significant decline in 2022 compared to 2021. However, there was a notable increase in 2022 compared to 2021 in other property insurance, non-life insurance, cargo insurance, and property insurance against fire and other hazards.

3. Innovations in Claims Management

Efficient claims processing increases insurance companies' profitability and policyholders' satisfaction. According to Deloitte, claims processing accounted for nearly 70% of collected premiums in 2020.[3] Efficient handling of submitted claims is also linked to effective detection and prevention of insurance fraud, given that most types of fraud, such as complex fraud or double-dipping, occur during claims processing. However, false claims constitute about 10% of total claims. Therefore, around 90% of claim resolutions pertain to resolving the issues of customers who have experienced a loss event. Thus, not surprising that 87% of insurers consider processing efficiency as a critical criterion for changing their claims management solution provider.[4]

From insurers' perspectives, claims management is often viewed solely as a cost centre, as claims and resolution costs are the main factors influencing the company's overall financial success. For example, in European insurance markets, the annual growth rate of total spending on compensation and claims is more than 4%, amounting to over 350 billion euros annually, and it

[3] M. Cline, K. Kamalapurkar, *Preserving the human touch in insurance claims transformations: How exponential claims professionals can balance automation and personalized customer service*, Delloite Insights, London 2021.

[4] C. Dilmegani, *Top 7 Technologies that Improve Insurance Claims Processing in '24*, AI Multiple Research, https://research.aimultiple.com/claims-processing, last visited 27. 03. 2024.

is expected to continue growing.[5] With digitalization and the application of new claims processing technologies, insurers can reduce claims and processing costs by more than 20% and improve customer satisfaction by up to 30%.[6]

The critical requirements of the claims management process are ensuring policyholder satisfaction, providing a competitive advantage based on cost and service quality, supporting the adequacy of premium and reserve determination, and improving the risk acceptance process in insurance. To meet these requirements, insurance companies need software solutions that offer precision, efficiency, and flexibility in terms of accepting various types of information, implementing new solutions, and eliminating the need for software maintenance on each computer. New technologies enable insurers to reduce claims management costs by automating processes, reducing routine operations, combating fraud, accurately assessing claims, and monitoring them in real-time. Additionally, the application of technology can ensure that claims management is faster, more accurate, and more consistent, thereby improving service delivery to policyholders. By automating the claims management process, the possibility of human error is minimized, and transparency of the entire process is enhanced.

Three key trends drive digital transformation: 1) **Customer Focus**: Insurers prioritize the policyholder experience, using data to personalize coverage services and streamline self-service options (especially after the COVID-19 pandemic). 2) **Insurtech Collaborations**: Traditional insurers are partnering with tech startups, integrating technologies such as telematics and the Internet of Things to optimize risk assessment and claims processes. 3) **Process Automation**: Automation is utilized in all business operations of insurers, reducing errors and increasing efficiency in risk underwriting, claims processing and payment, compliance, and interactions with policyholders and insurance applicants.

The global claims processing software market was valued at $36.3 billion in 2021. This market is projected to grow, with an estimated growth rate of 8.4% by 2030.[7] This is a rapidly growing market that includes digital tools

[5] O. Wyman, *The Future of Insurance Claims is Now*, 2024, https://www.oliverwyman.com/our-expertise/insights/2018/jun/the-future-of-insurance-claims-is-now.html, last visited 28. 05. 2024.

[6] *Ibidem*.

[7] Doxee, *Claims management: how to enhance it with technology*, 2024, https://www.doxee.com/blog/customer-experience/claims-management-how-to-enhance-it-with-technology/#:~:text=The%20integration%20of%20cutting%2Dedge,handled%20in%20the%20insurance%20industry, last visited 15. 05. 2024.

used to perform many functions, including 1) claims management, 2) underwriting risks into insurance coverage, 3) data collection, authorization, and monitoring of insurance payouts, as well as 4) creation, management, distribution, and tracking of communications. The growth of this market is due to the transition from manual processing systems to AI-based automation, which minimizes operational inefficiencies and legacy issues, reduces maintenance and training costs, and improves customer experience.

The integration of cutting-edge technologies, such as artificial intelligence, data analytics, the Internet of Things, digital platforms, mobile applications, advanced image and video analysis tools, and digital communication tools, redefines how claims are processed in insurance companies. These innovations make the process more efficient, accurate, cost-effective, and flexible and offer insurers a customer-oriented perspective, enabling them to evaluate, process, and resolve claims while emphasizing the importance of the policyholder experience in claims resolution and insurance payouts.

Automation and artificial intelligence play a crucial role in accelerating the claims management process. Intelligent algorithms can quickly analyze large amounts of data to assess claims, reducing the time needed for claims processing. AI-based systems can also detect patterns and anomalies, helping to identify potentially fraudulent claims. Chatbots and virtual assistants interact with policyholders and, in some cases, are used to gather initial information about claims. They can guide users through the claim's submission process, allowing them to provide all relevant details, which speeds up the claims initiation process and enhances the customer experience through rapid and instant support.

Chatbots can be used in customer service, on the insurance company's website, or mobile application. Chatbots can be the first point of contact for policyholders when they want to file an insurance claim. They can guide policyholders to record videos and take photos when submitting a claim and inform them about the necessary documents to be submitted, thus speeding up the claims process. Chatbots can also help insurers by contacting policyholders for payment processing or answering their questions. It is important to note that research indicates not all customers prefer to resolve their claims through chatbots. For instance, 22% of commercial insurance clients prefer brokers.[8] Depending on the customer segment, processing claims through chatbots can improve customer retention.

[8] C. Dilmegani, *Top 7 Technologies that Improve Insurance Claims Processing in '24*, AI Multiple Research, https://research.aimultiple.com/claims-processing, last visited

The most advanced analytics tools enable the processing and analysis of large data sets to identify trends, assess risk factors, and optimize processes related to claims resolution. Predictive analytics can forecast the frequency and severity of adverse events, providing valuable insights for resource allocation and strategic decision-making.

