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Introducing and Developing Digital Technologies in Lawmaking: Legal Theory Aspects

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Abstract

The article reviews current efforts to improve lawmaking which take place in a rapidly changing modern technological environment and are informed by the introduction of new information and digital technologies. On the one hand, the processes of digitization have an impact upon societal relations in all aspects of public life, leading to a fast growth of the volume of rulemaking. Law has an important role to play in the development of digital society and in the establishment of legal regimes necessary for the creation and development of modern technologies and for a functional business environment. On the other hand, the process itself of developing, adopting and putting laws into force changes and transforms under the impact of digital technologies. The author reviews practices of the application of IT technologies at different stages of lawmaking and examines the consequences, challenges and complexities of the introduction of digital tools. She pays special attention to the use of technologies of "digital rulemaking" by federal executive agencies in Russia and elsewhere and explores possibilities for improving them. The author also highlights the necessity to create a digital support for rulemaking, which would allow, inter alia, to automate the process of developing, and coordinating officially required cross-agency feedback for, drafts of laws/bylaws issued by the Government of the Russian Federation and federal executive agencies; the author argues that the electronic resources of the houses of the Federal Assembly should be connected to this system too. This would lay the foundation for creating a single integrated governmental system for develop-

ing and adopting laws/bylaws wherein all participants of lawmaking are connected with each other. The article reviews modern trends in developing and introducing digital services for lawmakers and technologies of machine readable law.

Keywords

lawmaking, information technologies, digitization, information systems, legal acts, bylaws, federal executive agencies, machine readable text, rules of administrative procedures, electronic rulemaking.

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Introduction

By their very nature, legal acts issued by federal executive agencies are the most complex and diverse segment of legislation. Due to their sectional and functional specificity, these legal acts are the most numerous documents of its kind. According to experts from the Academic Centre for Legal Information under the auspices of Russia's Justice Ministry, at the end of 2021 the Russian Federation had more than 12 million laws and bylaws. Every year approximately one million more of laws and bylaws is added to this big corpus of regulations[1].

"A statistical analysis of legislation for mid-1990s — late 2016 shows a steady tendency for growth in the volume of adopted laws. Moreover, a low quality of laws (which is partly explained by the fast production pace) causes an exponential growth in the number of bylaws. Now it is becoming a routine practice to issue 'incomplete' laws; many of the laws adopted in recent years count dozens of attached blanket and referral provisions, delegating more and more powers to the executive" [Golodnikova A., Yefremov A. et al., 2018: 14].

Studying the dynamics of the adoption of legal acts by the executive, one can clearly see a steady trend for an increase in the number of regulations. Thus, for instance, whereas the number of legal acts issued by Rus-

[1] Sessions Using the Modern Technologies in Rulemaking held by the Digitizing Public Administration section of the Council for Digital Economy Development under the auspices of the Federation Council // "On Governmental Projects to Use the Modern Technologies in Rulemaking". Available at: URL: https://www.garant.ru/news/1491777/ (accessed: 02.11.2021)

sia's President and government annually grows by 3-5%, the volume of legal acts issued by the federal executive annually grows by 35-45%.

The development of the system of legal acts issued by the executive and, as a consequence, an accelerating pace of growth in the number of legal acts calls for a large-scale introduction of the new digital technologies in lawmaking.

The steady tendency for a growth in the volume of bylaws calls for a system to process and systematize them using the modern digital technologies. Automation of the processes of developing, coordinating cross-agency feedback for, adopting, as well as storing and using, the entire body of laws and bylaws would contribute to harmonizing regulations and introducing consistency in the corpus of regulatory requirements.

Presently digitization and the new technologies have a tremendous impact on all spheres of public life. This is also true for the organs of government and their functionaries who prepare and publish laws and bylaws. As the practice shows, the approaches, methodologies and instruments currently applied in this area are no longer fit for the purpose.

1. "Electronic Rulemaking"

Regularly used in international scholarship, the term "electronic rulemaking" means the use of electronic technologies for enhancing transparency of the process of adopting legal acts and administrative decision making and for ensuring direct participation of citizens in public discussions, expert appraisal, and evaluation of the regulatory impact of subordinate legislation [Coglianese C., 2004]; [Moxley L., 2016]; [Farina C., 2014].

In recent decades, the use of electronic and information technologies by federal executive agencies in their work has enhanced the efficiency of public administration. Interactions among different public authorities now rest on a foundation of the updated informational and technological infrastructure, which includes public information systems and resources, as well as hardware that ensure the authorities' functioning, and their interaction with each other, with population, and with institutions, in the course of provision of public services.

In the early 2000s, when the electronic information resources were coming into their own, this process was greatly facilitated by the information systems (such as Garant Plus, Consultant Plus and others), which afforded an opportunity to quickly and easily access information about laws and bylaws.

Later, the introduction of information technologies and the creation of public agencies' web sites ensured informational openness and transparency of the processes of developing and adopting subordinary legislation and became a guarantee of citizens' rights of access to information about workings of the federal authorities. The federal authorities began using web sites for posting information about their activities and for unofficially publishing ministry-specific legal regulations, which significantly facilitated the search and use of the regulations.

The professional community started routinely using texts posted in the information systems and on ministries'/agencies' sites.

When www.pravo.gov.ru[2], in 2013, began to function as official electronic publisher of Russian Federation legal acts, digital versions of legal acts were no longer copies of the documents.

In view of this, this writer presently does not completely share the view, previously expressed in the scholarship, that "the formal sources of law, such as legal acts, law-making treaties, etc., now have 'virtual replicas,' 'digital doubles,' whose form and content can be an absolutely accurate copy of the official texts published, formatted and publicized by the book, but in some cases they can also differ from the original" [Khabrieva T., Chernogor N., 2017: 86].

An officially published legal act is no longer a copy but an authoritative source of law, the foundation for the establishment of, or changes in, or termination of, relations.

The matters such as digitizing legal acts, ensuring access to legislation of different countries and providing legal information online were examined in detail by Clair Germain [Germain C., 2010: 72].

Building up databases of legal acts laid the groundwork for further development of digital technologies and for transformation of the copies of legal acts — of their graphic images — into original digital documents posted on the official portal of legal information — the digital documents that sometimes come into effect more quickly than texts published in the newspaper "Rossiiskaya gazeta" or the Compendium of Laws of the Russian Federation.

Later, with the advancements in digital technologies, it became possible to make web sites of the federal executive agencies into platforms where

[2] Presidential Decree No. 88 of February 2, 2013 "On Introducing Amendments to Certain Regulations Issued by the President of the Russian Federation" // Compendium of Laws of the Russian Federation. 2013. February 11. No. 6. Art. 493.

civil society can directly participate in the development and expert appraisal of decisions adopted by these agencies.

In a major development, an era of information disclosure and public participation in rulemaking began in developed countries [Elmurzaeva R., 2013: 59].

In the USA, Australia, New Zealand and several European countries, the format of "electronic rulemaking" is used for ensuring informational openness.

Electronic rulemaking is the use of digital technologies by governmental agencies in the processes of rule-making and decision making. In the USA, regulatory agencies, before adopting new rules, must solicit comments from the public and analyze them, as well as carry out a full scholarly, engineering and economic analysis [Coglianese C., 2004: 13].

As Lauren Moxley aptly noted, "e-rulemaking — the use of digital technologies in forming regulations — has democratized the highly technical, highly consequential regulatory process, breathing life into the two core democratic promises of the notice-and-comment process that for decades languished in crowded docket rooms in Washington" [Moxley L., 2016: 661].

The Administrative Procedure Act, adopted in the USA in 1946, provided opportunities for the public to comment on draft laws prepared by the executive and to introduce their proposals, although in fact it was only in the late 1990s and early 2000s that these provisions became effectively operative. And it was only the introduction of information technologies that made the realization of this right possible.

In 2014 the USA carried out a large-scale experiment when the Federal Communications Commission used electronic rulemaking capabilities to receive and process the unprecedented 3.9 million public comments on the Commission's proposal regarding net neutrality rules.

The introduction of electronic rulemaking enables regulatory agencies to take stock of a wider array of factors and consider public opinion when making administrative decisions and adopting universally binding rules.

Similar trends are found in Russian lawmaking.

Pursuant to governmental order No. 851, August 25, 2012, "On Disclosure by the Federal Executive Agencies of Information about Drafts of Laws and Bylaws and Public Debate Thereon," all federal executive agencies began posting information about laws and bylaws in the making and

organizing public discussions about them on the portal regulation.gov.ru. This portal was launched on April 15, 2013. The USA[3], EU, Estonia, Finland and Slovakia have similar portals.

There is no consensus among Russian experts as to the efficiency of regulation.gov.ru[4]. One of the criticisms is a relatively low citizen participation level in most discussions about future regulations. This is so mainly because comments and suggestions from the public are generated by drafts of the most high-profile pieces of bills and drafts of subordinate legislation the ones with the most direct possible impact on citizens' rights and obligations. At the same time, even a superficial analysis shows that comments and suggestions from the public allow to fathom citizens' attitudes to a bill before it is passed into law and published. After a discussion of the draft of an order on potentially dangerous dog breeds[5], prepared by Russia's internal affairs ministry for the government, more than four fifths of the breeds were struck off the dangerous breeds list. Citizens also took active part in discussions on the legislative proposals concerning state control[6] and mandatory requirements[7], and many suggestions were incorporated into the final versions of the laws. Another example of comments from the public influencing bills of law are citizens' comments about the QR codes bill[8]. More than 300 000 negative comments about these bills were registered

[3] Pursuant to the decision to create a centralized rulemaking portal, the site regulations.gov was launched in 2003.

[4] 'Regulators' Actions Cause Counteraction: Experts from the Center for Advanced Governance Evaluate the Efficiency of Public Feedback on Laws and Bylaws' // RBC newspaper, № 143 (3432). 2021. Sept. 28; 'Profanation of Feedback from Common Folk: Government's Promotion of a "Digital School" Exposes the Sham of the Portal regulation.gov.ru' // Available at: rusdozor.ru (accessed: 23.12.2020); 'What's Wrong with Public Debate on Bills of Law in Russia' // Vedomosti. 2019. Dec. 12.

[5] Governmental Order No. 974 of July 29, 2019 "On Approving the List of Potentially Dangerous Dog Breeds" // Compendium of Laws of the Russian Federation. 2019. No. 31. Art. 4642.

[6] Federal Law No. 248-FZ of July 31, 2020 "On State Control (Oversight) and Municipal Control in the Russian Federation" // Rossiiskaya gazeta, 2020, Aug. 5.

[7] Federal Law No. 247-FZ of July 31, 2020 "On Mandatory Requirements in the Russian Federation" // Ibid.

[8] Draft of federal law No. 17357-7 "On Introducing Amendments to the Federal Law 'On Healthcare and Epidemiological Control'" (the section on introducing restrictions for preventing the spread of the new coronavirus infection); draft of federal law No. 17358-8 "On Introducing Amendments to Art. 107 of the Air Law of the Russian Federation and the Federal Law 'Railway Regulations of the Russian Federation'" (on measures to protect the population against the new coronavirus infection on domestic and international flights and on long-distance trains) //Available at: URL:https://sozd.duma.gov.ru/bill/17357-8 (accessed: 02.01.2022)

on the sites of the Duma and the Federation Council. As a result, the draft laws were withdrawn from the Duma agenda.

Thus, the portal regulation.gov.ru, designed as a platform for publicizing draft laws that federal executive agencies work on, a platform for citizens' input into discussions on bills of law, a platform which they can use as a convenient communication channel for delivering their suggestions and comments — this system affords citizens a chance to give feedback, in due time, on new pieces of legislation being considered by lawmakers. Citizens and businesses can trace the passage of bills, familiarize themselves with positions of ministries in charge, see comments made by other participants of public debate.

Thanks to all this, experts and interested lawmakers can be sure that their voices are heard.

First of all, when citizens can voice their opinion and provide suggestions, lawmakers have an efficient tool for gauging public opinion via so-called feedback channels. When the federal executive agencies, preparing draft laws or official decisions, take into account citizens' comments, they can prevent costly regulatory mistakes and thus enhance the quality of legal regulation. Secondly, the participation of citizens in lawmaking gives a boost to principles of direct democracy and ensures the practical realization of citizens' constitutional right to participate in the state governance.

At the same time, it should be noted that the public debate system needs improvement and fine-tuning. Enormous volumes of comments and suggestions lawmakers receive when a bill is at the stage of public debate are quite difficult to process, especially considering that some proposals radically differ from each other. In general, the present system of public discussion stands where it should. One should keep in mind that similar systems in the USA and Europe were developed in full only 30 years later after implementing[9].

2. Digital Services for Lawmaking

In 2016 Russia's President in his address to the Federal Assembly set the goal of developing a digital economy[10]. As a result, in 2017 Russia's govern-

[9] In the USA the federal government has taken interest in electronic rulemaking for nearly as long as the world wide web has been in existence, writes Cynthia Farina in Achieving the Potential: The Future of Federal e-Rulemaking. Available at: http://scholarship.law.cornell.edu/facpub/1237 (accessed: 02.01.2022)

[10] On Dec. 1, 2016 it was issued Presidential Directive to prepare a plan for and start, using the present potential and the accomplishments in the creation of information

ment approved the program "A Digital Economy of the Russian Federation"[11] and produced a Concept of Gradual Digitization of the Legal System Using Modern Artificial Intelligence-Based (AI-based) Technologies.

In accordance with this concept, the first stage would be identifying dated provisions that are no longer functional and dealing with them. These efforts can result either in amending specific provisions or in developing general recommendations for "quality rulemaking."

The next step is creating "electronic codes," "framework regulatory documents with different parts adopted by governmental agencies of different levels, in line with particular agencies' purview" [Rukavishnikova I., 2021]. The case of France is given as an example. The plan is to create governmental electronic legal information systems: provisions currently in force, it is proposed, should be cataloged as templates, and online codes of law should become in the future an official platform for publishing new regulations. The next move would be creating an automated AI-based regulations support system, including automated document generation tools. [Tikhomirov Yu., Nanba S., Gaunova Zh., 2019: 132].

The USA has practiced something similar. The portal govinfo.gov features the United States Code of Federal Regulations (CFR), the compendium of general and permanent regulations published in the Federal Register by the executive departments and agencies of the federal government of the United States. The CFR comprises 50 titles, each covering a broad subject area of legal regulation. This portal is distinctive because it not only features an advanced search engine based on metadata but also has records management. The components of the integrated management of electronic information include public access (the portal uses cutting-edge metadata-based search technologies to ensure the highest quality of search), content management (ensuring that digital documents are authentic and presented in their entirety), digital safety (guarantees of preserving the content for future generations despite any possible technical breakdowns and hardware amortization).

infrastructure, the realization of a large-scale systemic program of the development of the economy of the new technological generation – a digital economy // Presidential Directive PR-2346, Dec. 5, 2016. Available at: URL: http://www.kremlin.ru/acts/assignments/orders/53425 (accessed: 02.01.2022)

[11] Governmental order No. 1632-p (July 28, 2017) "On Approving the Program 'A Digital Economy of the Russian Federation'" // Compendium of Laws of the RF. 2017. Aug.7. No. 32. Art. 5138.

The third stage of the Concept of Gradual Digitization of the Legal System envisaged the creation of an AI-based automated regulations support system, including services that automatically generate documents pertaining to typical court cases. At the same time, there is a need for a risk management system that would carry out automated analysis of court decisions to identify errors and signs of corruption[12].

So far, however, these plans, unfortunately, have not been duly acted on, and this significantly slows down lawmaking and creates certain difficulties for legislative process.

In late 2017 issues of digitization were discussed at a joint session of the executive committee (praesidium) of the Academic Experts Council under the aegis of the Chairman of the Federation Council and the executive board of the Integration Club under the auspices of the Chairman of the Federation Council. The meeting ended up with a resolution containing several recommendations for Russia's government. In particular, one of the recommendations was to include in the Program a project for digitizing public administration: this project should involve the creation of an electronic platform for rulemaking, which would, inter alia, use electronic resources of the houses of the Federal Assembly to help automate the development of, and cross-agency feedback for, drafts of regulations, prepared by Russia's Government and federal executive agencies, which are necessary for the exercise of federal constitutional laws.

Another recommendation was to prepare, heeding suggestions from federal executive agencies, proposals as to the creation of an automated platform for rulemaking that would enable implementation of amendments to the legislation.

Since 2018 Russia's ministry of economic development, contributing to the efforts to create a single digital space for governmental agencies, has worked on producing a Single National Platform for Interaction of All Participants of Rulemaking in the Course of Producing Regulations[13]. Currently in the making, this single national information system for developing and adopting regulations will optimize the development, cross-agency feedback, and approval of drafts of regulations, the processes of introducing principles of teamwork, and the use of the system's instruments by all participants of rulemaking. The system would produce a sophisticated

[12] Kommersant. 2017. Nov. 13.

[13] Available at: URL: https://www.economy.gov.ru/material/directions/gosudarstvennoe_upravlenie/cifrovizaciya_normotvorchestva/ (accessed: 02.02.2022)

solution to introduce additional capabilities for enhancing the efficiency of rulemakers. The information system would digitize the existing processes of developing, coordinating cross-agency feedback for, and approving regulations prepared by the authorities.

Presently there are already various governmental information systems containing information on lawmaking. In addition to the earlier mentioned official portal of legal information[14] and the federal portal publishing drafts of federal regulations[15], there is another important digital service — Automated Lawmaking Support Platform [sistema obespecheniya zakonodatel'noy deyatel'nosti] of the State Duma[16]. Yet in 1997, developers started developing a software for a digital platform with information about lawmaking, drafts of federal laws and other documents related thereto. Since the launch of the Legislative Portal in 2006, the automated lawmaking platform has been available on the web. Since 2017 the federal information system for deputies of the State Duma and the Federation Council has been used as the Integrated System for Automated Legislative Process Support (Russian abbreviation: SOZD GD)[17]. SOZD GD automates the processes of federal lawmaking, as well as routine lawmaking at Russia's regional legislatures; it is also an instrument for keeping citizens better informed about legislative process because it provides a convenient access, including access via mobile applications, to detailed information about subject matters of draft laws under consideration[18].

In fact, SOZD GD is a realization of an idea [Arzamasov Yu., 2016]; [Tikhomirov Yu., 2009] academics have long advocated — creating "laws' case files", an information database containing records of parliamentary hearings and round table discussions; international legal documents and other countries' pieces of legislation pertaining to particular bills of law; reviews of pre-revolutionary, Soviet and international legislative experiences; analyses of Russia's regions' efforts to handle problems addressed in particular bills of law, explanatory notes to federal bills, opinions of the government; problems addressed by particular bills, presented through figures and facts, etc.

