YEARBOOK OF THE COURTS
2017

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Translation Estonian to English: Alia Via OÜ
Publisher: The Supreme Court of Estonia
Design and print: AS Ekspress Meedia

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FOREWORD

Dear reader,

In the 2017 Yearbook of Courts, we take a bolder than usual look outside Estonia, and in the main articles of the book we concentrate on the relations between Estonian and European Union law.

Our 100-year-old state has been a member of the European Union for 14 years. Just recently, we successfully completed our first Presidency of the Council of the European Union, and at least at the rhetoric level, Estonia has certainly and deeply grown together with the European Union. The strong integration of Estonian law with the European Union and, first and foremost, of course, the more tightly intertwined legal order of the European Union as a whole, means that those resolving domestic legal disputes have increasing contact with European Union law – they need to interpret it, resolve conflicts between national law and European Union law, and in all that also take into account the European Convention on Human Rights and the role of the European Court of Human Rights.

The following articles show, on the one hand, how complicated a national legal system can be when functioning together with European Union law. Despite their differences, all 28 Member States of the European Union are obligated to implement the same norms and in the same manner. This fact may provoke uncertainty, a fear of getting lost in the labyrinth of rules and principles, of not noticing something significant, or nagging questions about whether the law has been interpreted correctly. The role of the judge is all the more complicated, because before administering justice, he or she must be capable of resolving a host of technical questions: where and how to search for the applicable law or relevant legal practice; what actually is the current applicable European Union law; what role could be played by linguistic issues (for example, differences in translation) what is the interplay between national fundamental rights, the Charter of Fundamental Rights of the European Union and the European Convention for Human Rights, together with the case law of the European Court of Human Rights? This set of problems is aggravated, in turn, by the necessity to resolve a legal dispute not only correctly, but also within a reasonable time limit, and all that in a situation, where the stack of cases waiting for adjudication seems to be growing like yeasty dough. On the other hand, with the articles in this yearbook, we hope to shed at least some light on the machinery that results from the co-operation of European Union law and Estonian national law, and help raise judges' confidence in orienting within this system and in resolving increasingly complicated legal disputes in a timely, accurate and just manner.

In the yearbook, Head of the Estonian Translation Unit at the Court of Justice of the European Union Liina Teras describes in more detail to the reader the na-

ture of problems surrounding translation, a need arising from the multilingualism of the European Union. She also explains the significance of high quality legal translation and how the translation process works, while elaborating on the importance of the position of a lawyer linguist for the European Union institutions.

The article by University of Tartu doctoral student and adjunct instructor Kaie Rosin looks at changes in the area of criminal proceedings, a field that has traditionally been very keenly kept under the control of states themselves, due to the growing role of the European Union: the increasing harmonisation of law, the opportunity and need to request preliminary rulings from the European Court of Justice for criminal cases as well. The author acknowledges that today judges who deliberate criminal cases have started implementing European Union law. To fully fill this role, however, the Estonian criminal judge clearly still needs some adjustment time.

Lastly, attorney at law Karmen Turk and adviser to the Civil Chamber of the Supreme Court Maarja Torga look at the topic of applying common rules of the European Union for determining jurisdiction and applicable law in a networked world – the inevitable conflict between the analogue and the digital worlds. These articles are not so much centred on Estonia, but rather provoke thought about what kinds of problems are entailed with attempting to apply rules that are made for the real world to legal relations in the world wide web.

In addition to more academically oriented articles, the yearbook also contains an overview of court statistics and an in-depth article by judge Iko Nõmm from the Tallinn Circuit Court on the nonjudicial activities of judges – the rules, reasons for nonjudicial activities, the motivation of the judges to do more than their main work, as well as the risks that are entailed.

Pleasant reading!

Andres Parmas
Editor-in-chief of the 2017 Yearbook of Estonian Courts, justice of the Tallinn Circuit Court

I

YEARLY SUMMARY

DEVELOPMENT OF THE LEGAL AND JUDICIAL SYSTEM

Presentation at the Plenary of Judges on 9 February 2018, in Tallinn

Priit Pikamäe, Chief Justice of the Supreme Court

Dear colleagues and guests!
Honourable members of the Riigikogu!
Esteemed Minister of Justice!

A look back at the judiciary over the past year gives us the following picture. In the Estonian judicial system, the number of judicial positions remains at 242, of which 240 were filled at the time of the plenary last year; however, by the end of the year the number had decreased to 230. The office of a judge is relinquished mainly due to retiring, and in 2017 a total of 8 judges were designated judges emeriti. 4 colleagues were relieved of their duties for other reasons: 2 due to reasons of health, 1 of their own volition, and 1 was removed from the office due to a disciplinary offence.

To fill these vacant positions, 3 competitions were announced last year, with two now having been completed and the third in the initial stages of selection. These were the first competitions that were held based on the amended Courts Act of 1 August 2016, which separated the judge's examination from the judge's competition, and recognised already achieved examinations from other legal fields. Based on the experience of the first year of application, we can say that expanding the horizontal mobility of jurists has had a positive impact on the judicial system. Based on the two completed competitions, it can be concluded that there was no need to declare a competition unsuccessful for lack of candidates, and the average number of candidates for both one first instance judge position and one circuit court judge position was 4. Among the applicants, 15 applications were submitted by sworn advocates and 8 by prosecutors. The significant increase of representatives from other fields in competitions for judicial positions can only be considered a welcome development.

Therefore, by way of a mid-term summary, we can conclude that the long-standing low point in competitions for the positions of judges is passing, at least based on the example of last year, and that the attractiveness of the position of a judge among jurists is on the increase once more. This is especially significant because the five years ahead of us can prove to be breakthrough years, since the right to retire will extend from the existing 20 judges to an additional 58. In light of all this, the legislator must continue to thoroughly consider how to improve the conditions of judiciary service in order to ensure that those who have committed

themselves to the judicial office maintain their commitments as long as possible. Unfortunately, the removal of social guarantees, including the judge's pension from those who took office after 1 July 2013 also meant the removal of those stimuli that until then ensured the stability of the judiciary. Until the high levels of daily stress and great workloads in the administration of justice are not subject to reform, the way in which the service of a judge can be connected to increased social guarantees must be considered. From the judiciary system aspect as a whole, however, the most acute problem involves the salary conditions of the court officers, which have lagged behind any competition for quite some time already. Against the background of rising average salaries in the nation, the salary levels of court session clerks can become problematic for the orderly functioning of administrating justice.

I

Dear colleagues and guests!

This year is a jubilee year for the Republic of Estonia – in two weeks, on the 24th of February, a hundred years will have passed since the Republic of Estonia was born. For the state of Estonia, this is the most significant and dignified event thus far, which gives us all cause to look back at our history and to set goals for the future. First and foremost, however, it is precisely the right moment to think more thoroughly about those timeless values for which everyday work often doesn't leave time. Former President of the Republic of Estonia Lennart Meri once said that having our own state is an asset that we truly value only once it is gone. To fully comprehend what kind of an invaluable asset is an Estonia that is politically independent and Estonian-speaking, it is worth setting our statehood in a wider, international context, and think about how many nationalities in the world have succeeded in establishing their own state. Let us recall that the Unrepresented Nations and Peoples Organisation, established in the Hague in 1991, includes more than forty indigenous peoples, whose right to self-determination is limited to a greater or lesser extent. Statehood is the most certain way to ensure the persistence of a people, which due to cultural dilution in an increasingly globalising world can become questionable even for ethnicities larger than that of the Estonians. To put it in other and constitutional words, the main task of the Estonian statehood is to ensure the persistence of the Estonian nationality and culture throughout the times. Considering the history of the Estonians, having a state of our own is a gift of immeasurable value.

The milestone dates of our judicial system, however, do not fully overlap with the centenary of the Estonian state. The reason for that is, of course, a historical one. According to legal historian Toomas Anepaio, the establishment of a national justice system was initiated immediately after the end of the German occupation, and the main weight of the burden was on the Ministry of the Courts, which was being established and organised at the same time, with Jaan Poska at the helm from 12 November 1918.[1] Having an operational system for administrating justice

[1] Here and hereinafter, the author referenced the biographical lexicon compiled by T. Anepaio – *Judges, Preliminary Investigators and Prosecutors 1918–1940*, introduction p 7–26.

was needed in a hurry, because according to Jüri Jaakson, who became Minister of the Courts after him, by that time Estonia had been without proper courts for already one year. The first legislative step in the area of courts was the 18 November 1918 regulation "On the establishment of provisional courts", which removed the court structure of the German occupation period and, to a large extent, restored the court system from the Russian imperial times. The peasants` parish court and the peasant court of second instance, as the class-based courts for substantive administration of justice among the farmers, were abolished, and the matters over which they presided were transferred to the jurisdiction of Courts of Peace and Councils of Peace. The regulation also provided for the establishment of a Supreme Court, which was to function as a court of cassation. Estonian became the official language of the courts.

The establishment of a court system inevitably required finding suitable persons to fill the offices of judges. According to Toomas Anepaio, the task of finding these people was a difficult one, since there weren't enough legal professionals as it was, not to mention experienced judges. To find judges, the Ministry of Courts published a call on 22 November 1918, "For jurists and court officials", in which the ministry called for applications from people with a legal education, who would like to serve in the courts of the Republic of Estonia as judges, court investigators, or assistant prosecutors. On 12 November 1918, the Government of the Republic appointed the first judge to the office of Chairman of the Tallinn Circuit Court, in the person of sworn advocate Jaak Reichmann. By the end of 1920, a total of 76 judges had been appointed to office, of whom 46 were justices of peace.

By order of Minister of Courts J. Jaakson, all judicial institutions within the borders of the Republic of Estonia were to start work on 2 December, 1918. On 14 September this year, we will celebrate 100 years from the passing of this historical decision by Minister J. Jaakson with a joint centenary event of the Tallinn and Tartu circuit courts in Tartu, at the Estonian National Museum.

The Establishing Council approved the decision on the establishment of the Supreme Court on 21 October, 1919, and the first Supreme Court Justices were also chosen by the Establishing Council on 31 October of the same year. The first sitting of the Supreme Court took place on 14 January 1920, in the main hall of the Tartu City Hall. So as we can see, just as the Estonian state wasn't created in a day, our court system also was built gradually. This is also why we are celebrating the centenaries of the circuit courts of Tallinn and Tartu this year, while the centenary of the Supreme Court will be held in January 2020.

One of the central parts of the centenary program of the Republic of Estonia is the opportunity to give and receive birthday presents. As always, gifts on these kinds of occasions are meant to bring joy and happiness to people and shape the future. Looking at it from the side of the judicial system, the Estonian centenary will be marked by the joint publication of the Supreme Court and the State Prosecutor's Office, which gathers into one biographical lexicon all judges, court investigators and prosecutors, who served in Estonia between 1918-1940. This publication is the first instalment of a trilogy of lexicons that aim at aggregating and system-

atising all biographical data on judges and prosecutors, who have served on the Estonian territory. The second part of the publication looks at those, who served in the justice system during the German and Russian occupations, and the third instalment is dedicated to those, who took office as Estonian judges and prosecutors after regaining independence. After the publication of the final edition, the society should have access to a full overview of the biographies of those people, who have administered justice either in the Republic of Estonia or during its periods of occupation.

II

This XVII regular plenary of judges is dedicated to the topic of the judges' code of ethics. The need for implementing a code of ethics for judges stemmed from the 2002 Courts Act (CA § 38 (3) (9)), according to which one of the tasks set to the judges' plenary is also the approval of a code of ethics for judges. The working group developing the code of ethics used the code of conduct that had been in effect for the Estonian judges until then, however, they also used sources from other countries and the recommendations of international organisations. The draft code of ethics was discussed at the judges' plenary first on 14 February 2003, in Tallinn, and subsequently on 13 February 2004, in Tartu. The latter plenary also approved the code of ethics for judges, which meant that the lengthy preparatory works could be concluded.

Therefore, today, we are at the threshold of the fifteenth anniversary of the judges' code of ethics. That is long enough to be convinced that the rules set forth with the code of ethics are viable. The fact that the code of ethics for judges is a living document is also demonstrated by the practice of the judges' Disciplinary Chamber, according to which an indecent act that is the basis for the disciplinary review of a judge must be defined based on standards for conduct that have been agreed to within the code of ethics. In an analysis of the practices of the Disciplinary Chamber in 1994-2017, it is noted that while 77% of the charges sent to be discussed by the chamber in those 24 years are related to offences related to office, 23% or nearly a quarter of the cases fall into the undignified conduct category. It is also noteworthy that although by numbers the undignified conduct cases do form a minority among the disciplinary cases against judges, penalties in cases ending with a guilty verdict have been more severe.

At the same time, we do have to admit that the practice of the Disciplinary Chamber has developed into the only visible application mechanism of the code of ethics. Whether and to what extent the code of ethics helps judges solve ethical dilemmas outside disciplinary proceedings will remain unanswered at this point. In any case, it is clear that the task of a professional code of ethics can be to instruct the representatives of the profession in correct behaviour, and that aim can be fulfilled by a code of conduct only if it is appropriate for the time and the facts. Rapid societal changes that surround us, and especially the development of professional codes of ethics in Estonia, have given rise to the need for a critical re-evaluation of the rules within the code of ethics. Although I am convinced that the greater

part of the rules in the 2004 code are relevant today, it cannot be ruled out that some may have become outdated, while the adoption of codes of ethics in other professional communities might bring about the need to also adjust norms that pertain to judges. To find an answer to that question, it is most effective to compile a working group of judges in a manner that would include judges from all instances, as well as external experts – consultants from universities. In any case, the implementation practices of the code of ethics have convinced at least this speaker that we are in need of a separate consultative body, whose role it would be to advise judges in questions related to following the code of ethics. We can see in the materials about the development of the code of ethics, as well as in the protocols of the 2003–2004 judges' plenaries that the question of establishing this kind of a wise council has been raised several times, however, we have not reached a decision yet. Can a judge deliberate a case between a client and Eesti Energia (the dominant electricity provider in Estonia), while being a client of Eesti Energia? Can judges perform the duties of arbiters in one arbitration court or another? Should it be discouraged for a judge to work as a lector at a training course for the lawyers and employees of a law firm? These are just some questions that I can recall from the chaotic discussions of recent years. The surfacing of these kinds of questions is completely natural, and it shows that the judiciary is made up of people with a conscience, who are very much aware of the high expectations towards their office. On the other hand, each judge knows already from their vocation that from time to time, more complicated situations arise, where a dialogue with your conscience does not lead to certainty, and it is necessary to discuss the matter with another colleague. When it comes to the code of conduct for the judges, the assistance in finding the answers to such problems could be found in a special body of experienced judges, founded based on the code of ethics, whose authority in the judiciary is generally recognised. This body could, as necessary, also use the invaluable contributions of our judges emeriti. The questions asked and the answers given to and by this body, however, would start to shape the implementation practices of the code of ethics.

Since implementing a code of ethics for judges falls within the competence of this plenary, then the proposals from the working group on renewing the code are, of course, open to discussion at the next plenary. Whether and to what extent the current code of ethics should be changed is, therefore, in the end a decision made by all judges.

III

On the occasion of the centenary of our republic, it is befitting to also turn our eyes toward the future and try to imagine, what the Estonian court system could look like in the long-term perspective. Understandably, how the judicial system, as a significant part of statehood, fares is inseparable from how the nation is faring. One of Estonia's shortcomings is, of course, our small size. There are nearly a hundred times less of us than there are Germans, and nearly sixty five times less of us than there are Brits. A comparison with larger countries outside Europe would produce even more drastic numbers. At the same time, as a state Estonia has to be

capable of fulfilling the same tasks as a state with a much higher population. This also applies to the administration of justice.

In a pan-European comparison, Estonia does not have anything to be ashamed of, at least based on the EU Justice Scoreboard 2017. On the other hand, Estonia will probably never be a state that parties to large international transactions would choose as an agreed jurisdiction to resolve their disputes. Even though in a comparison of EU member states' judicial systems, Estonia is in third and fourth place in the brevity of the average time spent on proceedings in civil and administrative court cases, respectively, the speed of resolving a court case in a global comparison of judicial systems, in the end, is not a really weighty argument. For example, Great Britain has never submitted information to the scoreboard of the EU member state court systems, nevertheless, nobody doubts that this is one of the most trustworthy judicial systems in the world. What is more important than the speed of court proceedings here is the consistency of the legal culture, case law shaped over centuries, the foreseeability of possible resolutions that this entails, the continuity and longevity of the professional judiciary, and finally, the third most spoken language of all court proceedings in the world. Of course, the universality of the legal system also plays a role. While states of the world that share the common law legal heritage are characterised by a legal homogeneity, which is well exemplified by the regular practice of referencing each other's court decisions even in the highest instances, then the parallel continental European legal system is characterised by drowning in the particularism of separate legal orders. The constant need to orientate in the specificities of single legal orders, therefore, inevitably lessens the international competitivity of court systems in continental Europe, especially if the legal order is also coupled with the feature of being small in size.

Therefore, the task of Estonian courts now and in the near future will be to solve, first and foremost, court cases that have grown out of the Estonian society. A much more modern point of view, however, sees the judicial system increasingly in a role of influencing the state's economic environment. In a modern world, where the front pages of media publications are filled with news of the economy, and where the international success of states is increasingly measured by their economic success, the attractiveness of a state's economic environment and measuring it is gaining importance among other values. In order for people to dare start a business and make investment decisions, they need certainty that their capital investments also have legal protection. If there is no system that ensures the impartial fulfilment of transactions that have been entered into, it casts doubt on any state's ability to keep abreast with international competition. However, courts have an especially important role in the actual protection of adopted legal positions, because it is precisely the judiciary that determines how competently and at what cost the persons involved can rely on the state's protection in their claims. The effectiveness of resolving legal disputes in the business environment context is constantly analysed in the World Bank reports on the subject. A high level of administering justice in even the most complicated economic matters in such a way that businesses active in Estonia do not need to take cases that have surfaced here by agreement to another state's jurisdiction should be an unwritten development goal for the Estonian judicial system.

Estonia's small size also means that due to a lack of workforce, we also need to organise things vastly differently and in a much smarter way than they might be in the practices of larger states. In Estonia, we tend to be proud of our e-state reputation, and the digitalisation of many state processes has garnered us a lot of positive attention internationally. The administration of justice has not been left out of this development, and it is likely the smart use of information technology solutions that provides one opportunity to compensate for our size. Unfortunately, we have to admit that the digitalisation of work processes in Estonian courts at a closer look has not resulted in anything that warrants much recognition in comparison with other states. "Information technology solutions are driving judges crazy"– that was a headline ran by one of main dailies for an article that describes how the information system inculcated by the Ministry of Justice into the judicial system has resulted in slowness, freezing systems, errors in displayed information, and in the end, the senseless waste of time of many users. This all sounds very familiar, when we think back to the recent adoption of the second version of the courts' information system and to how it works now. The referenced article, however, is not from an Estonian daily, but a French one (*Le Figaro* 27.11.2017), and it describes the rocky road our French colleagues have been on for the past two decades in working on information technology solutions. On the background of this news story, however, we cannot take it as self-evident and leave the question unasked about our own situation – do we have anything really noteworthy to show in this area? Databases for procedural documents similar to our courts' information system exist nowadays in very many countries. In addition, it does not take much effort to find states, where the information technology solutions for organising communication between courts and parties to the proceedings far exceed our analogous systems in their user friendliness and functionality.

If Estonia wishes to maintain its reputation as a state that is characterised by innovation and solutions that deviate from the norm, we have to consistently work hard for that objective. The general information technology development in the world seems to favour this kind of approach. According to information technology researcher Enn Tõugu, recent impressive achievements by computers in imitating human activity have led us to another artificial intelligence boom in the world (*Sirp* 05.01.2017). Against that background, it is no wonder that there are hardly any states, whose judicial development plans do not have at least one program provision for the digitalisation of court proceedings. Estonia is no exception – when the development plans for first and second instance courts were being drafted on 22-23 November 2017, in Vihula, several proposals were made about how to connect the administration of justice with information technology more than it currently is. Among other suggestions, one of the proposals was to robotise the administration of justice. Whether that meant the expulsion of a human judge from judicial discussions or something less remains unclear the mid-term report of the development plan process. At the same time, we have to admit that this enthusiastic global activity around problems concerning artificial intelligence inevitably forces even the legal specialist to wonder whether soon enough there might be an information technology application that would take the task of administrating justice away from humans. While at first glance it seems that the immense variability of cases in their circumstantial facts automatically rules out the

development of an algorithm, which would be capable of sufficiently detailed distinguishing acts between different collections of facts, then today we cannot rule out that new developments in machine learning could soon resolve that problem. However, even if the matter were successfully resolved by technology, it would still leave doubt as to the possibility of robotising the substance of administrating justice. More specifically, the true nature of administering justice does not just narrowly lie in searching for a legal consequence based on a set of facts – which is indeed a task that a specially designed programme could successfully complete –, but rather in finding a just resolution to each case. I am convinced that a sense of justice is something so inherently human that transferring it into an algorithm is simply not possible. In other words – administering justice is an art. Just as providing treatment in the medical field requires accounting for many more factors than just merely prescribing medications based on a diagnosis, the just resolution of a court case also requires a perception of the entire context. Complaints about the superficiality and mechanical attitudes in resolving court cases, which are commonplace for today's human judiciary, would most likely be prevalent in the case of computers. The aforementioned, of course, does not mean that computers might not simplify the administration of justice. Information technology platforms that allow processing two hundred pages of accounting documents in just seconds to find information that is needed, for example, for bankruptcy proceedings or tax crimes, allow for significantly saving the working time of legal specialists. The workload of the courts could similarly be lightened if there was a computer programme to help those, who want to turn to the courts, to evaluate the person's perspectives in receiving the state's legal aid for protecting their rights. Since one assumption for providing legal aid is, as we know, the opportunity to receive judicial protection of one's rights, then the consideration of this likelihood together with all other conditions set out in law is certainly something in which such an algorithm could help avoid submitting clearly unfounded requests for state legal aid. This is, of course, merely one example of how information technology could be tied to the content of administering justice. More generally, the use of computers could also be considered more in all cases that pertain to the verification of prerequisites for court procedure.

Although administering justice will remain the task of human judges, it does not mean that deliberation itself could not be converted with the aid of information technology. Similarly to many other countries, Estonia has also started the digitalisation of judicial records, for example. As of the end of last year, at the Harju County Court, the Tallinn Administrative Court, and the Tallinn Circuit Court the dossiers of a part of the court cases are kept only in digital form. Effectively, this means giving up paper records and recording procedural documents only on computers. The natural end result of this process is the future reflection of the entire court procedure only in digital form, meaning that in the future, to view the documents related to a court case, you will probably have to log into the appropriate virtual environment instead of physically opening the case file. Nevertheless, whether and to what extent emphasising paper-free documentation will simplify resolving court cases is questionable. Leaving aside the cost-cutting factor, which a digitally archived case file will help achieve, the digital case file, at least in the form it is in today, does not mean anything more than just displaying the material

that has thus far been on paper on a computer screen. This could not be otherwise, because the whole logic of procedural codes by default is based on the understanding that the legal proceedings are recorded on paper. Since all procedural decisions and submitted claims must be fixed in writing in one way or another, the procedural codes generally stipulate the rules for compiling such documentation. Based on this paradigm of procedural code, the digitalisation of judicial proceedings is understood in unfortunately narrow terms as merely the mechanical transfer of procedural documents compiled on paper into the digital space. Even if the digital procedure does not require scanning a document previously generated on paper and if that document can be drafted directly on a computer, the paper format of the procedural document is still there, because the digital document template is based on the example of the paper document. Considering that a large part of people still prefers printing these digital documents to work with them, it is hard to find any additional benefits to digitising judicial procedures other than the freedom of the case handlers to work with the file without having to physically carry it from one place to another. I am of the opinion that if we wish to connect the administration of justice with truly innovative information technology solutions, then we first need a major paradigm breakthrough when it comes to legal proceedings themselves. We need to dispense with the detailed requirements set for formatting procedural documents currently found in procedural codes, and we have to agree to the fact that court proceedings held in the virtual world do not have to and cannot follow the same logic that is applied to keeping paper records. In digital court proceedings, information and procedural decisions should rather be recorded following a logic that fits information technology means, for example, through digital entries made by case handlers and parties to the proceedings. To move forward, we need a change in patterns of thought concerning legal proceedings that is similar to what happened with digital signatures – the understanding that a person's signature can also be expressed in a unique numeric code also constituted the translation of an old cultural phenomenon into the language of information technology. Just as today there is probably nobody left, who thinks that giving a digital signature means scanning a signed paper, the internet era is high time to dispense with ways to record judicial proceedings that were taken on board when the inquisitional model of procedures came about in the XIII-XIV century. I can only agree with the claim that the inevitable consequence of the technical revolution in our society is the change of society itself. Taking a field of activities into the cyber space can be successful only if it is done considering the unique nature of information technology, instead of trying to mechanically transpose the actual into the virtual. Therefore, if we want to bring information technology into judicial proceedings, we have to first accept the inevitable fact that it will mean a paradigmatic shift in court proceedings themselves, which might not be easy to adopt, considering the above average conservativeness of jurists. At the same time, it should also be kept in mind that even if court proceedings should be fully digitised, it will most likely still not mean the complete disposal of procedures on paper. The ID card crisis last year very quickly made it clear that in situations where information technology fails, there may be a need to sign procedural documents manually once more. So what makes the administration of justice simpler can also make us vulnerable in a new way. The state must retain its capacity to act in crisis situations as well, and for the administration of justice this means having

the flexibility to turn back to paper proceedings at any moment, for example, if an information system is offline for a longer period.

In conclusion, coming back to the daily concerns we have in administrating justice, and instead of taking an eagle eye view of things, looking at it from a frog's perspective, we must admit that before we get started with the information technology revolution, we should conclude discussions that have lasted now for at least two decades, and once and for all ensure that all Estonian courts have the means to record hearings.

Thank you for your attention and I wish everyone a good continuation of this plenary!

II
EUROPEAN UNION LAW AND NATIONAL LAW

TIME SPENT AWAY FROM THE CASE AS AN INVESTMENT IN THE QUALITY OF ADMINISTERING JUSTICE

Iko Nõmm, Justice of the Tallinn Circuit Court

Introduction

Generally speaking, the substance of a judge's work is to fulfil the task given by society to resolve conflicts that inevitably arise from the coexistence of people. As such, the fruit of a judge's labour is the outcome of a case – a decision. A written decision is a channel through which the court appears before the general public. This is an official self-portrait, the most visible and accessible image of a judge, created by himself or herself, about the judge's work and contribution to the execution of a state's authority.[1]

The opinion that the judges' activities should only be limited to administering justice and any other activities only waste time and disrupt this work is a simple opinion, however, intellectually it is a lazy one. To administer justice in the real world, judges must be a part of it, in order to avoid mutual estrangement.[2] On the one hand, the field of activities of judges must be wider than is needed to solve a specific case to give judges the opportunity for wider self-actualisation, since it shapes the judges' character and makes them a judiciary that understands the world around the court house better.[3] On the other hand, judges must not be in isolation, considering the connection between the interests that are significant for the development of society and the monopoly of administering justice that belongs to the judges, as an instrument of guaranteeing fundamental rights.[4]

The judges' code of ethics, which was in the focus at this year's plenary of judges,[5] largely focuses on delimiting the nonjudicial activities of judges and the code of conduct for judges outside their main work. The objective of this article is to call

[1] See also: Mitchel de S.-O.-l'E Lasser, Autoportraits judiciaires: le discours judiciaire dans le système judiciaire français, 104 YALE L.J. 1325, 1334 (1995).
[2] Robert B. McKay, The Judiciary and Nonjudicial Activities. Law and Contemporary Problems 9–36 (Winter 1970), p 12.
[3] See also: Toby S. Goldbach, From the Court to the Classroom: Judges' Work in International Judicial Education. Cornell International Law Journal, Vol 49, p 617–682.
[4] The height of the German period of national socialism is a didactic example of what kind of situation might arise if judges limit their role strictly to applying the law and consciously avoid looking at general development tendencies in society, see *infra*: Of regulation and its limits.
[5] The article is written before the XVII regular plenary of judges on 09.02.2018.

the reader to think along, besides setting limits to activities outside the judges' main work, about the reasons why the nonjudicial activity of judges should be supported and also coordinated.

Delimiting nonjudicial activities

The reason for ruminating on the limits of judges' nonjudicial activities, first, lies in the fact that differentiating between judicial and nonjudicial activities in certain cases can be complicated. If the judges' role were limited to being independent, impartial and decisive, there might not be any inherent difference in what some judges do beside their main work – for example, participating in arbitration work, where judges are welcomed, first and foremost, thanks to their skills in being independent, impartial and decisive. Also, there are no doubts as to the justification of obligations related to management and administration tasks or additional training obligations. The professional quality and prestige expected from judges, however, can be attractive also for activities that are much farther from administering justice, where the inclusion of a judge can raise questions about the nature of a judge's role and the separation of powers. If judges take an important role outside administering justice, they might intervene in other branches of government to an extent that may tarnish the separation and independence of judicial power and compromise a judge's impartiality.[6] Another question that may arise is to what extent legal guarantees and privileges should extend to judges in their nonjudicial work.

One possibility is to rank nonjudicial activities according to how near or far they are by nature to administering justice.

- Based on a close linkage, the top of the list would consist of activities that are by nature court-like; for example, being a member of an international court or adjudication in arbitrage proceedings.

- The top can also include activities that are related to the activities of courts in the wider sense: for example, administrative tasks in heading courts or judicial chambers/panels, participation in the overarching administrative work of courts through a court administration council, and committees inside the judicial system. The participation of judges in training courses and traineeships domestically and abroad is also closely related to the administration of justice, and it should be handled as a direct investment into the quality of administering justice.[7] This section of the ranking also includes activities in judges' associations in the interests of collective representation and in international communication between judges and courts. The top ranking of activities can also include communication with the media, in order to help shape the reputation of courts.