Advanced analytics are algorithms that help users better predict the future. Such tools are adept at finding and interpreting correlations, making them useful for initial claims investigations, policy verification, payment calculation, and claims processing. Insurers can use reports from controllers and experts as input for advanced analytics to predict the actual costs of claims. Advanced analytics is also an effective fraud detector, as it can identify patterns in fraudulent claims. Specifically, behavioural analysis can be used to assess whether a policyholder's claim aligns with the insurance policy terms. These tools check internet search history, clicks, location, etc., helping insurers determine the authenticity of claims.

The Internet of Things (IoT) is increasingly integrated into insurance contracts, particularly in vehicle and property insurance. IoT enables real-time data collection, allowing insurers to assess risk and expedite claims processing accurately. Regarding vehicle insurance policies, telematics can provide detailed information about driving behaviour, helping insurers determine liability more accurately (thus minimizing the risk of fraudulent claims). IoT is a connected universe of intelligent devices such as smartphones, smartwatches, home assistants, smart cars, and more. IoT facilitates claims processing. Thanks to IoT, notifying insurers of loss is almost instantaneous. For example, if airbags deploy due to a vehicle collision, telematics can automatically alert the insurance company about the incident. The same logic applies to smart homes, factories, and health insurance, thanks to smartwatches that monitor our health. Additionally, smart drones can conduct initial investigations of submitted claims, and the frequency of such investigations is expected to increase. Insurers can also use IoT to verify insurance contracts. In the event of a traffic accident, insurers can determine the speed and location of the vehicle at the time of the accident by checking the memory of the smart car. The submitted claim will not be paid if the driver exceeds the speed limit at a specific location.

Insurers can use artificial intelligence algorithms to analyze images and videos submitted as part of claim documentation. Advances in image and video analysis technologies help speed up processing and make accurate

27. 05. 2024.

loss assessments, facilitating faster claim resolution. Models can estimate the actual loss by analyzing data from videos and photos taken by policyholders. They can help insurance companies predict their obligations.

Optical Character Recognition (OCR) is a technology that categorizes handwritten documents. OCR improves the initial claims processing. Initial claims investigation and insurance policy verification involve processing handwritten documents such as witness statements, policyholder statements, police reports, medical reports, etc. This technology allows insurers to automate data extraction from such documents and focus on parts of the claims process that require human intelligence.

Mobile applications and digital platforms simplify the claims submission process for policyholders. They also enable self-service communication methods, giving policyholders greater autonomy. Policyholders can submit claims, upload documents, and track the status of their claims through intuitive interfaces. This not only speeds up claims resolution but also increases policyholder satisfaction. Given the increasing number of mobile devices, developing customized mobile applications is a promising area for insurers. Customized apps can facilitate claims processing, as it requires communication with policyholders.

Blockchain, a specialized database system that records real-time transaction data while addressing security, privacy, and control issues, holds immense potential to revolutionize the insurance industry. The application of this technology can be beneficial for many business activities of insurance companies, particularly in claims processing. Blockchain technology has the power to completely transform claims processing. It automates claims processing through smart contracts, revolutionizing the way insured events are handled. Claims processing can utilize data streams from IoT, i.e., smart devices, opening up a world of possibilities for the future.

Insurers who embrace technological advancements not only streamline their operations but are also better positioned to adapt to the evolving and competitive insurance industry. The future of claims management is not just in the integration of these technologies, but in the proactive use of them. Proactive claims management is not just a choice, but a necessity for insurers to stay ahead in the industry, benefiting both insurers and policyholders.

Insurers are committed to a proactive orientation in the claims management process. This involves assessing the risk of damage before accepting a certain risk into insurance coverage. To do this effectively, the insurance company needs comprehensive information about the policyholder's

risk profile. These profiles are formed based on the number of claims the policyholder has had in the past. For a long time, insurers based their risk assessments on policyholder statements. However, with modern technology, this is no longer the case in the USA. Two databases, CLUE (Comprehensive Loss Underwriting Exchange) and A-PLUS (Automated Property Loss Underwriting System), have been created to help insurers check the risk profile of homeowners and the property itself. This enables instant information retrieval, saving time and money, and ensuring a proactive approach to risk assessment.

As more digital tools become available online, insurers will likely be able to apply accelerated claims management and automated decision-making to an increasing portion of submitted claims, thereby boosting the productivity of claims specialists. However, will automation make the role of human judgment in the claims process obsolete? The answer to this question depends on whether employees can adapt to continue adding value to the policyholder's claims experience. With new data and technology available, employee roles and responsibilities in claims resolution will likely change. Traditional activities such as data collection and verification, loss assessment, and claims resolution could be fully automated. However, this does not mean that the role of professionals will disappear with the implementation of emerging technologies. Claims professionals "armed" with these tools could accelerate the pace of claims resolution, which should increase overall policyholder satisfaction while supporting the continuous evolution of automation solutions. Technology will significantly assist, but common-sense professional judgment will remain a crucial "ingredient" in claims management.

4. Claims Management in the Function of Insurance Companies' Marketing

The success of entrepreneurial activities has always been based on the management's ability to make adequate decisions, always considering different options regarding the risk-return relationship. Among the most significant are decisions about marketing activities, given that their primary goal is to achieve the sale of insurance services. According to the Chartered Institute of Marketing,[9] marketing is defined as a management process responsible for profitably identifying, anticipating, and satisfying consumer demands. Generally speaking, the goal of marketing is to ensure the profitably satisfying

[9] CIM, *A brief summary of marketing and how it works*, Charted Institute of Marketing, https://www.cim.co.uk/media/4772/7ps.pdf, last visited 17. 03. 2024.

of consumer needs for the organization that meets those needs based on the identification and anticipation of those needs.