[14] Available at: URL: http://pravo.gov.ru/ (accessed: 12.01.2022)

[15] Available at: URL:https://regulation.gov.ru/ (accessed: 4.12.2021)

[16] Available at: URL: https://sozd.duma.gov.ru/ (accessed: 12.01.2022)

[17] Directive No. 2-96 of the Head of the Central Office of the State Duma "On Test Run of the Single Digital Lawmaking System at the State Duma of the Federal Assembly of the Russian Federation." Available at: URL: http://duma.gov.ru (accessed: 02.02.2019)

[18] Available at: URL: https://ppr.ru/projects/sistema (accessed: 02.11.2021)

For more than 20 years of SOZD GD's functioning, the system has accumulated an immense theoretical and practical experience in organizing an information platform for supporting lawmaking process, and this experience should be used as the basis and taken into account by developers of the similar legislative information platform serving the federal executive agencies.

In order to accelerate the introduction of digital technologies, Russia's government came up with a national program called A Digital Economy of the Russian Federation, an instrument for putting into practice presidential order No. 204 (May 7, 2018) "On National Goals and Strategic Objectives for the Development of the Russian Federation Until 2024" and Presidential order No. 474 (July 21, 2020) "On National Goals in the Development of the Russian Federation Until 2030" [19].

The national program "A Digital Economy of the Russian Federation" includes a federal project "Digital Public Administration" — a roadmap for gradual automation of certain rulemaking processes and establishing case law, including the introduction of mechanisms for creating and using machine readable regulations and for using the capabilities of modern promising technologies of artificial intelligence and processing big data sets, blockchain technologies, and other promising technologies.

In conjunction with the federal project "Digital Public Administration," Russia's Ministry of Economic Development since 2019 has invested a lot of resources in automating separate lawmaking processes and using the capabilities of modern promising AI technologies.

According to deputy minister of economic development, A. I. Khersontsev, his Ministry is working on three major projects: digital services for rulemakers; creating automated regulations tools; developing a template for digital descriptions of mandatory requirements[20].

Presently that Ministry essentially uses a complex approach to digitization rulemaking.

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[19] Approved at a meeting of the board of the Council for Strategic Development and National Projects under the auspices of the President of the Russian Federation, protocol no. 7, June 4, 2019 // Available at: URL: https://base.garant.ru/72296050/ (accessed: 02.11.2021)

[20] Sessions "Using the Modern Technologies in Rulemaking," held by the Digitizing Public Administration section of the Council for Digital Economy Development under the auspices of the Federation Council // "On Governmental Projects to Use the Modern Technologies in Rulemaking" //Available at: URL: https://www.garant.ru/news/1491777/ (accessed: 02.12.2021)

The ministry has at its disposal an information system containing information about essentially all directives for developing regulations that the ministry receives. This system records objectives and deadlines for achieving them.

Importantly, the system can trace the progress of draft laws at every stage, from its initiation, development, discussion, cross-agency feedback to approval, signing and publication. This augments transparency of the process of adopting legal acts. Paper records do not let you trace the progression of particular draft laws or show officers responsible for failures to meet deadlines, etc. The system in the making is based on paperless cross-agency coordination and interaction among main contributors to the development of regulations.

This information system enables users to directly trace the entire process of cross-agency feedback on drafted regulations and documents attached to them. Normally, the process of drafting a law involves not one but several federal executive agencies. The use of electronic formats for discussions and cross-agency feedback on drafts of regulations enables participants to receive expert opinions in a timely manner and settle disagreements promptly.

At the same time, experts believe that "electronic paperwork exchanges between federal ministries and agencies have yet to be fine-tuned, and in regions these capabilities are introduced only fragmentarily. One ministry can refuse to recognize a document from another one, and there are big problems with conversion"[21].

Creating a switchboard for decision makers would allow to trace in real time the progress of a draft, as well as check current statuses of a particular regulation at different stages of its progress.

Experts from the ministry of economic development estimate that this system can cut by one third the time necessary for the preparation of a legal regulation.

The use of the information systems by rulemakers and lawmakers simplifies interaction between agencies of the executive branch and enhances transparency and openness in the processes of developing and adopting legal acts, as well as improves oversight of lawmaking processes.

[21] Opinion of M. V. Larin, director, the Russian National Institute for Archive and Document Research // Available at: URL: https://ar.gov.ru/ru-RU/presscentr/materialMedia/view/332 (accessed: 05.02.2022)

Presently the finished information system is being tested at the ministry of economic development. Later the successful experience can be emulated by other agencies of the executive branch as well.

When the Ministry of Economic Development finishes fine-tuning the information system for lawmakers, the next step to take would be creating a platform integrating the already existing information portals[22]. If the information systems of the government, the Federal Assembly, and the federal executive agencies are consolidated, all public authorities will be able to work in a single information space.

3. "Machine Readable Law"

"Machine-readable law is provisions of law expressed in a formal language. In other words, in the languages of computer programming and markup applicable to electronic computing machines. Besides, machine readable law includes instruments for applying such provisions of law — information systems and software. These technologies convert law to a computer code."[23]

Transformations in lawmaking taking place in an environment dominated by digital technologies call for a revision of and changes in the methodological approaches. The automation of law requires a special technological and organizational structure, as well as an understanding of legal aspects of changes in the technologies of recording, understanding and applying provisions of law. In the context of discussions on algorithmization of rulemaking, the formation of a digital legal language is especially important.

Many corporate lawyers are already using automation and introducing various technologies in their work. Like email and the internet changed the way law firms work, the introduction of AI is bound to push the boundaries of law.

In Russia, often used technologies include electronic documents (for instance, electronic employment history records [trudovye knizhki] have been in use), legal documents automation software, smart contracts, etc.

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[22] The State Duma's lawmaking digital platform (https://sozd.duma.gov.ru), the official portal of legal information (http://pravo.gov.ru/), the information portal on regulatory impact assessment (http://orv.gov.ru), the federal portal of drafts of laws and bylaws (https://regulation.gov.ru/).

[23] Available at: URL: https://www.economy.gov.ru/material/news/v_pravitelstve_utverdili_koncepciyu_razvitiya_tehnologiy_mashinochitaemogo_prava.html (accessed: 02.12.2021)

Lawmaking, however, is a complex, multi-layered process. In view of this, the question of using the new technologies for solving non-standard lawmaking problems remains relevant.

The current legislation already contains provisions regarding the integration of provisions of law into the functionality of information systems offering various automatic services.

Thus, the amendment[24], introduced in late 2020, to Federal Law No. 210-FZ (July 27, 2010) "On Organizing the Provision of Public Services at National and Municipal Levels," as well as the new rules for developing and approving administrative procedures for public services[25], contain provisions for making rules of administrative procedure machine readable. The law also provides that information about public services converted to a machine readable format can be used for automated implementation of a set of rules of administrative procedure when these rules come into effect.

Pursuant to the above mentioned provisions, the federal Ministry for Digital Technology, Communication and Mass Media [MinTsifry] is now completing the creation of the administrative rules automation software[26]. Unlike ordinary rules of administrative procedure, digital rules are developed and approved in the digital rules automation tool. The provision of services in this system is centered on information, rather than documents; and this process would be customized thanks to a choice of options. Developers of the digital rules system build internal capabilities to customize services for different groups of applicants.

The plan is that when particular services will be provided in a format adjusted to their users, and the choice of formats will be made based on the users' personal data gleaned from their member areas on the public services portal. So, the list of documents, the payment amount, the deadline for the provision of the service, as well as reasons for turning down the request for the service, would be determined individually for every applicant. The

[24] Federal law No. 509-FZ (Dec.30, 2020) "On Introducing Amendments to Some Legal Acts of the Russian Federation" // Compendium of Laws of the Russian Federation. 2021.Jan.4. No. 1 (part 1). Art.48.

[25] Governmental Order No. 1228 (July 20, 2021) "On Approving the Rules for Developing and Approving the Rules of Administrative Procedure for Providing Public Services, on Introducing Amendments to Some Legal Acts of the Government of the Russian Federation, and on Repealing Some Legal Acts and Some Provisions of Legal Acts of the Government of the RF" // Compendium of Laws of the Russian Federation. 2021. Aug.2. No. 31. Art. 5904.

[26] Available at: URL: https://kcr.gosuslugi.ru/kcr (accessed: 02.11.2021)

customized menu-based provision of services would ensure that demands from each category of applicants are clear and easily understandable.

Moreover, the use of this system is certain to reduce the time necessary for developing the digital rules themselves. The principle of one-off input of data, a wide use of reference tools, and control over format and logic are certain to reduce the amount of errors. The system's capabilities and the new rules are good not only for developing, but also for cross-agency feedback, expert evaluation and approval, and even for the official registration of a legal act at Russia's Justice Ministry.

Another track in the creation of e-government is directly related to the oversight reform. Pursuant to Federal Law No. 247-FZ (July 31, 2020) "On Mandatory Requirements in the Russian Federation," which requires a systemic approach, there are efforts underway to create a register of mandatory requirements, which would contain a list of such requirements, information about laws/bylaws that establish them, their time in force. In pursuance of the mentioned provision, the Governmental order No.128 (February 6, 2021) "On Approving the Rules for Compiling, Maintaining and Updating the Register of Mandatory Requirements."

The role of pioneering the use of the Register is assigned the ministry of labor, the ministry of construction, the Russian Federal State Agency for Health and Consumer Rights (Rospotrebnadzor), and Russian Accreditation (Rosakkreditatsia). Presently these agencies are feeding data into sections reserved for them and already added to the register more than 120 thousand requirements. This is an immense amount, considering that so far there have been only five agencies using the register. The ministry of labor had already added more than 110 thousand requirements. Labor protection rules are enshrined in quite lengthy industry-specific documents, so requirements outlined in them need to be revised.

In addition to the content of mandatory requirements, contributors to the register must add at least 20 items for each requirement: information about the requirement's target group; the requirement's in-force period and status; sanctions for non-compliance; a large volume of additional information (check lists, reports from oversight agencies on progress towards goals pursued by particular requirements, names of governmental agencies responsible for issuing non-compliance reports and sanction orders, etc.).

The creation of the register of mandatory requirements has highlighted the problem of blanket/referral provisions. Without systematizing in the

manner described, one has no way of knowing how many requirements are established by a particular legal act. A mandatory requirement established by a legal act can reference another act, which contains 500-600 requirements in relation to a particular type of activity.

Such register of mandatory requirements would ensure mutual connection with information systems of governmental oversight agencies and with the integrated register of monitoring measures. When the object and findings of a monitoring measure are recorded, the system will show which law/bylaw, which provision, which clause has been breached. This is how statistical data on the most often breached requirements would be compiled. This statistics would be based not on reports of oversight agencies containing information about the most common violations but on an official aggregation of statistical data from a single register of monitoring measures.

Later, at a stage of pre-trial appeal, the single register will provide information as to which requirements complainants ask to review — in other words, which requirements are most problematic. This information will help identify reasons why particular requirements are either ignored or appealed. Requirements under appeal can be difficult to accomplish, redundant, unclearly formulated or have some other problems.

The Concept of Development of Machine Readable Law Technologies[27] (hereinafter referred to as the Concept) is a blueprint for the development of electronic lawmaking platforms.

According to the Concept, machine readable law is a compilation of legal norms, based on the ontology of law and expressed in a formal language (including a language of programming, a markup language), as well as machine readable law technologies (instruments for applying such regulations, such as the requisite information systems and software).

Machine readable law can include a set of legally important metadata necessary for formulating and describing regulations in quantities sufficient for handling practical tasks, as well as algorithms applicable to particular formats of handling legal documents or regulations.

One of the important conclusions in the Concept is that machine readable legal regulations require a specially adapted legislation because it is

[27] Approved by the governmental commission for digital development and the use of information technologies for improving living standards and business environment. The text is on the site of Ministry of Economic Development. Available at: URL: http://www.economy.gov.ru (accessed: 6.10. 2021)

very difficult to make ordinary laws/bylaws machine readable. In view of this, of special importance is a Russian software evaluating complexity of sentences in the texts of legal acts adopted in Russia [Kuchakov R., Saveliev D., 2020:17].

It is noted in the Concept that obstacles to the use of machine readable law technologies generally include sheer novelty of such tools, a lack of standardized approaches to their use, and lawyers' lack of skill in using machine readable law.

The main challenge in introducing machine readable law is finding programming languages suited for the task and creating specialized information systems to make legal regulations machine readable.

The Concept references the following types of software:

software for processing natural language (capable of analyzing and creating logically consistent texts; such systems are used in chat bots);

software for processing knowledge graphs (capable of extracting facts from text and creating new logical statements the same as the human mind can; capable of storing and systematizing information; this software is used for training AI);

software for coding legal norms as a mathematical model (various markup languages; the systems are used to electronically process legal regulations);

software packages for automating legal transactions (used for autofill in legal documents, compiling documents using document automation tools, searching and systematizing laws/bylaws);

technologies of compiling and analyzing machine readable records of account (information databases; they reduce the volume of accounting in situations when the same information has to be submitted to regulators several times for different purposes).

As a review of international practices included in the Concept shows, technologies of machine readable laws have not been widely used across the globe so far.

Conclusion

To sum it up, Russia presently has quite a big potential for introducing new information and digital technologies in lawmaking. The automation of rulemaking, the use of electronic legal information systems, the creation

of legal information portals will undoubtedly contribute to improving and optimizing the processes of developing and adopting laws/bylaws.

The procedures for public debate on drafts of laws/bylaws have to be significantly revised. The first stage — setting up a platform as such for the public forum — is already finished. The next step is using information and digital technologies to put in place tools for qualitative processing of comments, automatic analysis of suggestions, and production of final versions of documents convenient for lawmakers.

One of the important areas is automation of law practitioners' "workplace." In this area, the things to do include ensuring fully-featured electronic exchanges among agencies; establishing a paperless electronic flow of documents and a single mechanism for coordinating lawmaking efforts among agencies; creating general governmental information resources; introducing software to simplify and automate routine, recurrent processes (document automation tools, document generation services, search engines, automated processing and analysis of documents, the use of cloud technologies for remote access, the creation of telecommuting jobs, etc.).

Digitized lawmaking would prevent not only grammar mistakes but also replication of provisions from other laws/bylaws; it would identify in timely manner flaws in bylaws and ensure consistency of legal terminology. The use of digital services in rulemaking will reduce administrative costs of, and the impact of human factor on, the creation of texts of laws/bylaws; it will reduce the routine volume of work for the federal executive agencies and eliminate certain procedural obstacles that arise in the course of coordinating cross-agency feedback.

When digital services are integrated in lawmaking to the maximal possible extent, we shall come close to achieving the goal of creating a single governmental system of developing and adopting laws/bylaws which would be used by all lawmakers.

The ultimate objective of the lawmaking digitization project which scholars and practitioners, lawyers and experts on information technologies have to achieve is developing and introducing technologies of machine readable law.

However, before human lawmakers are replaced with AI-based software, one should pay attention to digital technologies already available, in order to start simple.

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The Impact of Digitalization on Ways of Thinking about the Right of Property: Are We All "Owners" or "Users"?

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Abstract

The paper analyzes how emerging technologies, and especially the Internet, can affect the national and European legal system, transforming the fundamental rights and freedoms involved, challenging the traditional categories and qualifications of property, and, in more general terms, stimulating, if necessary, a re-thinking of the man-thing relationship in the light of parameters and references other than those that have been classically used. More specifically, the idea of creating a regulatory framework that accompanies the evolution to which the concept of property is exposed in a digital age pushes us to carry out an analysis of the framework referable to copyright, especially as far as it concerns the F/OSS software with non-copyleft effect, to understand more clearly if the present conceptual apparatus has problematic features or if the issues that the internet poses can be managed in the already existing normative-conceptual framework.

Keywords

dematerialization, digital age, digitalization, F/OSS, IPR, regulation, software, technology.

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Introduction

The thoughts here expressed aim to analyze how emerging technologies, and especially the Internet, can influence national and international legal frameworks:

transforming fundamental rights and freedoms; for a classic analysis of relationship between human freedom and ownership see [Reich C., 1964: 733 ff.],

challenging traditional categories and qualifications of property[1] and, in more general terms [Rodota S., 2013],

stimulating, if necessary, the development of a tool-box of remedies that is applicable to the relationship between humans and objects because it contemplates parameters that have never been considered before.

The aim is to provoke awareness of the possibilities offered by the internet for overcoming the traditional distribution-use model, as well as profoundly changing the relationship between owner and digital good — and, therefore, the idea of property itself [Mokyr J., 1990]; [Irti N., 1998]. The need is to develop and maintain, at both local and global levels, infrastructures composed of secure information that are able to improve the use of resources, reduce costs and incentivize the application of technological measures intended to assure standardized protection to operators.

In this regard, back in the 1990s, Samuelson argued that the digital world had six qualities capable, with perspective, of modifying the law in depth [Samuelson P., 1990: 324]. According to his theory, these features were: the ease with which works developed in digital format could be reproduced; their facility of transmission; their ease of modification and manipulation; the perfect identity with each other of any goods realized in digital format; their compactness; and the aptitude of digital goods to favor the study of new methods of interconnection and research into digital space.

However, taking a step back, what exactly does "technology" stand for, and does "technology" represent a tool in itself? Moreover, what does "digital good" correct actually mean?

[1] It is worth underlining that the difference between "ownership" and "property" is that the first noun indicates the state of having complete legal control of the status of something, while the second one relates to something that is owned.

1. The Impact of Technologies on Traditional Concepts and Categories of Law

Technology is unquestionably a powerful tool, both for improving human life and for contributing to changing (traditional) approaches and conceptual categories. Indeed, if law aspires to stability, new technologies seem to constantly question the maintenance of the established order.

In the legal field, in fact, ever-increasing technological development leads us to consider new technology not as an isolated and autonomous monad, but as a force that plays an increasingly important role in numerous legal fields. Therefore it would seem to be essential to identify those principles and those rules, also via the use of technologies, to better understand the incidence of τέχνη (techne) in all the sectors under consideration[2].

It is therefore necessary to evaluate the extent that technology, even in its disruptive features, can have on the existing legislative-regulatory framework. In this regard, two types of technological evolution can be understood, being able to speak, on the one hand, of sustaining technology[3], and, on the other, of disruptive technology[4].