[6] See also: Bertrand Mathieu, *Pouvoir judiciaire et politique : où se trouve la ligne de démarcation?* European Review of Public Law : ERPL. Vol. 27 (2015), no. 1, p 49–118.

[7] See on the subject: The 13.09.2011 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of Regions. Building trust in EU-wide justice – a new dimension to European judicial training, p 3.

- The next level is occupied by work in committees that is related to other branches of legal practice, such as the Bar Association, the prosecutor's office, notaries, etc., but is mandated for judges by law.[8] Questions that judges encounter at this level are divided between the areas of professional suitability, ethical requirements, and disciplinary action.

- Next, there are activities at the academic level, as judges contribute to research by working with a university or developing textbooks, commentaries on laws, guidelines for the application of laws, or any other professional publications. This level also includes teaching at universities or training courses, within as well as outside the judicial system.

- Next, participation in legislation or in carrying out reforms in the area of administration of justice, as a member of a working group or through giving an individual opinion on any amendments to laws or on reforms.

- The following activities involve fulfilling the tasks of the executive authority, for example, working at the Ministry of Justice, at the prosecutor's office[9], in an election committee[10], participation in activities related to the European Union presidency, in international civil missions to states in need of aid for building up democratic rule of law, or in the work of international organisations. In this case, judges may be temporarily transferred full-time into the service of the executive branch.

- Participation in societal or non-profit activities that are not related to the administration of justice should occupy the bottom half of this ranking.

- By nature and due to its weakest connection to the administration of justice, business activities are at the bottom of the list, including giving legal counsel, as are politics.

When comparing the bottom and top halves of this list, the activities are not equal in character. Activities that are by nature more similar to the administration of justice have more potential of benefitting from a judge's professional skills and independence, and they also have the most potential to have a positive significance for the judges as well, without tarnishing their professional standing. Moving down the list, not only is the benefit to judges more narrow, but the activities can also damage the independence and impartiality of the judicial authority, and potentially lead to conflicts of interest. Therefore, it is not surprising that most legal orders are permissibly disposed towards quasi-judicial activities, in the top half of the ranking, and reject the bottom half activities. So, for example, business activities, especially if they are related to legal matters, might benefit from the participation of judges, however, it would entail a significant risk of conflict of interest. The same applies to the active participation of judges in politics, which would rob the judici-

[8] § 38 (3)(8) of the Courts Act (RT I, 05.12.2017, 5).
[9] § 58 of the Courts Act.
[10] § 10 (2) (1 and 2) of the *Riigikogu* Election Act (RT I, 04.07.2017, 92).

ary of its reputation of impartiality.[11] There are legal orders, where the prohibition on such activities applies even for retired judges, and a certain period of time is determined during which judges who have left the office cannot participate in certain nonjudicial activities.[12]

Reasons for participating in nonjudicial activities

How could judges' activities outside the judiciary be justified? First, as mentioned above, the law in many instances foresees that judges must participate in some nonjudicial activities. At the same time, there are many activities that are not stipulated in law, and equally, the law cannot force any judges to take on any nonjudicial tasks.

Professors Nuno Garoupa and Tom Ginsburg explain this phenomenon by using the polarity present in market economy – demand and offer. On the one hand, the judges must have a desire to participate in nonjudicial activities, because they are voluntarily undertaking them. It can, therefore, be concluded that there is some kind of benefit to judges from the nonjudicial activity, which determines the offer side. On the other hand, those already active in nonjudicial activities have to have an interest in judges participating in their activities, meaning that they also have to see some benefit in the inclusion of judges, which then determines the demand side. As with any market relationship, there are presumably risks here as well for so-called market distortions, and this explains the need for regulating the limits of judges' nonjudicial activities.[13]

[11] There are some quite unusual examples of this in world practice. In a serious political and economic crisis, the Chief Justice of the Greek Supreme Administrative Court was appointed interim Prime Minister. Judges have also held the office of President in Bolivia, Bangladesh and Pakistan. One of the deepest constitutional crises in the Brazilian history was resolved in October 1945, when then-president was forced to step down and the Chief Justice of the Supreme Court was appointed head of state. See also: Helena Smith, Greece's Interim Government Sworn in Before Fresh Election, Guardian, 16.05.2012, available online: http://www.guardian.co.uk/world/2012/may/16/greece-interim-government-sworn-in (20.01.2018); Marites Dañguilan Vitug, Shadow of Doubt: Probing the Supreme Court, 185, (2010); Former Presidents: Justice Abu Sayeed Chowdhury, The Bangabhaban: The President House Of Bangladesh, available online: http://www.bangabhaban.gov.bd (20.01.2018); The President: Previous Presidents, The President: The Islamic Republic Of Pakistan, available online: http://www.presidentofpakistan.gov.pk (20.01.2018); Portal Brazil, available online: http://www.brasil.gov.br/linhadotempo/epocas/1945/jose-linhares (20.01.2018).

[12] For example, such is the case in China, where a judge cannot work as a sworn advocate for two years after leaving office. Lawyers Law of the People's Republic of China, art 36, available online: https://www.cecc.gov/resources/legal-provisions/law-of-the-peoples-republic-of-china-on-lawyers (20.01.2018).

[13] Nuno Garoupa and Tom Ginsburg, Judicial Roles in Nonjudicial Functions, 12 Wash. U. Global Stud. L. Rev. 755 (2013), p 756–782.

Motives and risks

Material profit

There can be several determinants or reasons for the offer side, meaning for why judges wish to be included in nonjudicial activities. The foremost reason can be considered to be material profit that is paid in certain instances for nonjudicial activity.[14] Besides additional pay for leading the work of courts, court houses and chambers, generally activities such as arbitration, training, publishing, participating in foreign missions, temporary service transfers and secondment are also financially compensated. Additionally, this kind of activity might be better compensated than regular work. Financial compensation can also be taken the other way around – nonjudicial activity may in certain cases also mean a reduction in the main workload, while the compensation stays at the same level, assuming that the nonjudicial tasks are less time and effort consuming than the daily work of resolving cases. Also, the nonjudicial activity may create economic perspectives that are beneficial in the future, for example, create career opportunities either within the judicial system or outside of it. As opportunities for judges to regulate their income are limited, monetary profit, whether it is immediate or at a later time, may be a weighty reason to participate in nonjudicial activities.

What are the dangers in all this? If the nonjudicial activity provides a considerable opportunity for earning extra income, there is the danger that it will become more motivating for the judge to contribute their time and quality work rather to the nonjudicial activity.[15] This creates the choice effect, which is dangerous in case the judge contributes effort to the paid nonjudicial extra activity to such an extent that it will decrease their performance in their main work, for which the wages are not reduced at the same time. A similar choice unfortunately against judicial work also occurs, when the nonjudicial activities are not directly compensated, but still provide other profit that can be monetarily measured. For example, a judge might be away from their main work, using secondments or training courses mainly for the purpose of travelling, or they might participate in other nonjudicial activities to enjoy the receptions and social gatherings that are entailed, thereby increasing their opportunities for spending leisure time.[16] Being away from their main job is questionable, when the secondment or external training does not provide any actual benefit, meaning when the judge does not take on the shared knowledge or use it in their individual work or does not even indirectly need or apply that knowledge for the benefit of the judicial system.

Self-actualisation

The second circle of reasons why judges participate in nonjudicial work is related to self-actualisation, the possibility of engaging in creative and developing work.

[14] *Ibid*, p 761.
[15] Robert B. McKay (reference 2), p 12.
[16] Toby S. Goldbach, From the Court to the Classroom: Judges' Work in International Judicial Education. Cornell International Law Journal, Vol 49, p 641–642.

According to the founder of the humanistic school of psychology Abraham H. Maslow (1908–1970), the need for self-actualisation is related to internal motivation, a psychological need, and it is positioned at the top of the pyramid of what motivates human behaviour. Self-actualisation is, according to Maslow, the highest need a person can have, and it means a person's motivation to reach their full potential. Although he is convinced that satisfying this need can only be possible after the lower hierarchy needs (physical needs and the needs for security, belonging and recognition) are satisfied, striving towards self-actualisation is still the highest target that a person can aim.[17]

The need for self-actualisation and achievement is to a large extent personal, and that is why certain types of individuals are more prone to look for side activities to their main work than others. The capacity to tolerate routine is also varying. Keeping in mind that the tenure of a judge is presumably life-long, it means doing essentially the same work in the same way for decades. That is why nonjudicial work provides judges with a more restless nature with the opportunity to have variety in addition to their main work and to expand their area of self-actualisation. In addition to a judge's individual characteristics, the wish to engage in nonjudicial work may be stimulated by the lack of opportunities for career development within the judicial system. Rising to the highest ranks of court instances is not possible for all judges merely for the reason that the number of positions is limited. Since judges are in office for a lifetime's tenure, the turnover in the highest positions and instances is low, because the positions are occupied for a long time. The same applies to opportunities for working as a judge outside Estonia. Although positions have fixed terms at the Court of Justice of the European Union and its General Court, they are renewable[18] and incumbents are presumed to have an advantage in getting appointed to office ahead of the other candidates. While the term of office of a judge at the European Court of Human Rights is not renewable, however, the opportunity to work at that court is also presented to only one judge every nine years.[19] So it may happen that even very capable judges of first instance courts never get the opportunity to work elsewhere other than at the court in which they started their career.

The category of self-actualisation also includes the circle of reasons that are related to personal prestige and reputation building. There is no doubt that the best advertisement for a judge is when their main work is done well, meaning that the right balance exists in the quantity and quality of proceedings completed and decisions taken. At the same time, a judge's reputation is not just shaped by the results of their main work, but also to a significant extent precisely by their nonjudicial activities. Compared to their main work, the benefit of the nonjudicial work is that the range of choices is much greater for allowing the judge to achieve the necessary reputation for achieving their personal objectives. It seems that the principle from the Bible applies – the person, who has been given something, will be given more[20], as does the assumption that whoever is doing can do, and that

[17] Abraham H. Maslow, Motivation and Personality, New York, Harper, 1954.
[18] Treaty on the Functioning of the European Union, Articles 253 and 254.
[19] The European Convention on Human Rights and the Protection of Fundamental Rights, Art. 23.
[20] Compare with parable on talents Mt 25:14–30, available online: http://piibel.net/?q=Mt+25:14-30#q=Mt%2025:14–30 (20.01.2018).

is why the judge's popularity can also prove to be an important influencing factor in the eyes of the decision makers, on whose discretion it is for the judge to rise through the ranks. So to speak, staying in the picture, that means leading, publicly speaking, publishing, memberships, participation, organisation, etc., shapes the judge's reputation to a significant degree. The more people read the books or articles by a judge who does academic work or the more popular are the judge's training courses, the better the results in leadership roles or administrative tasks, or the more positive reactions any other of the judge's activities garner, the greater will be their opportunity to improve their reputation.

Of course, there are certain moral dangers involved in self-actualisation and shaping a reputation. Participation in nonjudicial activity is morally justified if the judge has gathered and is able to maintain enough internal capital, so to speak, or skills for performing their main task of judicial activity.[21] Nonjudicial activities should not have a disruptive influence on the judge's main work, especially if that activity is outside of the judicial system.[22] Excessive occupation with nonjudicial activities and too much adherence to that activity can bring about a judge's estrangement from the actual substance of their work, it may push the desire to focus on the main work to the background and make performing the main duties superficial. That is a dangerous tendency, because the difference between actual and apparent is a matter of principle. If the nonjudicial activity related skills dominate over the judicial skills, which then either do not appear or fade away, it will eventually lead to having people with the wrong set of skills administering justice. The wrong choice effect or the tendency to deal excessively with unrelated matters can have more of an impact on judges, who do not succeed in gathering enough inner capital or achieve notable results in their main work.[23] In this case, the judge may be more attracted by other activities and an audience outside the judicial system, who does not know the actual quality of the judge. The wrong choice effect may also become apparent already at the level of choosing the judge's profession. That can happen if the opportunity to engage in nonjudicial activities is the main stimulus for taking the judge's office. For some people, the office of a judge may be more attractive because it brings along better opportunities for nonjudicial activities. For example, this can include belonging to a commission or participating in international activities to which they would otherwise not have access. This can prove problematic if an individual chooses the office of a judge only as an instrument to access the nonjudicial activities that actually interest them. In such case too, people with the wrong interests and skills may end up administering justice. A balance between the hoped benefits and the lurking dangers determines what kinds of nonjudicial activities one or another judge should choose. The profiles of benefits and dangers can also vary within the same field of activities depending on the characteristics of a particular judge. If the substantive skills for the work of a judge are present and maintained and if they are in balance with the nonjudicial activities, then the choice effect does not have significance.

In self-actualisation and reputation building, it should also be considered that

[21] Nuno Garoupa and Tom Ginsburg (reference 13), p 762.
[22] Robert B. McKay (reference 2), p 12.
[23] Nuno Garoupa and Tom Ginsburg (reference 13), p 763.

the reputation of judges, in addition to individual reputation, also has a collective component. The individual reputation of a judge impacts the reputation of the whole judiciary and vice versa, each judge's general, individual reputation depends on the overall reputation of the judiciary. Considering the skills and characteristics of specific judges, the nonjudicial activity of single judges can significantly improve the reputation of the entire judiciary. The public opinion of the judiciary inevitably forms based on the characteristics of those judges, who are known to the public. Since the rule that those who do actually can might not always hold true, there is the risk that a judge who fails at a nonjudicial activity also tarnishes the collective reputation of the judiciary to some degree. This is true especially if the judge should cross lines in their activities that have been set out in law or ethical requirements.

The contribution of judges, whose activity remains focused on their main work, isn't necessarily smaller since they are gathering the collective capital of the judiciary. Through satisfaction with the proceedings statistics and the general good quality of court decisions, the main work of judges also significantly impacts the reputation of the judiciary. The contribution of those judges, who are only focused on their main work, to the collective capital and the development of the judiciary system should also be recognised, because the greater burden of the main work can in certain instances fall on them. For example, at a time when one judge is participating in a long training course, is in a traineeship or is away from their post for longer due to some other nonjudicial activities, the workload of other judges in that court inevitably increases. Also, in the case of larger courts, a share of the chairman's judicial work might be divided between the other judges.

Political or social impact

The third reason why judges might be interested in nonjudicial activities is political or social influence. A judge, who has a specific ideological or social agenda, including a legal-political objective, may see nonjudicial activity as a means to promote the issue, using the independence and prestige of a judge.[24] With these kinds of activities, the first possible expression of danger is the fact that promoting a personal agenda outside of the judicial system might lead to the judges' reputation as a collective benefit being unfoundedly spread thin in the name of objectives that do not serve the judiciary as a whole in any way. Reputation as a collective benefit is created collectively, and once it has been created, its excessive use should be avoided, as should its dispersion through nonjudicial activities in a manner that benefits only one specific judge outside of his professional activities or the party outside of the judicial system.[25]

Achieving political or social influence can also be related to a danger that is expressed in demand that has been created by the offer side. Judges have a monopoly on administering justice and the judiciary might use it to strategically grow

[24] Nuno Garoupa and Tom Ginsburg (reference 13), p 761.
[25] See also: Edward N. Beiser, Jay S. Goodman, & Elmer E. Cornwell Jr., Judicial Role in a Nonjudicial Setting: Some Empirical Manifestations and Consequences, 5 Law & Society Review, 571 (1971).

demand for their own participation in nonjudicial activities.[26] Let us, for example, imagine a court decision, where a certain legal norm is interpreted in a way that means that certain committee must be composed of members of the judiciary. It should also be kept in mind here that outside the work of administering justice, judges have to compete with other professionals active in the field. This means that judges might start to use their monopoly in administering justice to promote their participation opportunities in nonjudicial activities. Economically speaking, this can be likened to dumping, a strategy used against the competition. Judges might start to use the administration of justice and the rights of a judge to raise their reputation, while damaging the opportunities of possible competitors. This is a risky strategy, because in this case court decisions may turn into instruments geared towards reaching a long-term and nonjudicial objective. In these cases, the interests of the judiciary towards participating in nonjudicial activities are not in line with the general interests of the public. At the same time, vigilance must be maintained towards the possibility of other branches of government pushing the judiciary aside and excessively limiting the judges' opportunity to participate in the activities of society.[27] For example, one of the prerequisites for the participation of judges in nonjudicial activities is the existence of time as a resource, which is directly linked to how many judges' positions are filled, and that is at the hands of the executive branch.[28]

Demand

Now a few words about why nonjudicial fields might be interested in the participation of judges in their activities. The first explanation is human capital and the professional skills of judges. Certain fields of activities can benefit from specialised skills or a pooling of human capital, which is a characteristic of the judiciary. Therefore, it is not surprising that judges are expected in areas, which need independence and impartiality and which are related to justice, proceedings, interpretation, verification, fact checking and decision making.[29] For example, arbitration court proceedings, participation in the exam or disciplinary committees of other legal branches or in the work of an electoral committee. Considering the above, it reveals that the motivator of the demand side is the reputation of judges or the desire to dress the activities that need to be carried out with the prestige of impartiality and independence that is characteristic to judges.

In certain cases, the need for the independence and impartiality of judges in nonjudicial activities can stem from a real need, however, in other cases it allows for accelerating work by riding on the coat tails of the judges' prestige.[30] For example, in legislative processes, the participation of judges can be beneficial through the fact of using the judiciary as well as the additional human capital, but it can also

[26] Nuno Garoupa and Tom Ginsburg (reference 13), p 766.
[27] Compare to the pressure started in 2015 in Poland on the significance of the judicial authority.
[28] At the time of writing, 4 judges' offices were not filled (one at the Harju County Court, one at the Tartu County Court, one at the Tallinn Administrative Court, and one at the Tartu Administrative Court).
[29] Nuno Garoupa and Tom Ginsburg (reference 13), p 763–764.
[30] *Ibid*, p 764.

generate trustworthiness and legitimacy for a specific, potentially political outcome. The significance of participating in such activities for judges depends on the sincerity of the demand side. The participation of judges is positive if the choice of participants is made objectively, according to the judges that know the area best, and if there are intentions to actually hear out their positions. The same activity can provide a negative example, however, when a judge influenced by the prospect of individual is used as a farce to spearhead a legislative amendment aimed at achieving a result that has garnered the criticism of experts. In this case, the inclusion of a judge in nonjudicial activities can constitute a real risk to the judge's reputation, it can damage their independence and breach the principle of separation of powers.[31] Moreover, the benefit of the judge's participation is then concentrated only to the specific political actor, who has the opportunity to engage the judge in the nonjudicial activity. At the same time, the activity is at the expense of the judiciary's reputation, who might not have an effective opportunity to stand against the participation of individual judges on such motives in nonjudicial activities.

Looking at it rationally from the side of the judges, it could be said that the participation of judges in nonjudicial activities is justified if its benefit to the entire judiciary outweighs both the level of risks as well as costs involved. The situation is critical, when the costs and benefits to the parties cannot be symmetrically distributed. Moreover, the demand curve is dependent on the balance of institutional strength between the nonjudicial field of activities and the judicial system.[32] In a situation, where the nonjudicial institutions are weak but the judicial institution is strong, there is probably more sincere demand for the participation of the judiciary in the nonjudicial activity. However, if the judiciary is in a less powerful position than the nonjudicial institutions, the level of sincere demand is presumably lower, leading to a so-called poor relative effect. Through that, the participation of judges in the nonjudicial activity is a kind of indicator to assess the strength of the judicial system as an institution.

Of regulation and its limits

Finding balance, where judges participate in nonjudicial functions according to determinants related to demand and offer, while avoiding the abovementioned risks, may not be simple every time. Therefore, it is not surprising that most legal orders have not left the situation up to self-regulation, and the limits of judges' nonjudicial activities are set in law. Although a universal optimum does not exist, it seems that across legal orders, a common question is whether the nonjudicial activity tarnishes the dignity of the judiciary profession and whether it could keep the judge from being independent and impartial in their main work.[33] In addi-

[31] See also: Adam M. Dodek, Judicial Independence as a Public Policy Instrument, in Judicial Independence in Context 295 (Adam M. Dodek & Lorne Sossin eds., 2010); Christopher M. Larkins, Judicial Independence and Democratization: A Theoretical and Conceptual Analysis, 44 AM. J. COMP. L. 605 (1996); Patrick Monahan & Byron Shaw, The Impact of Extra-Judicial Service on the Canadian Judiciary: The Need for Reform, in JUDICIARIES IN COMPARATIVE PERSPECTIVE 428, 438 (H. P. Lee ed., 2011).

[32] Nuno Garoupa and Tom Ginsburg, (reference 13), p 764.

[33] Robert B. McKay (reference 2), p 19.

tion, there are legal orders that base the regulation of judges' nonjudicial activities on the doctrine of *persona designata*, which in turn is based on the objective of maintaining the separation of powers and avoiding the interference of the judiciary power in the competence areas of other branches of government.[34]

In Germany, there is a long-standing tradition, whereby judges participate in high profile nonjudicial functions and the nonjudicial activity of judges is regulated by law. To point out only the essential, a judge can engage in academic activities, act as a judge in a court of arbitration, or give their expert opinion either in an arbitration proceeding or outside of it. Additionally, depending on the labour force situation and public interest, a judge can be transferred to public service. If he or she so wishes, the judge can temporarily be relieved of their judge's duties for up to six years, and a judge can also use the opportunity to work part-time. During that period, the judge can participate only in the kinds of paid additional activities that the law allows, which do not damage the professional duties of the judge.[35] Judges can belong to political parties and they can be elected to representative bodies, including the parliament. During that period, the judges will retain their professional status, and participation in local level politics does not rule out the possibility to fill a judge's professional tasks.[36] Germany's favourable position towards the participation of judges in politics is a consequence of the painful experience that started in 1933, when Adolf Hitler came to power, and lasted until the end of WWII, when judges refused to acknowledge any other task than applying the law and did not ask whether the objective of the laws they were provided was in harmony with the fundamental values of being human.[37]

In Italy, Spain and Portugal, the situation is comparable to that of Germany. Besides arbitration and academic work, judges can also participate in the kinds of political activities that have expressly been permitted. For example, judges can be members of the Justice Council, members of the senate, and serve in the State Council. Judges can also serve with the executive branch of government, mostly as ministers of justice or as heads of departments in ministries of justice or ministries of interior affairs, or sit in committees formed to reform legislation. The right to specify the details of the legal framework has been left to the Justice Council, which gives permits for nonjudicial activities and can grant exceptions to the general rules.[38]

In the United Kingdom, judges' nonjudicial activity is most prevalent in the form

[34] Nuno Garoupa and Tom Ginsburg (reference 13), p 758.
[35] Deutsches Richtergesetz, Apr. 19, 1972, BGBl. I at 713 (Ger.), §-s 4, 39–41 and 48a–48d, available online: http://www.gesetze-im-internet.de (20.01.2018).
[36] Judges are nonetheless assumed to have a background role, not be on the front lines. An example of exaggeration can be found in the AfD member Jens Maier, who has been criticised for excessively loudly being right-wing, see online: http://www.spiegel.de/politik/deutschland/afd-mahnt-jens-maier-wegen-noah-becker-tweet-ab-a-1186736.html (20.01.2018).
[37] See also: Law and Justice in the Third Reich, available online: https://www.ushmm.org/wlc/en/article.php?ModuleId=10005467; Foundations of the Nazi State, available online: https://www.ushmm.org/wlc/en/article.php?ModuleId=10005204 (20.01.2018).
[38] Ordinamento giudiziario, Regio decreto del 30 gennaio 1941, n. 12, art 16, Gazzetta Ufficiale del 4 febbraio 1941, n. 28, available online: http://www.gazzettaufficiale.it; Ley Orgánica del Poder Judicial (B.O.E. 1985, 6), available online: http://noticias.juridicas.com/base_datos/Admin/lo6-1985.html; Estatuto dos Magistrados Judiciais, Lei No. 21/85 de 19 de Julho de 1985, LEX I NTEGRAL, available online: http://www.verbojuridico.net/legisl/estatutos/emj.html (20.01.2018).

of heading investigative committees of significant public importance or in cases that are politically controversial.[39] According to a report of the government's Department of Constitutional Affairs, 30 investigations of high importance have been carried out since 1990, at a cost of 300 million pounds sterling.[40] According to the report, the participation of judges in such commissions is welcomed, and the experience of judges is emphasised in investigating the evidence, in determining the facts and in making conclusions, as is the independence of judges from politics and the influence of political parties.[41]

In the French judicial system, the tradition is that judges do not participate in non-judicial activities. The prevailing stance is that the office of a judge is incompatible with all other publicly held positions and any other work. Individual exceptions are, however, possible with the decision of the chairman of the court in which the judge works. Exceptions are extended mostly for educational work and activities that do not threaten the judges' independence. Acting as an arbitration judge is, however, ruled out. Without previous agreement, judges can engage in academic work and literary or artistic activities.[42] The French approach has a historical-cultural background, which is due to a general mistrust of *noblesse de robe*.[43]

In Estonia, the professional limitations of judges are stipulated based on § 147 of the Constitution[44] in § 49 of the Courts Act, which states in subsection 1 that a judge cannot work outside the profession in positions other than education or research. The same provision also sets out that a judge must notify the chairman of their court, and it foresees the precondition that nonjudicial tasks cannot impede the judge from fulfilling their duties or damage their independence in administrating justice. Subsection 2 of the same paragraph prohibits judges from being members of the *Riigikogu* or members of rural municipality or city councils, members of political parties, and a judge cannot be the founder of a company, a managing partner, a member of the management board or supervisory board of a company, or a director of a branch of a foreign company, a bankruptcy trustee, a member of a bankruptcy committee or the compulsory administrator of an immovable, and a judge cannot be an arbitrator chosen by the parties to a dispute.

At the same time, § 38(3) of the Courts Act provides that those judges, who have been chosen to fulfil the task by the judges' plenary, will in addition to their main work participate in the work of the Council for the Administration of Courts, the Disciplinary Chamber of the Supreme Court, the judge's examination commit-

[39] For example, the investigation into the role of the press and the police in the Rupert Murdoch telephone scandal, available online: http://www.levesoninquiry.org.uk (20.01.2018).
[40] Effective Inquiries. A consultation paper produced by the Department for Constitutional Affairs. Consultation Paper. CP 12/04, available online: http://webarchive.nationalarchives.gov.uk (20.01.2018).
[41] Ibid.
[42] Code de l'Organisation Judiciaire; Ordonnance 58–1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature, Dec. 23, 1958, p. 115 51, available online: http://www.legifrance.gouv.fr (20.01.2018).
[43] Until 1789 the office of a judge in France was a heritable title, see Jean-Louis de Tréourret de Kerstrat, Des qualifications nobiliaires. La jurisprudence nobiliaire par les textes et par l'exemple, Annales de la noblesse, Tome 1, Mémoires et Documents, 1997.
[44] Constitution of the Republic of Estonia (RT I, 15.05.2015, 2).

tee, the assistant judge's competition committee, the judges' training committee, the court of honour of the Bar Association, the advocates' professional suitability assessment committee, the prosecutors' competition and evaluation committee, and the notary disciplinary offence evaluation committee. In addition, § 10(2 (1)(2)) of the Riigikogu Election Act stipulate that the president of the Riigikogu will appoint one first and one second instance judge to be members of the National Electoral Committee. According to § 58(1) of the Courts Act, a judge may be transferred, without a competition, to the state public service, including the service of the Supreme Court or the Ministry of Justice. A judge may also be appointed as the Prosecutor General at his or her request. Additionally, according to § 58^1(1), a judge may be elected or appointed to the position of a judge of an international court institution or participate as an expert in an international civil mission, however, during that period the authority of a judge is suspended. § 73(1) of the Courts Act states that a judge shall supervise judges of a court of first instance with less than three years length of service and persons completing the preparatory service plan of an assistant judge, if this responsibility is delegated to him or her by the chairman of the court. § 74(1) of the Courts Act states that a judge is required to develop knowledge and skills of his or her speciality on a regular basis and participate in training.

In addition to the law, in nonjudicial activities, judges also have to adhere to the code of ethics, provided for in § 38 (3 (9)) of the Courts Act,[45] which details the limits of judges' nonjudicial activities from the aspect of professional ethics. The code of ethics demands judges to maintain the reputation of integrity and independence of the judiciary, and in section 3 emphasises the importance of arranging a judge's life and activities in a manner that avoids threats of possible conflicts with judicial duties. According to sections 5 and 29 of the code of ethics, a judge may also be active in citizens' associations and charitable organisations, belong to professional organisations both as an ordinary member and official, while avoiding the conflict of interests and being taken advantage of against the interests of the administration of justice. Section 28 states that a judge can participate in social and cultural life in conformity with the traditions of good conduct, while minding that this activity does not prejudice the dignity of their office and is not in conflict with their official duties. A judge may also participate in activities aimed at gaining a profit, while respecting the practices of good conduct and fair business. At the same time, section 7 sets out that a judge shall refrain from political activities, and section 24 states that a judge shall not participate in political or profit-making associations as a leader or official thereof. Section 27 sets forth that a judge shall not sacrifice his or her prestige and shall not allow others to take advantage thereof in private interests.