Insurance companies must shape an offer that will meet the needs of potential and existing policyholders and decide on the best way to present this offer of insurance coverage services to potential policyholders, i.e., insurance applicants. They must determine how to distribute the offer of insurance protection and convince potential policyholders best to insure with them, achieving this with maximum profitability and in accordance with ethical principles.[10]

The marketing concept and marketing orientation have started to be applied as a key aspect of organizational management due to the growing complexity of modern industrial nations. In the effort to secure higher sales compared to the competition, the role of marketing is strengthened. Marketing becomes crucial for creating demand and thereby improving business performance. Drucker emphasizes that because every company must satisfy the customers by attracting and retaining them, the core activities of every organization are marketing and innovation. Marketing and innovations produce results; everything else is a cost.[11]

Although insurance companies must adequately manage the entire marketing mix, including their service or offer, price, service distribution, and promotion, building trust in the institution of insurance and specifically in the insurance company is of primary importance for the company's market success. Building trust is a process that requires time and engagement at all levels so that insurance service users are adequately informed, make rational decisions, and achieve emotional satisfaction.[12]

Modern digital technologies are increasingly finding their application in insurance due to the growing number of smartphone users. There is a rising emphasis on virtual services, especially for "millennials," a growing consumer group that prefers using virtual and mobile applications and services. Considering that most consumers use smartphones and want simple services delivered in the most convenient and fastest way possible, insurance companies are developing mobile phone applications as channels to inform

[10] V. Njegomir, „Osiguranje života – marketing aspekti i specifičnosti", *Marketing* 1/2006, 29–35. Also V. Njegomir, „Kanali distribucije usluga osiguranja i reosiguranja", *Marketing* 1-2/2007, 47–53.

[11] P. Drucker, *Management: Tasks, Responsibilities, Practices*, Harper and Row, New York 1973.

[12] V. Njegomir, J. Ćirić, „Zaštita korisnika finansijskih usluga: Slučaj osiguravajućih društava i investicionih fondova", *Marketing* 4/2012, 288–299.

clients, establish and enhance client relationships, and promote products and services.

Social media represents a platform for developing and applying various applications and serves as a channel through which insurance companies establish and improve relationships with clients. Through social media, brands are promoted, consumers are informed, products and services are presented, or consumers are invited to participate in creating or improving a product or service. Additionally, after numerous catastrophic events (hurricanes, earthquakes, floods) in recent years, many social media users have shared their experiences with insurance companies via this medium, particularly regarding the response of claims adjusters and the speed of claims resolution. Negative comments on social media and dissatisfaction from policyholders following catastrophic events greatly impact an insurer's reputation more than an entire marketing campaign and the substantial funds allocated for such purposes.

Parallel to this, applications are being developed for brokers and insurance agents to increase their satisfaction. By establishing two-way communication through mobile phone applications, the aim is to continuously develop client relationships, to ensure clients regularly use the applications, not just for calculating and paying premiums and submitting claims. There is an increasing number of free applications that insurance companies offer to their clients and others, which are not directly related to the insurance business but to everyday life situations and activities, such as personal photo apps, road safety tips, ideas for safer child environments, advice on buying a new car, weather forecasts, etc. This way, relationships with current and future consumers are developed through constant interaction via mobile phones and various applications that the insurance company provides, often for free.

Given the enormous importance of marketing in connecting insurance companies with their potential clients, it is crucial for marketing activities to be part of strategic management. Strategic marketing management must exist in every organization to facilitate daily marketing decisions. Additionally, marketing activities are often seen only as part of the marketing department or function, but marketing should be viewed much more broadly.

However, not all marketing activities will favourably impact an insurance company's performance if it fails to pay claims to policyholders, delays payments, or litigates against policyholders. Therefore, paying claims transparently and in accordance with the contract is part of the overall marketing activities.

The key to success for any service company, including insurance companies, is focusing on the customer rather than the function. This is achieved through customer relationship management. Relationship marketing aims to build long-term relationships with key stakeholders to achieve positive business results and maintain business cooperation with them. It also aims to establish lasting connections with individuals and organizations that directly or indirectly affect the success of the company's marketing activities, i.e., those who influence business results. Relationship marketing focuses on customers, employees, partners, and financial community members (shareholders, investors, analysts).

The first goal of customer relationship management is to attract new candidates using marketing mix tools. The next goal is to advance customers up the loyalty ladder to the point where they become "clients", "advocates" and ultimately "evangelists" who not only spread positive word-of-mouth but also display emotional attachment. Relationship management is reflected in maintaining and improving relationships and retaining customers through increased service value and developing trust, satisfaction, and strong social bonds.

Customer relationship management involves maintaining and improving relationships and retaining customers through enhanced service value and the development of trust, satisfaction, and strong social bonds.[13] To achieve this and to retain existing and attract new policyholders, each insurance company must strive to use refined information about its current and potential policyholders to anticipate and adequately respond to their needs. Creating customer satisfaction, particularly for policyholders, can be ensured by integrating front and back-office functions, meaning that marketing, as a business function of insurance companies, is powerless to "deliver" full value to policyholders without adequate cooperation with claims adjusters and the organizational part responsible for processing claims. This cooperation is essential to build a culture where exceeding expectations is the norm of daily operations, creating a perfect experience for policyholders after processing claims.

Considering the critical characteristics of services—intangibility, perishability (they cannot be stored and a missed opportunity to sell is lost forever, as is the case with, for example, an hour of a lawyer's time), heterogeneity, inseparability of the production and consumption process, and absence of ownership—it is clear that in providing insurance services, quality depends not on how technically well-structured the insurance service is, but primarily on the perception of quality by clients or policyholders. This perception is most strongly influenced by word-of-mouth, as people, due to the mentioned characteristics of services,

[13] Č. Ljubojevic, *Menadzment i marketing usluga*, Želnid, Beograd 2001, 53.

are most inclined to act according to the advice of their friends based on previously acquired experiences.[14] In the case of insurance, experience resolving a claim will be crucial for determining service quality and spreading positive recommendations, thereby creating a competitive advantage, attracting new policyholders, and retaining existing ones.

Improved claims management inevitably must be understood in modern business conditions as an element supporting insurance companies' marketing activities. A study by the Chubb Group insurance group shows that experience regarding claims resolution is important for 76% of respondents and, in many cases, plays a decisive role in choosing an insurance company.[15] Policyholders tend to avoid insurance companies known for their poor reputation in fulfilling claims. In addition to word-of-mouth recommendations, the National Association of Insurance Commissioners created a website in the USA that provides consumers with information about disputed claims.