This last notion therefore concerns technological tools which, in a first phase, appear to be of uncertain application, and which, once a certain recognition has been acquired, can profoundly affect the reality in which they are applied, and, consequently, on the operating methods. of the economic models that are in place. It is at this stage that the distorting effects arising from the new technology are produced and the new business management models, which benefit from the innovative technological application, begin to threaten the existence of the traditional models that have hitherto been drawn upon [Katual N., 2014: 1685 ff.].

[2] If "technique" changes rapidly, the new perception of legal situations that individuals have and their affirmation could require long adaptation times — that should always assure respect for human dignity, health, identity and the needs of data protection and the environment — so that the gap existing between technological innovation and legal change may affect legal certainty and force the holders of the interests involved to operate in a (legal) environment characterized by a more or less high level of uncertainty, where rights and responsibilities may be devoid of clear limits and definitions.

[3] This concept makes reference to a technology that either evolves gradually or simply improves existing technologies.

[4] This concept makes reference to a new type of technology that, as soon as it is introduced, could appear less reliable than those already existing, but that would tend to acquire swift credibility.

Certainly, the invention of the Internet and the affirmation of intelligent technologies have produced evident distorting consequences, as is well demonstrated, for example, by e-commerce, which the market, in the first instance, approached timidly, meaning it as a form merely alternative to the material exchange mechanisms that see the physical store as their point of reference, to become, in a short time, a new and winning way of trading which, built on the use of the web, has meant that online exchange seriously competes, often even supplanting them, with bodily stores (so-called "bricks-and-mortar stores")[5]. Since that time, the use of the internet and digital technology has enormously expanded, stimulating the emergence of ever new business models that make the digital world their own, and causing the emergence of interesting problems in numerous branches of law.

Therefore, the problem that arises is to assess the impact that the changed socio-economic framework may have on the concept of consumer-investor, as conceived so far, simultaneously encountering the increasingly felt need to develop a homogeneous and systematic approach. The latter need, in fact, at least at a theoretical level, could facilitate the overcoming of both the possible structural gaps and the application difficulties related to disruptive technologies and which are expressed in the adoption of fragmented and differentiated solutions[6].

It can be assumed, then, that, where technological developments take on an authentic distorting character, it may be necessary to proceed with a change also at the normative-categorical level that makes it possible to deal with the lack of stability of the rules that refer to a given institution and, therefore, the impossibility of their mere adaptation to problems created precisely by the distortion produced by the new technology.

Alternatively, and provided that the changes produced by technological innovation are not such as to lead to excessive alterations in the system, one could hypothesize the maintenance of the existing settings, clarifying their application in the context of a new framework: the distortion effect

[5] In this regard, it should be noted how the distorting effect of e-commerce has become increasingly evident over the years. Indeed, it has caused cause either the disappearance of numerous brands that were famous in the past or the transformation of their presence in the market (from a physical reality to an online one).

[6] A valid help, in this sense, could be get from an appropriate cost-benefit analysis, especially with a view direct to introduce a unitary regulatory framework to make reference to and to achieve an appropriate balance between opposing and conflicting interests referable, on the one hand, to the subjects who put digital goods on the network, and, on the other hand, to the users themselves.

would be minimal, testing the organic and flexible structure of the existing regulatory system and its potential extension to the new system that has been created[7].

Finally, if technological change, while causing a distorting effect in the conduct of business, does not reverberate on the legal world and make minor changes sufficient, it would represent a further possibility: evaluating whether proceeding with contained reforms is sufficient to face the new and specific issues that technological change has generated[8]. Consequently, if such an approach were not possible or sufficient and it seemed appropriate to proceed with the development of a new set of rules, expression of new principles and normative-doctrinal guidelines, technological innovation would be the harbinger of an authentic distortion of the regulatory system.

From the outlined perspective, the need to conceive the right of the consumer-investor and of the subjects who populate it (the consumer-investor and the professional) is clear, in such a way as to consider the effects linked to the changes in the market that also originate in the gradual affirmation of digital platforms [Alpa G., 2014: 14].

In this perspective, the collaborative nature that is often perceived in these platforms conditions an essential profile of consumer law, because if this regulatory "corpus" presupposes the presence of a "professional" and to provide the service (for example, Airbnb) or selling the good (for example, Etsy) is a "private person", that is a person who does not operate in the context of an activity organized in an entrepreneurial manner, the professional-consumer relationship fails in favor of an inter-pares or peer relationship. to-peer, where the purchaser could be orphan of the protection provided by the consumer protection law.

It is in this perspective that the phenomenon of hybridization brought about by the sharing economy between professional and consumer figures, who are increasingly confused in the intermediate concept of "prosumer" or "consumer", which brings with it a fundamental question that is linked

[7] Consider in this regard, and just as an example, the updated guide that the European Commission has issued throughout Unfair Commercial Practices Directive. See: European Commission. Guidance on the Implementation/Application of Directive 2005/29 / EU on Unfair Commercial Practices — SWD (2016) 163 final, Brussels, 25.5.2016. Available at: http://ec.europa.eu/justice /consumer-marketing/files/ucp_guidance_en.pdf. (accessed: 11.05.2018)

[8] A principle commonly invoked, in this sense, is that of "functional equivalence", according to which, for example, once the essential characteristics of the new approaches developed in the light of existing legislation have been identified, we proceed to consider how these can be extended to any other new situation that requires regulatory intervention.

the possibility of placing legal obligations of conduct on the "private" if he decides to offer a good or service in a certainly not "professional" but also not occasional way.

The problematic features now reported are accentuated, then, if, as often happens, the platform includes both private individuals or operators and professionals, this generating a possible perception error in which the (supposed) consumer-investor could fall into error. evaluating the identity of the counterparty and seizing a trust in the platform that does not allow it to realize that it is moving in an area potentially without protection[9].

The complexity of the problem is such as to require clear and uniformly recognized coordinates in the territory of the European Union, despite the awareness of possible reservations on the possibility of dictating a Euro-unitary discipline that is capable of establishing, according to the various product sectors, who is professional and who is not[10].

In particular, while maintaining the competence of the Member State to trace the boundaries of professions, including those of a financial nature, the platform is expressly required to specify whether the third party offering goods, services or digital content is a professional or not, on the basis of the statement he made on the online marketplace; whether or not the rights of consumers deriving from Union legislation on consumer protection apply to the concluded contract; if the contract is concluded with a professional, which professional is responsible for ensuring, in relation to the contract, the application of consumer rights deriving from Union legislation on consumer protection.

The proposed solution would seem to increase the level of consumer-investor awareness, but the path appears only partially completed when reference is made to the remedies that arise from any non-compliance with these obligations. In this regard, the proposal for a New Deal Directive 1 is linked to the civil consequences deriving from any unfair commercial

[9] The need to draw a clear and clear boundary between profession and occasional or amateur activity can overlap with issues related to safety, public order, health hygiene and which, by virtue of the principle of subsidiarity, can be addressed either by individual Member States or the Community institutions.

[10] *The New Deal Communication* and the consequent proposal for a *New Deal Directive 1*, aimed at amending the directive on unfair terms in consumer contracts, the directive on consumer protection in the indication of the prices of products offered to consumers, the Directive on unfair business-to-consumer commercial practices in the internal market and the Directive on consumer rights appear to be moving in the right direction by ensuring better application of EU consumer protection rules and their adaptation in the light of digital evolution.

practice that legitimizes the Member States, in the presence of similar behaviors, to resort to contractual and non-contractual remedies, recognizing, among the first, at least the right to terminate the contract, and, among the latter, at least the right to compensation for damages.

In fact, not every violation of the contractual rights of consumers, such as, for example, the omission or inadequate identification of the counterparty, constitutes an unfair commercial practice, since it is necessary to demonstrate that the contested behavior can significantly distort the consumer's choice. On the other hand, considering the remedial contents more strictly, an equivalent protection might appear more appropriate which allows the consumer, like the rules on the guarantee of conformity, to choose between the satisfactory remedy and the liberating or compensatory remedy.

In this way, there would be a remedial framework that would require the platform, responsible for omitted choice or identification of registered users, to make up for the lack by configuring a sort of *culpa in vigilando* even if applicable, following a path of rigor, to the professional and not to the private, or, alternatively, to make every effort, at the request of the injured consumer-investor, to make him obtain an equivalent service, as some platforms already do.

In the light of the above and of its role, law also deals with all aspects of technology as an expression of the factual or real world and re-elaborates them in legal language [Cockfield A., Pridmore J., 2007: 475]; [Tranter K., 2007: 449]. Therefore, on the one hand, law can be considered a tool to regulate also technological issues when they are related to the "society of technologies", and, on the other, it can be evaluated as an entity that has technological nature, because law both stands as a technic to operate and it coexists with and is surrounded by technological tools (see, for example, the legal databases that are present on the web) [Moses L., 2007: 589 ff.].

In light of the above, it seems right to affirm that today, human life develops in a highly technological habitat, even with respect to law, and consequently talking about technology *per se* is meaningless, in a juridical and technical sense at least[11].

As a consequence, new technologies, more than in past times, enter in a deep and differentiated manner into human life by conditioning its de-

[11] Development and "wild" diffusion of constantly innovative technologies can affect the user's behavior, creating new and different needs, stimulating a growing demand and leading to the affirmation of factual rather than legal situations, especially because very often they are not subject to a regulation that reflects their fast evolution.

velopment and by amplifying nature through electronic devices, computer programs, machines and software [Mokyr J., 1990]; [Cafeggi F., 2011: 20 ff.].

If we want to understanding the nature of digital good/digital content, it is worth noticing that the digital asset, because it is a *res intra commercium* and therefore represents a tradeable commodity, "impacts" on the classic scope both of the contract and of the right to property, raising new issues that may require specific answers.

It is no coincidence that the Directive 2011/83/EU on consumer rights, for example, already provides a special framework for the protection of digital content, which Article 2 (11) defines as «data which are produced and supplied in the digital form», and provides the right to withdraw from the contract when the digital content is provided online in respect of distance and off-premises contracts (Articles 9 and 16 [m]).

At the same time, Article 2 (j) of the Common European Sales Law (CESL)[12] defines digital content as «[...] data which are produced and supplied in digital form, whether or not according to the buyer's specifications, including video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalize existing hardware or software».

Therefore it appears significant that Article 5 (b) CESL considers digital data in the same way as any other object that can be purchased, regardless of whether it was obtained online or offline or by downloading, providing that «[T]he Common European Sales Law may be used for: a) sales contracts; (b) contracts for the supply of digital content that is stored, processed or accessed, and re-used by the user, irrespective of the digital content price [...]».

In substance, the approach followed by CESL implies that in digital cross-border transactions digital goods are considered and protected in the same way as all other alienable assets.

A similar approach is evident in the well-known case UsedSoft GmbH v. Oracle International Corp., where the European Court of Justice (ECJ), in applying a line of thought based on Directive 2009/42/EU on the legal protection of computer programs and in ruling on a specific issue (prescription) concerning the sale of software, argues — in accordance with the principles of the European Single Market — that digital goods are fully "tradeable" and shall be considered, in cross-border exchanges, as assets to which a full property right can be transferred.

[12] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0635&from=EN (accessed: 20.01.2022)

As a consequence, the Consumer Rights Directive, the CESL and the underlined approach followed by the ECJ, have all contributed to identifying the discipline to apply to goods in digital format, providing it with the general extension of the contractual and proprietary logics and influencing, in this way, the behavior of the various operators of the Digital Single Market and the consequent commercial practices.

With reference to the issue at stake, technologies are characterized by a relevant capacity to increase the possibility of enjoyment of or access to goods, but also, in broader terms, by a relevant capacity to produce or create new goods. This feature, therefore, theoretically makes it easier for individuals to reach a (multilevel) form of empowerment in the socio-economic community.

Basically, the digital age, because of its evident technological nature, should be subject to flexible and, at the same time, responsive regulation — which is composed of law, social rules, market and legal architecture [Lessig L., 1999: 501–502] — capable of predicting future risks linked to activities in constant evolution (so-called future-proofing) [Copps M., 2005: 309 ff.]; [Moses L., 2007: 589]. In fact, it is necessary to approach the "new" legal figures with a degree of flexibility that is adequate to react to the potentially sudden changes typical of a world that is ever more dynamic and in constant evolution [Teubner G., 2011: 210 ff.].

2. Digitalization and Entitlement de facto and de jure

Until the advent of digitalization and the wide diffusion and utilization of the Internet, humanity was driven by a concept of ownership that enabled change (physically and legally) in the natural and limited forms of reality by allowing the acquisition and sharing of goods among the individuals (physical persons and legal entities) who composed society.

Thus, individuals were always concerned with the best and most efficient mechanism for accumulating (material) capital, for producing physical goods and services, and for distributing ownership. In these terms, property was always conceived as a vehicle for getting something.

In a pre-digital age, the control of natural resources and consequently of work conditioned, on an economic level, ways of allocating property and, on a sociological level, ways of distinguishing communities through social classes. It is clearly absolute centrality of the good in law, because it is the object of subjective rights [Alpa G., 2017: 238 ff.].

Nowadays the world is profoundly digital, and immateriality dominates and dictates its own rhythms, without space and time, both in the distribution of wealth, which is progressively identified with knowledge based on information and data, and in the creation of a «liquid modernity» [Bauman Z., 2012: 60] that is decomposed and reassembled, rapidly, in a continuous, fluid and volatile manner.

In this dimension, then, these institutions related to ownership are impacted by logic of sharing and a distortion, caused by digital technologies, of various aspects of everyday life [Podszun R., Kreifels S., 2016: 33 ff.].

Ultimately — and as already noted — it is always the notion of property that is exposed to economic-cultural and legal influences, affecting its effective scope, especially in terms of membership-accessibility-usability.

Indeed, property becomes the expression of an array of situations related to "things" that shall not lead to a fragmentation of the entitlements that have been traditionally considered as a granitic unicum. On the contrary, a simple acknowledgement that the phenomenon of goods' belonging can also be described in different terms shall emerge.

Indeed, if ownership refers to the subjective positions in which the owner is placed by the legal system to directly satisfy his/her own interest in one or more assets — without the cooperation of other specific subjects — two different criteria can be used by a legal system[13] to define the legal powers connected to the so-called *res*[14].

Considering that a supportive attitude towards an individual is obtained by means of his/her protection, his/her identification as owner can be realized either by attributing some effects to a *de facto* relationship between individual and assets (so-called "entitlement *de facto*"), or some entitlements that require formal procedures to confer a transmittable right on the basis of certain rules (so-called "entitlement *de jure*").

But are these ways of thinking still effective and are they capable of describing the juridical reality of things?

[13] The analysis of different legal systems appears to be of particular importance, also in terms of a marked ethnocentrism that we tend to recognize when dealing with the digital world: often reference is made to a single country. A comparative study, in fact, aims to achieve a dual 2002purpose, trying to improve, on the one hand, the understanding of the institutions considered, and, on the other, the clarification of their causal inference.

[14] Within the concept of digital good a large complex of *res* and services must be included, among which, in addition to digital intellectual works, databases, digital archives, as well as any other set of information whose processing and the supply of which are subject to economic evaluation.

3. The Actual Tendencies of Property Rights and their Impact on the Creative Process

The current proprietary phenomenon, in essence, manifests the evident tendency to expand its objective profile and this attitude stimulates change in many traditional features of the property right[15].

The prevision of property (and intellectual) rights [Janich J., 193] in a digital world responds conceptually to the need to ensure the development of a digital market that can meet the demands of innovation and contextual protection. But this kind of prevision must not neglect the peculiarities that characterize the digital world itself.

In this regard, two factors are present in the digital ecosystem, although they are in a potential relationship of conflict: on the one side, a call for protection, and, on the other, a call for sharing.

As for the first profile, the wide juridical circulation that the digital world assures raises questions concerning the protection of the right (its moral side) to the recognition of the authorship paternity of the work and the right to the integrity of the work as a means to prevent modifications or transformations.

As for the second profile, the regime of free sharing of the changes made to the original digital good that represents so much of the free/open source culture seems to evoke the regime of free use.

Applying this logic to the protection of ideas and creations in a sharing perspective that also constitutes the basis for free/open sources results in a legislative exception to the copyright regime. Therefore it may be inferred that — under a copyright regime — creative processes would be allowed only if they did not undermine the existing rights of the original work, without the express consent of the copyright holder.

However, the so-called openness, as a feature of the digital world, represents a mental propensity towards the diffusion of new technologies and the circulation of means aimed at innovation, without forgetting a general need of protection for the sector's operators; see for deeper analysis [Copps M., 2005: 309].

[15] There is no doubt that the advent of the internet has profoundly revolutionized the way the individual belongs to the community of reference, enriching his position in terms of variety and extension of the usable possibilities, but, at the same time, also impoverishing his way of behaving with other users of the network-community due to the continuous depersonalization of the individual relationships involved.

A typical example in this regard is software because it presents the undeniable tendency not to be definitive, deriving from its potential to be updated and modified, even such a way as to lose all contact with the original work. In fact, according to common understanding, any updating or improvement of the program would be subject to the exclusive right reserved to the copyright holder.

4. Software Logic and the Effect on the Proprietary Control Scheme

In light of all the above, can a proprietary scheme that gives importance to the peculiarities of "digitalization" be an instrument used to safeguard the coexistence of the described apparent contrast?

Of course, there are many needs to reflect upon when addressing this primary question, but a correct answer cannot ignore the pressure that permeates the digital era and the consequent culture of sharing.

Therefore, software, being a typical intellectual creation, reflects a stratified and multifaceted legal protection that arises from the tendency to extend the models of classical protection of intellectual property law — copyright and patent — but framed in a gradual protection, such as free/open software with a copyleft effect, that has essentially reversed the operative methods of copyright.

In fact, if copyright is based on user-licenses that channel the exploitation of the work within certain tracks determined by its creator, copyleft focuses on the idea of "no reserved rights" or "no rights reserved" that does not limit but frees the use of the good, without reaching the extreme effect of the public domain.

Compared to the latter, in fact, which would seem to be free from any link with a proprietary scheme, copyleft, even in the milder configuration of non-copyleft, still maintains a relationship between the licensor-author and the user-licensee that can be reported to the proprietary scheme.

Conclusion

To summarize, behind the idea of openness, which appears to be a fundamental ethical value in technological development, there is the same idea of sharing that has given life to the emerging culture of the sharing economy itself.

More specifically, technology has allowed a wider offering and a wider use of goods and services; it has also expanded the range and quality of information about goods and services; finally, it has facilitated the formation in the digital ecosystem of a vast and efficient mechanism of comments and opinions that allows users to have greater awareness of and confidence in the conduct of economic operations.