When asking, whether through the limits and responsibilities set to judges in law and the code of ethics the current regulation manages to mitigate the risks, there is no reason to answer in the negative. In practice, it seems that no significant problems have surfaced in relation to judges abusing the opportunity to participate in nonjudicial activities. Although 56% of the reasons for the disciplinary

[45] Code of ethics of judges, adopted at the III regular plenary of judges on 13.02.2004, available online: https://www.riigikohus.ee/et/kohtunikuamet/kohtunike-eetikakoodeks (20.01.2018).

review of judges have been related to inadequate fulfilment of professional duties, these cases are still not a matter of breaching obligations or non-performance due to nonjudicial activities. Nonjudicial activity also cannot be connected to cases, where the judges have been under disciplinary review for dishonourable conduct. These disciplinary cases are more related to the fulfilment of official duties or how leisure time is spent.[46]

Concluding comments

The nonjudicial activities of judges should not necessarily be considered only in terms of limits and bans. Instead, it should be asked whether nonjudicial activities of judges have sufficient positive connotations to promote them. According to professor Robert B. McKay, the nonjudicial activities of judges should be encouraged, if they help lessen the short-sightedness that occurs when the courthouse loses contact with the world that surrounds it, if it helps secure a reinforcement for the ranks through education, if it supports development in skills needed for the administration of justice and for administrative function, and if it has an enriching and educational influence on the judge's public.[47]

On the one hand, most of the nonjudicial opportunities are widely known to judges anyhow, participating in them is regulated and the limits have already developed. So, the chairmen of courts are appointed by another branch of government, the heads of judicial panels are elected by the judges of the particular court; in addition, the judges hold elections for committees within as well as outside of the judicial system, and the appointment of members to the National Election Committee is in the competence of the Chief Justice of the Supreme Court. Judges selected to carry out training courses are those, who have something valuable to contribute, training courses and traineeships are available to all judges who wish to participate, and the right to publication also extends to all judges due to freedom of speech. The opportunity for arbitration work starts with the proposal

[46] The main reason, why disciplinary proceedings are initiated against judges is the unsatisfactory performance of their duties, and that in as much as 56% of all initiated disciplinary proceedings. Indecent acts constitute 27% of initiated cases and non-performance of official duties just 17%. Concerning offences related to office, it is appropriate to point out that one of the biggest causes has been judges breaching the requirements of reasonable time and time limits, which make up as much as 43% of the disciplinary reviews initiated against judges. Errors in drafting the written court decision or other court documents have been cited as the reason in 11% of cases when disciplinary proceedings have been initiated against judges. The remaining 46% are other offences related to office, such as breaching the requirement of impartiality, refusing to administer justice without justification, not giving notice of the date that the court decision will be pronounced, etc. The indecent acts cases of judges can generally be divided into two categories: indecent behaviour under the influence of alcohol and other conduct inappropriate for a judge. The improper conduct of judges under the influence of alcohol makes up as much as 39% of all cases of indecent acts. The remaining cases of indecent acts by judges, 61%, included acts such as insulting; not maintaining the peaceful and dignified comportment appropriate for the position of a judge; inappropriate use of an official title, etc. See also: Laura Otto, Analysis of disciplinary review cases brought against judges and the practice of the Disciplinary Chamber in 2002–2015. University of Tartu, School of Law, Master's thesis, available online: https://dspace.ut.ee/bitstream/handle/10062/51740/otto_laura.pdf?sequence=1&isAllowed=y (20.01.2018).

[47] Robert B. McKay (reference 2), p 20.

of the arbiters chosen by the parties or the arbitration board,[48] service at the Ministry of Justice and at universities functions according to their respective criteria, etc. Also, there are additional activities that depend on the specific position and court instance, especially international cooperation, which is mainly the task of the Supreme Court, since it mostly encompasses cooperation with higher instance courts and constitutional courts. The Supreme Court participates in the Network of the Presidents of Supreme Judicial Courts of the European Union, the Association of the Councils of State and Supreme Administrative Jurisdictions (ACA-Europe), the Conference of European Constitutional Courts, the Venice Commission of the Council of Europe, the EU Forum of Judges for the Environment (EUFJE), the World Conference on Constitutional Justice (WCCJ), the European Judicial Training Network (EJTN) and the International Organisation for Judicial Training (IOJT).[49] Estonia is also represented in the Consultative Council of European Judges[50], and through the Estonian Association of Judges also in the International Association of Judges (IAJ), the European Association of Judges (EAJ) and the Council of the Baltic Associations of Judges.[51] Estonia has appointed one judge to be the liaison judge to the European justice cooperation network, which deals with civil and commercial matters, and one representative to the network of courts established by the Hague Conference on Private International Law.[52] An Estonian judge also participates in the Kosovo Specialist Chamber,[53] and four judges have been selected to be *ad hoc* members to the European Court of Human Rights.[54]

This list of what is already being done is not exhaustive, and there are certainly other nonjudicial activities in which judges participate. Although this list is definitely not short, there is no reason to believe that all opportunities for nonjudicial activities have been exhausted and already taken up by colleagues. Without a doubt, there is room and opportunity to engage in interesting nonjudicial work for more judges who are interested. This especially applies to international cooperation. Through its ministries and state institutions, Estonia is a member of numerous international organisations, with Estonian representatives from other branches of government and the legal system, however, within the justice cooperation of those activities, capable and motivated contributors could also be found among the judiciary. For example, at the Permanent Court of Arbitration (PCA), none of the four Estonian representatives are judges by profession.[55] The Ministry of Justice also represents Estonia in the Group of States against Corruption (GRECO)[56], in the International institute for the Unification of Private Law (UNIDROIT)57,

[48] Arbitral Tribunal of the Estonian Chamber of Commerce and Industry Act § 4 p 1.
[49] https://www.riigikohus.ee/et/rahvusvaheline-koostoo/rahvusvahelised-organisatsioonid (20.01.2018).
[50] https://www.coe.int/en/web/ccje (20.01.2018).
[51] http://www.ekou.ee/index.html (20.01.2018).
[52] https://e-justice.europa.eu/content_about_the_network-431-ee-et.do?member=1 (20.01.2018).
[53] https://www.scp-ks.org/en/specialist-chambers/chambers (20.01.2018).
[54] http://www.echr.coe.int/Documents/List_adhoc_judges_BIL.pdf (20.01.2018).
[55] https://pca-cpa.org/wp-content/uploads/sites/175/2017/07/Current-List-Annex-1-Members-of-the-Court-update-20171205.pdf (20.01.2018).
[56] https://www.coe.int/en/web/greco/structure/member-and-observers#{%2222358830%22:[13]} (20.01.2018).
57 https://www.unidroit.org/about-unidroit/membership (20.01.2018).

in the Confederation of European Probation (CEP)[58] and in the European Commission for the Efficiency of Justice at the Council of Europe (CEPEJ).[59] These are definitely areas, in which it would be appropriate for judges to cooperate.

In addition, there are many international forms of cooperation in which Estonia is currently not represented at all, for example, in the association that brings together judges that stand for democracy and freedom the Magistrats européens pour la Démocratie et les Libertés (MEDEL)[60], the European Expertise and Expert Institute (EEEI), which was founded by the courts of appeals of several member states[61], the European Network for Councils for the Judiciary (ENCJ)[62], which brings together European national institutions that are independent of the legislative and executive branches of government and that aim at supporting the judiciary and independent administration of justice, etc. In addition to organisational participation, judges can also individually become members of the Association of European Administrative Judges (AEAJ)[63], the European Group of Magistrates for Mediation (GEMME)[64], the Association of European Competition Law Judges (AECLJ)[65], the International Association of Refugee Law Judges (IARLJ)[66], the European Association of Labour Court Judges (EALCJ)[67], etc.

Considering the rather wide variety described above, it would also be pertinent to weigh coordinating and supporting nonjudicial activity, first and foremost, through information exchange. For that, a good example could be the current organisation of judicial training. First, the Supreme Court department of training pools information about possible training courses both domestically and abroad. Moreover, the collected information is not only based on passively receiving training offers, instead the specialists at the department actively engage in carrying out a training programme and each year seek opportunities for judges to participate in training, also researching the prerequisites for participating in a particular training course. The collected information is then made accessible to all judges on an equal basis, and all judges have the opportunity to express their preferences and, based on those, participate in training. If the number of places in a training course is limited, a selection is made based on understandable and objective criteria, with the objective of involving as many judges in training as possible. After participating in a training course, reporting is set in place to exchange information, to evaluate the quality of the training programme, and the results for the specific participant and the judiciary as a whole. The training department also gathers information about which judges who have participated in training abroad would be willing to also pass on their knowledge to colleagues in Estonia. This is also a factor that may prove to tip the scales at times, when the selection is made among those who

[58] http://www.cep-probation.org/organisation/types-of-membership/ (20.01.2018).
[59] https://www.coe.int/t/dghl/cooperation/cepej/presentation/cepej_en.asp (20.01.2018).
[60] http://www.medelnet.org/ (20.01.2018).
[61] http://www.experts-institute.eu/ (20.01.2018).
[62] https://www.encj.eu/ (20.01.2018).
[63] http://aeaj.org/page/Home (20.01.2018).
[64] http://www.gemme.eu/ (20.01.2018).
[65] http://www.aeclj.com/ (20.01.2018).
[66] https://www.iarlj.org/ (20.01.2018).
[67] http://ealcj.org/ (20.01.2018).

wish to participate in training. An analogous type of coordination would also be beneficial for other kinds of nonjudicial activities. Also, aggregating information about nonjudicial activities for judges could help correct the tendencies described above for the actualisation of risks.[68]

To answer the question of whether a judge engaged in nonjudicial activities is also better at administering justice, coming back to Maslow, the answer is yes. In addition to the fact that according to Maslow's theory, a working person can significantly be motivated through opportunities for creative and developing activities or self-actualisation, another interesting nuance ties in with Maslow's theory, which is not talked about often in the context of his theory, but still is noteworthy nonetheless. More specifically, Maslow claimed that a person who has fulfilled their self-actualisation needs also achieves a new level in their personal development. According to Maslow, self-actualisation brings the highest level of experiences, which widen horizons, change the perception of life, and increase capacity for activities after the experience. People who have met their self-actualisation needs have a strong sense of reality, they are tolerant, have a democratic view of the world, a strong sense of responsibility, they are independent, they value privacy, are oriented to meeting their personal potential, they have a very deep sense of humour, are open to new things, they enjoy the path that takes them towards their objectives, and they are members of society, who feel a deep sense of unity towards humanity.[69]

[68] See Supra, Motives and risks. A central review would be beneficial, for example, for making conclusions in a situation, where the excessive occupation of a judge in nonjudicial work causes lacking performance in their main work. Although the second sentence of § 49(1) of the Courts Act demands that a judge shall notify of his or her employment other than in the office to the chairman of the court, this type of monitoring alone might not be sufficient. First, the chairman of the court might not have knowledge about the quality of the main work of individual judges, since this is evaluated by the next highest court instance. Second, other occupations that lead to poor performance in judicial work could also affect the chairman of the court, who according to current regulation does not have the obligation to notify anyone of his or her nonjudicial work.

[69] See also: Abraham H. Maslow, Motivation and Personality, New York, Harper, 1954.

THE PAIN AND BEAUTY OF LEGAL TRANSLATION IN THE EUROPEAN UNION JUDICIAL SYSTEM

Liina Teras, Head of the Estonian Translation Unit at the Court of Justice of the European Union[1]

The European Union is unique among associations of nations due to the fact that one of its founding principles is multilingualism, which means that the Member States and their official languages are equal.[2] That is why already Article 248 of the Treaty establishing the European Economic Community, signed on 25 March, 1957, provided that the texts of the treaty drafted in the official languages of states adhered at that time[3] were equally authentic. Article 1 of Council Regulation nr 1[4], adopted the following year, lists all of the community's (now union's) official languages, which are the official languages of all member states. That provision is adjusted each time a new member joins the European Union, if that also means that a new language is added. Since § 6 of the Constitution of the Republic of Estonia sets out that the official language of the state of Estonia is Estonian, on 1 May 2004, when Estonia joined the European Union, the Estonian language also became an official language of the union. Therefore, even with its population of 1,3 million, the Estonian language has exactly the same weight as the official language of Germany, a state with a population of 81 million.

Currently, the EU joins 28 Member States and has 24 official languages: Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, and Swedish. In addition to numerous political, economic, and other documents on the functioning of the EU, all regulations and other acts of general application, as well as most decisions of the Court of Justice of the European Union[5], are published in these languages. Moreover, all

[1] All the opinions expressed in this article belong solely to the author and in no way express the positions of the Court of Justice of the European Union or any other EU institutions.

[2] According to Article 3(4) of the Treaty on European Union (TEU), the EU respects its rich cultural and linguistic diversity. The same principle is repeated in Article 22 of the Charter of Fundamental Rights of the European Union, which also adds religious diversity.

[3] At the time of signing the Treaty, there were four official languages in the six Member States – German, French, Italian and Dutch.

[4] Council Regulation nr 1 of 15 April 1958 determining the languages to be used by the European Economic Community (Official Journal of the European Communities 1958, 17, p 385; ECR Estonian language special edition 01/01, p 3).

[5] The Court of Justice of the European Union is an institution that comprises two courts: the Court of Justice and the General Court. When using the name of the institution, both instances are considered.

the texts are official, authentic, have equal legal authority and validity, and they are not only binding to all Member States, but they also outline the rights and responsibilities of the EU's over 500 million citizens. It is precisely the primacy, the direct applicability and effect of EU law, which create the need to publish all legal acts of the EU in all official languages and to ensure equality between the languages.[6] After all, one of the main guarantees of rule of law is that laws and legal remedy is accessible to all citizens in their official languages.

The rights and obligations that extend to Estonian citizens and legal persons registered in Estonia and that stem directly from EU law are accessible in the Estonian language thanks to legal translation, which is guaranteed by EU institutions, especially the European Commission, the Council of the European Union, the European Parliament, and the Court of Justice of the European Union.[7] Therefore, the functioning of EU law and the effectiveness of its application on the Estonian territory is directly dependent on the quality of that translation. The translations of EU legal acts and case law inevitably influence and shape Estonian legal language and terminology as well, already due to the fact that EU regulations are directly applicable in the Estonian legal system in the wording that has been chosen and accepted in the translation process in the institutions, and in transposing directives, often times the choice made is to use the terminology of the directive rather than risk the possibility that the Commission will initiate infringement procedures due to failure to transpose the directive properly.

To a bystander, the principle of multilingualism might not seem pragmatic at all, because it is costly both in terms of money and time, and it does require considerable human resource. This is felt especially in the administration of justice, because the time required for translation directly impacts the duration of the proceedings and the efficiency of a judicial remedy.[8] Nevertheless, the pragmatism argument in no way outweighs the principles of democracy and rule of law that have been placed on the other side of the scale. After all, the determination of a language as an official one expresses the state's national identity and the state's responsibility to defend and develop that language.[9] According to Article 4(2) of TEU, however, the EU honours the equality of the Member States before the Treaties as well as their national identities. This is also reflected in Article 20 of the Treaty on the Functioning of the European Union (TFEU), which in section 2(d) provides that

[6] Nonetheless, the EU legislator has foreseen two exceptions for the Maltese and Irish languages, which were above all due to practical considerations, meaning the lack of a sufficient number of translators for both languages, to ensure that all legal acts and court decisions would be available in these languages. In the case of the Maltese language, the Council Regulation nr 930/2004 that implemented the exception for 3 years ran out on 30 April 2007; the exception for the Irish language was applied by Council Regulation nr 920/2005, it is still in force and extendable by increments of 5 years. At the same time, the exception does not apply to legal acts, which are always translated into Irish as well.

[7] Additionally, numerous documents are translated into the EU languages by the European Economic and Social Committee and the Committee of Regions in their joint translation service, at the European Court of Auditors, at the European Central Bank, at the European Investment Bank, and the Translation Centre for the Bodies of the European Union.

[8] The right to an effective judicial remedy and the right to be tried within a reasonable time are guaranteed with Article 47 of the Charter.

[9] Constitution of the Republic of Estonia. Commented edition. Fourth, revised edition, Juura, 2017, § 6. Available online: http://www.pohiseadus.ee/index.php?sid=1&ptid=10&p=6.

citizens of the EU have the right to petition the European Parliament, to apply to the European Ombudsman, and turn to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

Although legal translation is done in several EU institutions in parallel, this article is dedicated first and foremost to the challenges that the principle of multilingualism poses to the functioning of the Court of Justice of the European Union, where translators are without exception lawyer linguists, who know the legal systems and language of their state well. I will explain what is the role of the translation service in guaranteeing court proceedings, what are the difficulties entailed with legal translation and the high demands on quality, what is the direct influence of translating EU legal acts to translating judicial practices, and how the Estonian translators' community in EU institutions works together. Lastly, I will, so to speak, try to tell the future in the coffee grounds, and offer up some measures that Estonia could take to help raise the quality and ensure the sustainability of legal translations in the interests of the state.

The principle of equality between languages in the practice of the Court of Justice of the European Union

However, before we move on to dissect the inner workings of how translation functions at the Court of Justice of the European Union, it is worth recalling a few significant court decisions and court principles, which emphasise the equality of languages and, through that, the need for uniform application of law and legal certainty.

Already in its historic 1982 judgment CILFIT,[10] the European Court of Justice emphasised that the legal acts of the EU have been developed in several languages and the different versions are equally authentic, which means that the interpretation of EU legal norms requires the comparison of the different language versions. The Court added that even if the versions in different languages fully correspond to each other, the terminology used in EU law is unique to the Union, and the same legal terms in EU law and Member State law might not have the same substance.

Also, settled case law has provided the requirement to interpret and apply the legal norms of the Union in a uniform way, while considering all the versions in all languages of the Union. It would be in contradiction with this requirement if the wording used in one version were used as the only basis for interpreting a particular provision, or if the version in that particular language were given priority over other language versions.[11]

Concerning the obligation to publish legal acts in the Official Journal of the Eu-

[10] Judgment of the Court of Justice of 6 October 1982 in CILFIT, 283/81, EU:C:1982:335, p 18.
[11] Judgment of the Court of Justice of 19 April 2007 in Velvet & Steel Immobilien, C-455/05, EU:C:2007:232, pp 16 and 19.

ropean Union, from the Estonian perspective, the judgment in the case of Skoma-Lux is especially interesting.[12] More precisely, the European Court of Justice interpreted the 2003 Act of Accession[13] and the abovementioned Council Regulation nr 1 to mean that they rule out the opportunity to apply obligations stemming from EU law to individuals, if these norms have not been published in the Official Journal in that Member State's language, and also if these persons would have had the chance to read these legal norms using other means, for example, electronically on the EUR-lex website.[14] The court stressed that a regulation can take effect in law only if it has been published in the Official Journal in the Member State's language, because the opposite interpretation is not in line with the principles of legal certainty and non-discrimination.[15]

Since the European Court of Justice gave the same interpretation, when the Supreme Court of Estonia referred the case of Pimix to the Court for a preliminary ruling,[16] the Estonian state could not demand that businesses pay a fine for agricultural surplus stock. Motivated by this decision, Estonia also applied to the Commission for the annulment of the so-called sugar fine that it had been issued,[17] because in the cases of Skoma-Lux and Pimix, the court determined that the Union's legal norms had been left unpublished in a timely manner due to the non-performance of duties by the Union's administration.[18] The Commission did not change its decision, and in its judgment T-117/15 of 24 March, 2017,[19] the General Court dismissed the petition by Estonia against the Commission as manifestly inadmissible. At the time of writing this article, the following appeals procedure initiated by Estonia (case C-334/17 P) has not yet been completed.

This case law confirms how important it is to publish legal acts in all official languages of the Union, so they could be used in actions against individuals and require them to fulfil the obligations set out for them in EU law.

Multilingual administration of law at the Court of Justice of the European Union

The need for legal translation is also dictated by the multilingual nature of administering justice in the EU. The order of language use, which is regulated in

[12] Judgment of the Court of Justice of 11 December 2007 in Skoma-Lux, C-161/06, EU:C:2007:773.
[13] Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003, L 236, p 33).
[14] Judgment in Skoma-Lux, p 51. Here it is appropriate to remember that during the pronouncement of this judgment, the only official version of the Official Journal of the European Union was the one that was published on paper. Since 1 July 2013, the OJ published electronically on EUR-Lex is authentic and has legal force.
[15] *Ibid*, pp 33–36.
[16] Judgment of the Court of Justice of 12 July 2012 in Pimix, C-146/11, EU:C:2012:450.
[17] Decision of the Commission nr 2006/776/EC of 13 November 2006 on the amounts to be charged for the quantities of surplus sugar not eliminated, OJ L 314, p 35.
[18] See Court judgment in Skoma-Lux, p 41 and Court judgment in Pimix, p 44.
[19] Court judgment in Estonia vs. the Commission, EU:T:2017:217.

Articles 36–42[20] of the rules of procedure, therefore, logically provides that all 24 official languages of the Union can be the languages of court proceedings.[21] In practice, that means 552 possible language combinations, into which the court has to provide interpretation as well as translation.

Due to practical considerations and especially for ensuring the secrecy of the discussions,[22] the court also has an internal working language, which for historic reasons is French. Therefore, for administering justice it is necessary for all procedural documents submitted in written proceedings to be translated into the language of the court case as well as French. Requests for preliminary ruling are always translated into all languages of the European Union and forwarded to all Member States.[23] The hearing will always be held in the language of the case, however, the judges are provided simultaneous interpretation only into the official language of the Union that they have chosen, and the Member States make their statements in their official languages, and EEA states and third states use one of the official languages of the Union. When the Advocates General submit their proposals on a case, they do so either in French, English, German, Spanish, Italian or Polish. The court decision is always written first in French, and by the date that the decision is pronounced, it must be translated into all official languages of the Union. The judgment published in the language of the case is considered the original (although usually this is a translation), which is then signed by the judges. All other language versions are still official texts as well, and they are published in the electronic archive of court decisions. If there are divergences between language versions, the decision published in the language of the case is taken as a basis, and it is also the only one that must be changed with an order of the court, when an error is found.[24]

[20] Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29.09.2012), amended on 18 June 2013 (OJ L 173, 26.06.2013, p 65) and 19 July 2016 (OJ L 217, 12.08.2016, p 69). The Rules of Procedure of the General Court of 4 March 2015 (OJ 2015, L 105, p 1, amended on 13 July 2016, OJ 2016, L 217, p 71) have provisions of analogous content in Articles 44–49.

[21] Preliminary ruling procedures are always in the language of the Member State, whose court submitted the request to the Court of Justice. In contentious proceedings, the language is chosen by the petitioner, however, if the respondent is a Member State, then the language of the proceedings is the official language of said state. In appeals proceedings, the language of the proceedings is the language of the proceedings of the case in the General Court. Privileged parties to proceedings or Member States use their official language in proceedings at the Court of Justice. States parties to the Agreement on the European Economic Area (EEA), the EFTA Surveillance Authority, and third countries can choose one of the official languages of the Union, which they will use for submitting their written and/or oral statements. EU institutions and parties to the proceedings who are individual natural persons (especially in preliminary ruling proceedings) are bound to the language of proceedings that has been chosen according to the rules described above.

[22] Only judges can participate in these discussions, therefore, they do not have the opportunity to communicate with each other via interpreters.

[23] In the portal of the European Judicial Network, launched on 1 January 2018, these applications in all language versions are also made available to all Member State courts.

[24] The conditions for the rectification of a court decision are stipulated in Article 154 of the Rules of Procedure of the Court of Justice. However, in case of a suspected translation error, it would be useful for a reader to verify the French language text of the decision because that is the text that was discussed by the judges and the wording that they agreed on. Thanks to the vigilance of one Estonian jurist, the Court also managed to catch and correct one very important error in the originals of a judgment with two procedural languages. See also: H. Sepp, Õigus ja keel, Õiguskeel, 1/2017, p 2–3.

Since multilingualism works hard against the need to make the judgment within a reasonable time limit, the European Court of Justice has taken various measures to reduce the impact of translation time on the duration of the proceedings. These measures involve the length of the procedural documents, the selective publication of court decisions, and providing expedited procedure in certain areas for preliminary rulings.[25]

Secret weapon of the Court's translation service – the multifunctional lawyer linguist

For the administration of justice to be possible in this jumble of languages that resembles the Tower of Babel, Article 42 of the Court's Rules of Procedure sets out that "The Court shall set up a language service staffed by experts with adequate legal training and a thorough knowledge of several official languages of the European Union". The practical outcome of this rule is the Directorate-General for Multilingualism, which now employs nearly half of the Court's 2000 membered staff. This service consists of two legal translation directorates, one interpretation directorate, and two horizontal departments, which deal with computer translation programmes, the planning of translations and external translations. In addition, the translators have the help of a department that works on terminology projects, however, after the structural reform of the Court, which entered into force on 1 January, 2018, this unit will be directly under the Registrar of the Court. The legal translation directorates, in turn, are divided into 23 language departments,[26] which employ over 600 lawyer linguists, translation assistants and editors/proof-readers.

The translation service has a two-fold role to fill – on the one hand, it mediates the communication between parties to the proceedings and the Court, allowing for the smooth functioning of multilingual court proceedings. On the other hand, the service ensures that the case law is translated and made available in a timely manner in all languages of the Union. In terms of the protection of fundamental rights, this is essential, because the judgments of the Court of Justice of the European Union are a source of Union law, and they have an *erga omnes* impact, interpreting the legal norms of the Union in such a way that they should have been understood from the moment the legal norms entered into force (*ex tunc*).

So who are these mysterious lawyer linguists and what kind of training do they need to fill this important role? Lawyer linguists (*juristes linguistes* in French) are experts in legal language, who must have a legal education in the language into which they translate legal texts. In addition to the target language, the translators have to have very good command of at least two official EU languages, and due to

[25] For more see: Gaudissart, M-A, Le régime et la pratique linguistiques de la Cour de justice des Communautés européennes, Hanf, D, Malacek, K ja Muir, E, Langues et construction européenne, Bruxelles, Peter Lang, 2010, p 151–157.

[26] Only the Irish language does not have a separate department, because due to the exception mentioned above, not all court decisions and proposals by jurists are translated into Irish, however, the Irish language can still be a language of proceedings. Jurists that translate into Irish work within the English translation department.

the organisation of the Court's work, one of those languages must be French. In practice, lawyer linguists with at least 10 years of experience know at least 4-5 of the official EU languages, from which they are capable of translating documents necessary for the Court's work.

However, language skills and a legal degree alone are not enough. The lawyer linguist also has to be an expert in comparative law, because often three different legal systems are entwined in one case – the national systems of the source language and the target language, and EU law. Here it should be also pointed out that several legal systems may apply in one Member State,[27] one legal system may be expressed in several languages,[28] and one language may be used in the legal systems of several states.[29] These facts significantly increase the challenge set to the lawyer linguist, because within one case, he or she must be proficient in the legal-cultural context of the source language state to understand the terms used in that state's legal system and the legal concepts behind those terms. The lawyer must also know the terminology used in the EU law in that particular area, the autonomous meaning given to those terms, and then they must find suitable corresponding terms for both in the target language, so that the jurist of that state could understand the contents correctly in their own legal language and legal-cultural context. Therefore, terminology work is an inalienable part of legal translation, and to make sure that the translations are uniform and to improve the quality of the texts, the Court uses the common terminology database CuriaTerm. Also, various terminology projects for different areas have been initiated.

At the Estonian translation unit, the translators are without exception Estonians, who have obtained a degree in law from an Estonian university. Knowing the Estonian legal system is important for the Estonian lawyer linguist to be able to weigh whether the legal term of another Member State is similar to that of the Estonian one or different, and decide whether to use the Estonian legal term if it is a similar regulation or use a different term altogether to emphasise the substantial difference between the legal terms.

Since it is inconceivable for all standard language departments, with their 22-24 lawyer linguists per unit, to cover all of the Union's official languages with their jurists, the Court of Justice uses a translation system based on intermediary or pivot languages (*langues pivot*). Due to its status as a working language, French is the natural mediation language, so to speak, which is why the French language department is the only one that has to be capable of translating all the documents from any of the official languages into the working language of the Court. If the other language departments do not have the opportunity (ability) to translate the document directly from the source language, it is done through an intermediary language. For that to function, the Court has divided up the 19 smaller languages between the bigger languages, which are English, German, Italian and Spanish, to

[27] For example, in the UK, there are separate legal systems for England, Wales, Scotland and Northern Ireland.
[28] For example, in Luxembourg, Finland and Belgium, which have several official languages.
[29] For example, in French there is Belgian and French law, in Dutch there is Dutch and Belgian law, in English there is UK law and Irish law, and in German there is German and Austrian law.

ensure that all 552 language combinations could be translated.

So in practice, for example, if a reference for a preliminary ruling comes from an Estonian court, it is translated by the German department (into the pivot language) and the French department (into the working language). All other departments then translate the document from German, however, a jurist from the Estonian department must verify before it is translated into other languages, whether the German and French colleagues have correctly understood the Estonian legal terminology and the linguistic nuances.

The Estonian translation department must be capable of translating documents from all pivot languages, which will include Polish starting in the summer of 2019. Since the volume of translations ordered is quite significant, the Court also uses the help of external freelance translators to a large extent, and those are chosen through an open and permanent procurement process.[30] Last year, the Court used the help of external translators to fill nearly a third of the volume of Estonian translation pages.

Legal translation – mission impossible?

The reason why legal translation requires a legal education from the translator lies in the complexity of legal jargon. Legal text is very complicated to translate, because while legal terms might be similar at first glance, in different legal systems they might signify legal concepts or constructs that have a different scope and content. A term is always a signifier that is agreed on, and the legal jargon of one legal system is a closed system, which does not refer to anything external.[31] Unlike translating literature, the translator of a legal text does not have any creative freedom or right to interpret the text that needs translation, correct it or improve it. The translation must always be very exact, clear, understandable, unambiguous and complete, however, often times a term from the legal jargon of one state does not have an equal in the legal jargon of another state or the same terms carry legal definitions that are entirely different in their substance. Even elementary concepts such as 'worker' or 'court' can signify in different Member States and also in EU law rather different groups of persons or organisations. Each translation must be correct in its use of language as well as uniform, so that the translation would be of good quality and trustworthy. In addition, the translator must have a very good command of the target language, grammar, orthography and syntax, use correct word order, and know the difference between theme and rheme. At the Court of Justice, style and format guides are also important, and they need to be studied and followed closely.