Lloyd's example is particularly significant in compensating for incurred loss and considering the issues around assessing actual loss. Lloyd's, which had started dealing with various types of insurance besides maritime insurance just three years before the San Francisco earthquake of 1906, issued a famous directive to its agent in San Francisco to pay all claims regardless of the policy conditions. This established a position of trust that Lloyd's still holds today. Additionally, after the most intense hurricane season in history in 2005, Lloyd's established a direct, free telephone line to assist affected policyholders and improve their satisfaction. After the Mumbai train explosion in July 2006, Indian insurers agreed to simplify the claims process to facilitate insurance payouts.[16] There are numerous similar examples of insurance companies' efforts to improve policyholder experience in claims resolution by increasing claims processing efficiency, especially after catastrophic events that represent an extremely sensitive area of claims management.

5. Conclusion

At the core of insurance is the compensation of the policyholder when an insured event occurs. Insurance compensation is the crucial reason for insurance, given that the need for protection against the adverse financial effects

[14] E. Ehrlich, D. Fanelli, *The Financial Services Marketing Handbook: Tactics and Techniques That Produce Results*, Bloomberg Press, Princeton, New York 2004, 10.

[15] Chubb, *Influencing the Insurance Purchase*, Chubb Group of Insurance Companies, Warren, New York, June 2002.

[16] World Insurance Report, Informa UK Ltd, London, UK, 21 July 2006, 1.

of risk realization through its transfer to the insurance company is essentially what insurance is all about.

When claims are appropriately managed, insurance companies can attract more policyholders and more capital and reduce operating costs by decreasing expenses related to legal proceedings and enabling a more accurate process of determining insurance reserves, which can also reduce reinsurance costs. To achieve this, insurance companies must constantly improve claims management by implementing new processes, utilizing new technology, and adhering to high standards of customer requirements.

Improved claims management must be understood as an element supporting insurance companies' marketing activities in modern business conditions. Research and experience indicate that how claims are resolved plays a key role, and in many cases, a decisive role for policyholders and insurance applicants when choosing an insurance company. Policyholders tend to avoid companies known for their poor reputation when fulfilling claims. Given this, if insurance compensation is inadequate, all other marketing efforts by the insurer will be futile.

Since claims represent insurers' largest cost item, have the greatest impact on their reputation, and serve as a significant tool for their marketing activities, it is essential for insurance companies to continually seek improvements in claims management and take steps to make it as efficient as possible.

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INOVACIJE U UPRAVLJANJU ODŠTETNIM ZAHTEVIMA U FUNKCIJI MARKETINGA OSIGURAVAJUĆIH DRUŠTAVA

Apstrakt

Naknada štete je osnovni razlog zašto ugovarači osiguranja ili osiguranici zaključuju ugovor o osiguranju a time i osnov postojanja osiguranja. Takođe, rešavanje odštetnih zahteva predstavlja najtransparentniji aspekt poslovanja osiguravajućih društava i najvažniji aspekt njihovog marketinga. Brzina rešavanja odštetnih zahteva i fer i pravovremena isplata šteta obuhvaćenih ugovorom o osiguranju jesu ključni osnov za unapređenje konkurentske prednosti i najsnažnije marketinško sredstvo. Kada isplata naknade iz osiguranja nije u skladu sa očekivanjima, svi marketinški napori osiguravajućeg društva biće uzaludni, a sam

opstanak osiguravač ugrožen. Imajući navedeno u vidu, prilikom konceptualizacije rada imali smo u vidu vezu između inovacija u naknadama šteta i marketinga osiguravajućih društava. Za cilj rada smo postavili analizu inovacija u naknadama šteta i njihova uloga u unapređenju marketinških napora osiguravajućih društava. Osim toga, u radu ćemo prikazati i kratak pregled rešavanja šteta osiguravajućih društava u Srbiji.

Ključne reči: naknada iz osiguranja, marketing, štete, inovacije, osiguranje.

Aleksandra D. Višekruna* **DOI: 10.56461/ZR_24.ONS.25**

EQUIVALENCE IN THE INSURANCE SECTOR UNDER SOLVENCY II – SOME REMARKS – **

Summary

The author analyses the application of institute of equivalence in the insurance sector. First, the concept of equivalence in general and its ramifications are discussed. Following that, the focus is changed to the insurance industry, with an emphasis on the Solvency II regime, presenting areas where this mechanism applies and the involvement of relevant supranational bodies. Furthermore, part of the paper focuses on the impact of Brexit on the financial services and insurance industries. Finally, the conclusions summarize the research findings.

Keywords: *Financial Markets, Insurance, Third Country Access, Equivalence, Solvency Ii, Brexit.*

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1. Introduction

Access of third-country entities to the financial markets in the European Union is a longstanding issue. Since the 1980s, this debate has run in parallel with the "ongoing integration of markets in Europe and the broader process of globalisation of financial services".[1] In the past several years, there has been a renewed interest in this matter, partly due to Brexit,[2] and partly due to the development of a new framework for some forms of access such as equivalence.[3] On the one hand, a less stringent regime for market access positively influences competition, innovation, range of products and services, but, on the other hand, it is necessary to preserve the stability of the market and therefore control who has access.[4] In an effort to find a balance between the aforementioned, the European Union has developed several approaches to third-country access to the EU financial markets. Still, these rules are "fragmented and contained in different sectoral regulations".[5]

This paper is aimed at presenting the mechanisms of access based on the principle of equivalence. Since this mechanism exists in various legal acts in the EU, we have decided to narrow the scope of the research to one specific area – the insurance sector. Though important in business and everyday life, and with great potential for influence on systemic risks, we feel that this area in the context of equivalence and its implications is not sufficiently researched.