Basically, the sharing economy, with the underlying philosophy of co-division, is a tool that has so far proved to be capable of ensuring greater efficiency, greater price competitiveness and a higher quality of goods and services.

The perspectives of this analysis, in the attempt to understand the new scope of traditional legal categories, allow us to overcome the artificial relations created between Roman law and modern categories to fully understand contemporary ownership.

Finally, the jurist of any age and time should use the actual content of a legal concept to better understand its juridical essence because, although remaining unchanged in its *nomen juris*, it may have undergone profound changes that have altered its way of being at different levels, as copyright and copyleft, by describing a peculiar relationship with a specific good, can easily prove.

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Problems of Real Estate Assignment Using New Electronic Technologies

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Abstract

The paper analyzes the problems related to the introduction of new electronic technologies in real estate assignment transactions. The law on registration of real estate title, electronic notarization and e-signature, as well as real estate transaction practices of different agencies are reviewed. The conclusion is made on the need to apply a differentiated approach to introducing new electronic technologies into real estate transactions, and to maintain the existing restrictions in the form of a shared document applicable to residential real estate. It is suggested to recognize online real estate transactions involving two notaries as attendee transactions under civil law authorized under the respective regime. The procedure for online transaction involving two notaries should lay the groundwork for instituting a legal regime for e-transactions involving other professional real estate market players.

Keywords

real estate, land plot, electronic contract, electronic signature, Rosreestr, state registration of real estate, notarization, residential and non-residential premises.

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Introduction

Electronic and digital technologies have been around for such a long time that one would be hard pressed to name a service sector totally free of digitization and e-services. The restrictions brought about by the COVID-19 pandemic have further boosted the introduction of e-technologies into real estate transactions[1]. Websites of property developers and real estate companies as well as digital platforms offer a variety of ways to buy flats, houses, non-residential premises, parking slots, land plots and other real estate with convenience[2]. Moreover, the subject of the contract could be displayed as a 3D image, with buyers taking a virtual tour of the property to see layout details, design solutions, window views and curtilage[3].

This paper is focused on the law governing the application of new electronic technologies to real estate transactions; problems related to enforcement practices; main conceptual approaches to introducing e-contracts into real estate transactions.

The research hypothesis is that the socioeconomic importance of real estate business to the state and society in general requires the introduction of electronic technologies involving e-contracts to be supported by legally binding mechanisms establishing the ways, procedures and limits of their applicability to specific types of real estate transactions (purchase transactions, transfer by gift, exchange etc.), with the relevant standards to be created for persons involved in online real estate transactions as exemplified by the online transaction rules involving two notaries.

The research has been mainly performed through analysis and synthesis of the documents to result in a number of important proposals to introduce new electronic technologies into real estate transactions. The logical method and the legal fiction method allowed to substantiate the possibility to apply e-contracts and electronic signatures to relationships involved in real estate transactions, once the data system complies with the principle

[1] According to real estate companies, the 2020–2021 pandemic has boosted the process of moving real estate sales online to encourage "seamless" transactions. See: Seamless real estate transactions: new post-pandemic apartment sales. Available at: https://realty.rbc.ru/news/614057df9a7947241fcb93ab

[2] The RBC provides interesting statistics regarding real estate e-transactions. In January-December 2021, Moscow reported 539.6 thousand online applications to register title to residential real estate or 1.5 times (+51.4%) more than in 2020. Available at: URL: https://realty.rbc.ru/news/61fa32959a7947d2a7636008?from=newsfeed (accessed: 12.08.2021)

[3] Online transactions and 3D tours: ways of selling apartments during the lockdown. Available at: https://realty.rbc.ru/news/61718d169a7947de9fa0c2fd. (accessed: 19.01.2022)

of shared document deemed an "attendee transaction". The comparative analysis was used to demonstrate the limits of applicability of e-technologies to real estate transactions in other countries' legal systems.

1. Theoretical Approaches to the Form of Real Estate Contract

A possibility of real estate transactions through the use of modern electronic and digital technologies is still a hot topic of debate among legal experts. There is a widespread view in the Russian legal theory that such transactions should never apply to real estate purchases because the civil law currently contains a number of strict requirements to the form and content of real estate contracts.

V.V. Vitryansky considers Article 434 of the Russian Civil Code (new para 4) as requiring a "strict" written form whereby a contract in writing can be concluded only as a shared document signed by both parties in cases envisaged by law or by agreement between them. He provides examples where the contract has to be made "strictly" in writing by virtue of law: real estate purchases, company sale (Art. 550, 560 of the Civil Code) etc. [Vitryansky V.V., 2019].

In discussing the form of a civil law contract, L.A. Novosyolova writes that "formal requirements could be even tightened to reduce the risk of abuse in sectors critically important to society (such as private real estate transactions, estate succession etc.)" [Novosyolova L.A.., 2019: 5].

These "strict" rules stem from Article 550 of the Civil Code ("Form of a real estate contract") whereby real estate contracts should be made in writing as shared documents signed by the parties — Article 434 (2), with non-observance of this rule resulting in one of the worst civil law effects, that is, voidance of the contract.

Other countries' legal systems also provide for specific regulation of civil law transactions. In particular, international instruments and national regulations often explicitly specify which transactions could not be contracted online. These include testaments, trust deeds, real estate transactions, foreign currency transactions and negotiable instruments since the law provides in these cases for more requirements which cannot be enforced where transactions are performed through the use of e-documents [Shelepina E.A., 2017: 31–39].

2. E-transactions in the Russian Civil Code: Applicability Limits in Respect of Real Estate Assignment

With the expansion of e-trade, the Civil Code was complemented in 2019 with two principal provisions on the possible use of new transaction technologies and e-documents to formalize such transactions: the amendments made to Article 160 (1) and 434 (2).

Actually, Article 160 (1) provides in respect of transactions in writing that they should involve a document describing their content and signed by contracting party(ies) or duly authorized attorneys. At the same time, as e-technologies became widespread, the legislator has added a rule that the written form of transaction will also deem observed, once the transaction is made through the use of electronic or other technology which allows to reproduce its content on a physical data storage device without alteration, with the signature requirement deemed observed if any method has been used to reliable identify the consenting party (para 2, Article 160 (1) .

In its turn, Article 434 (2) specifies that a written contract could be made as a shared document (including e-document) signed by the parties, or by the exchange of letters, telegrams, electronic documents or other data under the rules of para 2, Article 160 (1) of the Code.[4] However, under Article 434 (4), "in cases envisaged by law or by agreement between the parties, a contract in writing can only be made in the form of one document signed by the contracting parties".

The question is whether the rules of Article 434 (2) on the possibility to make one document (including electronic) are applicable to the provisions

[4] Importantly, there is a discussion of whether the electronic form is independent from the written one. Some authors argue in favour of formal independence of e-transactions thereby assuming possible division of transactions into oral, textual and electronic. Thus, L.G. Efimova argues that the e-form is not a variation of the written form. Efimova L.G. Revisiting the concept and legal nature of electronic transactions // Lex Russica. 2019, no. 8.

Apparently, such approach does not take into account a lot of factors including a need for specific regulation of e-contracts as a new form of transaction and the effects of its non-observance. The grounds for identifying specific effects from non-observance of electronic form (different from possible defects of the written form) are unlikely to be found. We believe that a more correct approach to the ratio between the written and the electronic forms would be to consider them, respectively, as the general and particular. In this case, the centuries-old rules on the written form, its defects etc. established in our legal system can quite reasonably apply to the electronic form taking into account the exceptions envisaged by specific regulations. See: Sinitsyn S.A. The Russian and International Law in the Context of Automation and Digitization. Moscow, 2021, p. 94.

on real estate purchase and, therefore, allow for wider interpretation of Article 550 of the Civil Code.

M.I. Braginsky and V.V. Vitryansky once considered Article 550 and Article 432 (2) to reciprocally constitute "an exception from exception" believing Article 550 to be specific. They argued that "…the specific rule governing the form of real estate contracts actually assumes that the underlying Civil Code provisions are not applicable (Article 434 (2)). As regards the real estate contract, the legislator goes back to the requirements applicable to the written form (Article 160 (1)), thereby tightening the real estate transaction regime" [Braginsky M.I., Vitryansky V.V., 2000: 206].

Thus, these researchers ruled out any option other than envisaged by Article 550 and Article 160 (1) of the Civil Code in respect of real estate transactions. But this was at the time when the Internet was not used in this manner while e-commerce barely existed.

3. Electronic Real Estate Transactions as Absentee Transactions: Exceptions from the Rule

The legal theory treats the approach where the parties themselves sign one and the same document as the "attendee transaction", that is, where the parties directly perceive each other's intent, with the terms of the future contract identified in the course of direct communication between them. In contrast, "absentee transactions" do not assume direct and simultaneous signing by the contracting parties as there is a time gap between the expression of their intent inevitably raises the issues regarding the textual unity of the contract to be signed, including its terms.

The importance of a special legal regime for absentee transactions stems from "a time gap between the expression of intent by one party and its perception by the other party located more or less remotely. In contrast, attendee transactions assume no such time gap as the parties directly communicate with each other" [Braginsky M.I., Vitryansky V.V., 2000].

"An absentee transaction is normally characterized by the fact that the parties are located remotely beyond direct communication while the transaction is made by sending and accepting an offer. That is, a time gap and location difference make it necessary for the parties to conclude the transaction by going through the steps of offering and accepting.

In real estate transactions, a time gap is extremely dangerous since the parties' intent in respect of the contract's terms such as subject, value, in-

junctive relief etc. may change between the offer and acceptance. High socioeconomic importance of real estate has prompted a need to approve the contract by simultaneous expression of the seller's and buyer's intent which is normally possible when both parties are located in one place. For this reason, real estate transactions are characterized in many legal systems as "attendee transactions".

Meanwhile, the history of domestic civil law shows exceptions from this rule. Thus, it became evident in the beginning of the last century that new technologies allowed transactions between remotely located persons over the phone, given they simultaneously agreed their intentions. As a result, the Soviet Civil Code of 1922 had to resort to a legal fiction by incorporating a note into Article 131 whereby an offer made by phone was deemed an attendee offer [Braginsky M.I., Vitryansky, 2000].

Notably, other countries' legal systems apply different approaches to remote transactions, that is, the ones between remotely located persons. Thus, pursuant to § 312 of BGB, remote contracts are those where a seller or another person acting on his behalf and a buyer use only remote communications to negotiate and make the contract. Remote communications include all communication technologies, such as letters, catalogues, telephone calls, fax, e-mails sent via mobile phone messaging service (SMS), radio and telecommunications, that can be used to offer or make a contract without the simultaneous physical presence of the contracting parties[5].

The Austrian law treats the intent to transact electronically as a declaration of intent based on the general e-trading rules. However, the Austrian law does allow to apply the attendee transaction regime to such electronic communications. The respective provisions are contained, in particular, in §12 of ECG where declaration of intent via chats, communication using messenger apps, VoIP or webcast systems are deemed attendee declarations[6].

For specific cases, the Austrian law provides for special requirements to the form — for instance, contracts in writing for real estate sales. [7]

Unlike the Russian legal system, the German and Austrian ones provide for mandatory notarization of real estate transactions. When asked why the legislator makes transactions more complicated and, in particular,

[5] Available at: www.uibk.ac.at/zivilrecht/buch/autorenliste.html (accessed: 14.01.2022)

[6] Ibid.

[7] Ibid.

more costly including by requiring their mandatory notarization, international legal experts refer to specific functions of the law in these situations.

Thus, in their comments to BGB they refer to the preventive, advisory and protective function of the "strict" form of real estate transactions[8].

In contrast to the European civil law, English legal experts argue that formal requirements no longer constitute a substantive feature of the English contractual law, except for specific contract categories. In particular, contracts for sale or other assignment of a property share could only be made in writing. In answering the question on the functions of such formal requirements, professor Fuller identifies thee functions: firstly, the probative function since in case of a dispute the formal requirement — for instance, a contract in writing — can serve as an evidence of its existence and content; secondly, formalities perform the preventive function "as a security against reckless actions"; thirdly, they allow to control the transaction's validity. On the other hand, he believes formal requirements are fraught with major limitations, the main ones being that they are normally bulky and time consuming [McKendrick E., 2016].

The Russian legal studies present contrasting opinions as to the strictness of real estate transaction forms: while some authors deny the electronic form, others deplore the excessive strictness of the law which is thus falling short of the modern requirements which extend the limits of the written form. These authors argue that there is a steady need in civil application of modern technologies to the contracting process [Tatarkina K.P., 2016].

A.G. Karapetov argues the electronic form can be applied without problem to any transaction for which a shared document signed by the parties has to be made [Karapetov A.G.,, 2020: 876].

There is a rapidly growing interest, both internationally and domestically, in e-commerce and, therefore, e-contracting, with e-transactions spreading out to real estate [Saveliev A.I., 2016]. However, it is not clear from the national legal theory whether a shared electronic document applies to absentee or attendee transactions. At the first glance, one is prompted to think of the former as the parties are located remotely and cannot directly coordinate their intentions, with e-commerce in goods likely to qualify.

On the other hand, there could be examples where even a remote transaction makes it possible for the remotely located parties to simultaneously read

[8] Available at: https://bgb.kommentar.de/Buch-2/Abschnitt-3/Titel-1/Untertitel-1/Vertraege-ueber-Grundstuecke-das-Vermoegen-und-den-Nachlass (accessed: 20.01.2022)

and e-sign a shared electronic document using their online accounts. The amendments to the notary law (Article 53.1, Fundamental Notary Law No. 4462-1, 11 February 1993) at least guarantee that the Unified Notary Information System allows to make a shared document to be signed almost simultaneously, once the notaries involved in a remote transaction have explained the shared document to their clients (parties to real estate transactions).

4. Controversial Approaches to Electronic Real Estate Transactions in the Legal Theory, Practice and Law

There are obviously two opposite approaches regarding the applicability of e-contracts to real estate transactions: the first could be called the civil law approach, the second — enforcement approach.

In particular, the civil law theory argues against the wide interpretation of real estate contract form insisting that the words "written form as a shared document" should be understood literally as leaving no place for an electronic document). As such, the legal theory provides the only acceptable option of real estate transactions (direct coordination of intent by signing a shared document in writing, that is, "an attendee document").

In contrast, the enforcement approach provides for the widest possible interpretation of Article 234 (4) of the Civil Code and thus allows electronic real estate assignment transactions. Russian real estate companies, credit institutions (including Dom.click, e-platform operated by Sberbank), property developers and other companies involved in real estate transactions propose electronic services to formalize sales.

While these activities continue, there is no explicit indication in the Russian law that real estate could be transacted in the form of a shared electronic document.

At the same time, it is noteworthy that the applicable regulations now contain provisions which allow real estate assignment in the form of electronic transaction (for example, Article 18, Federal Law "On the State Registration of Real Estate" allows electronic contracts for real estate assignment).

The demand for electronic real estate contracting calls for a need to legitimize transactions based on new technologies using a well-known method of legal fiction and recognizing e-signed transactions as "attendee transactions". In particular, the Russian notary practice has accepted this option by allowing remote transactions involving two notaries.

5. Remote Transaction Involving Two Notaries — "Attendee Contract": Legal Fiction Method.

As was shown above, the Fundamental Notary Law currently contains Article 53.1 (made effective by Federal Law No. 480-FZ of 27 December 2019) which governs remote transactions certified by two or more notaries. It deals with a situation where the parties to an apartment sale transaction are located in different regions: the buyer and the seller are served by notary offices of their respective cities [Kirillova E.A., 2015: 41-43][9]. Pursuant to this article, the contract certified by two or more notaries is deemed "a contract in writing in the form of a shared document signed by the parties".

Thus, the Fundamental Notary Law contains provisions that do not contradict Article 550 of the Civil Code (Article 53.1 of the Fundamental Law follows Article 550 of the Civil Code word for word in that such transaction "is deemed a contract in writing in the form of a shared document signed by the parties"). The transaction will involve two or more persons not in attendance simultaneously. Moreover, the law provides for a fairly detailed procedure of such transaction:

The notaries shall make a draft electronic transaction using the unified notary information system in accordance with the terms agreed between the parties; in the notary's presence each party signs an electronic duplicate with a simple e-signature as well as a physical duplicate to be kept by the notary office; textual invariability of the electronic transaction is secured by the unified notary information system; the e-transaction duplicate with certification statement is signed by the certifying notaries using qualified e-signatures, to be stored in the unified notary information system; the certified transaction is entered to the register of remote notary events and transactions certified by two or more notaries of the unified notary information system[10].

Moreover, the Fundamental Notary Law contains a number of requirements to protect the interests of such transacting parties. Firstly, the notary should explain to the parties the meaning and significance of the provided

[9] It is worth noting that other jurisdictions (for example, France) also provide for a possibility to transact remotely via several notary offices.

[10] See also: Ministry of Justice Order No. 222 of 30 September 2020 "On Approving the Procedure for the Use of the Unified Notary Information System in Transactions Certified by Two or More Notaries" (together with the Procedure for the Use of the Unified Notary Information System in Transactions Certified by Two or More Notaries approved by FNC Board Resolution No. 16/20 of 16 September 2020, Ministry of Justice Order No. 222 of 30 September 2020) (Ministry of Justice Reg. No. 60207 of 05 October 2020) // SPS Consultant Plus.

draft transaction and make sure that its content reflects the actual intent of the parties and does not contradict legal provisions (Article 54 of the Fundamental Notary Law). Secondly, in certifying any assignment or pledge contracts in respect of the property title subject to the state registration, the notary shall make sure that the property is owned by the assignor, except where the assignor has not yet taken ownership of it as of the contract date in accordance with the contract, and that the property title does not have any lien, encumbrance or other circumstances preventing such contracts from being made. Thirdly, a notary in private practice assumes full financial liability for the damage caused through his fault to the property owned by a physical or legal person as a result of a notary event performed in violation of the law[11]. The liability of a notary in private practice who certifies mortgage agreements and real estate assignment contracts should be insured to an amount of at least 5,000,000 rubles.

In this paper author specifically deals with transactions certified by two or more notaries since the procedure for remote real estate transactions involving two and more notaries envisages, in our opinion, the necessary rules to minimize the risks assumed by the transacting parties.

Author believes that the aforementioned procedural requirements to notarization of transactions through the use of electronic technologies should be acknowledged as a kind of "standard e-documented real estate transaction".

But since the current practice of entities involved in real estate sales allows for e-transactions without the notary's involvement, it is necessary to demonstrate the differences between remote procedures with and without a notary.