Nevertheless, I would like to draw special attention to the unique aspects of translating between French and Estonian, which will perhaps allow the Estonian jurist to better understand why the text of a judgment by the Court of Justice of the Eu-

[30] https://curia.europa.eu/jcms/jcms/Jo2_10741/direction-generale-de-la-traduction-collaborateurs-free-lance

[31] Bellos, D, Is That a Fish in Your Ear?, London, Penguin Books, 2011, p 224.

ropean Union is such a tough read and at times just hard to understand. There are several reasons. First, the style of the judgments of the Court of Justice has been strongly inspired by the French courts, where historically the decision consists of one single sentence that spans dozens of pages. This one sentence style also prevailed in the Court of Justice in the beginning. Luckily, over the years the Court of Justice has changed its style, and decisions now do contain more sentences; however, often they are still a dozen or so lines long, and here the translator does not have permission to shorten the sentence.

Second, the grammatical differences between Estonian and French must be considered, especially the problems that arise in Estonian due to its lack of articles, grammatical gender, certain polite forms, the future tense and also the conditional tense. The latter is used by the court often to pass on the position of a subject without naming them, however, without being able to confirm whether the statement is true. This is often translated into Estonian as a declarative statement and in the present tense, so the reader might not understand that the position is not one of the court. If this text appears under the heading "The Positions of the Parties", then there should be no problems with understanding, however, it is not that clear every time. Also, it is characteristic of the French legal jargon to join all sentences and phrases with certain conjunctions and systematise arguments, which is not usually the norm for written Estonian. Therefore, the translator is often faced with the dilemma of whether to start the sentence with "to begin with", "next", "besides", "to the contrary", "finally", "on the one side", "on the other side", etc., or whether that nuance should be captured in the text in some other manner, for example, by using an inflectional suffix or an adverb.

Third, it is worth remembering that the text of a court judgment is a compromise reached during negotiations. Since decisions at the Court of Justice are made anonymously based on the principle of a simple majority, and the judges do not publicly express their differences in opinion, they often try to reach a result that satisfies as many judges of the chamber as possible.

The result might be a text that is not always unambiguously comprehensible and clear. That may be intentional, and in that case the translator is obligated to maintain the ambiguity or intentional inaccuracy in the translation as well.

Considering all these demands and circumstances might leave the impression that legal translation is a mission impossible, but luckily it is not that bad. Sometimes, however, translating court decisions can be more complicated due to the Estonian language translations of EU legal acts, which have the force of law, and changing them if inaccuracies surface is not simple at all, although at times it is inevitable.

Translating EU legal acts and interinstitutional cooperation

Translating case law is significantly different from the process of translating the Union's legal acts, which is why certain problems are already pre-coded into the legal translation system. As mentioned above, the EU legal acts are translated by

the Commission, the Council and the Parliament. All these institutions have their own Estonian translation units,[32] which employ translators with very different training and education backgrounds. A legal degree is not mandatory for translators in those institutions.

Translating one legal act, however, is a process that takes years and includes translators from several institutions, editors, translation assistants, and often terminology specialists as well.[33] The preliminary translation text of a future legal act, as a rule, is completed at the Commission, which then submits the draft proposal to the Council and the Parliament. The draft proposal is compiled on the level of committees or working groups, mostly in English, and then translated into all other official languages of the Union. After that, the text is sent with all the translated versions to the Council and the Parliament, who then discuss the draft proposal and make changes and additions. These institutions agree amongst each other, who will be responsible for the legal act, and that in turn determines, who translates and edits the whole text. Each institution translates their own proposals for changes separately. In the end, the text of the legal act gets the finishing touches by the lawyer linguists of either the Council or the Parliament. Therefore, the translation of an EU legal act is born in the cooperation of many participants, and the efficiency of that cooperation largely determines the quality of the translations of these legal acts as well.[34]

But what then is the problem in the end? First, the differing source languages. While EU legal acts are translated into Estonian mostly from English, the Court of Justice takes the French text as a basis when interpreting the acts. Therefore, a translation problem may arise if the English and French texts are different, and in that case the Estonian version is definitely is based on the English version. Second, it has happened that in the Estonian text of the legal act, for example in case of a list, words with a very similar meaning have been left untranslated. In that case, Murphy's law almost always applies, because there is always a court of some Member State that then as if deliberately asks the Court of Justice what the difference is between those two or three words, of which one has not been translated into Estonian. Or then it has also occurred that leaving one word untranslated has reversed the meaning of the provision. That happened, for example, in the joined cases C-145/15 and C-146/15,[35] which involved the regulation that implemented rules for paying air passengers compensation. More specifically, Article 5 section 5 subsection c of the regulation stipulates in Estonian that if a flight is cancelled, "the passengers concerned have the right to compensation by the air carrier in accordance with Article 7, *if*," which is then followed by the conditions. The Estonian reader understands that these are the conditions for receiving compensation that need to be fulfilled. However, in English instead of the "if", there is the word "unless" and in French it is "à moins que", which means "except in case when", which is why the following is a list of conditions that rule out receiving com-

[32] The translation services of the Commission and the Parliament are located in Luxembourg, the Council one is in Brussels.
[33] K. Susi, Eurotõlge sünnib koostöös, Õiguskeel, 4/2016, p 1.
[34] *Ibid*, p 1–2.
[35] Judgment of the Court of Justice of 17 March 2016 in Ruijssenaars and others, EU:C:2016:187.

pensation. Here a corrected translation had to be made in translating the court judgment, because otherwise the text of the judgment would have turned out to be very illogical.

Third, a great temporal distance also has a role to play. This aspect separates the translation of the legal act from its interpretation by the Court of Justice, which can span from a few years to a few decades. For example, that is why the Court of Justice even now answers several references for preliminary rulings, in which it is asked to interpret the Sixth VAT Directive (77/388/EEC) from 1977, although as of 1 January, 2007, the new VAT Directive 2006/112/EC is in force, where several terms have been made more precise, however, it wasn't considered useful to retroactively change the earlier, already repealed directive.

Of course, the Court of Justice works with the other institutions, and there are regular meetings of the Estonian language translation communities including the heads of translation units, terminologists and quality advisors. Nevertheless, the working methods of the court, which translates case law, and the institutions, which translate legislation, are so different that on a daily basis it is not possible to consult with each other and give advice or feedback. Together the units do try to come up with ways to improve cooperation and communication with Estonian specialised terminology experts, plan the creation of a common terminology network, organise joint language training courses, and exchange experiences about organising external translation and improving translation quality.

The Estonian translation units of the institutions are also interested in having their translation work as a contribution to the development of the Estonian language and specialised terminology reflected in the strategic plan "Estonian Language Strategy 2018-2027", which is in development; however, this primarily requires political will and dialogue.[36]

Future predictions

In the information technology era, it is self-evident that computers are replacing human workforce everywhere possible. To the EU translation industry and the Union's taxpayers, the development of language technology is definitely a big relief, because money, time, and human resources could then be economised and the translation could be entrusted to the machines. Using translation memories is a practice that has been widespread for years, and it simplifies the translation of repeated text, and it ensures better uniformity with earlier translations; of course, assuming that the earlier translations are of a good enough quality that they can be used for support. Neural machine translation is being developed and used in translating more and more, which is a step forward from statistical machine translation. The European Commission's machine translation MT@EC is used to a lesser or greater extent by other EU institutions and organisations as well. Therefore, the role of the translator is increasingly becoming that of an editor, however, that leads to the risk of new types of errors arising.

[36] H. Pisuke, Tõlkimine ja uus eesti keelestrateegia, Õiguskeel, 3/2017, p 2.

Since, as we know, the machinery of the courts is one that turns slowly, it is doubtful, whether machine translation can provide satisfactory results in the legal field in the near term, from the perspective of the Court of Justice of the European Union. Personally, I remain sceptical about the quality of translation achieved through those solutions, especially considering the complicated nature of legal translation described above. I doubt whether a machine can learn the legal terms used in the legal systems of all Member States, compare them to each other, and take into account their contexts to offer solutions that would give the Estonian jurist a text drafted in the source language in an accurate and comprehensible way. Perhaps that will be possible one day, but at least for now the systems that have been developed, in my opinion, do not enable it yet; moreover, machine translation developers mostly work on the English-Estonian-English direction, which is of considerably less use to the Court of Justice than French-Estonian programmes. For that reason, I think it is much more important to invest in the development of a legal translation programme in education, and intensify, first and foremost, the teaching of French language and EU law in the law schools of Estonian universities. The number of Estonian jurists at the Court of Justice and the General Court is unfortunately not great, and the main reason is precisely the insufficient knowledge of the French language.[37] In recent years, the yearly translation volumes of the Court of Justice have surpassed the million page limit, and the more time elapses, the more the Court must rely on its network of external translators to cope with the volume. Already now, the Estonian unit does not have enough Spanish, Italian, and Polish language translators, and generally translators with a legal education, regardless of the pivot language. The need for reinforcements is also confirmed by the number of incoming court cases, which shows a steady growth tendency from year to year, and the recent Court reform, which doubled the number of judges at the General Court, which in turn increases and accelerates the productivity of that court. These facts do not give reason to project any decreases in workloads in the coming years.

In summary, I would like to emphasise that translating the case law of the Court of Justice of the European Union is extremely exciting, challenging and varied work, where the price per error is very high, where there is usually too little time, and you cannot check what the right answers are anywhere. Nevertheless, the effective protection of Estonian people and businesses depends on the quality of and timely access to those translations, as does the opportunity of the Estonian courts to correctly understand EU law and apply it properly.

[37] This knowledge would give an Estonian jurist the opportunity to apply for the position of an advisor at the Court of Justice or the General Court, which would give an invaluable experience and a unique opportunity to contribute to the interpretation and development of EU law.

A PARADIGM SHIFT IN CRIMINAL PROCEDURAL LAW

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The competence of the European Union in the areas of penal law and cooperation of Member States in the area of justice has expanded with each successive founding treaty. With the Treaty of Lisbon,[1] the previous third pillar situation was repealed, which had inhibited the possibilities of the Union's institutions to interfere in penal law, and the European Union was given the competence to regulate the rights of persons in criminal procedures.[2] The attention of the EU, which was previously directed towards efficient cooperation and criminalisation, has now shifted to strengthening the procedural rights of suspects and the accused. The establishment of a EU dimension in criminal procedural law has an influence that significantly changes the functioning and foundations of this area. The process that started with the adoption of rights of defence directives signifies a change in how criminal procedural law is applied and interpreted. In addition to the Supreme Court and the European Court of Human Rights (ECtHR), the role of shaping procedural rights has now been taken up by the European Court of Justice located in Luxembourg, which has the opportunity, via preliminary rulings, to interpret rights of defence already during criminal proceedings.[3] Therefore, the ultimate interpreter of these rights that are now covered with directives and taken up into the Code of Criminal Procedure, is no longer the Supreme Court, but the European Court of Justice. In legal literature, the new legal situation has been called a paradigm shift, because the area, which has so far been rather untouched by the influence of the European Union, is one that judges as well as others who apply the law will now have to approach in a different way.[4]

The competence of the European Union in regulating criminal procedural law

The reasons for the appearance of European Union penal law are rooted in events that took place at the beginning of the 1970s, when the spread of organised and international crime grew. In 1975, the first meeting of ministers of justice and internal affairs took place in Rome, with the objective of looking for solutions to fighting crime together. The series of TREVI meetings that formed in the course of that meeting at first constituted technical cooperation, which remained outside

[1] The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. OJ C 306, 17.12.2007.
[2] V. Mitsilegas, EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe, Oxford and Portland, Oregon: Hart Publishing, 2016, p 4–11.
[3] A. Soo, Milliseks kujuneb Euroopa Kohtu roll kaitseõiguste tagamisel kriminaalmenetluses? Juridica, nr 9, 2016, p 666–667.
[4] V. Mitsilegas, EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe, p 183–184.

of the European Community's institutional framework completely. By the mid-1980s, cooperation between Member States included mutual support in questions related to the trafficking of drugs and humans, illegal arms trade, and illegal immigration, and an increasing number of contact points with common market regulations started to appear. That was followed in 1992 with the Treaty of Maastricht and the restructuring of TREVI into the third pillar of the European Union, which was the basis for the formation of European Union criminal law.[5]

With the Treaty of Maastricht and the justice and security cooperation contained in the third pillar, criminal justice competence was given to the European Union, but not the European Community.[6] This remained so also until after the Treaty of Amsterdam, when the third pillar was partly reorganised to an area that included freedom, security and justice, with the objective of providing citizens with a high level of protection.[7] The Union's third pillar measures were initially only intended to be instruments of voluntary cooperation, because states did not want to relinquish their sovereignty in questions of penal law. However, with the judgment of the European Court of Justice C-105/03: Pupino, it was decided that the principle of loyal cooperation also extends to police cooperation and justice cooperation in criminal matters, and that the third pillar framework decisions had the same mandatory force as the directives of the first pillar.[8] This interpretation by the Court brought to the third pillar the principles of of EU law and direct effect, and it showed that the justice cooperation of Member States in criminal matters is not of a voluntary nature. The disappearance of third pillar characteristics and the move closer to the first pillar continued due to the impact of the Court of Justice's judgment, until the Treaty of Lisbon entered into force and the system of pillars was finally repealed.[9]

The field of activities, which initially began with the limited cooperation of Member States and then was contained within the third pillar before the Treaty of Lisbon, is now under the shared competence of the Union and its Member States. All of the EU law principles apply to it, and instead of the previous unanimity principle, legal acts in the area are now adopted with a qualified majority. This means that each time that the European Union exercises the competences given to it by the founding Treaties in applying legal acts, the scope of the Member States' decision-making over that particular matter is reduced. At the same time, according to Article 67(1) of the Treaty on the Functioning of the European Union (TFEU),[10] when constituting the area of freedom, security and justice, respect is maintained for the different legal systems and traditions of the Member States, and a complete uniformisation has not been set as an objective. In addition, according to Ar-

[5] A. H. Gibbs, Reasoned "Balance" in Europe's Area of Freedom, Security and Justice. European Law Journal, Vol. 17, 1, p 122–123.
[6] S. Peers, EU Justice and Home Affairs Law. Second Edition. Oxford: Oxford University Press, 2006, p 381–382.
[7] V. Mitsilegas, EU Criminal Law. Oxford and Portland: Hart Publishing, 2009, p 85.
[8] Judgment of the Court of Justice of 16 June 2005 in C-105/03 (Maria Pupino), ECR 2005, p I-05285, p 42–44.
[9] Herlin-Karnell, E. Waiting for Lisbon... Constitutional Reflections on the Embryonic General Part of EU Criminal Law, European Journal of Crime, Criminal Law and Criminal Justice, 2009, 3, p 229.
[10] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 83, 30 March 2010.

ticle 68 of the TFEU, Member States retain the right through the European Council to determine the priorities and directions in the area themselves. Nevertheless, the opportunity given to the Union in the founding Treaty to approximate criminal procedural law norms does bring principal and widespread changes.[11]

Based on Article 82(2)(b) of the TFEU, giving competence for the establishment of minimum rules pertaining to individuals in criminal procedures was one of the most significant changes in the Treaty of Lisbon in the area of penal law. Before that, the founding Treaties did not specifically contain a suitable provision for the establishment of rights of defence, which is why previous conventions and framework decisions that influenced criminal procedural law were geared towards the functioning of cooperation in the area of justice, not towards the regulation of the rights of suspects and the accused. Although justice cooperation between Member States, including the problems that arose with the practice of the European Arrest Warrant, gave an impetus to Union-wide action on rights of defence, most of the earlier attempts failed. The opposition of the Member States towards the appearance of Union-wide criminal procedural law stemmed both from the desire to maintain the differences in and sovereignty of criminal law systems, but also from the fact that the matter had not been agreed upon before in the founding Treaties. Even after Lisbon, the EU does not have an unlimited competence to apply criminal procedural law: Article 82(2) of the TFEU states that it can be done through directives, in the form of minimum rules, and only to the extent that it is necessary for the facilitation of the mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having cross-border dimension. This means that Member States do have to transpose the minimum requirements from the directives, however, they retain the characteristic features of their legal order and, compared to the directive, can guarantee a higher level of protection.[12]

Before the Treaty of Lisbon entered into force, there was much debate on how to protect the legal orders of Member States against the excessive invasion of EU law. It was feared that the EU legislation in this area would lead to the disappearance of national values and that it would endanger the retention of Member State sovereignty. This, however, led to a situation, where Union-wide actions related only to criminalisation and ensuring cooperation between justice institutions, and the rights of individuals did not receive sufficient attention. Today, the focus of the debate has shifted from protecting sovereignty to the question of how to achieve a balance between the protection of effective legal orders and the protection of persons' rights. Due to the cross-border dimension of crime and the Member States' close connections, the common understanding has appeared that it is no longer possible to manage without cooperation and bringing penal law and criminal procedural norms closer together. Therefore, since the end of 2009, the gradual process of establishing Union-wide minimum standards for criminal procedural law has been initiated. The priorities of the EU in criminal policy and the pressure of the debate in the area to reshape the legal framework, which until

[11] V. Mitsilegas, EU Criminal Law, p 36–43.

[12] V. Mitsilegas, EU Criminal Law After Lisbon. Rights, Trust and the Transformation of Justice in Europe, p 154–157.

now has fostered free market economy, to the protection of the rights of individuals should make the penal law of the EU more multitiered and balanced than it has been so far.[13]

Directives on the rights of defence have been adopted based on Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.[14] As a measure of the Roadmap, based on Article 82(2)(b) of the TFEU, six directives have been adopted:

1) Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings;[15]
2) Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings;[16]
3) Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty;[17]
4) Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings;[18]
5) Directive (EU) of the European Parliament and of the Council 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings;[19]
6) Directive (EU) of the European Parliament and of the Council 2016/1919 of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.[20]

During the Swedish Presidency of the Council of the European Union, the plan was adopted to apply rights for suspects and the accused persons specifically in steps through separate directives, because the fear was that negotiations for a legal act that aggregates all of the most important procedural rights in one would fail. The first to be implemented was Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings. The preamble of this directive explains why the European Union had to take an active leadership role to ensure the principle of fair proceedings: membership of the European Convention of Human Rights had not been sufficient for guaranteeing trust between Member States and

[13] K. Rosin, Euroopa Liidu kriminaalõiguse areng Lissaboni leppe jõustumise järel, Juridica, nr 9, 2015, p 667–668.
[14] Council Resolution of 30 November 2009, on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. OJ C 295, 04.12.2009, p 1–3.
[15] OJ L 280, 26.10.2010, p 1–7.
[16] OJ L 142, 01.06.2012, p 1–10.
[17] OJ L 294, 06.11.2013, p 1–12.
[18] OJ L 65, 11.03.2016, p 1–11.
[19] OJ L 132, 21.05.2016, p 1–20.
[20] OJ L 297, 04.11.2016, p 1–8.

for avoiding problems in the area of justice. Problems were created by the courts of Member States that refused to comply with the framework decision on justice cooperation on the grounds of possible violations of the fundamental rights of the person in proceedings. According to the preamble of Directive 2010/64/EU, strengthening mutual trust requires more consistent application of the rights and defence measures set out in Article 6 of the European Convention on Human Rights and the further perfection of minimal requirements set out in the Convention and the Charter. Implementing minimum standards for common procedural rights serves the purpose of increasing trust between Member States, so that all the justice cooperation in criminal cases, including proceedings involving the European Arrest Warrant[21] and the European Investigation Order[22] would function better.[23]

At the same time, the objective of the European Union institutions and the Court of Justice of the European Union was not to compete in that role with the European Court of Human Rights. Quite the opposite, a representative of the European Court of Human Rights also participated in drafting the texts of the Roadmap Directives. Through cooperation, the case law of the European Court of Human Rights concerning the rights of defence was codified into the directives. The preambles of the Roadmap Directives emphasise that the provisions of the directives that correspond with rights guaranteed by the Convention or the Charter should be consistently interpreted and applied in the same way that they are interpreted in the respective case law of the European Court of Human Rights and the Court of Justice of the European Union. Compared to the Convention, the directives on the right of defence have stipulated more detailed rights and a higher standard of defence in some questions, however, the texts of the directives emphasise that none of their provisions should be interpreted in a way that limits or sets exceptions to the higher level of protection offered by rights and procedural guarantees set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, other respective provisions set out in international law or in the legal acts of Member States.[24]

Is this gathering of the case law of the European Court of Human Rights into these directives justified and necessary? After all, according to Article 6(2) of the Treaty on European Union, the European Union shall accede the Convention on the Protection of Human Rights and Fundamental Freedoms, and its principles already are the founding principles of the Union's law. The new, multitiered system has for that reason even been considered as one that breaches the principle of security of law: the person administering justice has to consider yet another layer of regulation and its rules of interpretation, and the procedures contain additional

[21] Council Framework Decision of 13 June 2002, on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). OJ L 190, 18.07.2002, p 1–25.
[22] Directive of the European Parliament and of the Council nr 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters. OJ L 130, 01.05.2014, p 1–36.
[23] V. Mitsilegas, EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe, p 158–160.
[24] V. Mitsilegas, EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe, p 171–174.

disputes over all possible contradictions between national law and directives of the European Union. On the other hand, it has already been a challenge so far to stay up to date with the case law of the European Court of Human Rights, and the generalisation and aggregation of this case law into one legal act allows easier access to pertinent materials for the judiciary as well as the person subject to proceedings. The codification also allows to raise the standard of protection, although it does add more difficulty in interpreting which directive provision this has been done with and which not. The directives themselves do not provide a quick answer for that question. In any case, the reformation of the right to defence as the secondary law of the European Union does entail a change in the role of judges in applying and interpreting procedural laws.[25]

The significance of the changes for criminal judges

The increasing influence of European Union penal law brings several practical changes and new questions that need to be resolved to the everyday work of Estonian criminal judges. Increasingly often the Estonian Code of Criminal Procedure (KrMS)[26] has to be interpreted in light of European Union law, the questions of criminal defence counsels have to be answered about possible contradictions between the provisions of the KrMS and a directive, decisions on the need to request a preliminary ruling must be made, or justifications must be found for not requesting a preliminary ruling. That requires knowledge about both the contents of the directives, as well as the rules for interpreting European Union law, and the role of a Member State court in applying Union law.

In addition to their function in the organisational structure of a state, Member State courts have to fulfil a role that stems from the need for the functioning of the EU legal system. In the decision of Costa v ENEL,[27] the European Court of Justice explained that individual rights that stem from EU law must be protected by national courts. The Court of Justice of the European Union has a monopoly on interpreting EU law, however, it is also the task of the Member State courts to apply Union law. That can be done either directly or by applying Member State law which transposes the EU legal act.[28]

If a legal norm of the Member State, which has entered into force before the adoption of a directive, is in contradiction with the provisions and objectives of the directive, the Member State has the obligation to bring the national legal norm in conformity with EU law within the deadline for transposing the directive. If the possibility exists that the directive is not correctly transposed and the EU law and national law may still be in contradiction, the court must first attempt to overcome the contradiction by interpreting national law considering the wording and

[25] K. Bard, The Impact of the Lisbon Reform Treaty in the Field of Criminal Procedural Law, New Journal of European Criminal Law, Vol. 2, Issue 1, 2011, p 15–20.
[26] Code of Criminal Procedure. RT I, 05.12.2017, 8.
[27] Judgment of the Court of Justice of 15 July 1964 in case 6/64 (Costa vs. E.N.E.L.). ECLI:EU:C:1964:66.
[28] U. Lõhmus, Kuidas liikmesriigi kohtusüsteem tagab Euroopa Liidu õiguse tõhusa toime? Juridica, nr 3, 2007, p 143–144.

objective of the EU law as much as possible. If that is not possible, the question must be raised about the possibility of directly applying Union law and it must be evaluated whether the concerned provision of the directive is sufficiently clear, accurate and unconditional.[29]

According to criticism by the Bar Association, the rights of defence directives have not been correctly transposed to Estonian law. Concerning Directive 2010/64/EU on the right to interpretation and translation in criminal procedures, the Bar Association has pointed out that the KrMS lacks precise requirements for deadlines and quality assessment criteria for translations.[30] The harshest criticism has been directed at the transposition of Directive 2012/13/EU on the right to information in criminal proceedings – the main complaint is that the suspect's right to see the materials of the criminal file are too limited and differently worded than in the directive (KrMS § 34^1(3)).[31] In Supreme Court case nr 3-1-1-110-15 the question of disclosing information reached the highest court, although the resolution applied for by the defence was not reached, because according to the evaluation of the Supreme Court, there is no contradiction between KrMS § 34^1(3) and Article 7(1) of Directive 2012/13/EU.[32] Such disputes show that from now on, in the criminal law created by the European Union, the individual is at the centre, not the state. The suspects and accused have the right in a national court to directly rely on provisions of the right to defence directives and claim that the state has not transposed the respective obligation correctly or sufficiently. This means that besides the transposition relation between the European Union and Member States, a straight line is also drawn from Union law to the individual.[33] In this kind of a situation, courts have to determine whether they can interpret EU law themselves or whether they have to request a preliminary ruling from the European Court of Justice.

Requesting a preliminary ruling does not mean that the court of the Member State is subordinate to the Court of Justice, but a binding expert opinion that is created in cooperation of courts. Requesting a preliminary ruling is not necessary if an interpretation that is in line with the directive is possible and the content of the directive's provisions does not pose any interpretation problems, since it is a matter already interpreted by the Court of Justice (*acte éclairé*) or if the interpretation is clearly evident (*acte clair*). In case of correct transposition, rights are applied through national law. However, in a situation, where the Estonian law might be in contradiction with EU law, but, the court is not sure, since there is doubt about the validity or interpretation of the Union's legal norm, sending the Court of Justice a request for a preliminary ruling helps. In providing the preliminary ruling,

[29] Judgment of the Court of Justice of 4 July 2006 in case C-212/04 (Adeneler et al), p 121–124. ECR 2006, p I-6057; Judgment of the Court of Justice of 19 June 2014 in the joined cases of C-501/12–C-506/12, C-540/12 and C-541/12, (Thomas Specht et al), p 88–89. ECLI:EU:C:2014:2005; Judgment of the Court of Justice of 5 October 2004 in the joined cases of C-397/01–C-403/01 (Pfeiffer et al), p 103. ECR 2004, p I-08835.

[30] Estonian Bar Association, Participation in legislation in 2013, available online: https://www.advokatuur.ee/est/advokatuur/osalemine-oigusloomes/2013-a--ulevaade, 31.01.2018.

[31] *Ibid*.

[32] Ruling of the Criminal Chamber of the Supreme Court of 4 May 2016 in case nr 3-1-1-110-15.

[33] V. Mitsilegas, EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe, p 175–176.

conformity of the national law with EU law is not evaluated, but rather the EU law is interpreted; however, requesting a preliminary ruling still helps the judge determine whether there might be a contradiction. In that case, the question about interpreting EU law must be worded in a way that later the Member State judge could still decide based on the preliminary ruling, whether the national law is in line with EU law.[34]

If the Court of Justice indeed interprets the directive in a way that leads to the conclusion that the KrMS regulation is in contradiction with the directive, a need may arise to set the respective provisions of the Code of Criminal Procedure aside and directly apply the directive. The rights stipulated in a directive are directly applicable if they are clear, unconditional, precisely defined, and do not need to be concretised nationally.[35] If the interpretation of the preliminary ruling of the Court of Justice does not lead to the conclusion that there is a contradiction between the KrMS and the directive, but the interpretation differs from previous Estonian case law, it is enough to interpret the norm according to the new guidelines and to change the practice of the court. Additionally, the principle of consistent interpretation can neither be the basis for a *contra legem* interpretation of national law, nor lead to a contradiction with the principle of legal certainty.[36]

Due to the abovementioned factors, judges that deliberate criminal cases now have more need to constantly be updated with both EU legal acts as well as the case law of the Court of Justice. In that they receive help from several EU institutions and academic associations that organise thematic training courses and intermediate experiences and contacts. The European Judicial Training Network (EJTN)[37] and the Academy of European Law (ERA)[38] directly work in training judges, prosecutors and other employees of courts. In addition to many training courses, the ERA also organises a yearly conference, which gathers the most significant problems in EU criminal law and cooperation in the area of justice, and brings together presenters that represent the EU institutions as well as the academic sphere.[39] Of institutions that provide support, one to point out is the European Justice Network (EJN)[40], which has a website that gathers legal acts, assistive materials and information on justice cooperation, and it facilitates making direct contacts with the judges, prosecutors and representatives of ministries of justice of Member States. The curriculum of the University of Tartu and the training programme at the Supreme Court have also been supplemented due to changes in the field. Since 2016, the law school has a new course titled "European Union Criminal Law". Also, the influence of EU law on procedural rights is the subject

[34] J. Laffranque, Õppematerjal kohtunikele 2005. Eelotsuse küsimine Euroopa Kohtult, Sihtasutus Eesti Õiguskeskus, 2005, lk 24–32.
[35] Judgment of the Court of Justice of 27 April 2004 in the joined cases C-397/01–C-403/01 (Pfeiffer and others), p 103. ECLI:EU:C:2004:227.
[36] Pupino judgment (reference 8), p 44–47; Adeneler judgment (reference 29), p 108–111.
[37] European Judicial Training (EJTN), online: http://www.ejtn.eu, 31.01.2018.
[38] Academy of European Law (ERA), online: https://www.era.int, 31.01.2018.
[39] Annual Conference on EU Criminal Justice 2017, online: https://www.era.int/cgi-bin/cms?_SID=NEW&_sprache=en&_bereich=artikel&_aktion=detail&idartikel=126343, 31.01.2018.
[40] European Judicial Network (EJN), Welcome to the EJN website and its tools, available online: https://www.ejn-crimjust.europa.eu/ejn/EJN_StaticPage.aspx?Bread=7, 31.01.2018.

of the elective course "Prosecution and Defence in Criminal Proceedings".[41] On 14–15 December 2017 within a Supreme Court training programme, there was a course on rights of defence directives,[42] and on 15–16 February 2018 in Riga, there was an ERA practical course[43] on the same topic for judges, prosecutors, advocates and other officials of the judicial field. Participating in training courses offered both by the Supreme Court and on the European Union level helps judges in the field adjust to the changes faster and makes the transition to the new criminal justice system with the European Union dimension smoother.