The paper is structured as follows. First, the concept of equivalence and its implications are presented. Afterwards, the equivalence in insurance industry was researched with a focus on the Solvency II regime, presenting areas where this mechanism applies, the role of the European Insurance and Occupational Pensions Authority (hereinafter EIOPA) in the process, as well

[1] European Parliament, Understanding equivalence and the single passport in financial services Third-country access to the single market, 2017, https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599267/EPRS_BRI(2017)599267_EN.pdf, last visited 15. 6. 2024.

[2] J. Ćeranić, M. Glintić, "Evropska unija nakon Breksita – sa posebnim osvrtom na kontinentalno partnerstvo kao model za redefinisanje odnosa između Ujedinjenog Kraljevstva i EU", Pravni život 12/2017, 397–411.

[3] A. Višekruna, "The access to the EU financial market for the companies from non-member states", *EU and comparative law issues and challenges series* 2/2018, 658.

[4] *Ibid.*, 660.

[5] A. Višekruna, „Pristup finansijskom tržištu Evropske unije putem režima ekvivalentnosti – novi pravci razvoja instituta u svetlu Brexit-a", *Revija za evropsko pravo* 24(1)/2022, 106.

as examples of good practice. Also, one part of the research is dedicated to the impact of Brexit on the financial services and insurance industry. Finally, the concluding remarks summarise the research findings.

2. Equivalence in the European Union – Requirements, Characteristics and Consequences

One of the instruments of market access to the EU financial markets is based on the assessment of equivalence between the third country's regulatory and supervisory framework and the EU's regime in the relevant area. The procedure for establishing equivalence is outcome-based – the legislation of the third country does not have to be identical to the regime provided for by a certain EU act, but it must achieve the same regulatory and supervisory results,[6] i.e. the rules and regulations of the home and host country "must fulfil the same objective and achieve the same level of protection".[7] Even though it is a way to gain market access, European Commission sees the determination of equivalence primarily "as serving prudential purposes and benefits mainly to EU market participants".[8]

One of the characteristics of equivalence is that it is limited in scope since it doesn't cover all the areas of financial services, and it sometimes refers only to certain types of clients.[9] Furthermore, rather than establishing a uniform framework, each legislative act has its own rules and requirements tailored to its needs; therefore, there is no singular meaning of equivalence.[10]

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[6] D. Howarth, L. Quaglia, "Brexit and the Single European Financial Market", *Journal of Common Market Studies* 55(S1)/2017, 162; N. Moloney, *EU securities and financial markets regulation*, Oxford University Press, Oxford 2023, 851. D. Zetzsche, "Competitiveness of Financial Centers in Light of Financial and Tax Law Equivalence Requirements", in: *Reconceptualising Global Finance and its Regulation* (eds. R. P. Buckley, E. Avgouleas, D. W. Arner), Cambridge University Press, Cambridge 2016, 392. The author argues it is enough for the providers to be regulated in a „substantively similar way".

[7] D. Zetzsche, 395.

[8] A. Van Den Hurk, "Equivalence and Insurance", *European Business Organization Law Review* 25(1)/2024, 210.

[9] A. Višekruna (2018), 663.

[10] A. Margerit, M. Magnus, B. Mesnard, Third-country equivalence in EU banking legislation, 2016, 2, http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/587369/IPOL_BRI(2016)587369_EN.pdf, 22. 3. 2018. According to the European Commission, around 40 provisions in EU legislation can serve as the foundation for an equivalence decision, which has been made in more than

The prerequisite for the application of the equivalence regime is that its approval is foreseen in the specific act. European Commission evaluates and recognizes the foreign country's legal regime as equivalent by adopting an implementing or delegated act. As said, the decision on equivalence is centralized in the hands of the European Commission, with European Supervisory Authorities playing an advisory role in the decision-making process.[11] Since there is no fixed deadline for reaching the decision, the length of the process can vary.[12] When examining the equivalence, two steps play a crucial role – determining the objectives of the norms and comparing the results of legislation and supervision of the countries in question. Applying these steps can produce a great deal of uncertainty "about the authority of the sources used and the assessment methodologies".[13] The process is unilateral – the decision lies in the hands of competent EU authorities, and the equivalence decision may be withdrawn unilaterally by the European Commission at any time. The process is also discretionary and can be easily used as an instrument for achieving political goals.[14]

280 cases in favour of over 30 countries. European Commission, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Equivalence in the area of financial services, COM(2019) 349 final, Brussels, 29. 7. 2019, 3, https://eur-lex.europa.eu/resource.html?uri=cellar:-989ca6f3-b1de-11e9-9d01-01aa75ed71a1.0001.02/DOC_1&format=PDF, last visited 10. 7. 2024.

[11] European Supervisory Authorities is an overarching term for three supervisory authorities – European Banking Authority (EBA), European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA).

[12] European Parliament, Understanding equivalence and the single passport in financial services Third-country access to the single market, 2017, 3, https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599267/EPRS_BRI(2017)599267_EN.pdf, last visited 10. 7. 2024. As this research shows, in some areas, the process took from two to four years.

[13] D. Zetzsche, 395.

[14] E. Wymeersch, Brexit and the Equivalence of Regulation and Supervision, *European Banking Institute Working Paper Series 2017 - no. 15*, 2017, https://ssrn.com/abstract=3072187, 1. 8. 2024; P. Böckli *et al*., The consequences of Brexit for companies and company law, 15, https://ssrn.com/abstract=2926489, 30. 7. 2024; F. Pennesi, "Equivalence in the area of financial services: An effective instrument to protect EU financial stability in global capital markets?", *Common Market Law Review* 58(1)/2021, 51; D. Zetzsche, 415-416.