6. Residential Construction Co-investment Contract As an e-document

It is noteworthy that the Federal Law "On Co-Investments for Construction of Apartment Blocks and Other Properties, and Amendments to

[11] Pursuant to Article 17 of the Fundamental Notary Law, a notary in private practice shall assume full financial liability for the damage caused through his fault to the assets owned by a physical or legal person as a result of a notary event performed in violation of the law, unless otherwise provided for by this Article. A notary in private practice shall assume full financial liability for real damage caused by illegitimate denial to perform a notary event, as well as by disclosure of information on performed notary events. The damage caused to the assets owned by a physical or legal person shall be compensated from the insurance coverage under the notary's civil liability insurance contract or, should this coverage prove insufficient, the one under the notary's collective civil liability insurance contract, or, should this last coverage prove insufficient, from the notary's personal assets, or, should these prove insufficient, from the compensation fund of the Federal Notary Chamber.

Specific Regulations of the Russian Federation" also provides for a possibility to conclude an electronic co-investment contract. Article 4 (3) of this Law contains a general rule that the co-investment contract shall be made in writing subject to state registration, and shall be deemed concluded from the date of such registration unless otherwise provided for by the law. However, the following was added to this rule: the contract could be made as an electronic document signed by the enhanced qualified e-signature, as amended by Federal Law No. 147-FZ of 17 July 2009 and No. 151-FZ of 27 June 2019.

Thus, real estate transactions in the form of an electronic document have been legalized in the Russian construction co-investment legislation.

However, it is necessary to underline a major intrinsic difference between this contract and the one for real estate purchase since construction co-investment gives rise to mutual obligations (rather than to proprietary claims) to be assumed by the parties[12]. Obviously, this type of contract has been thus moved outside the scope of Article 550 CCR provisions on the contract form, only to make the electronic form acceptable.

Transactions related to co-investment construction — agreements to amend the contract, agreements for assignment of claims under a construction co-investment contract — could also be made electronically[13].

7. Electronically Formalized Real Estate Transactions: Title Registration Law and Rosreestr Practices

The general rules on possible conclusion of electronic real estate assignment contracts are enshrined in Article 18 of Federal Law No. 218-FZ of 13

[12] The concept of construction co-investment contract follows from Article 4 of Federal Law No. 214-FZ of 30 December 2004 "On Co-Investments for Construction of Apartment Blocks and Other Properties, and Amendments to Specific Regulations of the Russian Federation" (effective since 01 January 2022 as amended) whereby one party (developer) undertakes to build/construct an apartment block or another property within the dates fixed in the contract, either on his own or by retaining other persons, and, once the commissioning certificate is issued, to transfer the property to the co-investor, while other party undertakes to pay the amount stipulated in the contract and accept the property, once the commissioning certificate to an apartment block and/or other property is issued.

[13] The relevant rules were specified in Rosreestr Order No. P/0202 of 17 June 2020 "On approving the requirements to electronic construction co-investment contracts, contract amendment agreements and claim assignment agreement including the requirements to the format and completion of such document forms" (Ministry of Justice Regulation No. 59780 of 11 September 2020).

July 2015 "On State Registration of Real Estate" whereby the contracting parties can make an online application to register the real estate title and simultaneously conclude a contract without visiting a notary office, once they have a Rosreestr account and an enhanced qualified e-signature.

Pursuant to Article 18 (1) of the Federal Law "On State Registration of Real Estate" (as amended on 30 December 2021 and in effect since 10 January 2022), an application for cadastral and/or state registration of title and documents attached thereto shall be made available to a title registration body including in the form of e-documents and/or electronic document images signed with an enhanced qualified signature in accordance with the Russian law unless otherwise provided for by the federal law using general purpose telecommunication networks including Internet, central state and municipal services portal or official website, or other information technologies for interaction with the title registration body.

Under Article 18 (1.3) of the same law, the title holder could use his account with the title registration body to electronically file the application to register the title arising, modified, terminated or assigned as a result of transaction concluded in respect of the property owned by the holder in question.

Moreover, the Rosreestr offers model assignment contracts. Under Article 18 (1.3), such transactions can be concluded by using model terms of the respective contracts developed by the registration body, posted to its website and published in accordance with Article 427 of the Civil Code (part 1.3 effected by Federal Law No. 120-FZ of 30 April 2021 to take effect since 01 January 2023).

While the said model terms have not yet been developed by the Rosreestr, the agency's website provides interesting information on the transactions available to title holders and visible in client accounts. Using the real estate transaction menu, the applicant can e-sign the following transactions via his Rosreestr account: life estate contract, non-compensated fixed-term land use contract, lease agreement, construction co-investment contract, mortgage modification contract, repudiation of contract, termination of contract[14].

Thus, the Rosreestr website suggests that the parties to a real estate contract cannot transact electronically by themselves using their accounts. But notaries and credit institutions can.

[14] Available at: URL: lk.rosreestr.ru (accessed: 10.02.2022)

At the same time, it is worth noting that the real estate registration law does not impose any restrictions or prohibitions in respect of such transactions. It may well be that starting from 1 January 2023 (the date of the planned introduction of model assignment contracts) the Rosreestr website will offer model contracts while the system itself will make such transactions technically possible.

Moreover, the operational analysis of the Rosreestr regional branches shows a controversial picture. In particular, the regional office website gives an affirmative answer to the question of whether one can register a real estate transaction using a Rosreestr account. It explains that in this case the contract should be signed with an enhanced qualified e-signature (EQES) by both buyer and seller.[15] What do these official explanations on possible e-registration of real estate transactions mean? As a Russian proverb says there is no smoke without fire. We believe the explanations are not accidental: as electronic real estate transactions generally gain recognition, the Rosreestr officials admit that e-sales could be allowed. The only major obstacle is Article 550 of the Civil Code which is quite important politically and legally in the current socioeconomic context.

The rules allowing the parties to assign real estate using Rosreestr accounts as envisaged by Article 13 of the Federal Law "On State Registration of Real Estate" should not be widely interpreted as applicable to transactions in the form of shared documents signed by the parties (Article 550 of the Civil Code).

It is worth noting that Article 6 (1) of Federal Law No. 63-FZ "On Electronic Signature" of 06 April 2011 provides that the information signed with a qualified electronic signature is deemed e-document equivalent of a handwritten document and acceptable in any relationships under the Russian law except where federal law or underlying regulations require making an exclusively physical document.

As O.A. Ruzakova pointed out, in the course of drafting the law allowing to conclude contracts in the form of a shared document (including e-document) there were proposals to detail the procedure for specific transactions involving electronic documents. With regard to real estate transactions, especially mortgages, renowned banks operating relevant data platforms had proposed to simplify the procedure for mandatory use of enhanced e-signature depending on the importance of the assets in question. O.A. Ru-

[15] Rosreestr answers to the questions on electronic registration of real estate title. Available at: https://www.gov.spb.ru/gov/terr/krasnogvard/news/187830/ (accessed: 11. 01.2022)

zakova underlined that the second signature on the original e-document would change its parameters into a document exchange, something that would in turn require to amend the Civil Code. But, given a considerable number of fraud in this market, this was premature in respect of all real estate transactions [Ruzakova O.A., 2019: 29-35].

But despite the above interpretation of the impossibility to acknowledge real estate electronic transactions as a shared document, the Rosreestr was supported by the Federal Tax Service which in its letter of 20 December 2019 defining the form of sale documents (No. BS-3-11/10825@) explained that e-documents would be acceptable: "Pursuant to para 6, Article 220 (3) of the Code, where an apartment was bought, the taxpayer will confirm his right to property-related tax deduction by making available the purchase contract, title documents and documents evidencing the costs being incurred".

Moreover, the FTS provides the following interpretation: "It is worth noting that in accordance with Articles 550 and 434 of the Civil Code the sale agreement should be made in writing as a shared document signed by the parties; the contract in writing could be made as a shared document (including e-document) signed by the parties. A failure to observe these formal requirements will void the contract". Thus, the FTS interpretation admits a combination of the content of Articles 550 and 434 — despite the doctrinal approach that only Article 160 provisions are applicable to Article 550 while the applicability of Article 434 (4) is ruled out.

Even if we apply a broader interpretation of Article 550 and, therefore, view the shared document concept in two ways — as a physical document or e-document — it is still unclear how the Rosreestr will make sure that the shared electronic document is signed by both transacting parties.

It is noteworthy that Rosreestr Order No. P/0241 of 1 June 2021 (as amended on 29 October 2021)[16] contains certain rules for registering transactions in the form of e-documents. Pursuant to the main rules (para 3, section 4), special registration endorsement on the electronic document describing the transaction content will be made by generating an e-document. The e-document describing the transaction and signed with an electronic signature and the e-document bearing special registration en-

[16] See: Rosreestr Order No. P/0241 of 01 June 2021 (as amended on 29 October 2021) "On the Procedure for the Unified Real Estate Register, Form, Details and Completion Requirements to Special Registration Endorsement on Transaction Documents, Requirements to Special Registration Endorsement of Electronic Transaction Documents, Procedure for Modification of Information Regarding the Location of Land Plot Borders in Correcting Registration Errors" (Ministry of Justice Reg. No. 63885 of 16 June 2021).

dorsement will be signed by the state registrar with a single enhanced qualified e-signature. Moreover, it is stated that the e-document bearing special registration endorsement on the document describing the transaction will be generated as an XML file created through the use of XML plans available at the Rosreestr official website as of the date of such document, or in any other format allowing the said electronic document to be viewed and copied without resorting to special software. The XML plans used to generate e-documents shall be deemed operable from the date they are posted to the official website[17].

The aforementioned Rosreestr order does not in any way prohibit or restrict e-formalized real estate transactions. Thus, the agency applies the general format of electronic documents to the registration of title to real estate. Since the Rosreestr admits the electronic form of real estate transactions, with credit institutions using IT technologies to communicate with the registration body, the underlying contract has to comply with the requirements of Article 550 of Civil Code (on a shared document signed by the parties) [Tymchuk Yu.A., 2018: 24-27]. However, it does not follow from the said procedure that the Rosreestr will make it possible for all parties to generate a shared document as they apply for registration of an electronic real estate assignment contract.

We believe that the Unified Notary Information System and the contract form for remote real estate transactions proposed by the Fundamental Notary Law could serve as a model in formalizing electronic real estate sales[18].

Apparently, the whole set of requirements to remote transactions involving a public notary proposed in the Fundamental Notary Law — first, generating a shared document (text of the contract) to be signed through the use of the Unified State Automated Information System (USAIS); second, verifying the will and intent of the parties, their legal capacity; doing legal due diligence — should be assumed as a model.

A major limitation of the proposed electronic real estate transaction service not involving a notary is that the risks assumed by the parties are

[17] Moreover, it is specified that the e-document bearing special registration endorsement on the transaction document will be generated as an XML file created through the use of XML plans available at the Rosreestr official website as of the date of such document, or in any other format allowing the said electronic document to be viewed and copied without resorting to special software. The XML plans used to generate e-documents shall be deemed operable from the date they are posted to the official website.

[18] In analyzing the aforementioned innovations, sometimes also suggest that notaries both have broad powers and relevant electronic tools to conduct an adequate legal due diligence of the documents as part of the procedure for notarization of real estate transactions, something that different intermediaries in the real estate market clearly lack.

not secured in the form of either liability insurance or other guaranteed compensation of damage (the notary, in contrast to the Rosreestr, is known to be liable for the damage caused by an illegal transaction made through his fault)[19].

Despite the aforementioned limitations of electronic technologies as applied to real estate transactions not involving a notary, electronic services have become a predominant feature of the title registration process.

In its turn, the practice has also revealed opportunities for a fraud where this method is used to register title. There are many reports of electronic identity theft where fraudsters could file the documents for registration of title without a need to provide physical documents or refer to the Rosreestr in person [Naumova O., 2019: 61–90].

To stop the practice of fraudulent filing in case of electronic identity theft, the Federal Law "On State Registration of Real Estate" was amended on 2 August 2019 to provide (Article 36.2) that in order to register the electronic title transfer transaction, the title holder should apply to the registration body in person or by mail at least five days before the envisaged date (with the applicant's signature to be certified by a notary)[20].

[19] The law on registration of real estate also guarantees a compensation to the title holder where the damage was caused by illegal registration. In fact, Article 68.1 "Compensation to a bona fide purchaser for the loss of residential premises" (introduced by Federal Law No. 299-FZ of 02 August 2019) rules that a physical person (bona fide purchaser) losing residential premises as a result of claim in accordance with Article 302 of the Civil Code is entitled to a lump sum one-time compensation payable from the public budget of the Russian Federation, once the court order to claim the respective residential premises has taken effect. The amount of compensation shall be determined by the court based on the amount of real damage or, where the respective claim was made by the bona fide purchaser, in the amount of cadastral value of the residential premises effective on the date of the court order envisaged by part 1 of this Article. However, unlike the notary's liability, the registration law deals with a compensation stipulated by a clear set of conditions. This is a much less frequent type of damage to the title holder than registration of an illegal transaction.

[20] Rosreestr information "On Formalizing Real Estate Transactions Using the Enhanced Qualified Electronic Signature (EQES). Available at: URL: https: rosreestr.ru (accessed: 12.01.2022)

At the same time, there are authors (D. D. Titov) who view this innovation quite negatively: "As this example and the legal review clearly show, the electronic service provided by the Rosreestr before 13 August 2019 made the procedure considerably simpler and more convenient in terms of time saving, costs, social focus and security, something that was fully in line with Presidential Resolution No. 203 of 9 May 2017 "The 2017–2030 Strategy for the Development of Information Society in Russia", with the service now becoming cumbersome, bulky and more costly. The amendments to Federal Law No. 218-FZ of 13 July 2015 "On State Registration of Real Estate" effective since 13 August 2019 have actually wiped out all its advantages.

The explanatory note to the draft Federal Law "On Amending the Federal Law on State Registration of Real Estate" reports multiple violations committed through electronic identity theft. The drafters stress that identification through the use of enhanced qualified e-signature is not immune from the risk of unauthorized access to the verification key. New fraudulent practices for plundering someone's property — gaining unauthorized access to the signature verification key followed by the electronic application filed with the Rosreestr on the title holder's behalf — have emerged.

In such cases, the law cannot protect the title holder in full. The registration center has discretion to establish its operational procedures (part 3, Article 8 of the Federal Law on the Electronic Signature). A qualified certificate can be issued on the basis of the applicant's identification document copy or a simple letter of attorney in writing (Article 13). The security level of verification keys often held on flash storage devices could not be considered adequate either. At the same time, the holder of the verification key is responsible for maintaining its confidentiality under Article 10 of this law[21].

While Article 36 (2) was introduced to the Federal Law on State Registration of Real Estate requiring title holders to file registration applications electronically, this requirement does not apply to certain applicants.

In particular, the fact that the Unified Real Estate Register does not provide for registration of documents signed with the enhanced qualified e-signature does not prevent registration where the relevant electronic application is filed under para 6, Article 36 (2) by: central or local government body; notary; parties to a real estate contract made through the use of IT communications between credit institutions and the title registration body; parties to a property assignment contract where the relevant application and e-documents attached thereto are signed by enhanced qualified e-signature (EQES) with the qualified verification key issued by a federal agency in accordance with the existing law.

Thus, the procedure for real estate transactions via a Rosreestr account could involve two title registration options:

prior application in writing to solicit an electronic transaction;

no prior application.

Credit institutions able to communicate with the registration body through the use of IT technologies are among those authorized to apply

[21] Explanatory note to the draft of Federal Law "On amending the Federal Law on State Registration of Real Estate".

for remote transactions without a prior permission. This opportunity is currently available to Sberbank (via Dom.click platform), VTB Bank, etc.[22]

8. E-technologies: the Main Development Areas Applicable to Real Estate

Thus, a wider interpretation of the form of real estate contract has emerged in the law enforcement practice over the last few years. As regards the design of the shared document, the Rosreestr and other institutions involved admit possible use of electronic documents.

As was already noted above, Article 550 of the Civil Code assumes that real estate transactions should conform to the requirements of "attendee transactions". Over the last decades, this approach was interpreted as to void transactions made in any other form — for example, through an exchange of documents, letters or faxes. Interestingly, despite the dissemination of online property sales, the legal practice does not demonstrate any decision to void new forms of transactions due to a flaw of the form. On the contrary, we have found a number of court decisions where an electronic real estate transaction did not raise questions either with the parties or the judges. At the same time, the statistics reported by law enforcement authorities is a matter of growing concern. While we did not find the statistics on the number of fraudulent practices involving real estate, the prosecutor's office reported that digital crime grew 13 percent in 2021[23]. The

[22] The Rosreestr deputy head has noted how important to develop digital services jointly with professional market participants. "The Rosreestr is creating a service called "Virtual Transaction Room" accessible online from accounts with banks and other entities. As necessary, persons may invite a notary, real estate company, credit institution to provide an advice, arrange for a loan or sign a contract", the deputy head said. In her presentation, electronically registered mortgage transactions accounted for 60% percent of the total compared to 9% before the pandemic. This was achieved through cooperation with the banking community. Available at: URL: https://rosreestr.gov.ru/press/archive/rosreestr-planiruet-razrabotat-servis-dlya-oformleniya-ipoteki-v-rezhime-onlayn/?fbclid=IwAR0qPi3PzSZpkAL1E447b8GjILDhheb3FlnyTnds0xu9-3KYayypMUpVZPE (accessed: 16.12.2021)

[23] According to the General Prosecutor's data published by the mass media, 282 thousand frauds were reported in Russia in January-November 2021 (plus 6.5% compared to 2020). Their real number could be greater since the criminal intent is not always provable in case of transactions in a simple written form. Cases where the victims have to claim their rights under a civil procedure are not reported in the fraud statistics.

Real estate fraud is still a major issue. Legal heedlessness of individuals, personal data leakage via faked websites, dissemination of forged passports, letters of attorney, other documents, QR codes — all these things enable fraudsters to plunder other people's assets. New fraudulent practices increasingly emerge. Thus, in the end of last year fraudsters were offering online loans secured by real estate, only to deprive borrowers of both money and

fraud involving real estate has major implications regarding both civil, tax and criminal law etc.

It is worth noting again that the notary rules on remote real estate transactions minimize the counterparty risks in transactions between remotely located parties, with the USIS generating a shared electronic document and the parties also signing a shared physical document.

Other parties involved in real estate transactions (such as credit institutions) do not minimize risks to such extent in their communications with the contracting parties. While allowing e-transactions (including through EQES), the registration law does not provide for any special due diligence standards which means that the parties assume all risks involved in electronic real estate transactions.