Particularity of the preliminary ruling in criminal proceedings

Although the preliminary ruling institute has been formed in the Court of Justice case law for decades, for Estonian criminal judges it presents a rather unhabitual and new opportunity. Since the role of the Court of Justice itself in interpreting rights of defence is also new, it raises the question of whether the preliminary ruling institute has any particularities or problems that may inhibit the dialogue of courts. As mentioned above, the European Union thus far did not have the competence to regulate the rights of individuals in criminal proceedings. Therefore, before the entry into force of the rights of defence directives, in these matters it was not possible to ask for a preliminary ruling.

In addition, the jurisdiction of the Court of Justice over third pillar legal acts was limited. Only a few Member States had subordinated themselves the Court of Justice with separate declarations, and even they were able to request preliminary rulings only to interpret legal acts pertaining to material law and justice cooperation. Also, the Court of Justice did not have the competence to evaluate the correct implementation of third pillar measures by of Member States. Since 1 December 2014, when the five year transition period after the entry into force of the Lisbon Treaty ended, the court received full competence to resolve disputes over the formerly third pillar legal acts. The position of the Court of Justice and the opportunities to influence the laws of Member States are now bigger than ever before, and expectations for that influence are high.[44]

The new role of the Court of Justice in guaranteeing rights of defence is different from that of the European Court of Human Rights in Strasbourg, and it has several advantages. Since rights of defence are stipulated in the directives in more detail than in the case law of the European Court of Human Rights, the European Court

[41] University of Tartu, School of Law (2458) 2017/2018 for students, Curriculum, available online: https://www.is.ut.ee/pls/ois/!tere.tulemast?naita_ka_alternatiive=1&_naita_ka_alternatiive=1&leht=OK.BL.PU&id_a_oppekava=4913&kordi_pealehel=1&systeemi_seaded=3,1,12,1,&viida%20kaudu=1&sessioon=0, 31.01.2018.

[42] Supreme Court, training information for judges, available online: https://koolitus.riigikohus.ee/index.html?gid=kohtunikud&kuu=12&aasta=2017, 31.01.2018.

[43] ERA – Academy of European Law, Events, Procedural Safeguards in the EU, available online: https://www.era.int/cgi-bin/cms?_SID=a1439c4079c53eea4513460711b45fb1f1b8b8d100576163628982&_sprache=en&_bereich=artikel&_aktion=detail&idartikel=127193, 31.01.2018.

[44] E. Baker, The Court of Justice of the EU and the „New" Lisbon Treaty Environment Five Years On, European Journal of Crime, Criminal Law and Criminal Justice 2015 (23) 1, p 1–10.

of Justice has the opportunity to also publish its position about such aspects of the rights that the ECtHR has not elaborated on yet. The advantage in terms of time and procedural economy comes from the fact that with the reference for a preliminary ruling, the courts of all Member States can turn to the European Court of Justice already during proceedings, not resolve disputes *ex post*, as in the case of the ECtHR. It is possible for the European Commission to initiate an infringement procedure at the Court of Justice against a Member State that has failed to meet its obligation to transpose a directive. Although the hopes are that the European Court of Justice will be a beacon for guaranteeing rights of defence in the future, it is also hoped that the ECtHR will not weaken in its impact in the promotion of the rights of suspects and the accused. Both courts have an important role to carry in this area, which is why it is expected that the dialogue between these two courts will continue and there will be an easing of the tensions that surfaced after the opinion of the European Court of Justice, which gave a damning assessment to the EU plan to join the Convention for the Protection of Human Rights and Fundamental Freedoms.[45]

Before the Lisbon Treaty entered into force in 2009, within the third pillar the European Union only had the competence to approximate material criminal law and to regulate the justice cooperation between Member States.[46] Therefore, ensuring procedural rights is a new role for both the EU institutions and Court of Justice. The few existing judgments that touch on the rights of defence directives do not yet give an opportunity for in-depth analysis of the respective case law of the European Court of Justice and its role. By the end of 2017, the Court had given preliminary rulings in relation to Directive 2010/64/EU on the right to interpretation and translation in judgments C-216/14: Gavril Govaci[47], C-25/15: István Balogh[48] and C-278/16: Sleutjes[49]; and in relation to Directive 2012/13/EU on the right to information in criminal proceedings in judgment C-124/16, C-188/16, C-213/16: Tranca, et al[50]. Another request for a preliminary ruling has been accepted in case C-612/15: Kolev and Kostadinov[51] in relation to Directive 2013/48/EU on the right of access to a lawyer, and Directive 2012/13/EU on the right to information in criminal proceedings. In the judgments made, the Court has explained the scope of implementation of the directives and single aspects, however, so far the case law has not had the impact of significantly raising defence standards.

The low number of preliminary rulings is partly related to the novelty of the area and the fact that the transposition process of all the Roadmap Directives has not yet been completed. At the same time, an example from Estonian case law in

[45] A. Soo, p 668–671.
[46] S. Peers, EU Justice and Home Affairs Law, p 381–382.
[47] Judgment of the Court of Justice of 15 October 2015 in case C-216/14 (Gavril Covaci). ECLI:EU:C:2015:686.
[48] Judgment of the Court of Justice of 9 June 2016 in case C-25/15 (István Balogh), ECLI:EU:C:2016:423.
[49] Decision of the Court of Justice of 12 October 2017 in case C-278/16 (Frank Sleutjes). ECLI:EU:C:2017:757.
[50] Judgment of the Court of Justice of 22 March 2017 in the joined cases C-124/16, C-188/16 and C-213/16 (Tranca, Reiter and Opria), ECLI:EU:C:2017:228.
[51] Opinion by Advocate General Yves Bot, submitted on 4 April 2017 in case C-612/15 (Nikolay Kolev, Stefan Kostadinov). ECLI:EU:C:2017:257.

Supreme Court case nr 3-1-1-110-15, and the first and second instance court not requesting preliminary rulings, shows that requesting preliminary ruling is simply not considered necessary. Requesting a preliminary ruling can be seen both as an opportunity and an obligation. For a judge considering referencing for a preliminary ruling, it is first and foremost important for him or her that the interpretation from the European Court of Justice would to allow him or her to apply EU law correctly. The Criminal Chamber of the Supreme Court did not ask for a preliminary ruling in case nr 3-1-1-110-15, because it considered the legal situation to be sufficiently clear. According to the decision, the Chamber did not have any irreversible doubts in interpreting Article 7(1) of Directive 2012/13/EU, which is why referencing for a preliminary ruling from the European Court of Justice was deemed not necessary.[52]

According to the provision of the Directive under dispute, the Member State has to ensure that an arrested person or his or her lawyer has access to documents essential to challenging effectively the lawfulness of the arrest. The Supreme Court was subject to criticism in legal literature for its decision not to request a preliminary ruling. U. Lõhmus emphasised that the competence to interpret EU law lies with the Court of Justice of the European Union, and in case of a need of interpretation, the court of a Member State, against whose decisions there is no judicial remedy, is obligated to ask for a preliminary ruling (TFEU Art 267). Since the Court of Justice of the European Union has not yet interpreted Article 7 of the Directive, the interpretation given to the Directive by the Supreme Court is only one of the possible interpretations. According to the assessment of U. Lõhmus, this is not a norm that is sufficiently clear or already interpreted by the Court of Justice of the European Union (*acte clair* or *acte éclairé)*, which is why requesting a preliminary ruling was mandatory.[53]

Lector in criminal law A. Soo also agrees with the position of U. Lõhmus and finds that there are several aspects to the Supreme Court's interpretation which indicate that this was not an *acte clair* situation.[54] An interpretation from the European Court of Justice would have been needed to clarify the relation between the preamble of the Directive and Article 7(1), as well as for answering the question of whether the Directive expands the rights of suspects and the accused compared to what is stipulated in the Charter of Fundamental Rights.[55] The right of the arrested person and his or her lawyer to access the case file also cannot be considered of little importance in light of the great amount of attention that the issue has gained in Estonian legal literature and court disputes. In addition to arguments outlined by A. Soo and U. Lõhmus in their articles, it is worth analysing the substance of the *acte clair* doctrine and its development in the case law of the Court of Justice of the European Union, to evaluate when a provision of a directive can be considered sufficiently clear.

[52] Ruling of the Criminal Chamber of the Supreme Court of 4 May 2016 in case nr 3-1-1-110-15, p 15.3.
[53] U. Lõhmus, Vahistamise aluseks olevate tõendite kättesaadavaks tegemine kahtlustatavale, Riigikohtu kriminaalkolleegiumi 4. mai 2016. a määrus kohtuasjas 3-1-1-110-15, Juridica nr 6, 2016, p 423–430.
[54] A. Soo, p 673–675.
[55] *Ibid*.

The European Court of Justice established its ***acte clair*** theory with its judgment in case 283/81: CILFIT[56] related to the reluctance of French courts to requesting preliminary rulings and the practice of justifying it with the clarity of the legal situation. A situation can be considered *acte clair* if the correct application of EU law is so evident that reasonable doubt is not possible. However, before making the respective decision, a national court has to be convinced, according to the CILFIT decision, that the question is just as evident for the courts of other Member States and the European Court of Justice. In case C-160/14: Ferreira da Silva,[57] the European Court of Justice explained in further detail that the need for requesting a preliminary ruling is indicated by both contradictory judgments of lower instance national courts as well as repeated interpretation difficulties in different Member States. However, in its judgment in joined cases C-72/14 and C-197/14: X and van Dijk,[58] the European Court of Justice found that a court of a member state, against whose decisions there is no judicial remedy under national law, does not have to turn to the European Court of Justice only because a lower instance national court has turned to the European Court of Justice for a preliminary ruling in a case that is similar to one in its proceedings and touches on exactly the same problems. The highest instance court also does not have to wait for an answer to that question. The judgments in the cases of Ferreira da Silva and X and van Dijk have given cause to speculations that the Court has given more slack to interpreting the *acte clair* doctrine and the obligation to request a preliminary ruling is not as absolute as could have been deduced solely based on the CILFIT decision ("reasonable doubt is not possible"). At the same time, these decisions could be criticised instead for the European Court of Justice not using the opportunity to better explain the doctrine and not giving more concrete criteria.[59]

Future dialogue between the supreme courts of Member States and the European Court of Justice depends on how the *acte clair* doctrine will change as new criminal procedural law questions are added and whether rules drawn up based on previous European Court of Justice interpretations are entirely suitable for this field of law. Compared to civil and administrative matters, criminal cases have several unique characteristics that could potentially impact the *acte clair* doctrine. The detection of crimes and their rapid proceeding as important public interests could be damaged if the addition of each new directive would be followed by an excessively strict obligation to ask for preliminary rulings in all manner of matters to reach a situation, where the question will have been interpreted by the European Court of Justice. According to the judgments in the cases CILFIT, Ferreira da Silva and X and van Dijk, the indications for a need to request a preliminary ruling include differences in the positions of lower and higher instance courts and differing positions in interpreting the disputed provision in other Member States. This criterium is difficult to interpret in a situation, where the criminal procedural law of

[56] Judgment of the Court of Justice of 6 October 1982 in case nr 283/81 (Srl CILFIT). ECLI:EU:C:1982:335.
[57] Judgment of the Court of Justice of 9 September 2015 in case nr C-160/14 (João Filipe Ferreira da Silva e Brito and others). ECLI:EU:C:2015:565.
[58] Judgment of the Court of Justice of 9 September 2015 in the joined cases C-72/14 and C-197/14 (X and T. A. van Dijk). ECLI:EU:C:2015:564.
[59] A. Limante, Recent Developments in the Acte Clair Case Law of the EU Court of Justice: Towards a More Flexible Approach, JCMS: Journal of Common Market Studies, Vol. 54, Issue 6, 2016, p 1384–1397.

Member States indeed is very different, and the practice of lower instance courts is rooted in the regulation that preceded the directive. In this situation, there are no any significant differences between county and circuit courts' interpretations, for example, of the previously analysed regulation on making the criminal case file available. Comparison with the case law of other states is somewhat more difficult due to a language barrier and the fact that the directives on the rights of defence only cover a certain set of minimal rights, and to a large extent the regulation in criminal procedural codes will always have divergences. Therefore, unlike civil and administrative law, the level of EU law influence and uniformisation in criminal law is lower; in fact, the founding Treaties guarantee Member States a special regime with a bigger autonomy.

It is noteworthy that in the Code of Criminal Procedure currently in force, unlike in the Code of Administrative Court Procedure[60] and the Code of Civil Procedure,[61] there is no regulation concerning requesting a preliminary ruling from the European Court of Justice. The KrMS only regulates the procedure for requesting an advisory opinion from the ECtHR (§ 352[1]). Therefore, judges cannot find clear guidelines in the KrMS about when and how to request a preliminary ruling and stay the proceedings in the meantime. While the guidelines for requesting a preliminary ruling are in detail available in the Official Journal of the European Union, published as the recommendations in relation to the initiation of preliminary ruling proceedings,[62] the process and limitations concerning staying proceedings should be stipulated in the Code of Criminal Procedure, taking into account the nature of court proceedings in Estonia and the review procedure. Since requesting preliminary rulings pertaining to the rights of defence directives could already be needed in the stage of pre-trial proceedings, the question of staying proceedings requires special attention. In addition, there are several types of complaints in criminal procedure, for which the decision of the preliminary investigation judge or circuit court judge is final and not subject to appeals. In such case, according to Article 267 of the TFEU it may be the case of a court that is obligated to request a preliminary ruling, since it is a court, against whose decisions there is no judicial remedy under national law. However, with the first or second instance court asking for a preliminary ruling, there is a risk of excessive delays on proceedings, and the desire to avoid such a delay might impede the court from asking for a preliminary ruling. Among other matters, clear regulation is also needed in the question, if, in the process of appeals submitted against preventive measures or the actions or decisions of investigative bodies, a preliminary investigation judge requests a preliminary ruling, whether and how the stay of proceedings impacts other, parallel or subsequent appeals in the same case.

For this the area of freedom, security and justice, the European Court of Justice has established a separate urgent preliminary ruling procedure. To apply this procedure, a respective request must be submitted and the urgent need for rapid action must be justified. Moreover, all the legal and factual circumstances which make

[60] Code of Administrative Court Procedure § 95(4). RT I, 28.11.2017, 3.
[61] Code of Civil Procedure § 356(3). RT I, 04.07.2017, 30.
[62] Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings (2016/C 439/01). OJ C 338, 6.11.2012, p 1.

the case an urgent one must be outlined, as well as the dangers that are entailed if the preliminary ruling were to be made in regular proceedings. A court may consider submitting an application for urgent preliminary ruling procedure, for example, in a case, set out in the fourth paragraph of Article 267 of the TFEU, of a person in custody or deprived of his or her liberty, where the answer to the question raised is decisive as to the assessment of that person's legal situation.[63] In the year 2016, the speed of urgent preliminary ruling procedure at the European Court of Justice was nearly 3 months.[64] Although that is considered to be a positive achievement, even a three month delay could mean that a time-sensitive criminal proceeding would considerably lengthen in time.

Conclusion

With the Lisbon Treaty, the change in the competence of the European Union to regulate criminal procedural law and the subsequently adopted directives on rights of defence have brought with them a paradigm shift in the field. While previously criminal procedural law was shaped by cooperation instruments and the case law of the European Court of Human Rights, as a whole, the area was in the jurisdiction of Member States, not the European Union. Now the special arrangements under the third pillar have ended, the transition period after the adoption of the Lisbon Treaty has finished, and the criminal procedural law regulated by the directives on rights of defence are a part of the legal order of the European Union. The procedural rights transposed from the directives on right of defence have to be interpreted according to the principles of EU law, and their correct application is wholly subjected to the control of the European Court of Justice. This sets challenges to the Estonian judges and gives them the role of applier of European Union law in criminal proceedings.

[63] Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings (2016/C 439/01), p 32–36.

[64] Court of Justice of the European Union, Annual report 2016, Luxembourg, 2017, p 82, available online: https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/ra_jur_2016_en_web.pdf, 31.01.2018.

A NETWORKED WORLD AND COURTHOUSES WITH AN ADDRESS OR JURISDICTION ON THE INTERNET

Karmen Turk, partner (TRINITI Law Firm)[1]

This article discusses the judgment of the European Court of Justice from last year, with which the Supreme Court's reference for a preliminary ruling was resolved. The case concerned an Estonian private limited company (OÜ Bolagsupplysningen). The company's services in Sweden received a lot of criticism on the platform managed by Svensk Handel. Svensk Handel published its assessments about an Estonian company on its platform and allowed about a thousand commentators to have their say. Regardless of the Estonian company's requests to remove the incorrect allegations and comments, Svensk Handel did not agree to do so. The Estonian company decided to turn to the court in Estonia.

The case has by now received final settlement through a Supreme Court judgment. In summary, the Supreme Court found that in the case of the specific company their centre of interest is not in Estonia, therefore, there is no jurisdiction.[2] This article, however, is not about the Supreme Court judgment, but the case of the European Court of Justice,,[3] about what it changed and why it is important.

1. Why should this interest an Estonian person or entrepreneur?

We live in a globally linked and connected world. It is characteristic to this world that decisions about goods and services are no longer made on site, while touching the goods or sensing the service. Decisions are made on the basis of information available on the internet, on the basis of information that reflects someone else's earlier experience. This information is at the click of a button for every single one of us, and we make the decision of which online shop to order a new TV from or which airline's offer to use within seconds, depending on the provider's quality

[1] In the interest of transparency: Bolagsupplysningen OÜ and Ingrid Ilsjan were represented in the Estonian court and the European Court of Justice by attorney-at-law Karmen Turk and associate Maarja Pild (TRINITI Law Firm).

[2] Supreme Court, ruling of 21 December 2017 in case 2-16-4631, Bolagsupplysningen OÜ's action against Svensk Handel AB for the rebuttal of incorrect data, ordering to remove comments and ordering payment of proprietary damage of 56 634 euros and 99 cents.

[3] European Court of Justice (Grand Chamber), 17.10.2017, C-194/16 *Bolagsupplysningen* and *Ilsjan*, ECLI:EU:C:2017:766.

and reliability. This quality and reliability is collectively referred to on the internet as a "rating". This may take the form of numerical assessments of a taxi driver driving an Uber or a so-called review of a product and manufacturer on Instagram, Youtube or in the Amazon feedback box. The numbers speak for themselves: at the end of 2017, Forbes reported statistics on how great the impact of such reviews on buying behaviour is. The impact is shockingly great – 88% of consumers trust online reviews as equivalent to a recommendation from a friend. 90% of web users read reviews before making a purchase or investment decision and 40% of users make a purchase or investment decision on the basis of one to three reviews.[4]

The modern market economy differs from the classical one. Without being an economist, I think that success is no longer determined solely by needs-based demand and an offer appropriate to the price tolerance, since now the public consumer opinion has been added. This factor is not exclusive to information society services. The impact is broader than the narrow sphere of e-commerce or collaborative economy. We can even use as an example the case that received attention in Estonia, where an upset foreign customer started a war against an esteemed Tartu café on social media, posting negative reviews on the café's Facebook page referring to racism and service culture.[5] As the administrator of its page, the café cannot remove negative reviews on social media and, therefore, the only way to protect their rights is to apply for the refutation of the claims or even a claim for damages – to claim directly from the person that "started the war". The other option is to get into a dispute with the social media platform itself. Moreover, what is happening on social media may today largely seem trivial, but let us take into account that according to some studies a social media search is already used more among young people than the traditional Google search engine. Also, information found on the internet is crucial for visitors, definitely for tourists, when choosing a place to eat.

One can more broadly also think about the opportunity of protecting their rights in the following situations: false claims concerning cockroaches running around or a poisoning are made about an Estonian accommodation operator on the world's largest review platform tripadvisor.com; or false claims concerning creative theft are made about a musician under a YouTube video; or a plagiarism accusation is made in a review about a book publisher's hit publication on the largest (internet) book purchasing environment Amazon.com; or various claims about the quality of work of the labourers of an Estonian construction company are posted in the Facebook group "About Estonian companies in Finland".

[4] M. Frary, The Power Of Review Sites For Brands, Forbes 09.10.2017. Online: https://www.forbes.com/sites/forbesagencycouncil/2017/10/09/the-power-of-review-sites-for-brands/#4c3d712969d5. Last accessed: 05.01.2018.

[5] R. Veski, Pettunud välismaalased alustasid hinnatud Tartu restorani vastu sotsiaalmeediasõda, kasulik.ee, Delfi 22.02.2017. Online: http://kasulik.delfi.ee/news/uudised/pettunud-valismaalased-alustasid-hinnatud-tartu-restorani-vastu-sotsiaalmeediasoda?id=77314968. Last accessed: 03.01.2018.

2. The creature called jurisdiction

The case ended up in the Grand Chamber of the Court of Justice thanks to being characteristic of the modern world, in which a debate over judicial protection is even more important due to the fact that each published claim is momentarily amplified more than was possible ever before – it is available in almost all jurisdictions of the world at the moment of publication. It is also characteristic that the information does not disappear, unlike a conversation at a café or even a speech to hundreds of listeners that dims in memory and loses its discoverability on paper. Information circulating on the internet is available exactly until it is deleted.

In this case, what is at issue is a situation, where a company with authority giving various judgments to the activity of a market participant inevitably led to one result – a claim may have arisen for one person against the other for the termination of the violation, a remedy and compensation for damages. In the cyber world, these two concerned persons were not in one country. Moreover – these persons were not natural persons, consumers for whom the European Court of Justice has already brought clarity in the rules of jurisdiction before. These were companies. Therefore, the question was which country has jurisdiction and what can be claimed in the court of the country of jurisdiction.

Jurisdiction may be affirmed according to general jurisdiction pursuant to the respondent's location, as well as special jurisdiction according to the place where the harmful event occurred. The place where the harmful event occurred may be the place of the harmful act as well as the place where damage occurred. This arises from the principle that jurisdiction is held by the court of the Member State that is the closest to the dispute, and both places have "a significant connecting factor from the point of view of jurisdiction" and "places that have sufficient closeness to the evidence and proceedings".[6] Accordingly, Article 7(2) of the Brussels I Regulation[7] establishes jurisdiction on the plaintiff's choice in the respondent's location, location of the harmful act as well as the place where the damage occurred on the basis of the principle of ubiquity.[8] Concerning selective jurisdiction in the special case of tort, delict or quasi-delict claims, the Court of Justice has repeatedly emphasised[9] that the expression "the place where the harmful event occurred or may occur" must be interpreted to mean:

[6] European Court of Justice, 30.11.1976, C-21/76, *Handelskwekerij Bier vs. Mines de potasse d'Alsace*, ECLI:EU:C:1976:166, paras 15–17.

[7] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. OJ L 351, 20.12.2012, p 1–32.

[8] Judgment of the Court of Justice of the European Union in case *Handelskwekerij Bier vs. Mines de potasse d'Alsace*, para 24.

[9] See judgments of the European Court of Justice: 05.06.2014, C-360/12, *Coty Germany GmbH vs. First Note Perfumes NV*, ECLI:EU:C:2014:1318, para 46; 22.01.2015, C-441/13, *Pez Hejduk vs. EnergieAgentur.NRW GmbH*, ECLI:EU:C:2015:28, para 18, and 16.05.2013, C-228/11, *Melzer vs. MF Global UK Ltd*, ECLI:EU:C:2013:305, para 25: „The fact remains that the expression 'place where the harmful event occurred or may occur' in Article 5(3) of Regulation No 44/2001 is intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the applicant, in the courts for either of those places."

1) place of the harmful event and
2) place where the damage occurred.

Jurisdiction of the location of the act. In the case at hand, the complexity arose from the fact that the infringement took place in the form of public communication – on the internet, i.e. information transmission took place on the World Wide Web between one sender and an unlimited number of recipients and the content was visible to every internet user (the public). The information spread from the original uploading computer/server through the network to the users on their demand.[10] Therefore, the place of the harmful act in the case of the information published by the respondent is the location of the computer and server used for uploading and with respect to the information the respondent stores on their server, the place where the storing activity takes place.

Jurisdiction pursuant to the place where the damage occurred. In the case of tort, delict and quasi-delict caused on the internet, the place where the damage occurred is also the place where the unlawful information reaches the injured party or third parties (place of distribution). In the case of the internet, such a place is the entire world; therefore, it is necessary to limit the places permitted for jurisdiction to preclude favouring the plaintiff's *forum shopping*. At the same time, the limitation cannot lead to a situation where only one jurisdiction is permitted – this would remove the plaintiff's right to special jurisdiction.

A) Place of distribution on the internet as a criterion forming a condition for special jurisdiction

The basis for the place where the damage occurred is still provided by the 1995 judgment *Shevill*,[11] in which the court found that as an alternative to general jurisdiction the plaintiff shall have the right to turn to the courts of those Member States, where the publication was distributed and where damage may thereby also have arisen for the plaintiff. Let us remember that it was a dispute concerning the distribution of a paper publication. Today, we are in the internet era. On the basis of the famous sentence of the legendary UN freedom of expression Special Rapporteur Frank La Rue, "the same rights that people have offline must also be protected online".

The European Union relies on the technology neutrality principle, pursuant to which the legal practice from before the internet era must, if possible, be interpreted in the context of the information society and not lost or replaced with new rules. In judicial practice, the *Shevill* case has been 'translated' into the internet space through two approaches:

1) **Translating the term "distribution of a paper publication" into the term "internet content accessibility".** The European Court of Justice

[10] Called the so-called recall principle.

[11] Judgment of the European Court of Justice, 7.03.1995, C-68/93 *Fiona Shevill, Ixora Trading Inc. Cheqiepoint SARL* and *Chequepoint International Ltd vs. Press Alliance SA*, ECLI:EU:C:1995:61.

has used this approach in the *eDate* judgment,[12] finding that there is jurisdiction in all the countries where the content is accessible.

2) **Identifying the term "distribution of the paper publication" with the term "targeting".** According to the targeting principle, jurisdiction is only affirmed in those countries, where the author had a desire and will to target the content.[13]

B) Distribution on the internet as targeting

The latter of those, relying on the **targeting criterion** seems to be inapplicable on the internet, as before deciding the jurisdiction it would presume that the plaintiff could prove to whom the publisher had wanted to target the text. Even though objectively the standard could be considered as a limitation to universal jurisdiction, if the publisher himself or herself has taken sufficient measures – e.g. if the Facebook group is limited to 10 users or if the Tripadvisor recommendations can only be read by users with a Lithuanian IP address.[14]

Practitioners also often recommend relying on the language in which the statement has been made in on the internet, and then consider the homeland of this language as the country where one can turn to the court. The author cannot agree with that. Namely, today the language and translation technology already means that when loading a page, by permitting the respective setting it will automatically be translated into the preferred language selected by the user. The user does not have instructions to know the original language – the domain no longer helps either, considering the thousands of global, regional and other top domains besides country code domains, such as .hotel, .video and .pub. Today the regular user is still able to conclude from the translation quality that it is probably a machine translation. As the technology develops, in the near future will is probably be almost impossible for a user to make an independent decision on whether the page was originally in another language or in the display language visible to him or her. As an example, already today the instructions and questions and answers of global companies are translated by machine translation; for example, the Microsoft user centre, but also a lot of the manuals for Samsung home electronics and several large European car manufacturers. On social media, where the average European spends about two hours per day, each non-mother tongue post automatically has a button "translate post". The reality of the coming years is already the real time translation of voice calls and videos.

[12] Judgment of the European Court of Justice, 25.10.2011, C-509/09 and C-161/10, *eDate Advertising GmbH vs. X* and *Olivier Martinez* and *Robert Martinez vs. MGN Limited*, ECLI:EU:C:2011:685.

[13] See e.g. judgment of the European Court of Justice, 3.10.2013, C-170/12, *Peter Pinckney vs. KDG Mediatech AG*, ECLI:EU:C:2013:635, para 42.

[14] Such an approach is supported by e.g. Moritz Keller, *Lessons for the Hague: Internet Jurisdiction in Contract and Tort Cases in the European Community and the United States*, 23 J. Marshall J. Computer & Info. L. 1 (2004), p 84.

As a criterion for targeting, scientific literature has among other things suggested an analogy with the law of ship flag known in the maritime law, according to which the nationality of the owner or administrator of any place of publication (e.g. website) determines the jurisdiction.[15] Considering the cross-border nature of the internet, the determination of the nationality or residence of an operator of an information society service in the procedural stage of deciding on jurisdiction may be quite a complicated task.

Therefore, in the author's opinion, the targeting criterion is not the most appropriate approach to jurisdiction for several reasons. It is also not unimportant that the targeting criterion has essentially been precluded by the earlier case law of the European Court of Justice. Namely, the Court of Justice found that a prerequisite of applying the accessibility criterion is not that the activity concerned to be directed to the Member State in which the court seised is situated.[16]

C) Distribution on the internet as accessibility

It could be more appropriate to rely on the **principle of accessibility**. This means that there is jurisdiction in each country on the territory of which the content is available. The Court of Justice has found in the *Pez Hejduk* judgment that when determining the place where the damage occurred for the purposes of Article 7(2) of the Brussels I Regulation, it is sufficient if the web page on which the rights are infringed, is available in the Member State of location, where the rights that were infringed on the web page are protected.[17]

The Court of Justice held that:
"In circumstances such as those at issue in the main proceedings, it must thus be held that the occurrence of damage and/or the likelihood of its occurrence arise from the accessibility in the Member State of the referring court, via the website of Energie-Agentur, of the photographs to which the rights relied on by Ms Hejduk pertain. /…/

Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that, in the event of an allegation of infringement of copyright and rights related to copyright guaranteed by the Member State of the court seized, that court has jurisdiction, on the basis of the place where the damage occurred, to hear an action for damages in respect of an infringement of those rights resulting from the placing of protected photographs online on a website accessible in its territorial jurisdiction."[18]

Content found on the internet is, however, as a rule available globally. Therefore, a justified concern arises over how to ensure that the person that causes the damage can foresee the consequences of their actions, if court proceedings can be brought in any country.