3. Equivalence in the Insurance Industry

3.1. Solvency II Regime of Equivalence

3.1.1. Types of Equivalence under Solvency II

Due to the potentially international character of the insurance group's activities, Solvency II equivalence may be significant to them and the entities with which they operate.[15] Under Solvency II, there is no single determination of equivalence in relation to a third country's regime, but each equivalence provision has its requirements and specific effects.[16] The areas of equivalence assessment under Solvency II refer to:

1. Reinsurance (Article 172). This provision is relevant for reinsurers from third countries. If the third country's rules are deemed equivalent, such reinsurers must be treated by EEA supervisors in the same way as the EEA reinsurers, which will also contribute to the number of reinsurance arrangements signed with reinsurers from third countries.
2. Solvency calculation (Article 227). This provision is relevant for EEA insurers operating in a third country. If an equivalence decision is reached, EEA insurance groups can use the local (non-EU) rules to calculate capital requirements and available capital (own funds) instead of the Solvency II rules.
3. Group supervision (Article 260). This provision is relevant for insurers from third countries operating in the EEA. If the third country's rules are deemed equivalent in this area, EEA supervisors will under certain conditions rely on the group supervision exercised by a third country, thus minimizing burdens arising from dual group supervision.

Equivalence under Solvency II can have different forms – it can be full, temporary or provisional. Full equivalence is granted for an indefinite period, but due to the nature of the institute, it can be unilaterally revoked at any time.[17] Moreover, EIOPA monitors the application of the equivalence and reports its progress annually. Under Solvency II, temporary equivalence could be determined for a limited period, that is, until 31 December 2020 with a possibility of

[15] A. Van Den Hurk, 212.

[16] Clifford Chance, *Brexit: passporting and equivalence implications for the UK insurance sector*, 2016, 3, https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2016/08/brexit-passporting-and-equivalence-implications-for-the-uk-insurance-sector.pdf, last visited 15. 6. 2024.

[17] A. Van Den Hurk, 215.

a one-year extension. Having in mind that this deadline is long past, this type of equivalence is now obsolete. Provisional equivalence can be granted for a limited period of ten years and is renewable for further ten-year periods. Provisional equivalence is suitable for countries that are modernising their regimes or have well-functioning solvency regimes unlikely to be updated soon.[18]

In the insurance industry, equivalence is granted only to certain countries – full equivalence was determined only for two (Bermuda and Switzerland), while provisional equivalence is granted only for a number of countries (Australia, Brazil, Canada, Mexico, USA, Japan).

Unlike some other areas, equivalence under Solvency II is not used to grant direct access to the internal market for non-member market actors.[19] Equivalence in Solvency II has prudential background.[20] The equivalence framework in insurance described as "relevant in practice, relatively advanced and still evolving".[21]

Type of equivalence	Full equivalence	Temporary equivalence	Provisional equivalence
Solvency II areas	All three areas	Reinsurance (art. 172.4) and groups doing business in EEA (art. 260.5)	EEA groups doing business in third countries (art. 227.5)
Duration	Unlimited period	Limited period (until 31 December 2020, with the possibility of a one-year extension)	Limited period (10 years, with possible another 10-year extension)
Countries	Switzerland, Bermuda	Japan	Australia, Brazil, Canada, Mexico, USA, Japan

3.1.2. The Role of EIOPA

The decision on equivalence lies in the hands of the European Commission, but supervisory authorities in the relevant areas play a significant role in the process. In the realm of insurance, EIOPA assists in the process of determining the equivalence. When founded in 2010, EIOPA was mandated to develop the guidelines for the assessment of the equivalence of third-country supervisory regimes for national supervisory authorities which were enacted in 2015.[22]

[18] *Ibid*., 212.
[19] *Ibid*., 213.
[20] *Ibid.*
[21] *Ibid.*
[22] EIOPA, Guidelines on the methodology for equivalence assessments by National Supervisory Authorities under Solvency II, 2015, EIOPA-BoS-14/182 EN,

EIOPA assess a series of principles, giving an opinion on whether the legal regime in question is equivalent.[23]

As stated by the body itself, EIOPA will particularly focus on the *monitoring* of regimes for which positive equivalence decisions have been taken, including temporary ones, and assess whether implementation and potential regulatory amendments still meet the criteria.[24] In the past two years, EIOPA finalized monitoring Bermuda (2022) and Switzerland (2023) equivalence. In 2023, EIOPA enacted the Single Programming Document 2024-2026 in which it reaffirmed its mission regarding equivalence. As one of its annual operational objectives, EIOPA sets effective monitoring of the application of equivalence decisions and market or regulatory developments impacting equivalence.[25] Further planning priorities will be defined considering a 3-year cycle for equivalence monitoring of jurisdictions with full equivalence and a 10-year cycle on provisional equivalence monitoring. As part of its cooperation with third states and international organisations, EIOPA envisages monitoring third-country regimes where there is an equivalence decision.[26] In 2020, changes were introduced to give EIOPA more responsibility regarding the equivalence in the insurance industry. In accordance with its mandate, EIOPA proclaims it will continue on-site visits, delivering third-country reports, and annual assessments, in addition to providing input to the European Commission when deciding upon equivalence.[27]

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https://www.eiopa.europa.eu/document/download/6f493074-4457-440c-9881-eca30ba64ce5_en?filename=Guidelines%20on%20the%20methodology%20for%20equivalence%20assessments%20by%20national%20supervisory%20authorities%20under%20Solvency%20II, 30. 6. 2024.

[23] See, for example, the assessment of the Swiss regime. EIOPA, Advice to the European Commission Equivalence assessment of the Swiss supervisory system in relation to articles 172, 227 and 260 of the Solvency II Directive, 2011, https://www.eiopa.europa.eu/system/files/2019-03/eiopa-bos-11-028-swiss-equivalence-advice.pdf, last visited 13. 8. 2024.

[24] https://www.eiopa.europa.eu/browse/regulation-and-policy/international-relations-and-equivalence_en

[25] EIOPA, Single Programming Document 2024-2026, 2023, 50, https://www.eiopa.europa.eu/document/download/73ad1211-1cbd-475f-883b-cbc864afb447_en?filename=EIOPA%20Final%20SPD%202024-2026.pdf, last visited 30. 6. 2024.

[26] EIOPA, Single Programming Document 2024-2026, 111.

[27] *Ibid*.