In applying the general rules to all property sales made in the electronic form, neither the legislator introducing the innovation nor the Rosreestr in its respective practices have paid attention to the fact that real estate is subject to a different legal regime and has varying socioeconomic importance; and the contracting parties also have different legal status and assume different implied risks.

What we mean here is that even if the electronic contract form may not have negative legal implications where public or municipal non-residential real estate is offered for sale at public/municipal tenders (with the relevant document package subject to prior due diligence by the tender organizer etc.) or where a property is assigned in the process of bankruptcy (with perceived business risks assumed by entrepreneurs), the sales of residential real estate will have major socioeconomic implications.

A lack of differentiated procedure for electronic transactions with residential and non-residential real estate is unjustified. Residential real estate is, among other things, a place to live, which allows everyone to implement the constitutional right to housing. The above described real estate sales through the use of e-technologies (in two or three clicks) do not offer adequate protection to prevent fraudsters from taking possession of someone's apartment or house. The problems of restitution or vindication of housing are notoriously hard to solve in legal practice. In the context of inflation, pandemic restrictions and low wages of the Russian population, the amount of compensation awarded by court for an apartment or house

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housing. Simple Contracts and Less Simple Fraudsters: Real Estate Fraud on the Rise in Russia. Available at: URL: https://notariat.ru/ru-ru/news/prostye-dogovory-i-neprostye-moshenniki-v-rossii-stalo-bolshe-afer-s-nedvizhimostyu-2201 (accessed: 14.01. 2021)

not restituted as a result of a fraudulent transaction will not provide an adequate relief for the lost title.

Thus, it could be asserted that a wider interpretation of Article 550 of the Civil Code allowing to apply the electronic contract form to real estate sales, primarily in respect of housing, is quite dangerous.

At the same time, as the future obviously lies with technologies, the contract in writing signed by counterparties will become obsolete and abandoned with time. For this reason, the jurisprudence should today search for a balance of interests by combining the use of advanced electronic digital technologies with specific strict legal provisions aimed at creating a "format" for real estate transactions to ensure adequate due diligence.

It is worth noting that other legal systems are also searching for a balance in regulating real estate transactions. In Germany, such transactions are traditionally subject to notarization. Under para 1,311b "Contracts for sale of land, assets and real estate", the contract whereby one of the parties undertakes to transfer/purchase title to real estate should be notarized. Any contract made in violation of this form will be voided in full from the date it was issued and entered to the Land Register. In this case, these provisions apply to obligational real estate transactions.

As regards the concept of proprietary contract established in the German law, § 873 of BGB "Title purchase by way of agreement and registration" provides for the following procedure: in order to transfer title to real estate, the parties will need to agree on the fact of mutation and registration thereof in the Land Register, unless otherwise provided for by the law. For this purpose, the parties are bound by the agreement only to the extent the respective declaration was notarized or entered to the Land Register, or where a duly authorized person has given the other party a permission to make an entry in accordance with the provisions governing the Land Register.

At the same time, the German civil law has been amended as e-commerce and e-transactions progressed. In particular, a number of amendments were made to the obligational law section: thus, §126 (BGB) "Written Form" (Schriftform) came to include para 3[24] whereby the form in

[24] Where the law provides for a written form, the document should be signed by the issuer or have his handwritten signature notarized.

The parties to a contract should have their signatures on one and the same document. Where a contract includes several identical documents, each party signs the document intended for the other party.

The form in writing may be replaced with electronic form, unless otherwise provided for by law.

Notarization is made in lieu of the written form.

writing could be replaced with the electronic form, unless otherwise provided for by law. Moreover, as follows from provisions on the electronic form (Elektronische Form) introduced to §126a of BGB, where the written form envisaged by law is to be replaced with the electronic one, the issuer should add his name to his intent and provide an e-document with a qualified e-signature (para 1). Interestingly, § 312 regulating the applicability of online contracts was amended in 2021. While the previous wording did not allow to apply the online transaction provisions to contracts to establish, purchase or transfer title or other rights to real estate (para 2), the current one does not make such exception in respect of assignment transactions.

The Land Register rules (Grundbuchordnung) were also largely amended to include the sections on electronic juridical transactions and electronic master files (§§ 135–141)[25]. These rules specify in detail the procedure for filing e-documents to the Land Registry (§ 136), e-document form (§ 137) etc. Thus, the German legal system contributes to the development of electronic Land Register (Elektronische Grundbuchs) [Vieweg K., Werner A., 2007: 441] while maintaining the core rule on notarization of real estate assignment contracts in the context of changes to the scope of e-commerce and formalization of real estate title.

It has to be admitted that provisions of Article 550 (1) of the Civil Code need to be improved given the use of e-technologies to sell real estate as evidenced by notary practices, Rosreestr activities and a lack of court decisions to void electronic real estate contracts. However, it would be premature to drop out Article 550 (1) altogether. Since there are no due diligence standards applicable to residential real estate sales formalized electronically without notarization, and given high social importance of housing, these provisions should be maintained in respect of residential premises. At the same time, the Civil Code should provide for the cases where the real estate registration law allows to use electronic documents. For this purpose, Article 550 could be amended as follows: "In cases envisaged by law, the contract may take the form of a shared electronic document signed by the parties through the use of a qualified electronic signature".

Conclusion

Since the development of electronic transaction forms between individuals to purchase residential real estate will continue, it is necessary to

[25] The text published on 26 May 1994 (Federal Law Newsletter I p. 1114) was amended by the law effective from 5 October 2021 (Federal Law Newsletter I p. 4607), with amendments effective from 1 January 2022. The amended law will take effect from 1 July 2022.

minimize the risks assumed by the parties in using e-technologies. For this purpose, the following is proposed:

maintain the provision for the real estate contract to be made in the form of a shared document signed by the parties as a general rule.

amend Article 550 of the Civil Code as follows: "In cases envisaged by law and provided for by the notary legislation and the law for registration of real estate title, the contract may take the form of a shared electronic document signed by the parties through the use of a qualified electronic signature".

e-sales of residential real estate between individuals are possible where two notaries are involved in the online transaction.

As was shown above, e-technologies involving both legal entities as property sellers and a variety of intermediaries (agents) such as property developers, credit institutions, real estate agencies etc. are gaining momentum, with credit institutions operating special e-platforms for interaction with the Rosreestr playing a special role. In this paper, author doesn't intend to analyze the political reasons for allowing credit institutions to participate in real estate transactions. Obviously, the banking lobby will dominate major decision-making with regard to real estate for quite a while, only to make credit institutions serious competitors of the notary community regarding formalization of real estate transactions. However, these competitors will need to comply with higher standards applicable to real estate sales. Therefore, we need a mechanism for involvement of credit institutions in real estate transactions which would guarantee due diligence and adequate injunctive relief to contracting parties.

When comparing the role of credit institutions with that of other parties (other than notaries) involved in formalization of title, one can assume that their activities give rise to fewer risks than those generated by questionable dealers or real estate companies proposing to perform an online real estate transaction in three or four clicks. In a large number of cases, banks will be involved in real estate sales as mortgage creditors since transacting parties predominantly use mortgage loans as a payment method. The security, legal and other departments at banks will analyze various aspects of the proposed transaction, review the borrower's credit history, look for possible encumbrances on the property and thus attempt to reduce the risk of transaction voidance and client insolvency (bad loans) since banks are directly interested to ensure the viability of contracts and, therefore, repayment of mortgage loans[26].

[26] As estimated by the VTB, 60% of the clients opt for electronic registration of real estate to avoid visits to the bank's offices or multifunctional public service centers. Available at: URL: https://realty.rbc.ru/news/61768d3c9a7947a9f0db4d98 (accessed: 12.12.2021)

It is necessary to introduce not only due diligence and counterparty risk relief standards but also those applicable to the legal status of other parties involved in real estate sales (which possibly need to be accredited with the Rosreestr).

As a due diligence standard, we propose to use the relevant experience gained by notaries in ensuring validity of transactions.

The standard applicable to the legal status of a professional real estate market participant could be implemented by various legal methods: special accreditation with the Rosreestr; self-regulatory practices in this area; mandatory insurance of liability etc.

Thus, proposals and calls from the websites of professional real estate market participants to encourage property sales in a few clicks using smartphones or other devices are apparently risky for title holders while the legislative support of such opportunities is currently premature. One could buy a robotic vacuum cleaner or a smartphone in a few clicks — if the platform company is unscrupulous, the loss will not be great (e-commerce in consumer goods is covered by the consumer rights protection law which governs the status and liability of platform companies and provides for relevant remedies).

In the context of legal limbo, real estate transactions in the form of electronic document will generate various sorts of risk for contracting parties including in the form of implied flaws of intent regarding all contract terms: the parties involved, content, discrepancies between the intent and expression of will, electronic fraud. Further regulation of real estate transactions should rely on new e-technologies whose introduction should not be prejudicial to the rights of title holders and the interests of their counterparties in the process of real estate transactions.

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Standard-setting and Normativity in International Governance of Interstate Relations in the Information and Communication Technologies Context

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Abstract

The paper considers how the standard-setting path, taken by states with respect of the information and communication technologies (hereinafter: ICTs), correlates with the normativity in international governance of this sphere. The pro-normative reading of this question pushes to examine whether this path designates a pre-lawmaking phase, contributes to the interpretation of the *lex lata* general norms, or fills in the gaps that cannot be covered by the orthodox international lawmaking. The counter-normative reading assesses whether the standard-setting path precludes, contests, freezes, or substitutes the lawmaking. In order to fulfill these tasks, the author concentrates on two standard-setting sources: the 'non-binding norms, rules, and principles of responsible state behaviour' adopted by the UN level in relation to ICTs related context and International Code of Conduct for Information Security, drafted by the states–members of the Shanghai Cooperation Organization. The paper reveals that 'non-binding norms, rules, and principles' elaborated at the UN level do not change the scope of binding provisions of International law. Thus, the content of these standards did not generate any 'added value' with respect to the negative and positive obligations of the states. Moreover, these standards cannot serve as an interpretation or understanding as to how existing international law applies to ICTs precisely because of the caveat made by the states with respect to the additional, subordinated role of these norms, rules, and principles. Such constellation puts in place a 'normative

gap scenario' showcasing that for the many states the legal uncertainty and legal gaps are a more profitable constellation. However, should the states follow the standard-setting track and adhere to the non-binding norms, provided that they are relaxing existing legal obligations of states, this 'deviation scenario' will also erode the normativity of International law. A solution can be found in the stage-by-stage shift from the standard-setting to the law-creating track. Already elaborated norms, rules, and principles of responsible state behaviour allow this shift for. It can happen in two stages: at the level of content and then with respect to the nature of these norms.

Keywords

standards; information and communication technologies (ICTs); International Law; normativity; responsible state behaviour.

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Introduction

Cyber security has started to gain more weight in the international political agenda at the universal, regional, and bilateral levels since 1998[1]. This agenda had a very clear-cut legal segment. From the very beginning, both governmental and academic discourse surrounding the application of International law to information and telecommunication technologies (hereinafter: ICTs) was put and nurtured in the 'whether and how' ontological frame. A designation of forms of possible legal contribution were confined to interventionist (managerial) and lawmaking actions [D'Aspremont J., 2016: 577–579, 582–583]. According to this binary, the current stage of legal affairs drifts between two dimensions, namely an acknowledgment of applicability of International law and precision of the existing and non-cyberspecific legal norms. The former culminated in the Group of Governmental Experts on advancing responsible state behaviour in cyberspace in the context of international security (hereinafter: the GGE) reports of 2015 and 2021, thus, serving as a response to the 'whether'-question. The latter

[1] Resolution of the UN General Assembly. 4 December 1998. A/RES/53/70. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/760/03/PDF/N9976003.pdf?OpenElement (accessed: 15.02.2022

adopted the form of individual interpretation by states on the one hand[2] and their collective elaboration of the standards on the other hand, addressing the 'how'-question.

The standard-setting initiatives in all possible formats, including governmental, hybrid, corporate, and academic are continuing to boom. At the UN level, states concentrated on operationalization of the 'norms, rules, and principles of responsible state behaviour' in relation to ICT, capacity- and confidence-building measures. This work started in the GGE and was fleshed out in 2015 report[3], continued in 2019-2021 in parallel in the

[2] Australia: Department of Foreign Affairs and Trade. Australia's Cyber Engagement Strategy. Annex A: Supplement to Australia's Position on the Application of International Law to State Conduct in Cyberspace. 2019. Available at: https://www.internationalcybertech.gov.au/sites/default/files/2020-11/2019%20Legal%20Supplment_0.PDF (accessed: 08.11.2021); Australia's Cyber Engagement Strategy. Annex A: Australia's Position on How International Law Applies to State Conduct in Cyberspace. 2017. Available at: https://www.internationalcybertech.gov.au/sites/default/files/2020-11/The%20 Strategy.pdf (accessed date: 08.11.2021) (далее — Australia's Cyber Engagement Strategies); United Kingdom: Cyber and International Law in the 21st Century. Attorney General Jeremy Wright Speech on the UK's Position on Applying International Law to Cyberspace; Mission to the United Nations: UK Statement on the Application of International Law to States' Conduct in Cyberspace, para 10. June 3, 2021. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/990851/ (accessed: 10.02.2022); application-of-international-law-to-states-conduct-in-cyberspace-uk-statement.pdf; the Netherlands: Ministry of Foreign Affairs. Letter to the Parliament on the International Legal Order in Cyberspace. 5 July 2019. Available at: https://www.government.nl/ministries/ministry-of-foreign-affairs/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace (accessed: 08.11.2021); Finland's National Positions, International Law and Cyberspace. 2020. Available at: https://front.un-arm.org/wp-content/uploads/2020/10/finland-views-cyber-and-international-law-oct-2020.pdf (accessed: 28.01.2022); France. Ministère des Armées. International Law Applied to Operations in Cyberspace. October 2019. Available at: https://www.defense.gouv.fr/content/download/567648/9770527/file/international+law+applied+to+operations+in+cyberspace.pdf (accessed: 26.11.2021); Germany. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Dr. A.S. Neu, A. Hunko, W. Gehrcke, weiterer Abgeordneter und der Fraktion DIE LINKE. Krieg im 'Cyber-Raum' — offensive und defensive Cyberstrategie des Bundesministeriums der Verteidigung. Drucksache 18/6989. 10.12.2015. S. 4, 5–7. Available at: https://dserver.bundestag.de/btd/18/069/1806989.pdf (accessed: 17.01.2022); US: [Koh H.: 2012]; nine Latin American states: [Hollis D., 2020: 5]. See also: Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States submitted by participating governmental experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security established pursuant to General Assembly resolution 73/266 (A/76/136). Available at: https://www.un.org/disarmament/group-of-governmental-experts/ (accessed: 12.02.2022)

[3] Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security. Report (June 26, 2015).

GGE and the Open-Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security (hereinafter: OEWG)[4], and since that time has been carried out by the latter[5]. In 2011, a group of states led by Russia and China has promoted the submission of the International Code of Conduct for Information Security to the UN (known as the SCO[6] Code of Conduct), and presented an updated version in 2015[7]. Hybrid standard-setting initiatives embrace the 2018 Paris Call for Trust and Security in Cyberspace proposed by France, which was endorsed by 81 states, the EU, and more than 700 companies[8]. The 2018 Charter of Trust, which contained ten principles of cyber security was initiated by Siemens in partnership with the Munich Security Conference. The Charter was primarily designated for private sector companies, however it was endorsed by the German Federal Office for Information Security[9]. The 'six critical norms' ('Singapore norms package') was proposed in 2018 by the multi-stakeholder group called the Global Commission on the Stability of

A/70/174. [hereinafter: GGE Report 2015]. Available at: https://undocs.org/A/70/174 (accessed: 15.02.2022)

[4] Report of the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security. 14 July 2021. A/76/135 [hereinafter GGE Report 2021]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/075/86/PDF/N2107586.pdf?OpenElement (accessed: 15.03.2022); Open-Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security. Final Substantive Report. 10 March 2021. A/AC.290/2021/CRP.2. Available at: https://front.un-arm.org/wp-content/uploads/2021/03/Final-report-A-AC.290-2021-CRP.2.pdf (accessed: 12.02.2022)

[5] Resolution of the General Assembly. 31 December 2020. A/RES/75/240. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/000/25/PDF/N2100025.pdf?OpenElement (accessed: 12.02.2022)

[6] The Shanghai Cooperation Organization.

[7] International Code of Conduct for Information Security, Annex to the letter of 12 September 2011 from the Permanent Representatives of China, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General. Available at: https://digitallibrary.un.org/record/710973?ln=en (accessed: 14.01.2022); International Code of Conduct for Information Security. Annex to the letter of 9 January 2015 from the Permanent Representatives of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General. A/69/723. Available at: https://digitallibrary.un.org/record/786846/files/A_69_723-EN.pdf (accessed: 15.02.2022)

[8] Available at: https://pariscall.international/en/ (accessed: 12.02.2022)

[9] Available at: https://press.siemens.com/global/en/feature/charter-trust-takes-major-step-forward-advance-cybersecurity#:~:text=At%20the%20Munich%20Security%20Conference,cybersecurity%20and%20further%20advance%20digitalization (accessed: 12.02.2022)

Cyberspace[10]. In 2016, the Freedom Online Coalition issued Recommendations for Human Rights Based Approaches to cybersecurity[11]. There are also a number of private initiatives, for instance the Microsoft's Cybersecurity Tech Accord[12], supported by about 150 IT companies and a voluntary set of good practices to improve routing security entitled the Mutually Agreed Norms for Routing Security (MANRS). This initiative was joined by network operators, Internet Exchange Points, CDN and cloud providers, and equipment vendors[13]. The most prominent academic standard-setting initiative is the Oxford Process on International Law Protections in Cyberspace that embraces a number of recommendations dedicated to different types of the ICTs operations[14]. Alongside with the taxonomy of standards drawn on their respective authors, the emergence of a form of standard setting falling outside the orthodox legal and political instruments should be also noted. Namely, the regulation by design, which is carried out by a technical language of algorithms and programming, i.e., 'design-based regulation embeds standards into design at the standard-setting stage in order to foster social outcomes deemed desirable' [Yeung K., 2017: 120].

At the same time, the creation of legally binding norms in the cyber sphere is not at an absolute standstill, but three aspects render these processes to have a limited impact. Firstly, the scope of this international lawmaking, as a rule, does not cover the substantial issues related to the legality of the interstate cyber interferences. Instead, a growing mass of treaty provisions have been focused on criminalization of cybercrimes and related to jurisdictional and procedural matters[15], or information sharing

[10] Available at: https://cyberstability.org/?news_category=norm-proposal (accessed: 12.02.2022). The Group was founded in 2017 and concluded its activities in 2021.