[15] Darrel C. Menthe, Jurisdiction in Cyberspace: A Theory of International Spaces, 4 Mich. Telecomm. & Tech. L. Rev. 69 (1998). Online: https://repository.law.umich.edu/mttlr/vol4/iss1/3 (last accessed 22.12.2017).
[16] Judgments of the European Court of Justice C-170/12, *Peter Pinckney vs. KDG Mediatech AG*, para 42, and C-441/13, *Pez Hejduk vs. EnergieAgentur.NRW GmbH*, paras 31 and 32.
[17] Case C-441/13, *Pez Hejduk vs. EnergieAgentur.NRW GmbH*.
[18] *Ibid*: para 34-38.

D) The qualified and objectivised cumulative criteria of the accessibility principle

A fair and predictable result in the case of special jurisdiction could be ensured by a restrictive interpretation of the accessibility principle in addition to the place where the damage occurred. This could be done by way of **qualified and objectivised cumulative criteria, i.e.**

1) **objective restriction;**
2) **centre of interests and**
3) **an especially close connection.**

First – objective restriction. Accessibility must be complemented by objective criteria that are perceptible to everyone and have been disconnected from the publisher's subjective will. If, for example, the content that causes damage is accessible in a closed social media group, all users of which are domiciled in Latvia, the content in that group must be deemed only to be available in Latvia.

Second – centre of interests. According to the *eDate* judgment, special jurisdiction is in the country where the plaintiff's centre of interests is, and in the case of a natural person the centre of interests means their place of residence. In the absence of a place of residence or also besides it, the centre of interests may be in a country where the person's place of stay is.

Before the *Bolagsupplysningen* case only one dispute that concerned the protection of the so-called universal right on the internet (in the specific case the right to protection of reputation on the internet) had reached the European Court of Justice. Even though earlier case law concerned jurisdiction in the case of a claim by a natural person, it was appropriate by formal logic to rely on the presumption that the principles laid out in the judgment should also be applied in the case of legal persons, because they also have the universal right to reputation.

By analogy, it could be presumed that when deciding about the centre of interests, it would be reasonable to apply analogy with a natural person, as the analogue for the place of residence in the case of legal persons is the registered office and the analogue for the place of stay is the place of business. Therefore, it could be asked, whether the centre of interests is the registered office. In addition to the Brussels I Regulation, the importance of the registered office when defining the centre of interests is also indicated by other European Union legislation. For example, the regulation on insolvency proceedings[19] considers the registered office to be the centre of main interests when assessing jurisdiction. Therefore, even just for the purpose of applying the law uniformly it could be affirmed that the registered office is most important and the additional place of business can only be considered in a situation where it is overwhelmingly rebuttable that there is no real connection between the person and the country of the registered office.

The European Court of Justice explained that the registered office is a criterion, but

[19] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2015, p 19–72, Article 3(1).

in a situation where most of a legal person's activity is in another state compared to the registered office, when deciding the centre of interests in a reputation dispute, the place where this person's reputation is most developed should be relied upon among other things:

"As regards a legal person pursuing an economic activity, such as the applicant in the main proceedings, the centre of interests of such a person must reflect the place where its commercial reputation is most firmly established and must, therefore, be determined by reference to the place where it carries out the main part of its economic activities. While the centre of interests of a legal person may coincide with the place of its registered office when it carries out all or the main part of its activities in the Member State in which that office is situated and the reputation that it enjoys there is consequently greater than in any other Member State, the location of that office is, not, however, in itself, a conclusive criterion for the purposes of such an analysis."[20]

The third cumulative criterion of the accessibility principle could be an especially close connection. In certain cases, the two abovementioned criteria, i.e. objective restriction and centre of interests, may not be sufficient, in order to avoid an interpretation of the accessibility principle that is too broad. Primarily, this could be a situation where the legal person's entire activity takes place in Member State A, but registration has taken place in another Member State because of, for example, tax or data protection purposes. In that case, an especially close connection to that country would not exist.

In legal theory, special jurisdiction has sometimes been defined in the judicial practice of Member States by way of which country the dispute is most connected to. For example, a sufficient and actual connection between the forum and dispute is a criterion for jurisdiction in German judicial practice.[21] This should, however, never lead to a situation, in which jurisdiction could only be in one court, which is the most connected. Namely, special jurisdiction means several possible and simultaneous jurisdictions, and the search is not for the Member State that is most connected, but rather a Member State that is closely connected. A different interpretation would preclude an efficient existence of special jurisdiction.

Requiring an especially close connection would preclude damaging the predictability aim. Namely, the preamble to the Brussels I Regulation contains the predictability principle, pursuant to which the aim of the regulation is among other things to avoid the possibility that an action is filed against the respondent to the court of a Member State that they could not have reasonably foreseen. In order to

[20] European Court of Justice (Grand Chamber), C-194/16 *Bolagsupplysningen and Ilsjan*, para 41.

[21] See e.g. BGH, 29.03.2011 judgment in case No. VI ZR 111/10, in which it was discussed what is a sufficient connection for jurisdiction in the situation where the infringer was a citizen of the USA, the injured party was a Russian citizen and resident of Germany; the information infringing the rights was stored in a German server, but its topic was the class reunion of the injured party and infringer in Moscow and the former classmates lived in Moscow. A sufficient and actual connection has been taken into use as a criterion instead of other criteria (e.g. the accessibility criterion) also for example in Canada through the *Breeden vs. Black* case (2012,SCC19 [2012] 1 SCR 666, § 15; Castel, M, *Jurisdiction and Choice of Law Issues in Multistate Defamation on the Internet*, Alberta Law Review, Vol. 51, Issue 1 (October 2013), pp. 153–164, p 158).

fulfil this purpose, the regulation prescribes that special jurisdiction must consider the"close connection criterion between the court and proceedings".[22]

In relation to this topic, the European Court of Justice has held that:

"The content [on the internet] may be consulted instantly by an unlimited number of internet users throughout the world, irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person's Member State of establishment and outside of that person's control." [23]

In the author's opinion, the accessibility principle restricted by these three criteria would not bring about a situation where the respondents are not protected in civil proceedings. Namely, the legislator has created the institute of exclusive jurisdiction for the protection of the weaker respondent.[24] In the case of damage to reputation, it is also not justified to automatically rely on the presumption that the respondent is the party requiring protection. In a networked and platformed world, often the weaker party is the person whose reputation is damaged, even if it is a legal person.

3. Which claims can be realised in the court of special jurisdiction?

A. Universal and territorial rights

There was a dispute in the European Court of Justice concerning whether total damages, i.e. all proprietary and moral damages caused to the reputation, as well as the rebuttal of statements andthe publication of a correction can be claimed in Estonia. The competing position was that if in such a situation the Estonian company turns to an Estonian court, the claim can only be made with respect to such damages, that have been caused in the territory of Estonia. This is called partial damages and more broadly mosaic theory to illustrate how claims would be spread on a map.

If in the case of a proprietary claim it is possible to calculate, what is the"part"that has arisen in Estonia, then in the case of"indivisible"claims, such as rectification, rebuttal and deletion, that cannot be claimed or performed in part, before the *Bolagsupplysningen* judgment there was no solution prescribed by law for legal persons.

[22] Recital 16 of the Brussels I Regulation sets as the aim that: „In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen."

[23] Judgment of the European Court of Justice in joined cases C-509/09 and C-161/10, *eDate Advertising GmbH vs. X* and *Olivier Martinez* and *Robert Martinez vs. MGN Limited*, para 45.

[24] Exclusive jurisdiction determines the court, which is the only one to be approached for resolving a civil case. Similarly to the code of civil procedure the Brussels I Regulation specifies as such disputes for example disputes based on the location of an immovable.

In the *Shevill* case, the European Court of Justice found that the plaintiff can claim compensation for damages in the full extent at the court of the place where the publisher of the content is established i.e. the court of general jurisdiction. Later practice makes exceptions for natural person plaintiffs. For example, in the case of *Pez Hejduk* in addition to the compensation for damage in the sum of 4050 euros, P. Hejduk also demanded the publication of the court judgment at the expense of EnergieAgentur.[25] Parallels may be drawn between the publication of the court judgment and rebuttal of the statements – neither one can be divided and both can be performed on the basis of one claim. In the *Pez Hejduk* case, the court did not argue that the legal remedy of publishing the court judgment would depend proportionately on the damage caused on the territory.

The court has also affirmed the right to claim total damages in one jurisdiction in the court case *eDate*, in which the European Court of Justice held:

"/…/ Article 5(3) of the Regulation must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised." [26]

In legal theory, we know the opposite situation as the mosaic theory. The mosaic theory is appropriate in the case of territorial rights such as the rights of the owner of a trademark. For example, a pan-European advertising campaign, with which the trademark owner's rights are infringed in Estonia and Belgium is supposed to end in court proceedings in both of the Member States. Territoriality characterises a large majority of the possible claims of legal persons, but one of the few claims that is not territorial, arises from damage to reputation. The protection of reputation and the right to conduct business are the rights that are also protected for a legal person as they are protected in all Member States, incl. Estonia. As the Supreme Court already indicated in the reference for a preliminary ruling:

"In this case however the allegedly infringed rights are not, by their nature, rights that can only be protected within the territory of certain Member States. Plaintiff I is essentially relying on the fact that hthe publication of the incorrect information has harmed its good name and reputation." [27]

[25] European Court of Justice case C-441/13, *Pez Hejduk vs. EnergieAgentur.NRW GmbH*, judgment para 12.
[26] Judgment of the European Court of Justice in joined cases C-509/09 and C-161/10, *eDate Advertising GmbH vs. X* and *Olivier Martinez* and *Robert Martinez vs. MGN Limited*, para 52.
[27] Supreme Court request for a preliminary ruling, para 14.

The European Court of Justice has previously explained that by publishing defamatory claims, damage is caused to the reputation and good name of a legal person.[28] Honour is also protected by Article 8 of the European Convention on Human Rights and § 17 of the Constitution of the Republic of Estonia. The European Court of Human Rights (ECtHR)[29] has emphasised that a legal person can claim protection with respect to certain fundamental rights.[30] With respect to the meaning of a legal person's reputation, the ECtHR has held that the extent of this right is the states' decision and the legal person's commercial reputation and the natural person's reputation may have a different scope in different countries. It does however clearly arise from the ECtHR's case law that the protected universal right is the legal person's reputation[31] and the aim of assigning the right is economic welfare and commercial success.[32]

B. Claims for total and partial damages

Precisely in the case of such universal claims like that arising from damage to reputation, in the author's opinion the mosaic theory cannot be applied. Reputation cannot be divided into parts, but according to the mosaic theory the action must be filed in every Member State concerning the damage caused there. This is uneconomical for the court systems and the plaintiff, as in addition to the damage and its extent they should be able to determine a fair part of the total damage corresponding to this precise Member State. It would also be burdensome for the respondent, who would have to participate in up to 28 proceedings.

The question of whether it is also possible to analyse legal persons' right to claim total damages must be answered depending on which rights are infringed. This is because the European Court of Justice has held in the case *Pez Hejduk*:

"However, given that the protection of copyright and rights related to copyright granted by the Member State of the court seised is limited to the territory of that Member State, a court seised on the basis of the place where the alleged damage occurred has jurisdiction only to rule on the damage caused within that Member State."[33]

[28] European Court of Justice case C-68/93 *Fiona Shevill, Ixora Trading Inc. Cheqiepoint SARL and Chequepoint International Ltd vs. Press Alliance SA*, judgment paras 29–30.

[29] Article 52(3) of the European Charter of Fundamental Rights states that the meaning and scope of such rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection. The European Court of Justice has previously consistently also relied on ECHR practice when interpreting fundamental rights (see e.g. judgment of the Court of Justice of the European Union 11.07.2002 in case C-60/00, *Mary Carpenter*, ECLI:EU:C:2002:434, para 42).

[30] Judgment of the European Court of Human Rights 10.07.2016, No. 19101/03, *Sdružení Jihočeské Matky vs. The Czech Republic (dec.)*.

[31] Judgment of the European Court of Human Rights 02.02.2016, No. 22947/13, *Magyar Tartalomszolgáltatók Egyesülete* and *Index.hu Zrt vs. Hungary*, para 70.

[32] See e.g. judgment of the European Court of Human Rights 15.02.2005, No. 68416/01, *Steel and Morris vs. Unikted Kingdom*, para 87.

[33] Cases C-441/13, *Pez Hejduk vs. EnergieAgentur.NRW GmbH*, judgment paras 29 and 34, and C-170/12, *Peter Pinckney vs. KDG Mediatech AG*, judgment paras 32–33.

This means that whether a total damage or partial damage claim can be filed in the respective Member State depends on the type of the right that has allegedly been infringed. The European Court of Justice has also emphasised the incorrectness of the opposite position on the example of a dispute related to registering a trademark:

"Contrary to the situation of a person who considers that there has been an infringement of his personality rights, which are protected in all Member States, the protection afforded by the registration of a national mark is, in principle, limited to the territory of the Member State in which it is registered, so that, in general, its proprietor cannot rely on that protection outside the territory."[34]

The judgment *Wintersteiger AG vs. Products 4U Sondermaschinenbau GmbH* concerned a natural person, but this does not preclude the application of the rule with respect to a legal person, if fundamental rights that are also characteristic to a legal person are concerned. Therefore, in the case of rights that are protected in all Member States, the right to claim total damage should be affirmed.

By turning to the court of general jurisdiction, the plaintiff can claim everything that the law gives him a right to – the assertion of the entire damage i.e. all main and other claims (e.g. publication of a correction). In the European Union, however, before this judgment the question of what can be claimed when submitting an action by special jurisdiction, i.e. in this case the Estonian company that has suffered damage to reputation turning to an Estonian court, was unanswered.

In the continental European legal culture non-contractual damage consists in restitution i.e. putting the person into the position he or she was in before the harmful event took place. Damage can be compensated for in other forms than money – in the case of damage to reputation, for example, by way of rebuttal, rectification and deletion. Precisely these claims are indivisible by nature, which cannot be performed in part i.e. according to the mosaic theory. The Brussels I Regulation allows the plaintiff to file proprietary as well as moral claims concerning direct damage in the Member State of special jurisdiction. In order for special jurisdiction to also retain meaning in the case of indivisible claims, the rebuttal, rectification and deletion i.e. total damages should be able to be claimed in each Member State of special jurisdiction.

The European Court of Justice held in this respect in the judgment under review, *Bolagsupplysningen* – if the person has the right to turn to a Member State's court pursuant to special jurisdiction (i.e. the centre of their interests is in that Member State), the person, legal and natural, can file a total damage claim in that Member State with respect to his or her non-territorial rights (i.e. indivisible rights such as rebuttal, rectification):

"/…/ Article 7(2) of Regulation No. 1215/2012 must be interpreted as meaning that a legal person claiming that its personality rights have been infringed by the publication

[34] European Court of Justice, 19.4.2012, C-523/10, *Wintersteiger AG vs. Products 4U Sondermaschinenbau GmbH*, ECLI:EU:C:2012:220, para 25.

of incorrect information concerning it on the internet and by a failure to remove comments relating to that person can bring an action for rectification of that information, removal of those comments and compensation in respect of all the damage sustained before the courts of the Member State in which its centre of interests is located." [35]

In summary

How and whether additional criteria and institutes will be developed to decide jurisdiction in situations where companies no longer have a strong or close connection to the physical territory of any country or they have this connection with many countries (e.g. *Uber*, *Taxify*), we will definitely be able to see in the coming years. Until then, however, the European Court of Justice has removed from the jurisprudence that has developed over the years certain conclusions leading to an unfair result, according to which turning to your court of domicile in the case of an infringement that took place on the internet was only affirmed for natural persons and a legal person was in a situation, where in order to protect their rights they should turn to the court in all Member States of the European Union and in case of indivisible claims, it was only effective to turn to the court at the respondent's place of residence or place of business i.e. solely and only to the court of general jurisdiction.

In summary – at the beginning of the article, the author provided examples of how the café owner or publisher are in an unfair situation, where in order to protect their reputation, they should turn to the platform's court of place of business to remove the incorrect information. Pursuant to the *Bolagsupplysningen* judgment, according to the instructions of the European Court of Justice these companies have the opportunity to receive protection for their reputation in their home country.

[35] Judgment of the Court (Grand Chamber), C-194/16 *Bolagsupplysningen* and *Ilsjan*, para 44.

EXAMINING JURISDICTION AND DETERMINING THE APPLICABLE LAW IN ESTONIAN COURTS IN DISPUTES CONCERNING THE SO-CALLED WEB DELICTS, AFTER THE *BOLAGSUPPLYSNINGEN OÜ* CASE

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1. Introduction

In 2017, the European Court of Justice made a judgment[1] in the *Bolagsupplysningen OÜ* and *Ilsjan vs. Svensk Handel AB* court case – in the first[2] private international law dispute originating from Estonia that reached the European Court of Justice, even though by the time of writing this article (01.03.2018) there had been more such cases. In this decision, the European Court of Justice interpreted the common jurisdiction examination rules of the European Union, more precisely Article 7(2) of the Brussels I (recast) Regulation,[3] taking, to simplify, the position that according to this provision, similarly to natural person plaintiffs, legal person plaintiffs have the right to claim compensation for damage caused to them by the so-called web delicts[4] in the full extent in that Member State of the European Union, where the centre of interests of the legal person plaintiff is, i.e. where the

[1] *Bolagsupplysningen OÜ* and *Ingrid Ilsjan vs. Svensk Handel AB*. 17.10.2017 judgment in case No. C-194/16, ECLI:EU:C:2017:766.

[2] See *Collect Inkasso OÜ, ITM Inkasso OÜ, Bigbank AS vs. Rain Aint, Lauri Palm, Raiko Oikimus, Egle Noor, Artjom Konjarov*, 28.02.2018 judgment in case No. C-289/17 (ECLI:EU:C:2018:133) that started in the Tartu County Court and concerned the interpretation of the Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143, 30.04.2004, p 15–39). If interested, read more about the European Enforcement Order Regulation in Estonian: M. Kaur, Euroopa täitekorralduse tõend: miks ja millal?, Juridica 2012/2, p 122–126.

[3] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p 1–32. If interested, read more about this Regulation in Estonian: M. Torga, Brüsseli I (uuesti sõnastatud) määrus: kas põhjalik muutus Eesti rahvusvahelises tsiviilkohtumenetluses?, Juridica 2014/4, p 304–312.

[4] See more about the term "network delict" in the first chapter of this article. It is not a legal term used in current law but a collective name for delicts in the case of which the person committing the delict operates (or should operate) online.

main part of the economic activities of the legal person is carried out.[5]

Even though the central question of the *Bolagsupplysningen OÜ* court case was how a specific jurisdiction examination norm should be interpreted (i.e. Article 7(2) of the Brussels I (recast) Regulation) and the common rules of the European Union concerning the determination of the applicable law[6] did not find interpretation in this case, the reasoning used in this case can in part also be used when interpreting other norms concerning questions dealing with the examination of jurisdiction and the determination of applicable law in force in Estonia and to be applied in disputes over the commission of network delicts. Due to the aforementioned, the purpose of this article is to explain to the readers what is the impact of the *Bolagsupplysningen OÜ* court case in Estonian private international law, incl. whether the reasoning of the European Court of Justice used for interpreting the jurisdiction norms is also transferable to the interpretation of those Estonian private international law norms, which deal with determining the law applicable to network delicts.

2. Discussion of network delicts in the Estonian and European Union's private international law

The term "network delict" is not expressly familiar to the Estonian or European Union's private international law (nor e.g. Estonian substantive law), and professional foreign legal literature contains appeals to not introduce such a term, as it is essentially a regular tort or delict, in the case of which the act consists of publishing something or distributing some material on the internet.[7] In order to facilitate communication with the reader, inspired by the *Bolagsupplysningen OÜ* case, in the context of this article network delicts are, however, deemed to be delicts, in the case of which the person committing the act causes the injured party damage by an act (or omission) on the internet. For example, in the *Bolagsupplysningen OÜ* case the plaintiff, who was an Estonian company, sued the respondent, a Swedish company, for the reason that on its website it had declared the Estonian company a so-called problematic company, which allegedly deceived its clients. In addition, the Swedish company enabled third parties to publish negative comments about the Estonian company and its employee on its website, which, according to the Estonian company, caused it damage. Both of the aforementioned activities (publishing data, enabling third parties to publish comments/not deleting them) were figuratively committed on the internet. Network delicts are distinguished from other delicts by the medium through which damage is caused, whereas the legal right that is damaged (i.e. the right to honour and good name etc.) by the so-called regular delict does not differ from the damaged legal right in the case of a network delict.

[5] See *Bolagsupplysningen OÜ* and *Ingrid Ilsjan vs. Svensk Handel AB*, para 41.

[6] In the context of non-contractual obligations the so-called Rome II Regulation (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), OJ L 199, 31.07.2007, p 40–49).

[7] See e.g.: O. Bigos, Jurisdiction over Cross-Border Wrongs on the Internet, International & Comparative Law Quarterly, Vol 54, Issue 3, 2008, p 585, 588.

The reason why network delicts should still be considered separately from other delicts in private international law is based on the fact that private international law norms often use certain place determinations as connecting links[8] (e.g. the place of committing the act, place where the damage occurred, place where the harmful event occurred etc.), the determination of which in the cases where damage is caused online is difficult from a legal, as well as a practical viewpoint. For example, in the *Bolagsupplysningen OÜ* case the European Court of Justice had to determine what is the "place where the harmful event occurred" referred to in Article 7(2) of the Brussels I (recast) Regulation in the case of network delicts. The European Court of Justice found in the *Bolagsupplysningen OÜ* case that in the case of publishing something online (i.e. network delict) the referred place could among other things[9] be deemed to be the place where the injured legal person's centre of interests is located. This is due to the reason that the court of that place is in a suitable position to assess the actual impact on the legal person of what is published on the web and whether what is published damages the legal person or not[10] – the court of that place indeed has the best access to the material proving these circumstances. In the *Bolagsupplysningen OÜ* case, the European Court of Justice therefore interpreted Article 7(2) of the Brussels I (recast) Regulation pursuant to the general purpose of the norms for the examination of special jurisdiction – to ensure that the dispute is resolved by the most suitable court from the perspective of procedural economy. Next, it will be explained to what extent a similar reasoning can be transferred to the interpretation of other norms of Estonian private international law, which may be applicable in disputes concerning network delicts in Estonian courts.

3. Legislation regulating the examination of jurisdiction in disputes concerning network delicts and its area of application

In the absence of a special regulation concerning network delicts in particular, the general private international law acts concerning non-contractual obligations shall be applied when examining jurisdiction in disputes concerning such delicts.

[8] The so-called connecting link or connecting factor is deemed to be the part of a private international law norm which links the facts of the specific case to some court or applicable law. For example in the norm, pursuant to which the law of the bequeather's last country of residence shall be applied to succession, the connecting link is the "bequeather's last place of residence" – the law applicable to succession is determined pursuant to it. But in the norm that, enables to file an action for support with the court of the creditor's country of habitual residence, the connecting link is the "contractor's habitual residence". If interested, read more about the connecting link in private international law: I. Nurmela, Rahvusvaheline eraõigus, Juura 2008, p 43–45.

[9] Traditionally in the case law of the European Court of Justice the "place where the harmful event occurred" for the purposes of the Brussels I instruments has been deemed to be both the place of the harmful act and the place where the damage occured on (see about this: *eDate Advertising GmbH vs. X* and *Olivier Martinez vs. MGN Limited*. Joined cases C-509/09 and C-161/10 (ECLI:EU:C:2011:685), para 41 and case law referred to there). In the *Bolagsupplysningen OÜ* case the European Court of Justice dealt with determining the latter of those. In which country the publication as an act takes place in the case of publishing data online, the European Court of Justice left open in the *Bolagsupplysningen OÜ* judgment.

[10] *Bolagsupplysningen OÜ* and *Ingrid Ilsjan vs. Svensk Handel AB*, para 37.

More precisely, in the case of network delicts jurisdiction[11] is examined on the basis of the appropriate international agreements (legal assistance agreements concluded with the Russian Federation[12] and Ukraine[13], the 2007 Lugano Convention[14]), the Brussels I (recast) Regulation and the Code of Civil Procedure[15].

3.1. Examining jurisdiction in disputes concerning network delicts pursuant to legal assistance agreements

If a citizen or legal person of the Russian Federation or Ukraine participates in a court case as a party to the proceedings, the jurisdiction must be examined and the applicable law determined (accordingly) on the basis of legal assistance agreements concluded with the Russian Federation and Ukraine.[16] In the case of network delicts, the legal assistance agreements would therefore be applicable, for example, if a person that is a Russian citizen living in Estonia published false information concerning some Estonian company on its website, due to which the latter would want to sue the Russian citizen in an Estonian court.

The jurisdiction examination norms applicable in the case of network delicts are worded analogously in both legal assistance agreements. For example, pursuant to subsections 1-3 of Article 40 of the Estonian-Russian legal assistance agreement, the delict law disputes are as a rule[17] subordinated to the court of the contracting state, on the territory of which the act or another fact that formed the basis for the claim for the compensation for damage occurred. A similar regulation is also contained in Article 33 of the Estonian-Ukrainian legal assistance agreement. The legal assistance agreements, however, leave open the question of how to determine the place "where the act or another fact that formed the basis for the claim for the compensation for damage occurred" for the purposes of the abovementioned provisions, if the delict in relation to which the compensation for damage is claimed, has been committed online. This question is also not answered by Estonia's current jurisprudence.

[11] See more about the examination of jurisdiction: M. Torga, Rahvusvahelise kohtualluvuse kontrollimine Eesti kohtutes, Juridica 2013/3, p 192–200. Read more about the jurisdiction of cases concerning defamation of honour on the internet in Estonian: M. Sepp, Au haavamine internetis ja sellest tulenevate nõuete rahvusvaheline kohtualluvus, Magistritöö, Tartu Ülikool 2016.

[12] Agreement between the Republic of Estonia and the Russian Federation on legal assistance and legal relations in civil, family and criminal cases, RT II 1993, 16, 27.

[13] Agreement between the Republic of Estonia and Ukraine on legal assistance and legal relations in civil, family and criminal cases, RT II 1995, 13, 63.

[14] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – protocols, OJ L 147, 10.06.2009, p 5–43.

[15] Code of Civil Procedure (TsMS), RT I 2005, 26, 197; RT I, 04.07.2017, 31.

[16] See more about the area of application of legal assistance agreements: M. Torga, Õigusabilepingute kohaldamine tsiviilvaidluste lahendamisel Eesti kohtutes, Kohtute aastaraamat 2012, p 76–81.

[17] In addition, the injured party may file an action to the court of the contracting state, on the territory of which the respondent's residence is (Art 40(3) of the Estonian-Russian legal assistance agreement, Art 33(3) of the Estonian-Ukrainian legal assistance agreement). The special nature of network delicts does not cause additional difficulties when determining the respondent's residence as the connecting link – determining the respondent's residence is rather a factual problem because nobody "lives" online (at least not in the traditional and legal meaning of the word).

There cannot be a dispute over the fact that the internet is not a so-called physical place with which some country's court or law could be linked. Therefore, even in the case of network delicts, it is necessary to determine a physical place where, for the purposes of legal assistance agreements, the act which provides grounds for the claim for the compensation for damage was committed. Regardless of the fact that the legal assistance agreements are not European Union legislation and that the European Court of Justice does not have competence to interpret legal assistance agreements, the reasoning used in the *Bolagsupplysningen OÜ* case of the European Court of Justice can still also be used for interpreting legal assistance agreements and this is so for the following reasons.

In the *Bolagsupplysningen OÜ* case, the European Court of Justice interpreted Article 7(2) of the Brussels I (recast) Regulation, which by its nature is a norm of special jurisdiction. Special jurisdiction norms give the plaintiff an additional opportunity to sue the respondent, in addition to turning to the court of the plaintiff's residence, habitual residence, domicile[18] etc. country, in the country where the evidence necessary for resolving the dispute is presumably located, i.e. where it is most sensible to resolve the specific dispute from the perspective of procedural economy.[19] For example, in the *Bolagsupplysningen OÜ* case, i the opinion of the European Court of Justice the appropriate court in the case of network delicts, when assessing damage caused to a legal person, was the court of the place that can best assess the actual impact on the legal person of what was published online and whether what was published damages the legal person or not.[20]

The reasoning used by the European Court of Justice in the *Bolagsupplysningen OÜ* case can in principle also be used for interpreting the provisions of legal assistance agreements concerning tort, delict and quasi-delict cases (that are by nature also provisions of special jurisdiction)[21] – for the purposes of legal assistance agreements " the place where an act or other fact that formed the basis for the claim for the compensation for damage occurred" should, therefore, be the place where the evidence that the respective act was committed is located. In the case of network delicts, such a place can primarily be the place where the person uploads

[18] Suing the plaintiff on the basis of his residence, habitual residence, domicile etc. means suing the plaintiff pursuant to general jurisdiction. The general jurisdiction verification provisions of various legislation thereat use somewhat different personal connecting links – e.g. the Code of Civil Procedure (TsMS) uses the respondent's residence in the general jurisdiction norm (TsMS § 79 (1)), Art 4 (1) of the Brussels I (recast) Regulation the respondent's habitual residence i.e. domicile, Art 3 of the maintenance obligation regulation (Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.01.2009, p 1–79) the respondent's habitual residence etc.

[19] With respect to Art 7 of the Brussels I (recast) Regulation it is mainly confirmed by recital 16 of the Regulation.

[20] *Bolagsupplysningen OÜ* and *Ingrid Ilsjan vs. Svensk Handel AB*, para 37.