3.1.3. Good Practice – The Case of Bermuda

Equivalence decisions can be examples of "the good, the bad and the ugly".[28] Namely, equivalence can bring numerous benefits for the third country ("the good"), but it can also bring uncertainty ("the bad") or more stringent requirements ("the ugly"). One of the good examples of impact of equivalence in general is precisely in the area of insurance where Bermuda is seen as a positive example.

Bermuda plays a key role in international insurance and reinsurance since it is the home country of around one-third of the top reinsurers in the world and many captive and insurance-linked securities.[29] Early on Bermuda's authorities revised insurance regulation putting it in line with Solvency II resulting in full equivalence under all three articles.[30] In practice, that means that (re)insurers from Bermuda can conduct business in the EU on equal footing as EU companies without additional regulatory burdens.[31] Bermuda is seen as a "jurisdiction with an appropriate degree of stability, legal certainty, and commercial flexibility",[32] and has attracted many insurance professionals over the years.[33]

3.2. Impact of Brexit on Equivalence in Insurance Industry

3.2.1. Brexit and Equivalence in Financial Services – A Brief Overview

One of the events that has strongly shaped the equivalence landscape was Brexit. In the area of financial services, the withdrawal of the UK from the EU has significant ramifications, but financial services are barely mentioned in the Trade and Cooperation Agreement (hereinafter TCA) which regulates UK-EU relations after Brexit.[34] Some outlines of the EU-UK relations in

[28] L. Bonacorsi, Quo vadis the UK? The Future of Equivalence in Brexit Negotiations, 2020, 8, https://ssrn.com/abstract=3670623, 25. 5. 2022.

[29] *Ibid.*, 9.

[30] A dedicated team was set up that worked for more than six years to achieve equivalence.

[31] L. Bonacorsi, 10.

[32] A. Potts, J. O'Mahony, "Bermuda: regulating big insurance on a small island", in: *Research Handbook on International Insurance Law and Regulation* (eds. J. Burling, K. Lazarius), Edward Elgar Publishing, Cheltenham 2023, 729.

[33] Bermuda offers a wide range of diverse and innovative insurance and reinsurance products. *Ibid.*, 729-730.

[34] On the dynamics of Brexit negotiations see D. V. Galushko, "The modern Brexit

the field of financial services can be found in the TCA Annex which contains a Joint declaration on financial services regulatory cooperation between the European Union and the United Kingdom. This is a non-binding act by which the contracting parties undertake to sign a memorandum of understanding (Memorandum of Understanding establishing a framework for regulatory cooperation on financial services – MoU), which should represent a framework for dialogue between the EU and the UK on the financial services market.[35] After many delays, the MoU was signed on 27 June 2023, creating the administrative framework for voluntary regulatory cooperation in the area of financial services between the EU and the UK, outside of the TCA structures which includes the establishment of a Joint EU-UK Financial Regulatory Forum.[36]

Brexit prompted a re-examination of the equivalence regimes, but contrary to expectations it made the process stricter so that it is now more difficult for the UK to achieve equivalence and gain access.[37] Unlike the other third countries where the question is *whether* there is equivalence, at the time of withdrawal UK's legal order is unquestionably in line with the EU's, but it is uncertain how the legislative process will continue to unfold in the future.[38] There is a chance that UK legislators will (un)intentionally diverge from EU legislation in an attempt to adapt to the new market conditions, making legal order less and less equivalent.

3.2.2. Brexit, Equivalence and Insurance

In 2016, the Treasury Committee launched an EU Insurance Regulation inquiry to determine the operation of Solvency II in the context of the UK's

agenda: some consequences of 'take back control", *Strani pravni život* 67(4)/2023, 691–706.

[35] A. Višekruna (2022), 102–103.

[36] Commission signs Memorandum of Understanding on regulatory cooperation with the United Kingdom, 2023, https://finance.ec.europa.eu/news/commission-signs-memorandum-understanding-regulatory-cooperation-united-kingdom-2023-06-27_en, last visited 2. 7. 2024.

[37] L. Bonacorsi, 15; N. Moloney, "Reflections on the EU third country regime for capital markets in the shadow of Brexit", *European Company and Financial Law Review* 17(1)/2020, 49. Bush points out that now it has become increasingly important whether the financial service in question is (likely to be) of systemic importance. See D. Busch, "The Future of Equivalence in the EU Financial Sector", *European Business Organization Law Review* 25(1)/2024, 11.

[38] L. Bonacorsi, 14.

withdrawal from the EU.[39] The inquiry intended to investigate various options for the UK insurance industry in case of exit, evaluate the impact of Solvency II on the competitiveness of the UK insurance industry, analyse how Solvency II will affect how insurance meets the needs of UK consumers and the country's businesses, and assess what lessons the sector and regulators might have learnt from its implementation.[40] After the consultations with stakeholders, the Treasury Committee published a Report on the Solvency II Directive in October 2017 proclaiming the insurance industry as a "priority sector during the Article 50 negotiations" and pleading for a form of bespoke agreement with the EU.[41] The report highlighted several complications that would ensue in the absence of a proper arrangement between the EU and the UK.[42] First of all, insurers from both the UK and the EU would have to restructure their business to adapt to the new circumstances. Second, withdrawal would affect the pre-Brexit insurance contracts, which would need to be addressed in order to have effect. Third, equivalence provisions are present only in Solvency II, while other insurance directives don't have such provisions so the issues of access would have to be resolved differently. Lastly, the problem of Lloyd's of London was emphasized. Being a unique organisation, Lloyd's faced unique challenges in the face of Brexit. It was able to operate across the EU because Solvency II had incorporated specific norms to accommodate its role. In the case of Brexit, such a model of operating would no longer be available. Since no agreement on financial services (including insurance) was reached, Lloyd's was obliged to find a new model for doing business in the EEA.[43] Hence, Lloyd's has established a subsidiary insurance and reinsurance company incorporated in Belgium – Lloyd's Insurance Company S.A. (Lloyd's Europe).[44] Subsequent anal-

[39] Treasury Committee, Treasury Committee Inquiry into Solvency II - Terms of Reference, 2016, par. 3, https://www.parliament.uk/globalassets/documents/commons-committees/treasury/Terms-of-reference/EU-insurance-regulation-ToR-16-17.pdf, last visited 25. 6. 2024.