[11] Available at: https://freedomonlinecoalition.com/wg1-launches-recommendations-on-human-rights-based-approaches-to-cybersecurity/ (accessed: 12.02.2022)

[12] Available at: https://cybertechaccord.org/accord/ (accessed: 12.02.2022)

[13] Available at: https://www.manrs.org/ (accessed: 12.02.2022)

[14] Available at: https://www.elac.ox.ac.uk/the-oxford-process/ (accessed: 01.02.2022)

[15] The first and oldest treaty, the 2001 Budapest Convention on Cybercrime, that seeks to harmonize substantive, procedural and jurisdictional legal issues on cybercrimes, has long overspepped the status of a regional international treaty. Under the autspicies of the League of Arab States all its states members have signed and — except for Saudi Arabia — ratified the 2010 Convention on Combating Information Technology Offences which aims to strengthen cooperation between the Arab States and repeats the model for co-operation set by the Budapest convention. The 2014 African Union Convention on Cyber Security and Personal Data Protection, that have a more extensive material scope, governing not only cyber security, but also electronic transactions and personal data protection, has not entered into force yet, having collected only five ratification so far (whilst 15 are needed).

and capacity building[16]. Secondly, a few lawmaking projects embracing binding rules, relevant for legal qualification of the interstate operations, though having resulted in the international treaties that have entered in force, are entirely regional initiatives driven by Russia in the Commonwealth of Independent States (hereinafter: CIS) and the Collective Security Treaty Organization (hereinafter: CSTO)[17], or jointly by Russia and China in the framework of the Shanghai Cooperation Organization (hereinafter: SCO) [Zinovieva E., 2019]. Thirdly, the sole initiative at the universal level is an elaboration of a Comprehensive International Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes, which will cover the criminalisation of the ICTs-related malicious behaviour and cooperation on matters of criminal procedure only[18].

The aim of this paper is to consider how this standard-setting path, taken by states, correlates with the normativity in international governance of information and communication technologies. The pro-normative reading of this question will be to examine whether this path designates a pre-lawmaking phase, contributes to the interpretation of the *lex lata* general norms, or fills in the gaps that cannot be covered by the orthodox international lawmaking? The counter-normative reading assesses whether the standard-setting path precludes, contests, freezes, or substitutes the lawmaking?

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[16] For example, see: Directive (EU) 2016/1148 of the European Parliament and of the Council Concerning Measures for a High Common Level of Security of Network and Information Systems across the Union. 6 July 2016 // Official Journal of the European Union. L 194/1. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016L1148&from=EN (accessed: 1.02.2022)

[17] The 2009 Agreement on Cooperation in Ensuring International Information Security between the Member States of the SCO. Bulletin of International Treaties. № 1. 2012. Available at: http://eng.sectsco.org/load/207508/ (accessed: 1.02.2022). The 2013 Agreement on Co-operation of the States Members of the Commonwealth of Independent States in the Field of Ensuring Information Security (20 November 2013). Bulletin of International Treaties. № 10. 2015. Available in Russian at: URL: https://base.garant.ru/70604710/ (accessed: 01.02.2022); The Agreement of the States Parties of the Collective Security Treaty Organization in the Field of Ensuring Informational security. 30 November 2017. Available at: URL: http://publication.pravo.gov.ru/Document/View/0001201904260001 (accessed: 12.02.2022)

[18] Resolution adopted by the General Assembly, Countering the use of information and communications technologies for criminal purposes (26 May 2021). A/RES/75/282. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/133/51/PDF/N2113351.pdf?OpenElement (accessed: 1.02.2022)

1. 'Norms, Rules, and Principles of Responsible State Behaviour' Elaborated Under the United Nations Umbrella

1.1. The Advent of the Standard-Setting Track

The setting of standards, which are called 'non-binding norms, rules, and principles of responsible state behaviour', is a clear-cut contemporary trend and track chosen by the states as a response to the necessity to determine the 'rules of the game' in the ICTs relations. This conclusion follows from the results of the previous UN GGE work, which culminated in the acknowledgment of general applicability of International law to ICTs and the elaboration of 11 substantial standards[19], which were endorsed by the UN General Assembly resolutions adopted by consensus[20]. In 2018, the same body supported the standard-setting track and using a majority vote added two new norms to the initial list of the GGE[21].

The choice of the standard-setting track was also confirmed by the states' delegations at the two substantial sessions of the Open-Ended Working Group[22], established by the UN General Assembly in parallel with a new GGE in 2019-2020[23]. The overwhelming majority of states explicitly preferred not to create any new legally binding instruments. Explicitly articulated grounds for this had references to the sufficiency of the current 'strategic framework'[24] for regulation of the cyber sphere. Another reason included the danger that the creation of new legally binding instruments will undermine or create uncertainty in respect to the existing ones[25]. Fi-

[19] GGE Report 2015.

[20] UN General Assembly Resolution. Developments in the field of information and telecommunications in the context of international security. 23 December 2015. A/RES/70/237. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/457/57/PDF/N1545757.pdf?OpenElement (accessed: 1.02.2022)

[21] UN General Assembly Resolution. Developments in the field of information and telecommunications in the context of international security. 5 December 2018. A/RES/73/27. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/418/04/PDF/N1841804.pdf?OpenElement (accessed: 10.02.2022)

[22] Ibid.

[23] Open-ended working group on developments in the field of information and telecommunications in the context of international security, Final Substantive Report. 10 March 2021. A/AC.290/2021/CRP.2, para 24-33. Available at: https://front.un-arm.org/wp-content/uploads/2021/03/Final-report-A-AC.290-2021-CRP.2.pdf (accessed: 10.02.2022)

[24] EU statement at the 1st subs. session of the OEWG, 9–12 September 2019 (Portugal joined). Available at: http://webtv.un.org/ (accessed: 1.11.2021)

[25] Bulgaria and Italy at the 1st subs. session of the OEWG.

nally, a lack of consensus among states[26] or a lengthy nature of international lawmaking, which contrasts with the speed of technological developments were brought to the fore[27]. Only a minority of states favoured a necessity of lawmaking[28]; some of them did so with a reservation that they consider a development of new binding norms as a medium or long-term objective[29]. The preference of the standard-setting track was enhanced by a strong consensus on the need to concentrate on strengthening awareness, operationalization, and implementation of the GGE recommendations and development of capacity building. Finally, the priority of the five-years mandate of a new (the second) OEWG is to continue to further develop 'the norms, rules and principles of responsible behaviour of States and the ways for their implementation and, if necessary, to introduce changes to them or elaborate additional rules of behaviour'.

1.2. The Content and Significance of the GGE Non-binding Norms, Rules and Principles of Responsible State Behaviour

Analysing different impacts that the standard-setting track may have for the normativity of International law implies a necessity to dwell on the content of these non-binding norms of responsible state behaviour. It is worth examining how these norms relate to the existing non-cyberspecific provisions of International law, and then subject a subsequent qualification of the forms of the states' behaviour towards these standards to the results of this content-based analysis. The GGE Report of 2015 contains 11 'norms, rules and principles for the responsible behaviour of states'. The Endorsement of these standards gained consensus of the UN General Assembly[30] and their content was not disputed at the substantial meetings of the OEWG in 2019–2020.

As it is clarified by the GGE, these 'norms do not seek to limit or prohibit action that is otherwise consistent with international law'[31], so 'norms

[26] Israel and UK at the 1st subs. session of the OEWG.

[27] The US, Chile, Australia, Japan at the 1st subs. session of the OEWG. 2019; Singapur, UK, Australia at the 2nd subs. session of the OEWG. 10–14 February 2020. Available at: webtv.un.org (accessed: 7.11.2021)

[28] A necessity of lawmaking was expressed by the CARICOM group, Algeria, Nigeria, Syria, Russia, India, China, Malasia, Indonesia, Singapur, and Jordan.

[29] South Africa and Chile at the 1st subs. session of the OEWG; Brazil, joined by Pakistan, Cuba and Egypt at the 2nd subst. session of the OEWG.

[30] Resolution adopted by the General Assembly. 23 December 2015. A/RES/70/237, para 2 (a).

[31] GGE Report 2015, para 10.

and existing international law sit alongside each other'[32]. The OEWG also stressed that 'norms do not replace or alter states' obligations or rights under international law, which are binding' as they provide 'additional specific guidance on what constitutes responsible state behaviour in the use of ICTs'. Thus, it was not the intention of the states to reduce or change the existing *lex lata* rules of international law and challenge their normativity [Akande D., Coco A., Dias T., 2022: 31].

However, the content of these recommendations is different: some of them do reflect, repeat or can be deduced from the existing international obligations. For instance, this is true for the obligation to cooperate, respect of human rights, the obligation not to conduct and not to knowingly support ICT activity contrary to the states' obligations under international law. Some, as for instance the cyber due diligence obligations, have a weaker basis in International law. As the UK Mission to the United Nations stated, 'the fact that States have referred to this [cyber due diligence] as a non-binding norm indicates that currently there is no State practice sufficient to establish a specific customary international law rule of 'due diligence' applicable to activities in cyberspace'[33]. A legal obligation of 'cyber due diligence', requiring states to ensure that 'their territory is not used as a base for state or non-state hostile cyber operations against another state that cause serious adverse consequences with regard to a right of the target state' [Schmitt M.T., 2017: 30-50], exceeds a general duty of the states 'not to allow knowingly its territory to be used for acts contrary to the rights of other States'[34]. This concept is still in a nascent form and, despite the positions of some states[35] and the existence of a 'patchwork' of already existing

[32] Report of the Group of Governmental Experts on Advancing responsible State behaviour in cyberspace in the context of international security (A/76/135). 14 July 2021, para 15. Available at: https://www.un.org/disarmament/group-of-governmental-experts/ (accessed: 12.02.2022)

[33] UK. Mission to the United Nations, UK. Statement on the Application of International Law To States' Conduct in Cyberspace. June 3, 2021, para 10. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/990851/application-of-international-law-to-states-conduct-in-cyberspace-uk-statement.pdf (accessed: 12.02.2022)

[34] Corfu Channel Case (UK v. Albania). Judgment .9 April 1949. I.C.J. Reports. 1949. P. 4.

[35] The Netherlands: Ministry of Foreign Affairs, Letter to the Parliament on the International Legal Order in Cyberspace, pp. 4-5. July 5, 2019. Available at: https://www.government.nl/ministries/ministry-of-foreign-affairs/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace; France: Ministère des Armées, International Law Applied to Operations in Cyberspace 2019. Available at: https://www.defense.gouv.fr/content/download/567648/9770527/file/international+law+applied+to+operations+in+cyberspace.pdf (accessed: 15.02.2022)

general due diligence duties' [Dias T., Coco A., 2022: 198] is widely considered *lex ferenda* [Shackelford S.J., Russell S., Kuehn A., 2016: 22-23].[36] Finally, some norms, rules, and principles of responsible state behaviour are not underpinned by the existing legally binding rules of international law. They constitute political commitments or 'soft law' arrangements.

By their content, these norms, rules, and principles of responsible state behaviour do not alter the nature of binding provisions of International law, mainly because of two safeguards. The first one lies in the design of formulations. Standards that may be relevant for setting the contours of the outlawed cyber activities are constrained by references to *lex lata* International law. For instance, the first obligation to cooperate in developing and applying relevant measures and preventing malicious ICT practices is subjected to the 'purposes of the United Nations'[37]. The third norm prohibits states to allow to use their territory for using ICT only if it constitutes an 'internationally wrongful act', which serves as a clear mentioning of the existing binding norms of International law[38]. The fifth norm is reiterating that 'the same rights that people have offline must also be protected online' by an explicit reference to the UN Human Rights Council and General Assembly resolutions, which, in turn, are based on the International Covenant on Civil and Political Rights[39]. A promising sixth norm, which could have significantly contributed to the outlawing of state-on-state cyber-operations should it be limited to state activity that 'intentionally damages critical infrastructure or otherwise impairs the use and operation of critical infrastructure to provide services to the public', remarkably confines the scope of this prohibition to the activities violating their obligations under International law[40].

The second umbrella safeguard envisaged in the 2015 GGE report provides for that these 'norms do not seek to limit or prohibit action that is

[36] The GGE Report 2015 at 13 (3) envisages a negative obligation of states 'not knowingly allow their territory to be used for internationally wrongful acts using ICTs' as one of the 'voluntary, non-binding norms, rules or principles of responsible behaviour of States'. See U.S. International Strategy for Cyberspace: Prosperity, Security, and Openness in a Networked World. 10 May 2011. Available at: https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/international_strategy_for_cyberspace.pdf; (accessed: 16.11.2020)

[37] GGE Report 2015, para. 13 (a).

[38] Ibid, para 13 (c); UN General Assembly Resolution. 12 December 2001. Responsibility of States for Internationally Wrongful Acts. A/RES/56/83. Art. 1-2. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/477/97/PDF/N0147797.pdf?OpenElement (accessed: 12.02.2022)

[39] GGE Report 2015, para 13 (e).

[40] Ibid, para 13 (f).

otherwise consistent with international law'[41]. During substantial meetings of the OEWG, many states also underscored that the standards do not replace the existing international obligations of states[42]. The OEWG report also reiterates the same approach that norms 'rather provide additional specific guidance on what constitutes responsible State behaviour in the use of ICTs'[43].

The UN General Assembly added two new norms to the list and altered few aspects in the GGE formulations in the resolution on the establishment of the OEWG in 2018[44]. However, it was adopted by voting and not by consensus with 119 votes in favour, 46 against, and 14 abstentions[45]. In any case, the novelties introduced by this resolution, according to their content, do not touch upon the scope of the states' negative obligations, even when taking into account the absence of the general disclaimer on conformity of norms with legally binding rules (in contrast to the 2015 GGE Report). New norms reflected in this resolution are dedicated to the exchange of information, prevention of proliferation of malicious ICT tools, and broadening of the scope of actors involved in the relevant discourses[46]. Notably, in its 2021 report, the GGE commented on the initial list consisting of 11-non-binding norms, and not on an extended one[47].

Thus, the content of the standards both in its initial and extended versions did not generate any 'added value' with respect to the negative obligations of the states[48]. The opinion, expressed by D. Akande, A. Coco and T. Dias, who argued that these norms, rules, and principles 'are not deprived of any legal significance as they lay out possible, timely, and widely accept-

[41] Ibid, para 10.

[42] Netherlands, 1st subst. meeting, 2019.

[43] Second "Pre-draft" of the report of the OEWG on developments in the field of information and telecommunications in the context of international security. 2020. P. 7. Available at: https://front.un-arm.org/wp-content/uploads/2020/05/200527-oewg-ict-revised-pre-draft.pdf (accessed: 15.02.2022)

[44] UN General Assembly Resolution. Developments in the field of information and telecommunications in the context of international security.5 December 2018. A/RES/73/27. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/418/04/PDF/N1841804.pdf?OpenElement (accessed: 15.02.2022)

[45] Available at: https://www.un.org/press/en/2018/ga12099.doc.htm (accessed: 15.02.2022)

[46] The UN General Assembly Resolution. A/RES/73/27, para 1.4, 1.10, 1.13.

[47] GGE report 2021, para 15–68.

[48] Against this background it is revealing that during the OEWG sessions in 2019–2020 only Egypt explicitly suggested transforming the recommendations of the GGE to legally binging, and Phillipines expressed concern about non-binding their nature and reduced options for complaence and enforcement.

ed interpretations or understandings as to how existing international law applies to ICTs' [Akande D., Coco A., Dias T., 2022: 35] contrasts with the general rule of interpretation. According to Art. 31 (3) (a) of the Vienna Convention on the Law of Treaties[49], which is widely regarded as a reflection of the customary law applicable to both treaty and customary norms, 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' should be taken into account together with the context of the treaty. As no formal requirements are set forth for these 'agreements', the GGE reports adopted by a consensus and the General Assembly resolutions listing the recommendations on the respectful behaviour in the ICTs context, especially taking into account those that were adopted without a vote, can fall under this category. However, the caveat made by the states with respect to the additional, not substitutional role of these 'norms, rules, and principles' does not allow them to be used as means of interpretation of the existing treaty and customary law. They are, consequently, not exceeding the frame of the non-binding recommendations.

This standard-setting track may be important and justified as a political instrument to reaffirm the applicability of International law to cyber specific interstate relations. However, by its content, it is legally tautological in the sense that it does not change anything in the assessment of the legality of interstate cyberoperations. It cannot be said that the states did not notice this fact: a necessity to change or add these norms was discussed at the OEWG sessions. However, whilst the need to concentrate on implementation and operationalisation of these norms met general acceptance, only twelve states insisted on development of this list[50]. Argentina, Brazil, Egypt, Finland, France, Germany, the Netherlands, Pakistan, Singapore, Sweden, and the UK suggested to add norms dedicated to the protection of the public segment of the Internet and electoral infrastructure[51]. China proposed further ensuring the integrity of the ICT supply chain, namely that states should not exploit their dominant positions to undermine the supply chain security of ICT goods and services of other states[52]. The ICRC

[49] Vienna Convention on the Law of Treaties.23 May 1969. United Nations. Treaty Series. Vol. 1155. P. 331.

[50] The Open-Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security. 2nd session of the OEWG. 11 February 2020. Available at: webtv.un.org (accessed: 07.11.2021)

[51] 2nd subst. session of the OEWG (Norms, Rules and Principles) 10 February 2020. The UK expressed concerns on the concept of the public core of the Internet.

[52] 1st subst. session of the OEWG, 6th meeting. Available at: https://dig.watch/resources/6th-meeting-first-substantive-session-open-ended-working-group-oewg

represented additional norms protecting the medical facilities[53]. The limitation of the mandate and the lack of consensus did not allow the OEWG to include any of the proposed norms in the recommendations forwarded to the consideration of the General Assembly[54]. This fact puts in place a 'normative gap scenario' showcasing that for the majority of states the uncertainty and legal gaps are a more profitable constellation despite their double-edge nature. As a result, the states are not additionally bound by the political or legal obligations.