[21] This can be read in the second sentence of Art40(3) of the Estonian-Russian legal assistance agreement and the second sentence of Art 33(3) of the Estonian-Ukrainian legal assistance agreement. According to these provisions the injured party can file an action also in the respondent's country of residence, i.e. the right to sue the respondent "in the place where the act or other fact that formed the basis for the claim for the compensation for damage occurred" is an additional option given to the plaintiff pursuant to the wording of these provisions.

something online, i.e. where the evidence about the commission of the respective act (putting material online) is located. Such a place is primarily the place where the person physically operates, insofar as physical evidence about his activities is located in that place (e.g. an extract of the internet café video recording, a curious neighbour peering at the computer screen over the shoulder of the person that causes the damage etc.). For example, merely the fact that someone participates in a chat room directed to foreign readers via a computer network does not make the activity physically take place in a foreign country, insofar as in such a case the evidence about the damage arising (e.g. damage to the injured party's reputation) may be located in a foreign country, but not the evidence concerning committing the specific act.

3.2. Examining jurisdiction in disputes concerning network delicts pursuant to the 2007 Lugano Convention and the Brussels I (recast) Regulation

The Brussels I (recast) Regulation adopted in the European Union and the 2007 Lugano Convention concluded by the European Union with Iceland, Switzerland and Norway regulate the examination of jurisdiction in civil and commercial matters (incl. matters of tort, delict and quasi-delict).[22] Both pieces of legislation contain analogously worded norms for examining jurisdiction in tort, delict and quasi-delict matters (Art 5(3) of the 2007 Lugano Convention and Art 7(2) of the Brussels I (recast) Regulation), the European Court of Justice also interpreted in the *Bolagsupplysningen OÜ* case.

To put it simply, both pieces of legislation prescribe that in matters of tort, delict and quasi-delict the respondent (in the absence of a jurisdiction agreement) can be sued in the country where the respondent's permanent residence or seat i.e. domicile[23] is, or in the place where the "harmful event occurred or may occur". The first option of the two is expressed in the general jurisdiction examination norms contained in both pieces of legislation (Convention Art 2(1) and Regulation Art 4(1)), the purpose of which is to ensure that everyone is able to foresee as well as possible country where they can be sued[24] – persons can best foresee that they can be sued in the country where they live or (in the case of legal persons), where their seat is. The other option is expressed in the special jurisdiction norms included in both pieces of legislation (Convention Art 5(3) and Regulation Art 7(2)), the purpose of which is to ensure that the dispute is resolved by a court that is closely connected to the action[25], i.e. where the evidence about the facts forming the basis of such a claim are located. According to these purposes the

[22] See more about the relationship of these two legal acts and the precise area of application when examining jurisdiction: M. Torga, § 69 – V. Kõve jt, Tsiviilkohtumenetluse seadustik, Kommenteeritud väljaanne, Juura 2017, p 413–414.

[23] Read more about this term in Estonian: M. Torga, Elukoht tsiviilseadustiku üldosa seaduses: tähendus rahvusvahelises tsiviilkohtumenetluses, Juridica 2010/7, p 473, 476–477.

[24] This has been confirmed by the European Union legislators e.g. in recital 15 of the recital of the Brussels I (recast) Regulation.

[25] This can been confirmed e.g. in recital 16 of the Brussels I (recast) Regulation.

European Court of Justice has interpreted the Brussels I instruments[26] in a row of court cases – for example, in the *Bolagsupplysningen OÜ* case the court held that in the case of damage being caused online, a legal person plaintiff should be able to sue the person that caused the damage in the Member State where the plaintiff's centre of interests is located, as the evidence about damaging him is located in that country.[27] The European Court of Justice had decided essentially the same earlier in the so-called *eDate*[28] case with respect to natural person plaintiffs. Both court cases were based on the position already expressed by the Court of Justice of the European Union in 1976 in the so-called *Bier* case[29], pursuant to which for the purposes of the Brussels I instruments the "place where the harmful event occurred or may occur" must be deemed to be the place where damage occurs as well as the place where the act is committed or the event occurs that is the basis for causing damage.[30] The European Court of Justice did not deal with determining the latter of these in its judgments, however, in professional legal literature in the context of Brussels I instruments the position has been taken that when examining jurisdiction, in the case of network delicts the place of committing the act should be deemed to be the place where the person uploads the material online or from where he e.g. sends an e-mail to someone, i.e. the physical place where the respective acts are committed,[31] but not e.g. the place from where the material is accessible.[32]

As explained before, in the *Bolagsupplysningen OÜ* and *eDate* cases the European Court of Justice dealt with defining the place where the damage occurred as the connecting link, i.e. it assessed, where the place where the damage occurred is located if the damage is caused by publishing something on the internet. In both cases the reasoning of the European Court of Justice was based on the logic that in the case of causing damage to a person in an online environment, this damage can best be assessed by the court closest to the person, i.e. the court where the centre of the person's interests is located. When interpreting the connecting links contained in the jurisdiction norms, the court therefore mainly relied on considerations of procedural economy. The same considerations are, however, not transferable to interpreting the connecting links contained in the instruments for the determination of applicable law in disputes where damage is caused to the injured party via a computer network.

[26] The Brussels I instruments are the Brussels I (recast) Regulation, the Brussels I Regulation that preceded it and the Brussels Convention and the 2007 Lugano Convention, as the jurisdiction examination provision of all of these pieces of legislation are largely worded analogously. See the Brussels I Regulation: Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12, 16.01.2001, p 1–23. See the Brussels Convention: 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJ L 299, 31.12.1972, p 32–42. Estonia has never joined the Brussels Convention, therefore there is no official Estonian language version of the Brussels Convention. The Brussels Convention is still important for those applying Estonian law, as the decisions made by the European Court of Justice concerning the Brussels Convention can be used for interpreting the provisions of the Brussels I Regulation and the Brussels I (recast) Regulation.

[27] *Bolagsupplysningen OÜ* and *Ingrid Ilsjan vs. Svensk Handel AB*, para 37.

[28] See: *eDate Advertising GmbH vs. X* and *Olivier Martinez vs. MGN Limited*, para 52.

[29] *Handelskwekerij G. J. Bier BV vs. Mines de potasse d'Alsace SA*, case C-21/76, ECLI:EU:C:1976:166.

[30] See the *Bier* case, para 24.

[31] P. Mankowski, art 7, Brussels Ibis Regulation. European Commentaries on Private International Law, Sellier 2016, p 295. See the same also e.g.: O. Bigos (2008), p 605.

[32] P. Mankowski (2016), p 296.

4. Legislation regulating the determination of applicable law in disputes concerning network delicts and their area of application

In the case of network delicts, the applicable law is determined[33] on the basis of the provisions of the appropriate international agreements (i.e. the legal assistance agreements concluded with the Russian Federation and Ukraine), the Rome II Regulation and the Private International Law Act (the PILA).[34] Similarly to legislation regulating the examination of jurisdiction, these pieces of legislation do not contain special norms about determining the law applicable to network delicts. The law applicable to network delicts is therefore determined on the basis of the general rules for determining applicable law for delicts contained in these pieces of legislation.

4.1. Determining the applicable law in disputes concerning network delicts on the basis of legal assistance agreements

The norms for determining the applicable law in the case of network delicts have been worded analogously in both legal assistance agreements concluded with third countries (Russian Federation, Ukraine). For example, pursuant to subsections 1-3 of Article 40 of the Estonian-Russian legal assistance agreement, the norms of the country of location of that court are, as a rule, applied to network delicts,[35] on the territory of which the act or another fact that formed the basis for the claim for the compensation for damage occurred. A similar regulation is also included in Article 33 of the Estonian-Ukrainian legal assistance agreement. The connecting link for determining the applicable law in delict disputes is therefore the same as for examining jurisdiction in legal assistance agreements.

As the legal assistance agreements use the same connecting link for examining jurisdiction as well as determining the applicable law in delict disputes (i.e. "the place the act or other fact that formed the basis for the claim for compensation of damage occurred"), it would not be reasonable to start defining this connecting link differently depending on whether the court is currently examining jurisdiction or determining the applicable law. The court should, however, take into account the different purpose of the norms for examining jurisdiction and determining the applicable law when interpreting these norms, that are contained in different pieces of legislation. This difference is better explained in the context of the Estonian private international law on the example of the different interpretations of the Brussels I instruments and the Rome II Regulation.

[33] Read more about the legislation for determining applicable law and their relationship: M. Torga, Kohalduva õiguse ja selle sisu kindlakstegemine rahvusvahelistes eraõiguslikes vaidlustes, Juridica 2014/5, p 406–416.

[34] The Private International Law Act. RT I 2002, 35, 217; RT I, 26.06.2017, 31.

[35] As an exception the law of the country of joint citizenship of the parties to the proceedings can be applied to delicts pursuant to the legal assistance agreements: Art 40(2) of the Estonian-Russian legal assistance agreement, Art 33(2) of the Estonian-Ukrainian legal assistance agreement.

4.2. Determining the applicable law in disputes concerning network delicts on the basis of the Rome II Regulation

The Rome II Regulation regulates the determination of applicable law to non-contractual obligations on the European Union level. With respect to network delicts, the area of application of the Regulation is more limited than that of the Brussels I (recast) Regulation. This is due to the reason that Article 1(2)g) of the Rome II Regulation precludes from the area of application of the Regulation non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation. Often the legal rights that are damaged in the case of network delicts are precisely natural persons' privacy, personality rights etc. (e.g. if false allegations, insults etc. are published about the injured party online). If the network delict damages the personality right or privacy of a natural person, the Rome II Regulation is not applicable pursuant to its Article 1(2)g) and the applicable law must be determined pursuant to the relevant provisions of the PILA instead.

It is not unequivocally clear to what extent the Rome II Regulation is to be applied in the case of network delicts, with which a legal person is damaged. As previously explained, the right damaged by network delicts is normally a person's privacy, good name, personality right etc., i.e. it is a situation that is precluded from the area of application of the Regulation by its Article 1(2)g) if the injured party is a natural person. The same exception is not explicitly prescribed by the Regulation in the case of legal persons. Even though there is a prevalent understanding in Estonian substantive law that a legal person does not have a private life, the inviolability of which could be breached, and the legal person's right to claim compensation for non-patrimonial damage is also denied in Estonian substantive law,[36] then in the context of Estonian private international law it is not so easy to reach the same conclusion. This is due to the reason that in civil disputes with an international element, the law of a foreign country may theoretically apply, pursuant to which personality rights may be owned by legal persons as well as natural persons. The European Court of Justice has yet to provide a consistent interpretation to Article 1(2)g) of the Regulation, however, in professional legal literature the position that moral rights should not extend to legal persons from the context of the Rome II Regulation is supported,[37] i.e. if a legal person is damaged by a network delict, regardless of its Article 1(2)g) the Rome II Regulation is still applicable when determining the law applicable to this delict, therefore the determination of applicable law to network delicts on the basis of the Rome II Regulation will be discussed next.

If the network delict damages a legal person or if the network delict damages such a right of a natural person that is not the right to privacy or other personality right, the law applicable to the network delict must be determined on the basis of the Rome II Regulation. What right is damaged by the network delict determines

[36] See more about this: K. Sein, § 134 – P. Varul jt, Võlaõigusseadus I kommenteeritud väljaanne, Juura 2016, § 134, c 3. See also: M. Käerdi § 1045 – P. Varul jt, Võlaõigusseadus III kommenteeritud väljaanne, Juura 2009, § 1045, c 3.5.

[37] A. Halfmeier, Rome II Regulation art 1, G.-P. Calliess (toim), Rome Regulations, Commentary on the European Rules of the Conflict of Laws, p 387–388.

which provision of the Rome II Regulation must be applied in the respective case – for example, if the right to intellectual property is damaged online, the law applicable to such a network delict shall be determined on the basis of the special rule contained in Article 8 of the Rome II Regulation (*Infringement of intellectual property rights*), i.e. the law of the country for which protection is claimed shall be applied to the network delict. If a person living in Finland uploads online a book written by a professor of the University of Tartu, Finnish law shall therefore be applied with respect to the damage caused to the professor for the reason that the book is read by Finnish readers for free.

As a general rule, pursuant to Article 4(1) of the Rome II Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict (incl. network delicts) shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. The purpose of this rule is to ensure that parties have legal certainty in respect of which law shall be applied to the legal relationship between them.[38] How to determine the place where damage occurred for the purposes of the Rome II Regulation in the case of network delicts therefore primarily depends on which country's law's application the parties to the legal relationship can foresee, not however e.g. on of which country's territorial jurisdiction the evidence necessary for the resolution of the dispute is located, as was important for interpreting the Brussels I instruments. Therefore, it is not theoretically precluded that in the case of network delicts the European Court of Justice would interpret the Brussels I instruments and the Rome II Regulation and the connecting links contained in them differently, this regardless of the similar wording of such connecting links. For example, if a person who lives in Finland causes damage by uploading insulting materials in Finnish about an Estonian company on a web address with the Finnish "fi" ending, which is read by Finnish readers, according to the position of the European Court of Justice so far the plaintiff can sue for the damage caused to him in an Estonian court by his centre of interests as the place where the damage occurred. When determining the applicable law, the "place where the damage occurred" for the purposes of Article 4(2) of the Rome II Regulation may, however, be Finland, insofar as that is the country, which the parties best foresee as the place where damage occurred. The reasoning used in the *Bolagsupplysningen OÜ* case is not suitable for interpreting the Article 4(2) of the Rome II Regulation due to the above regardless of the fact that the connecting links that both Regulations use in norms concerning non-contractual obligations seem similar at first.

[38] This can be derived from e.g. para 14 of the recital of the Rome II Regulation.

4.3. Determination of applicable law in disputes concerning network delicts on the basis of the PILA

In the case of delicts that do not fall within the area of application of the legal assistance agreements and the Rome II Regulation, the determination of the applicable law takes place pursuant to the appropriate regulation of the PILA. More precisely, the first sentence of § 50 (1) of the PILA prescribes that, as a rule,[39] claims arising from unlawful causing of damage shall be governed by the law of the state where the act or event which forms the basis for causing the damage was performed or occurred. The regulation of the PILA therefore differs somewhat from the Rome II Regulation – if the latter prescribes that the law of the place where the damage occurred shall apply to the network delict, then according to the general rule of the PILA, the law of the country where damage is caused is applied. However, what connects both pieces of legislation is the fact that the connecting links used in them should rely on what is foreseeable for the persons participating in legal relationships – pursuant to the logic of the PILA, presumably the person causing the damage should foresee the application of the rules of compensation for damage of the country where he operates. The reasoning of the European Court of Justice used in the *Bolagsupplysningen OÜ* case when defining the connecting link contained in Article 7(2) of the Brussels I (recast) Regulation is, therefore, also not transferable to the interpretation of § 50(1) of the PILA as the aims that these provisions serve are different, regardless of the fact that both may apply in disputes concerning network delicts.

At first glance, it may seem that in the case of network delicts, if it is difficult to physically determine the place where the damage occurred, insofar as there is access to material on the internet from very different countries, the regulation contained in § 50(1) of the PILA is easier to apply as it is probably easier to determine the person's act in comparison with the occurrence of damage. At the same time it may not always be so – even though when uploading some material online a person must factually always operate in some country and the respective place may be the suitable connecting link for examining jurisdiction, such a place may not be foreseeable for the parties to the dispute as the place of operation from the perspective of applicable law. For example, if a person posts Swedish language materials to the comments section of a Swedish online newspaper in a Finnish internet café, knowing that it will be read by Swedish readers, the application of Swedish law may be significantly more foreseeable to the person posting and the injured party, than the application of Finnish law. In order to avoid potential disputes over where the consequence of the commission of the network delict arrives for the purposes of § 50(1) of the PILA, pursuant to § 54 of the PILA the parties may agree on the application of Estonian substantive law. The respective agreement can still, however, only be concluded after the harmful event has occurred or commission of the act. Therefore, the use of such an option is probably not very likely in practice, considering the opposing interests of the disputing parties.

[39] Pursuant to the second subsection of the same provision, if the consequences do not become evident in the state where the act or event which formed the basis for causing the damage was performed or occurred, the law of the state where the consequences of the act or event became evident shall be applied at the request of the injured party.

5. Summary

In the modern world, figuratively a lot happens online, among other things it is possible to cause both non-patrimonial and patrimonial damage to persons online. In which courts the resolution of such claims arising from causing damage in this manner should take place is, however, still based on the same considerations, as at the time when the internet was not yet in use by the masses, i.e. in the territorial jurisdiction of which country's court the evidence of the commission of some act or the occurrence of the consequence is physically located. This reasoning confirmed by the European Court of Justice in the *Bolagsupplysningen OÜ* case is appropriate when interpreting all of the legislation regulating the examination of jurisdiction in Estonian courts, but it is not appropriate for interpreting the norms for determining the applicable law. This is due to the reason that the norms for the examination of jurisdiction and determination of the applicable law serve different purposes in private international law. The common norms of the European Union for the determination of applicable law still await the position of the European Court of Justice, which would probably be based on the purpose of protecting the foreseeable expectations of the participants in the legal relationship, i.e. it is not precluded that the determination of the place where the damage occurred in the case of network delicts, which was confirmed in the *Bolagsupplysningen OÜ* judgment, will not be approved when determining applicable law in similar disputes.

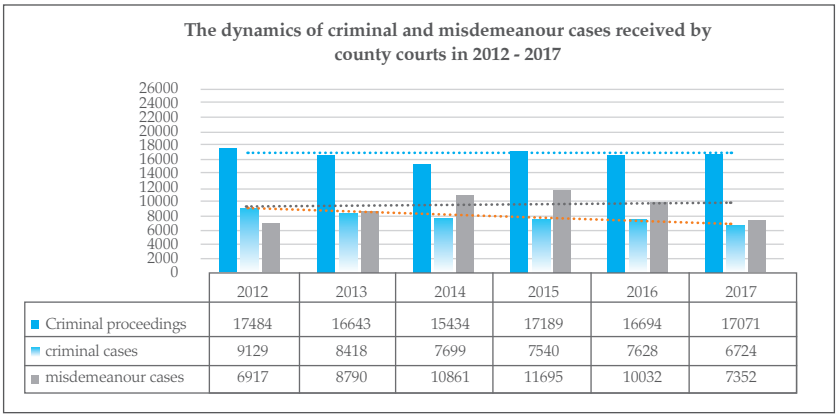
III
STATISTICS

OVERVIEW OF PROCEDURAL STATISTICS OF COUNTY, ADMINISTRATIVE, AND CIRCUIT COURTS IN 2017; ADJUDICATED CASES AND THE AVERAGE WORK LOAD OF JUDGES

Külli Luha, analyst at the Ministry of Justice, Department of Courts

In 2017, the county courts received 30 179 civil cases for hearing (0.8% less than in 2016) and 32 187 cases for expedited procedure in orders for payment (3.8% more than in 2016), 17 071 criminal procedure cases (2.3% more than in 2016), including 7724 criminal cases (11.9% less than in 2016) and 7352 misdemeanour procedure cases (26.7% less than in 2016).[1] Administrative courts received 2986 administrative matters for adjudication (1.0% more than in 2016).

The figures below illustrate the changes in figures over the past five years of criminal and misdemeanour cases (figure 1), civil cases (figure 2)[2] and administrative cases (figure 3) received by county courts. The trend line on the figures shows the change in the work load of courts over the past five years.

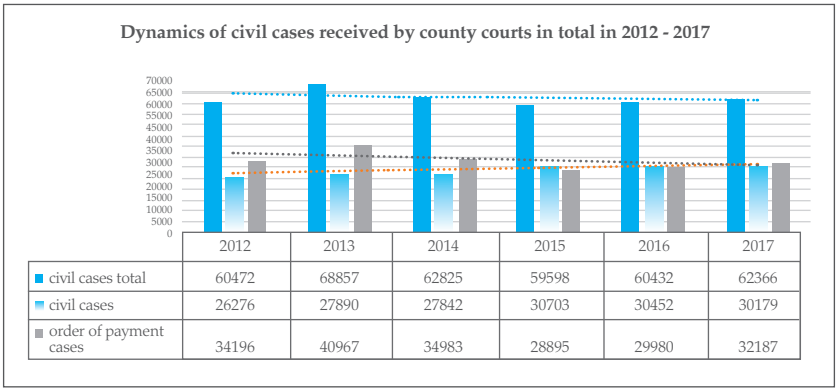


	2012	2013	2014	2015	2016	2017
Criminal proceedings	17484	16643	15434	17189	16694	17071
criminal cases	9129	8418	7699	7540	7628	6724
misdemeanour cases	6917	8790	10861	11695	10032	7352

Figure 1

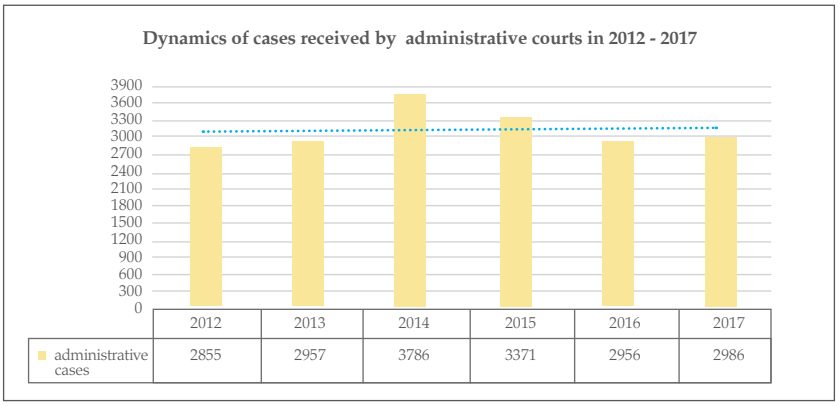
[1] To clarify: in Estonia, sanctions which in many other European countries are considered administrative sanctions, are considered part of penal law and adjudicated by criminal judges.

[2] This figure reflects the total number of cases submitted to civil court proceedings in county courts, including to the Pärnu CC and to the Haapsalu courthouse submitted cases for e-payment order expedited procedures; supervision proceedings are not included.



	2012	2013	2014	2015	2016	2017
civil cases total	60472	68857	62825	59598	60432	62366
civil cases	26276	27890	27842	30703	30452	30179
order of payment cases	34196	40967	34983	28895	29980	32187

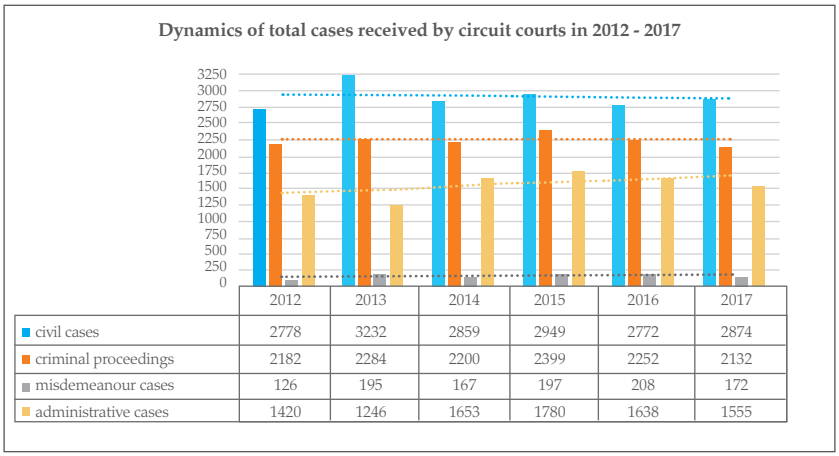
Figure 2



	2012	2013	2014	2015	2016	2017
administrative cases	2855	2957	3786	3371	2956	2986

Figure 3

The circuit courts received a total of 2874 civil cases in appeals and appeals against court rulings (3.7% more than in 2016), 1555 administrative cases (5.1% less than in 2016), 2132 criminal cases (5.3% less than in 2016) and 172 misdemeanour cases (17.3% less than in 2016). The figure below (figure 4) demonstrates changes in the number of cases received by circuit courts over the past five years across all types of proceedings. Additionally, the trend lines show the changes in the work loads of circuit courts over the past five years.



	2012	2013	2014	2015	2016	2017
civil cases	2778	3232	2859	2949	2772	2874
criminal proceedings	2182	2284	2200	2399	2252	2132
misdemeanour cases	126	195	167	197	208	172
administrative cases	1420	1246	1653	1780	1638	1555

Figure 4

More detailed information about the procedural statistics of first and second instance courts for 2017 across all types of procedures are published on the website of courts at[3]:

Adjudicating cases in county courts: civil cases

In county courts, a total of 30 068 civil cases were resolved, of which 14 641 at the Harju County Court, 3668 at the Pärnu County Court, 6598 at the Tartu County Court and 5161 at the Viru County Court. Over a half were resolved in contentious proceedings, i.e. 53.4%, and 43.6% were resolved in non-contentious proceedings, including 10% international legal assistance. Resolved cases involving provisional legal protection securing an action constituted 1.5%.

In 2017, there were no differences in the distribution of substantively resolved cases, therefore, county courts resolved law of obligation matters the most (32.2% of resolved cases), followed by family law cases (23.6% resolved cases), and matters subject to the General Part of the Civil Code Act (14.4% resolved cases). The remaining 29.8% were divided between enforcement, bankruptcy cases, company law, international legal assistance, and other civil cases (figure 5).

[3] http://www.kohus.ee/sites/www.kohus.ee/files/elfinder/dokumendid/i_ja_ii_astme_kohtute_2017.a_statistilised_koondandmed.pdf

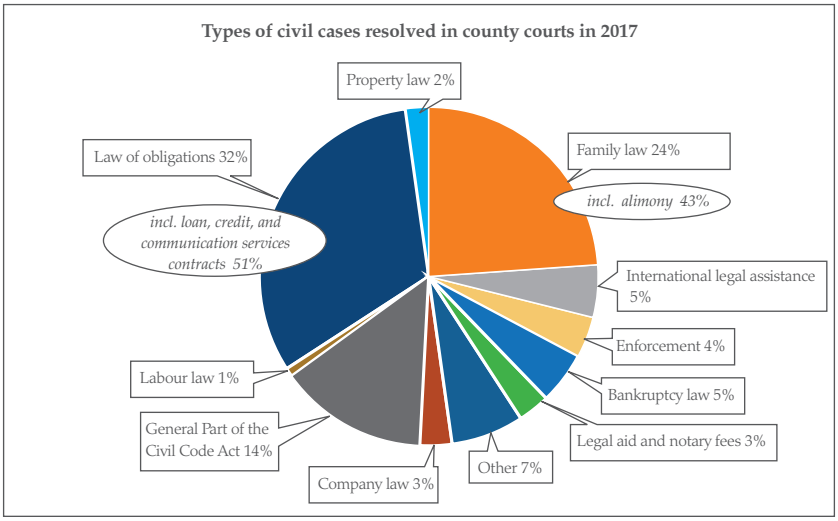


Figure 5

The average duration of proceedings in civil cases in 2017 was 99 days, with 113 days average at the Harju County Court, 80 days at the Pärnu County Court, 80 days at the Tartu County Court, and the 97 days at the Viru County Court. In county courts, 16 075 civil cases were resolved in contentious proceedings with an average duration of 165 days, substantive resolution was reached in contentious proceedings in 8410 cases (incl. judgment by default in county courts 53% - 59% of substantive resolutions in contentious proceedings). The longest durations were in civil cases resolved through contentious proceedings were, in the so-called full length proceedings. The table below reflects the time spent on adjudicating these civil cases and the share of full length proceedings across courts:

Court	Resolved in full length proceedings, number of actions resolved	Average duration of proceedings in days	*incl. nr of resolved cases (and percentage), in which proceedings lasted more than 365 days*
Harju County Court	1812	285	*467 (25,8%)*
Pärnu County Court	464	177	*44 (9,5%)*
Tartu County Court	719	194	*75 (10,4%)*
Viru County Court	626	195	*78 (12,5%)*
County courts total	**3621**	**237**	***664 (18,3%)***

In terms of substance, the longest duration civil cases were intellectual property cases (40 cases were resolved with an average duration of 438 days), followed by law of succession cases in contentious proceedings (78 cases resolved with the average duration of 311 days), labour law cases (364 cases resolved with an average duration of 220 days), bankruptcy cases in contentious proceedings (157 cases resolved with an average duration of 289 days), and company law cases (188 cases were resolved with an average duration of 252 days).

In county courts, 13 086 civil matters were resolved through non-contentious proceedings, including proceedings terminated through the approval of a compromise in 171 cases, with an average duration of 157 days. Matters of securing an action/provisional legal protection were resolved on average in 6 days (with 466 such cases resolved in county courts), letters of request (167 resolved cases) were resolved on average in 19 days, legal aid and notary fee cases (941 resolved cases) were adjudicated on average in 28 days, and matters subject to the General Part of the Civil Code Act (4332 resolved cases) were adjudicated on average in 38 days.

In 2017 in county courts, a total of 1255 international legal assistance cases were resolved (delivering documents, gathering evidence, applications for proof of enforcement order, state legal aid in cross-border cases, European order for payment cases).

In county courts, civil cases were adjudicated by 84 judges, of them 41.2 at the Harju County Court, 9.4 at the Pärnu County Court, 19.5 at the Tartu County Court, and 13.9 at the Viru County Court.[4] During 2017, every judge that adjudicated civil matters at the Harju County Court resolved an average of 355.4 civil cases, at the Pärnu County Court an average of 390.2 civil cases, at the Tartu County Court an average of 338.4 civil cases, and at the Viru County Court an average of 371.3 civil cases.

Resolving cases at the county courts: criminal and misdemeanour cases

A total of 17 136 criminal proceedings were heard in county courts, which were divided into types of proceedings as follows: 39.7% of resolved cases were criminal cases (22% of criminal cases were submitted to expedited procedure), 26.2% were cases of judges in charge of execution of court judgments, 27.7% were cases of preliminary investigation judges, 5.4% cross-border cooperation cases, and 1.0% other criminal proceedings (figure 6).