[40] *Ibid*., par. 4.

[41] House of Commons Treasury Committee, The Solvency II Directive and its impact on the UK Insurance Industry, 2017, par. 201, https://publications.parliament.uk/pa/cm201719/cmselect/cmtreasy/324/324.pdf, last visited 25. 6. 2024.

[42] *Ibid*., paras. 189-196.

[43] It was estimated that 3 billion pounds worth of capital is endangered. See J. Armour, "Brexit and financial services: the significance of 'third country equivalence'", in: *Brexit and the implications for financial services* (ed. P. Jackson), SUERF – The European Money and Finance Forum, Vienna-London 2017, 74.

[44] See Lloyd's, Brexit: what happens next?, 2020, https://lloydseurope.com/events-and-

ysis of the impact of Brexit on financial services was more focused on other types of services, and the insurance industry was only mentioned where appropriate.[45] Despite that, problems that were identified in that analysis can also apply to the insurance sector.

Equivalence was one of the modalities of UK access that was considered. In favour of the positive UK equivalence decision in the insurance sector spoke the fact that the UK would easily achieve equivalence having in mind it "has been at the forefront of prudential regulation for insurance and, in some areas, is super-equivalent for Solvency II".[46] But, as we have previously stated, during negotiations the entire area of financial services was given almost no attention despite possible ramifications. At first, it was considered that the supervisory regime in the UK insurance market would not deviate significantly from Solvency II, firstly because of the possible requirement to establish equivalence and secondly, because of the policyholder protection objectives proclaimed by the UK supervisory authority (PRA).[47] Nevertheless, Brexit gave the UK more flexibility in the legislative area, allowing it to be more competitive and rectify some of the current difficulties in Solvency II.[48] Deviations from the Solvency II could go two ways – if future changes of the Directive are not implemented in the UK insurance legislation or if UK deviates from Solvency II regime when reforming national legislation. In such circumstances, it is not clear whether the regime in force in the UK (Solvency UK) would be deemed equivalent. An equivalence decision has not yet been made, and the efforts of the British legislator to adapt the existing regime based on Solvency II to national circumstances heighten the uncertainty.[49] The UK Government has started legislative reforms of the financial services markets by enacting the Financial Services and Markets Bill.[50] The Bill allows for the implementation of reforms by revoking Solvency

communications/news/brexit-what-happens-next, last visited 14. 8. 2024.

[45] In 2022, the European Affairs Committee of the House of Lords submitted a Report "The UK-EU relationship in financial services". See https://committees.parliament.uk/publications/22728/documents/167235/default/, par. 3.

[46] Clifford Chance, 4.

[47] A. Müller, S. Reuse, "Solvency II post-Brexit: equivalence discussion in light of the UK solvency II review and the financial services and markets bill", *Journal of Financial Regulation and Compliance* 31(5)/2023, 632.

[48] Clifford Chance, 5.

[49] A. Müller, S. Reuse, 630.

[50] The Bill was introduced to the Parliament on 22 July 2022 and received the Royal Assent on 29 June 2023.

II and transferring that responsibility to the PRA so that the PRA can replace it with the appropriate regulatory requirements in its rulebook. During the reform process, the Bank of England conducted a series of consultations on the new Solvency II framework for the UK (Solvency UK). During 2023 and 2024, PRA has published several policy statements setting out new Solvency UK rules, confirming major reforms to Solvency II, with minor changes to its original proposals. The new framework removes onerous requirements and increases flexibility and competitiveness.[51]

4. Conclusion

The paper presented two potential frameworks of equivalence regulation in the insurance sector under Solvency II. One is the current framework under Solvency II applied to several major non-EU insurance industries. This framework is based on the approval from the European Commission based on the assessment by the supervisory authority (EIOPA). After gaining the equivalence decision, its continuation is conditional upon maintaining an appropriate level of alignment of the regulatory and supervisory framework with regulatory changes in the EU which is periodically checked. The other framework is still in the making and it relates to the former member state (i. e. the UK) and its contours are not definite. UK's position in the realm of financial services' equivalence is unique compared to other third countries as, at the moment of the withdrawal, its legislation was fully in line with the EU legislation. However, the passage of time and legislative reforms on both sides may alter the situation. Even before Brexit was finalized, the view was taken that the UK's withdrawal could have a significant impact on the Solvency II supervisory regime and equivalence decisions. Although it was initially thought that the UK would not deviate too much from Solvency II after Brexit, the current reforms show otherwise. The negotiation process revealed that financial services in general were not the top priority in defining EU-UK relations, leaving this area almost completely undefined. The insurance sector will inevitably be influenced by Brexit, but the extent of this is still unknown. Legislative reforms on the UK part, combined with the EU's stance that it will not make concessions, are shaping the future contours of equivalence decisions in the insurance sector.

[51] PWC, PRA finalises new Solvency UK framework, 2024, https://www.pwc.co.uk/financial-services/assets/pdf/pra-finalises-new-solvency-uk-framework.pdf, last visited 14. 8. 2024.

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EKVIVALENTNOST U SEKTORU OSIGURANJA U DIREKTIVI SOLVENTNOST II – NEKA RAZMATRANJA –

Apstrakt

U radu se analizira primena instituta ekvivalentnosti u sektoru osiguranja. Prvo se uopšteno razmatra koncept ekvivalentnosti u oblasti finansijskih usluga i njegove posledice. Potom se fokus prebacuje na sektor osiguranja, tačnije Direktivu Solventnost II gde se predstavljaju oblasti u kojima se ovaj institut primenjuje i uloga supranacionalnih tela u njegovoj primeni. Jedan deo istraživanja posvećen je uticaju bregzita na tržišta finansijskih usluga i posebno na industriju osiguranja. Na kraju se rezimiraju nalazi istraživanja.

Ključne reči: finansijska tržišta, osiguranje, pristup tržištu od strane trećih država, ekvivalentnost, Solventnost II, bregzit.

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