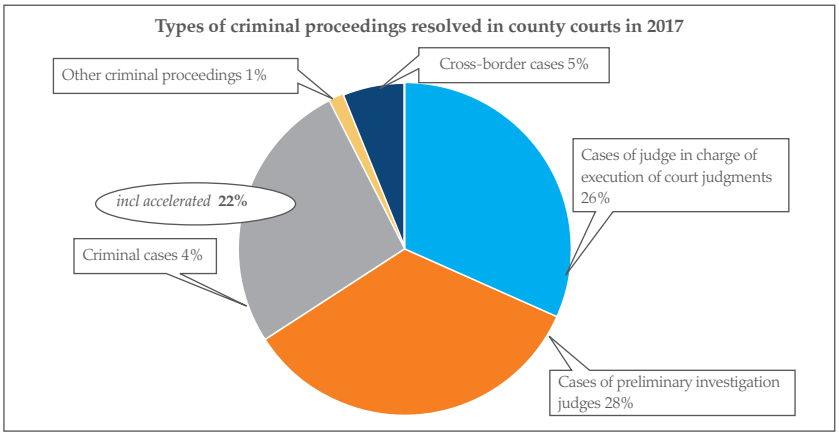


Figure 6

[4] The basis for this calculation is the specialisation of judges, vacant positions, and long-term absences (more than 3 consecutive months).

In county courts, a total of 6802 criminal cases were resolved, of which 2703 were at the Harju County Court, 1013 at the Pärnu County Court, 1614 at the Tartu County Court, and 1472 at the Viru County Court. Two thirds (i.e. 4738 criminal cases) of criminal cases were resolved through settlement proceedings (incl. 752 in expedited procedure), 1455 in alternative proceedings (incl. 648 in expedited procedure), 172 summary proceedings (incl. 79 in expedited procedure) and 437 cases in general procedure. In county courts, the adjudication of cases in general procedures on average took 223 days, of which 11.4% cases lasted over 365 days. The average duration of the 8365 criminal cases adjudicated in simplified proceedings[5] in county courts was 30 days. The following table reflects the number of cases adjudicated in general proceedings and the duration of the proceedings:

Court	Number of criminal cases resolved in general proceedings and average duration of proceedings (in days)					
	1 accused person		2-5 accused persons		over 5 accused persons	
	Nr of cases	Avg duration of proc.	Nr of cases	Avg duration of proc.	Nr of cases	Avg duration of proc.
Harju County Court	113	149	21	279	5	264
Pärnu County Court	75	150	18	181	2	206
Tartu County Court	105	225	16	276	3	198
Viru County Court	61	206	17	341	1	865
County courts total	**354**	**198**	**72**	**341**	**11**	**290**

The biggest rise in the work load of judges adjudicating in criminal proceedings in 2017 was among cases resolved by preliminary investigation judges. In total, 4754 such cases were resolved in county courts, whereas over two thirds were search warrant applications (37.6% cases adjudicated by preliminary investigation judges) and arrest warrant and arrest warrant justification applications (37.1% of cases). The following table reflects the number of cases resolved by preliminary investigation judges across courts in 2015–2017:

Court	Cases resolved in 2017	Cases resolved in 2016	*Work load change 2017 vs 2016*	Cases resolved in 2015
Harju County Court	2465	1734	*42.2%*	1364
Pärnu County Court	494	318	*55.3%*	272
Tartu County Court	896	527	*70.0%*	436
Viru County Court	899	553	*62.6%*	423
County courts total	**4754**	**3132**	***51.8%***	**2495**

In 2017, 816 international cooperation cases (incl. surrendering a person to a foreign state, arrest for surrender, confirmation of the legality of an extradition,

[5] These include alternative proceedings, settlement proceedings, summary proceedings and expedited procedure.

handing over property to a foreign state) were resolved in county courts, of which 392 at the Harju County Court, 140 at the Pärnu County Court, 187 at the Tartu County Court, and 97 at the Viru County Court. The average duration of international cooperation cases in 2017 was 18 days (whereas it did not significantly differ between courts).

In county courts, a total of 7348 misdemeanour proceedings were adjudicated, of which 3348 at the Harju County Court, 1349 at the Pärnu County Court, 1295 at the Tartu County Court, and 1388 at the Viru County Court. The average duration of a misdemeanour proceeding case was 40 days, and resolving appeals filed against decisions made in misdemeanour matters on average took 58 days. In county courts, a total of 2900 misdemeanour cases and appeals filed against decisions made in misdemeanour matters were resolved, which were divided in substance as follows: 63.2% traffic misdemeanours, 15.9% misdemeanours against public health, 6.3% misdemeanour offences against property, 3.8% misdemeanour offences against public peace, and 10.8% other misdemeanours.

Criminal and misdemeanour proceedings were adjudicated in county courts by a total of 55.3 judges, of them 20.6 at the Harju County Court, 9.0 at the Pärnu County Court, 12.8 at the Tartu County Court, and 12.9 at the Viru County Court.[6] In 2017, each Harju County judge, who adjudicated offences resolved an average of 354.5 criminal proceedings and 162.5 misdemeanour proceedings, each judge of the Pärnu County Court on average in a year resolved 203.0 criminal proceedings and 149.9 misdemeanour proceedings, each judge at the Tartu County Court resolved an average of 315.5 criminal proceedings and 101.3 misdemeanour proceedings, and each judge at the Viru County Court resolved an average of 293.5 criminal proceedings and 107.6 misdemeanour proceedings.

Resolving cases in administrative courts

In 2017, a total of 2967 administrative cases were resolved in administrative courts, of which 1648 at the Tallinn Administrative Court and 1319 at the Tartu Administrative Court. In terms of contents, the most cases were solved concerning law enforcement (41.9% resolved cases), 13.6% of the resolved cases were tax law matters, 8.7% population cases, 5.4% planning and building cases, 3.8% economic governance cases, and 23.3% were other resolved administrative cases (figure 7).

[6] The basis for this calculation is the specialisation of judges, vacant positions, and long-term absences (more than 3 consecutive months).

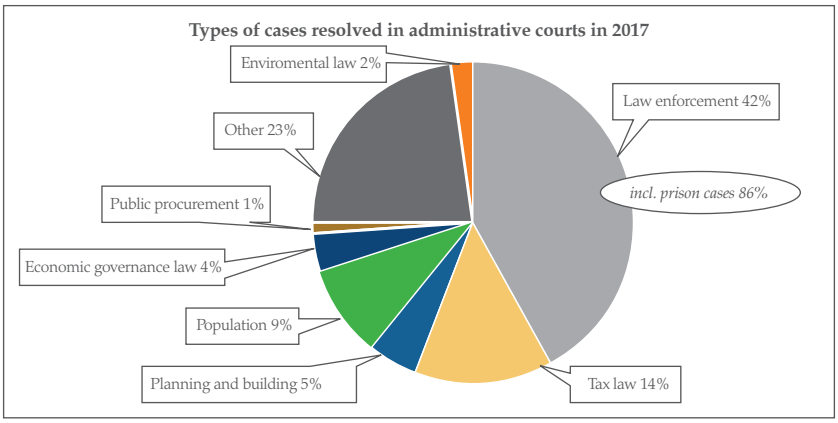


Figure 7

In total, the most resolved cases were actions by prisoners, totalling 1069 (ca 5% more than in 2016), of which the Tallinn Administrative Court received 338 actions, and the Tartu Administrative Court received 731 actions. 845 actions submitted by prisoners were refused to hear, returned to the applicant, or the proceedings were terminated, and 33 of the actions were granted either partially or fully.

The average duration of administrative proceedings in 2017 was 127 days at the Tallinn Administrative Court and 82 days at the Tartu Administrative Court. In substantively resolved administrative cases, the average duration of proceedings was as follows:

Court	Number of substantively resolved administrative cases	Average duration of proceedings (in days)	*Including number of resolved cases (and percentage), in which proceedings lasted longer than 365 days*
Tallinn Administrative Court	594	247	*127 (21.3%)*
Tartu Administrative Court	367	184	*26 (14.1%)*
Total and average of administrative courts	**961**	**223**	***153 (15.9%)***

In terms of the contents of the administrative cases, the longest proceedings were in cases involving planning and building (average duration 238 days), environmental cases (254 days), economic governance cases (198 days) and ownership reform cases (157 days). The shortest proceedings were in cases related to public procurements (average duration of proceedings 54 days), population cases (65 days) and law enforcement cases (92 days).

Administrative cases were adjudicated in administrative courts by a total of 23.9 judges, of whom 15.2 were at the Tallinn Administrative Court and 8.7 at the Tar-

tu Administrative Court. In 2017, each judge at the Tallinn Administrative Court resolved an average of 108.8 administrative cases, and each judge at the Tartu Administrative Court resolved an average of 151.6 administrative cases.

Resolving cases in circuit courts: civil cases

In 2017 in circuit courts, a total of 2800 civil cases were resolved in circuit courts (1935 at the Tallinn Circuit Court and 865 at the Tartu Circuit Court), of which 1267 civil cases were resolved in appeals proceedings and 1533 in cases of appeals against court rulings.

In terms of content, among the matters resolved in circuit courts a third is constituted by law of obligations cases (32.7% of resolved cases), another third by family law cases (16.0% of resolved cases), enforcement law cases (9.6%) and property law cases (7.1% of resolved cases), and the final third is constituted by the rest of the resolved civil cases (figure 8).

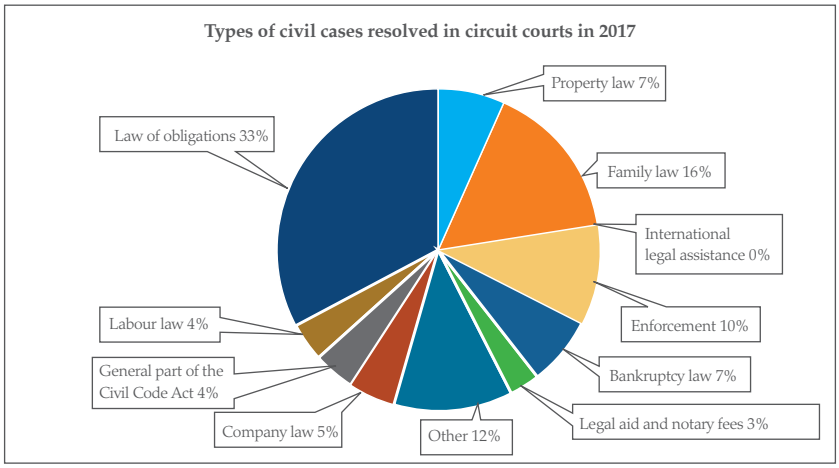


Figure 8

In circuit courts, appeals in civil cases were resolved on average within 150 days (136 days at the Tallinn Circuit Court and 179 days at the Tartu Circuit Court) and in appeals against court rulings, the cases were resolved on average in 23 (24 days at the Tallinn Circuit Court and 19 days at the Tartu Circuit Court). 34 appeals proceedings at circuit courts lasted longer than 365 days (22 days at the Tallinn Circuit Court and 12 days at the Tartu Circuit Court).

In the Civil Chambers of circuit courts, 19.5 judges adjudicated cases, of them 13.5 judges at the Civil Chamber in Tallinn and 6 judges at the Civil Chamber in Tartu. In 2017, each judge of the Tallinn Circuit Court resolved an average of 72.6 civil cases in appeals proceedings and 80.4 cases in cases of appeals against court rulings. Each judge of the Tartu Circuit Court resolved an average of 70.3 civil cases in appeals proceedings and 144.2 cases of appeals against court rulings.

Resolving cases in circuit courts: criminal and misdemeanour cases

In 2017 in circuit courts, a total of 2097 cases were resolved in criminal proceedings (1148 at the Tallinn Circuit Court and 949 at the Tartu Circuit Court), of which 527 criminal cases were resolved in appeals proceedings, 1411 cases of appeals against court rulings, and 159 cases were initiated in a circuit court.

Of cases resolved in circuit courts, two thirds were constituted by cases of judges in charge of execution of court judgments (33.3% of resolved cases) and criminal cases (31%, respectively), cases of preliminary investigation judges constituted 24.3% of resolved cases. Complaints against the activities of the Prosecutor General constituted 7.5%, international cooperation cases 1.5%, and other criminal proceedings made up 2.5% of all resolved cases (figure 9).

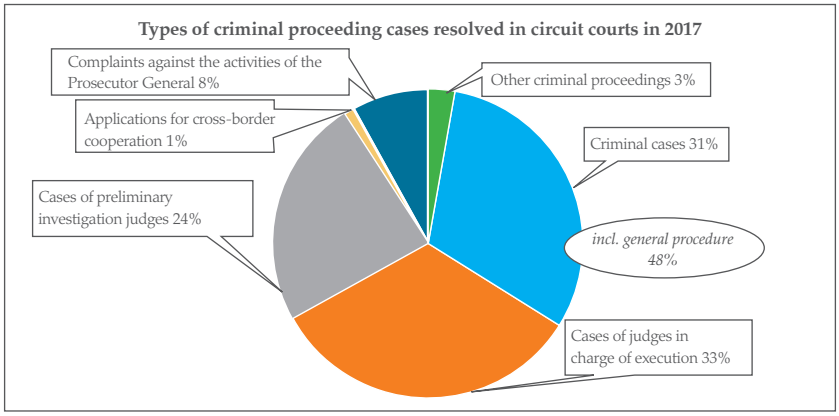


Figure 9

Criminal cases in appeals proceedings were resolved on average in 40 days (36 days at the Tallinn Circuit Court and 47 days at the Tartu Circuit Court). The rest of the cases in appeals against court rulings were resolved on average in 15 days (16 at the Tallinn Circuit Court and 15 at the Tartu Circuit Court). In circuit courts, a total of 210 general proceedings were resolved in appeals proceedings in an average of 62 days (of them 123 cases at the Tallinn Circuit Court in 56 days and 86 general proceedings in 71 days). In criminal proceedings, there were no cases that lasted more than 365 days in a circuit court.

A total of 171 misdemeanour cases were resolved, of which 96 at the Tallinn Circuit Court and 75 at the Tartu Circuit Court.

In the Criminal Chambers of circuit courts, criminal and misdemeanour cases were solved by a total of 12.4 judges, of them 8 judges at the Criminal Chamber in Tallinn and 4.4 at the Criminal Chamber in Tartu. In 2017, each judge of the Tallinn Circuit Court resolved an average of 44.0 criminal cases in appeals proceedings and 84.6 cases of appeals against court rulings. Each judge of the Criminal Chamber of the Tartu Circuit Court resolved an average of 40.2 criminal cases in appeals

proceedings and 166.6 cases of appeals against court rulings.

Resolving cases in circuit courts: administrative cases

In 2017, a total of 1679 administrative cases were resolved in circuit courts (957 at the Tallinn Circuit Court and 722 at the Tartu Circuit Court), of them 787 in appeals proceedings and 892 in appeals against court ruling proceedings.

In terms of content, circuit courts resolved law enforcement cases the most (42.4% of resolved cases), of which in turn most were constituted by prison cases (a total of 680 appeals from prisoners were resolved). The next largest share was made up of tax law cases (14.0% of cases) and planning and building cases (8.0% of cases). Environmental law, public procurement, economic governance law, and population cases together constituted 14.5% of resolved cases, and other administrative cases made up 21.2% of resolved cases (figure 10).

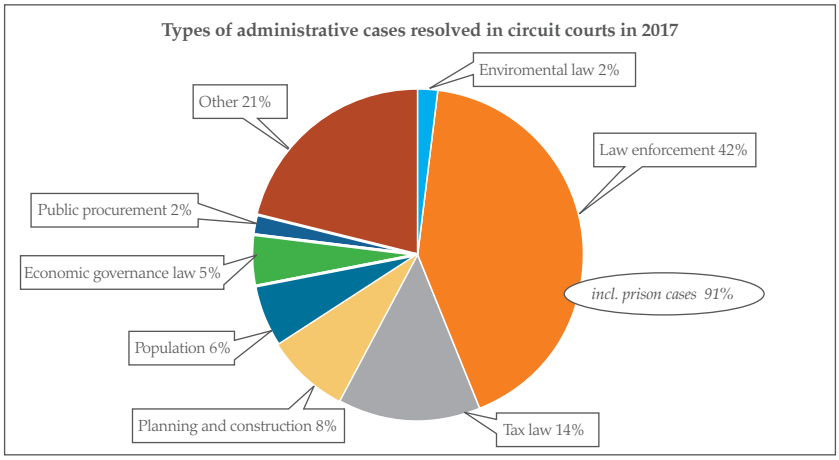


Figure 10

In circuit courts, appeals procedures in administrative cases were resolved on average in 273 days (269 days at the Tallinn Circuit Court and 277 days at the Tartu Circuit Court), and appeals against court rulings on average in 27 days (27 days at the Tallinn Circuit Court and 26 days at the Tartu Circuit Court). Of all cases in appeals proceedings those that lasted over 365 days made up 46.8% of all resolved cases, including 47.5% at the Tallinn Circuit Court and 46.3% at the Tartu Circuit Court. Among cases with long procedural duration at the Tallinn Circuit Court, most were tax law cases (28.8%) and at the Tartu Circuit Court law enforcement cases (53.3%).

In the Administrative Chambers of circuit courts, 10.7 judges adjudicated cases, of them 5.2 judges at the Administrative Chamber in Tallinn and 5.5 judges at the Administrative Chamber in Tartu. In 2017, each judge at the Tallinn Circuit

Court adjudicated an average of 87.1 administrative cases in appeals proceedings and 96.9 cases of appeals against court rulings. Each judge of the Administrative Chamber in Tartu resolved an average of 60.7 administrative cases in appeals proceedings and 70.5 cases in appeals against court rulings.

REVIEW OF CASES IN THE SUPREME COURT IN 2017

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The statistical information that characterises the work of the Supreme Court is collected based on pre-trial proceedings in the Supreme Court and adjudicated court cases. Information about reviewed cases and pre-trial proceedings is collected in three categories of court proceedings: civil, administrative and offence proceedings. In constitutional review proceedings, information is only collected about adjudicated court cases. For pre-trial proceedings, information is recorded about the filed appeals and petitions (for example, appeals in cassation, appeals against a court ruling, and petitions for review). The statistics also keeps separate records for applications for state legal aid. The adjudicated cases are recorded case by case.[1]

Pre-trial proceedings in the Supreme Court

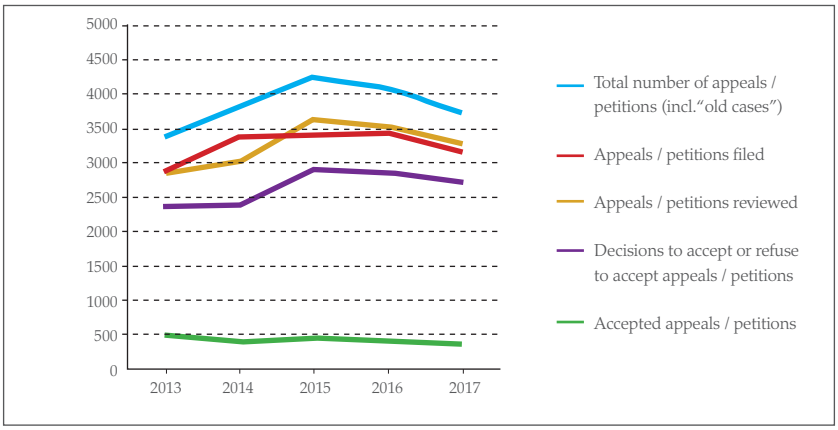

Figure 1. Pre-trial proceedings in the Supreme Court 2013–2017

According to law, the Supreme Court has the right to decide whether to accept or reject any appeal or petition filed to the Court for the purposes of ensuring the legality of the decisions courts of lower instance, for harmonising judicial practice or for developing procedural law.

[1] More detailed data about pre-trial proceedings and reviewed cases by the Supreme Court since 1993 are available at the website of the Supreme Court: https://www.riigikohus.ee/et/riigikohus/riigikohtu-tegevust-iseloomustav-statistika.

In 2017, 13.4% of appeals and petitions were accepted (367 of 2728). In comparison, in 2016 the same figure was 18% (422 applications or petitions of 2391 were accepted). The year before that, the same figure was two percentage points higher at 20% (with 478 of 2361 accepted). The ratio of accepted appeals and petitions compared to filed appeals and petitions has shown a steady decrease in 2012–2016.

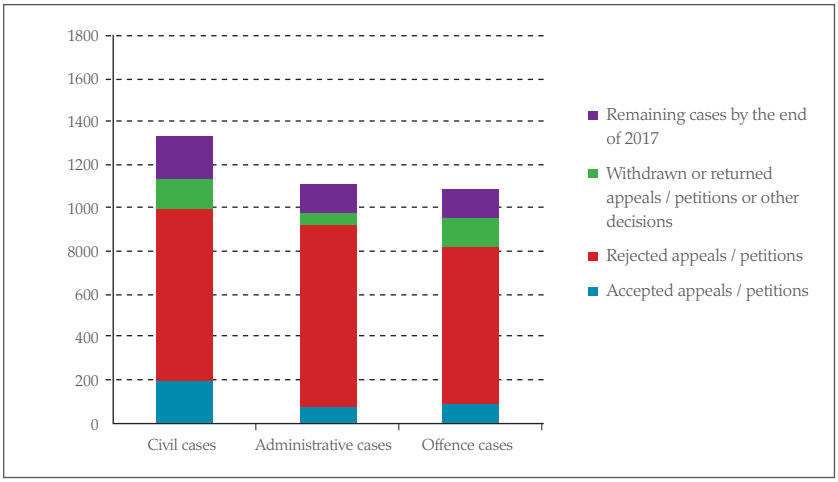

Figure 2. Pre-trial proceedings by types of proceedings in 2017

As in previous years, in 2017 the work of the Civil, Administrative Law and Criminal Chambers of the Supreme Court was characterised by a high work load (see figure 2).

In the Civil Chamber, the number of appeals and petitions totalled 1355 (1414 in 2016), of which 1108 were filed in 2017. The Chamber reviewed 1162 appeals or petitions (1172 in 2016). A decision to accept or refuse was made in 993 cases (1023 in 2016), of which 196 were decisions to accept the case for review (205 in 2016).

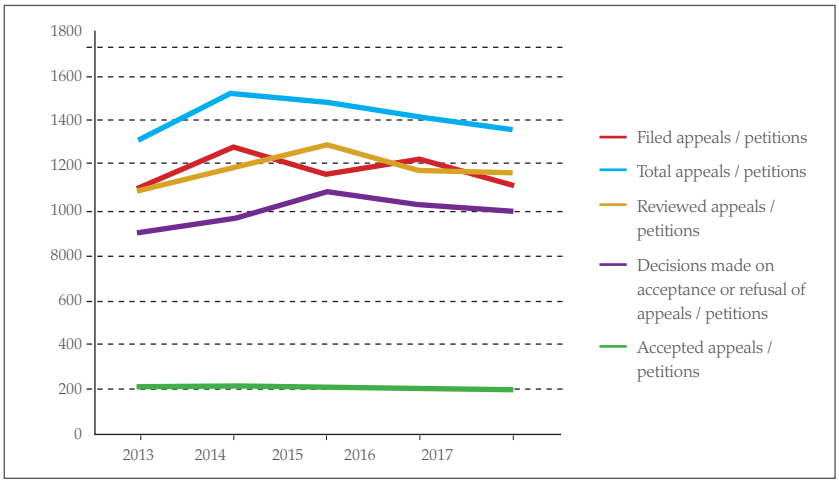

Figure 3. Pre-trial proceedings in the Civil Chamber

In the Administrative Law Chamber the number of appeals/petitions totalled 1120 (1166 in 2016), of which 973 were filed in 2017. The Administrative Law Chamber reviewed 984 appeals/petitions (1031 in 2016), a decision to accept or refuse an appeal/petition was made in 921 cases (918 in 2016), of which 80 appeals/petitions were accepted (104 in 2016).

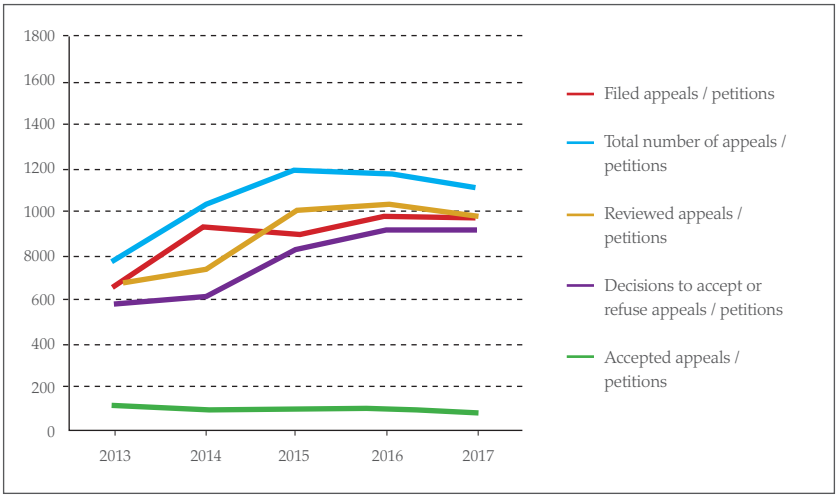

Figure 4. Pre-trial proceedings in the Administrative Law Chamber

In the Criminal Chamber, the number of appeals/petitions totalled 1243 (1476 in 2016), of which 1086 were filed in 2017. 1114 appeals/petitions were reviewed (1294 in 2016). A decision to accept or refuse an appeal/petition was made in 814 cases (898 in 2016), of which 91 appeals/petitions were accepted (123 in 2015).

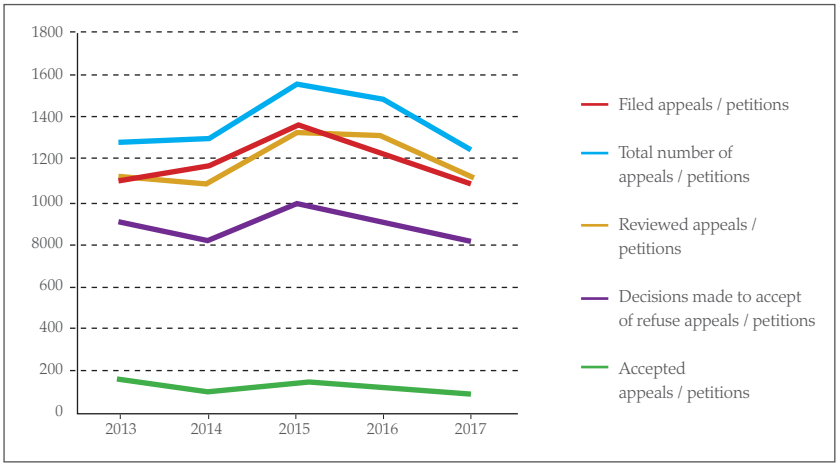

Figure 5. Pre-trial proceedings in the Criminal Chamber

Results of the review of cases in the chambers of the Supreme Court

Constitutional review proceedings

In constitutional review proceedings, 43 cases were reviewed at the Supreme Court in 2017. Table 1 below details the results of cases that underwent constitutional review proceedings. In the Constitutional Review Chamber and the Supreme Court *en banc,* the appeal or petition was granted in 5 cases. A disputed provision of the legal act was declared unconstitutional in 4 cases and the refusal to issue a legislative act was declared unconstitutional in one case. 28 appeals or petitions were not granted and 10 appeals were returned.

		Total		Legislative acts	Regulation of the Government	Local government act	Refusal to issue a legislative act	Decisions or measures of the National Electoral Committee	Ministerial order	Other
Cases reviewed in the Constitutional Review Chamber in 2017		**43**	*100%*	17	11	1	3	9	3	2
Petitioner	Chancellor of Justice	**3**	*7%*	2		1				
	Court	**14**	*33%*	13			1		3	
	Local government council	**13**	*30%*	1	11		1			
	Other person	**13**	*30%*	1			1	9		2
Outcome	Petition granted or provision declared unconstitutional	**5**	*12%*	4			1			
	Petition dismissed; provision declared constitutional	**28**	*65%*	7	11	1		9		
	Petition returned without review	**10**	*23%*	4			1		3	2

Table 1. Results of the review of cases in constitutional review proceedings in 2017

Review of cases in Criminal, Administrative Law and Civil Chambers

The Criminal Chamber resolved 93 cases of offence, of which 72 were criminal cases and 21 misdemeanour cases. The Civil Chamber resolved a total of 194 court cases. The Administrative Law Chamber reviewed 85 administrative cases.

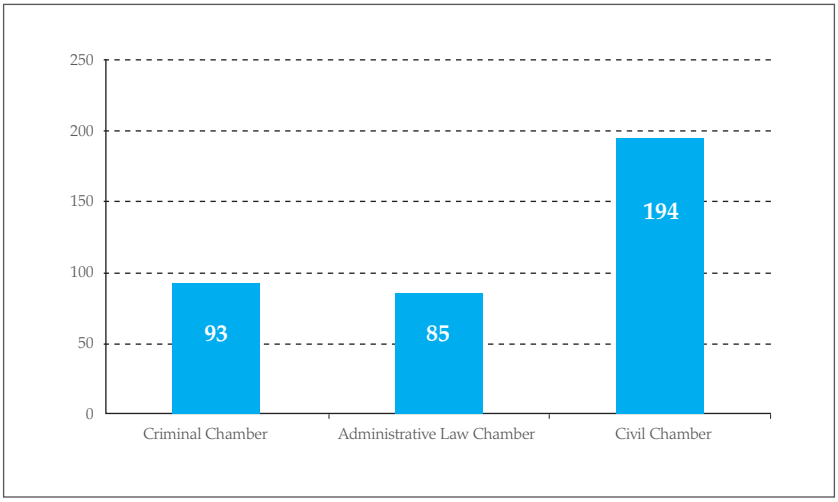

Figure 6. Review of cases in Criminal, Administrative Law and Civil Chamber in 2017