Two opposing stances framing the problematique of the necessity of new binding rules restricting states' sponsored cyber operations are an appeal to the necessity of law as a system able to restrict, deter, and enable the use of the tools of international responsibility. This view is based on the normativity of International law. In the other corner of continuum is a realistic vision of a deterrent role of the offensive cyber-capacities and a wide possibility for tit-for-tat, which is slightly limited by *lex lata* international legal provisions. During the OEWG sessions this — otherwise implicit — binary was strikingly incarnated in an initiative to introduce a general obligation to refrain from the weaponization and offensive uses of ICTs. This motion, proposed by Cuba, Indonesia, India, Iran, Nigeria, and Pakistan, triggered an immediate objection from Australia, Denmark, and the UK. They insisted on a necessity to respect the existing limitations of the usage, but not the outlawing of the possession or development of offensive cyber capabilities[55]. These stances are not as different as it might seem. States insisting on a need for additional norms in the form of standards meant political, and not legal commitments. Even if the proposals should have dealt with the binding rules, the nature of the normative force of International law cannot be exhaustively explained by a purely formalistic approach [D'Aspremont J., 2011]. States cherishing the under inclusiveness of the *lex lata* provisions are not really contesting the normativity of International law, not only because whilst declining to elaborate new legally binding norms, they claim to obey the existing rules, but also because their actions are driven by the presumption that these new norms will have normative force and limit their behaviour.

(accessed: 20.06.2020). This proposal was also envisaged in the SCO Draft Code and supported at the first OEWG sessions by Russia (2nd subs. session, 10 February.2020).

[53] 2nd subst. session of the OEWG… 10 February 2020.

[54] The OEWG Final Substantive Report. 10 March 2021. A/AC.290/2021/CRP.2. Available at: https://front.un-arm.org/wp-content/uploads/2021/03/Final-report-A-AC.290-2021-CRP.2.pdf (accessed: 0 8.11.2021)

[55] 2nd subst. session of the OEWG…10 February 2020.

A solution can be found in the stage-by-stage shift from the standard-setting to the law-creating track. Already elaborated norms, rules, and principles of responsible state behaviour allow this shift for, provided that the above-mentioned safeguards will be lifted. It can happen in two stages: at the level of content and then with respect to the nature of these norms.

2. The International Code of Conduct for Information Security

2.1. The content of the Code

The group of SCO states consisting of the former USSR republics, i.e, the Russian Federation, Kazakhstan, Kyrgyzstan, Tajikistan, Uzbekistan plus China sponsored the initiative to adopt the International Code of Conduct for Information Security. The draft was initially submitted to the UN General Assembly in 2011 and a revised version was filed in 2015[56]. Both drafts were composed in the form of a potential General Assembly resolution and sought to achieve 'earliest possible consensus' on the issue of 'information security'. The text of the Code consists of very general provisions and constitutes rather a list of goals and principles, than a draft of concrete norms. Nonetheless, what matters is the stance taken by the states sponsoring this Code in respect of the already existing legal framework.

According to the preamble of the revised version of the Code, the drafters took as a starting point the availability of norms 'derived from existing international law', which are applicable to the use of ICTs by states, and pledged to a necessity to form a consensus on how these norms can be applied in this context[57]. At the same time, they acknowledged that additional norms 'can be developed over time', making a reference to para. 16 of the Report of the GGE, which contains a list of voluntary confidence-building measures[58]. By their content, the provisions of the Code can be classified into several categories. The first one comprises the repetition of already existing principles of International law, such as to comply with the UN Charter, respect sovereignty, territorial integrity, and political independence of all states, respect human rights, peacefully settle the disputes, refrain

[56] International Code of Conduct for Information Security. Annex to the letter 9 January 2015 from the Permanent Representatives of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General. A/69/723 (hereinafter: SCO Code 2015).

[57] Ibid, para 9.

[58] GGE Report 2015, para 16.

from the use of force, and cooperate[59]. The obligation to respect rights and freedoms in the information space fully repeats provisions of Art. 19 of the ICCPR. Only a duty not to interfere in internal affairs of other states is formulated in a scope that goes beyond the existing two-elements test, i.e., interference to the *domaine réservé* and a coercive character[60]. In particular, the Code not only provided that only one element is enough, but also broadened of the second category to include the undermining of stability[61]. A pledge not to carry out activities which run 'counter to the task of maintaining international peace and security'[62], should this general aim be interpreted in light of the UN Charter, can be also qualified as making no difference in comparison to the existing legal framework. Almost the same is true for the legal protection of information space and critical information infrastructure.

The 2015 Code, besides some stylistic upgrades, delivers only two novelties, both of which are designed to challenge the existing multistakeholder model of Internet governance. The first one is a pledge to supply 'chain security' in order to prevent other states from 'exploiting their dominant position' to undermine the states' 'right to independent control' of relevant goods and services or to threaten their security[63]. The second novelty is a call for equality of states in international governance of the Internet[64]. In comparison to the previous version, the updated one does not contain a definition of an 'information weapon' and does not use the phrase 'proliferation of information weapons'. However, the foreign commentators were sceptical about the prospects of the revised version, for 'the new wording is consistently very broad, allowing that any use of 'information and communications technologies' could be qualified as inconsistent with 'maintaining international peace and security' [Rõigas H., 2015].

2.2. Impact of the Code

Both initial and revisited drafts were disseminated by the UN Secretary General and although drafted in the form of a General Assembly resolution, they were not discussed at the sessions of this UN body. Although the

[59] SCO Code 2015, para 1, 4, 7, 12, 13.

[60] ICJ. Case concerning Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America. Judgment of 27 June 1986. I.C.J. Reports. 1986. P. 14. § 205.

[61] SCO Code 2015, para 3.

[62] Ibid, para 2.

[63] Ibid, para 5.

[64] Ibid, para 8.

influence of the Code can be tracked at the UN level, its impact was rather very modest. References to these drafts can be found in the GGE reports[65], however, they were not followed by the application of the content[66]. The language of the Code was initially introduced in the draft of the General Assembly resolution in 2018, but was removed from the final version[67].

As for the position of other states, only United States has explicitly expressed its negative position. In 2012, the Congress has adopted a resolution,[68] criticising the Code for challenging the existing multi-stakeholder model of Internet governance and reserving a position for the US representative to oppose, should the UN or any other international organization vote for the Code. The reaction of the 'western' scholarship was also harsh and concentrated on the threat of the advancement of censorship, an attempt to overlay territorial sovereignty on the Internet [Mueller M., 2011]; [Carr J., 2011]; [Segal A., 2012] and a very broad approach to ICTs, which could be classified as inconsistent with 'maintaining international peace and security'. The next critique was related to the human rights restrictions mentioned in the revised Code. This interpretation was regarded as not consistent with 'objective application of the law' and the impermissibility of general restriction of human rights that 'may not put in jeopardy the right itself'. Thus, the danger was seen in the potential for 'eroding protections for human rights guaranteed under international law' [McKune S., 2015].

However, is it really true to consider the draft Code simply as 'a food-for-thought document' [Grigsby A., 2015]? Besides a very modest impact of the Code at the universal level and till now rather futile attempts of Russia and China to place it as a possible source for new norm-creating[69], some

[65] Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security (24 June 2013). A/68/98. Para 18, Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/371/66/PDF/N1337166.pdf?OpenElement (accessed: 12.02.2022); GGE Report 2015, para 12.

[66] Available at: https://www.unidir.org/files/medias/pdfs/developments-in-the-field-of-information-and-telecommunications-in-the-context-of-international-security-2012-2013-a-68-98-eng-0-518.pdf; https://www.un.org/ga/search/view_doc.asp?symbol=A/70/174 (accessed: 12.02.2022)

[67] UN General Assembly Resolution. 5 December 2018. A/RES/73/27.

[68] The Congress of United States of America. Resolution.26 March 2012. Available at: https://www.congress.gov/112/bills/hconres114/BILLS-112hconres114ih.pdf (accessed: 16.01.2022)

[69] Available at: https://dig.watch/sessions/norms-rules-and-principles (accessed: 12.02.2022)

of the key ideas of this draft were reflected in a number of both multilateral and bilateral treaties initiated by Russia and concluded with the states-members of the SCO and other states. Indeed, the concepts and threats identified by Russia, including 'use of information to undermine the political, economic and social system of other States', 'domination or control in the information area', and 'unauthorized transboundary influence through information' are clearly integrated within the SCO Agreement on Cooperation in the Field of International Information Security[70].

Chinese officials and scholars demonstrated continued support of the draft Code. On a number of occasions, China's Foreign Ministry's spokespersons characterized the Code of Conduct as the means of 'maintain[ing] peace and stability of the cyber space,' and declared that China was 'hoping to build a peaceful, secure, open and cooperative cyber space'.[71] Despite lacking recognition within the UN framework, Russia seems to retain its approach. Andrey Krutskikh, special representative of the President of the Russian Federation for international cooperation on information security, argued that 'the peace-oriented concept suggested by Russia has come in conflict with the position of several countries that seek to impose on the whole world their own game rules in the information space, which would only serve their own interests'.[72] Additionally, he stated existing approach 'puts in jeopardy the security interests of other countries and is fundamentally in contradiction with the objective of ensuring peace in the information space'[73].

Conclusion

In general, the impact of the choice of a standard-setting track examined in relation to the normativity of International law is ambivalent. On

[70] Available at: https://citizenlab.ca/2015/09/international-code-of-conduct/ (accessed: 12.02.2022)

[71] Available at: https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1164254.shtml; http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1241296.shtml; https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1242257.shtml (accessed: 12.02.2022)

[72] Available at: https://coe.mid.ru/en_GB/sotrudnicestvo-v-sfere-pravoporadka/-/asset_publisher/jYpWpmrO5Zpk/content/otvet-specpredstavitela-prezidenta-rossijskoj-federacii-po-voprosam-mezdunarodnogo-sotrudnicestva-v-oblasti-informacionnoj-bezopasnosti-a-v-krutskih-n?inheritRedirect=false&redirect=https%3A%2F%2Fcoe.mid.ru%3A443%2Fen_GB%2Fsotrudnicestvo-v-sfere-pravoporadka%3Fp_p_id%3D101_INSTANCE_jYpWpmrO5Zpk%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-1%26p_p_col_count%3D1 (accessed: 12.02.2022)

[73] Ibid.

the one hand, in the widely used ontological matrix of 'whether and how' International law applies to 'cyberspace', this track both strengthens the affirmative answer to the 'whether' question and helps to shape the contours of 'how', and, thus, clarifies the application of general and not cyber-specific legally binding norms of International law. Furthermore, the standard-setting can be a stage of the steady crystallization of the new international customary law or can serve as a platform for elaboration of a new international instrument, thus, paving the way for binding rules.

However, on the other hand, a positive effect of this track for the normativity of International law may be illusory and far from being neutral. Such scenarios can be enabled by both different combinations of the relationship of the content of such standards to the *lex lata* provisions of International law and the ways by which states will treat such non-binding norms. Should the endeavours of states be confined to standards not only in a short, but also in a middle and long term perspective, and binding rules will not be developed in the inter-state sphere where they are needed, it will mean that States are, thereby, championing a 'normative gap scenario'. A normative gap can also arise not because of the states' reluctance to make the standards formally binding, but stem from the content of these standards, if they will not bring any 'added value' to the existing legal framework. This will have an adverse impact on the International law as a legal regime, regardless of whether states would undertake any actions to codify such norms or not. Should the states follow the standard-setting track and adhere to the non-binding norms, provided that they are relaxing existing legal obligations of states, this 'deviation scenario' will also erode the normativity of International law.

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Thoughts on the EU Digital Single Market Strategy and the New Consumer Sales Directive

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Abstract

The paper describes the impact of the EU 'Digital Single Market Strategy' (DSMS) on consumer law. The essay analyses, in particular, the new Consumer Sales Directive [Directive (EU) 2019/771] and its recent transposition into Italian Law. Starting from the assumption that the Information-Digital Age certainly has social-economic impacts, therefore also legal ones, the paper first of all illustrates the Strategy promoted in 2015 by the European Commission. In order to represent how the Commission intends to face the new digital "revolution" and its economic opportunities, this essay — through a brief description of the main pillars of the DSMS — tries to circumscribe the outcomes of the Strategy and its correlation with the new legal regime proposed for the building of the so-called 'Internal Market 2.0'. Moreover, the paper analyses the important role that consumer protection plays in relation to the European Commission's DSMS. With this in mind, the article examines the main aspects of the so-called 'New Deal for Consumers' (NDC), promoted in 2018 by the Commission in order to accompany the implementation of certain parts of the DSMS. In this first part of the article, a sort of "toolbox" is offered to the reader with the purpose of developing a better understanding of the current EU trends in consumer law. Following this line of research, the second part of the article focuses on the Directive (EU) 2019/771 proposed by the European Commission to regulate certain aspects concerning contracts for the sale of goods. In the final section, the paper describes the principal characteristics of the Italian transposition of the New Consumer Sales Directive (NCSD), as implemented in November 2021. In the conclusion, the paper suggests that the most recent EU interventions on consumer law are still based on a traditional understanding of consumer protection and, with regard to certain aspects, do not appear to be very different from the previous legislation (this is the case of the so-called hierarchy of remedies).

Keywords

digital age, EU digital single market strategy, new deal for consumers, consumer protection, consumer law, consumer sales directive, Italian Consumer Code.

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Introduction

In his book *The Fourth Industrial Revolution* the German economist Klaus Schwab wrote: «I believe that today we are at the beginning of a fourth industrial revolution. It began at the turn of this century and builds on the digital revolution. It is characterized by a much more ubiquitous and mobile internet, by smaller and more powerful sensors that become cheaper, and by artificial intelligence and machine learning. […] The fourth industrial revolution, however, is not only about smart and connected machines and systems. Its scope is much wider. […] It is the fusion of these technologies and their interaction across the physical, digital and biological domains that make the fourth industrial revolution fundamentally different from previous revolutions». [Schwab K., 2016: 11–12].

The Fourth Industrial Revolution — also referred to as the New Information-Digital Age [De Franceschi A. et al., 2016]; [Grundmann S., Hacker P., 2017: 255 ff.] — is an economic and social revolution, which certainly has many legal implications.

With specific regard to consumer relationships — which will be the only focus of the present analysis — *t*echnology may create the illusion that problems such as asymmetry of information can be solved with no need of a legal framework. On the contrary, the social concepts of 'network' and 'trust' appear to be weak when technological devices operate within trade relationships [Sartor G., 2020: 9 ff.]; [Pistor K., 2019: 183 ff.]. The legal 'Code' plays an essential role when it creates accountability mechanisms to face abusive behaviour and to guarantee consumer protection. Effective enforcement mechanisms could indeed implement the current Revolution, so as to develop a horizontal system, making it possible to develop a cooperative model and an intra-community trade that could benefit all market actors.

This is in line with the activity of the European Commission with specific — but not exclusive — regard to consumer protection law. The European Commission has indeed considered the impact of the New Information-Digital Age as an opportunity to improve the digital declination of the Single Market, and since 2015 the Commission has engaged in an intense activity to address the legal implications of this "revolution".

After a brief introduction of the 'Digital Single Market Strategy' (DSMS)[1] and its main pillars (Section 1), Sections 2 and 3 analyse its impact on EU consumer law. Section 4 then follows by focusing on the so-called 'New Consumer Sales Directive' (hereinafter NCSD)[2] that was proposed by the European Commission to regulate «certain aspects concerning contracts for the sale of goods». In Section 5, the paper then illustrates the main aspects and characteristics on the Italian transposition of the NCSD. As confirmed by the Italian experience, the paper argues that the most recent EU interventions on the topic (i.e., the NCSD) are still based on a traditional understanding of consumer protection.

1. The Digital Single Market Strategy and the New Deal for Consumers of the European Commission

In May 2015, the European Commission has published its communication on the Digital Single Market Strategy,[3] where the EU digital market is described as a market «in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence».

The Commission intends to reach the following outcomes with its strategy regarding a single digital market: (i) the «removal of key differences between the online and offline worlds to break down barriers to cross-border online activity»; (ii) the implementation of «secure and trustworthy infrastructures and content services». In other words, we are observing the construction of a sort of 'Internal Market 2.0' [Garben S. et al., 2020].

In particular, the Commission underlined that a fully operative digital single market could bring many benefits to European businesses and

[1] COM(2015) 192 final, 6 May 2015.

[2] Directive (EU) 2019/771.

[3] In May 2017, the Commission published a mid-term review of the implementation of the DSMS.

consumers, promoting innovation and increasing European GDP. In line with these purposes, the Commission presented an ambitious package of reform proposals, based on the idea of the digital market as a place characterized by the absence of any legal barriers regarding both the entry of new operators, on the one hand, and the possibility for consumers to directly relate with entrepreneurs from any Member State, on the other (indeed, with its Strategy, the Commission intends to ensure «better access for consumers and businesses to online goods and services across Europe»).

The DSMS consists of a series of initiatives that are functional to the promotion of e-commerce through the harmonization of national laws. It is built on three main pillars:

'Access': «better access for consumers and businesses to online goods and services across Europe»;

'Environment': «creating the right conditions for digital networks and services to flourish»;

'Economy and Society': «maximising the growth potential of the digital economy».

The DSMS and its three pillars clearly encourage two follow-up legal measures: developing harmonised EU rules for online purchases of digital content; allowing traders to «rely on their national laws based on a focused set of key mandatory EU contractual rights for domestic and cross-border online sales of tangible goods».

The implementation of the Strategy and the consequent growth of e-commerce has created new legal problems that should be addressed considering e-commerce's specificities. In this regard, there are two main arising issues: the trust gap between market actors of the digital economy and the legislative fragmentation. However, both these issues cannot be solved simply by applying the traditional European legal framework that was developed for an "offline" single market.

Subsequently, the Strategy promoted by the Commission was enriched by the so-called *New Deal for Consumers* (hereinafter NDC) [Tommasi S., 2020: 311 ff.]. The NDC was presented in April 2018[4] with the specific aim of ensuring a high level of protection of consumer rights. According to the Commission, the objective of creating a (digital) single market — by removing, also within the digital dimension, the legal obstacles to the free movement of goods and capital — must, in any case, be reconciled with an

[4] COM (2018) 183 final, 11 April 2018.

intensification of the protection of consumer rights (which represents one of the fundamental pillars of European private law). After evaluating the existing law (which was implemented in 1987), the Commission has concluded that «that EU consumer protection rules have helped the operation of the Single market and provided a high level of consumer protection. They are fit for purpose overall but must be better applied and enforced. The evaluation also has identified areas where EU consumer law could be updated and improved». In this spirit, the Commission proposed both to adopt a set of new directives and to update certain areas of existing legislation.

As regards consumer law in the strict sense, two general action lines have been identified and are summarised below.

Firstly, the Commission intends to modernize consumer law by taking into account the latest digital developments: in this respect, online platforms should be required to make it clear to consumers whether consumers are about to conclude a contract with a private individual or with a 'trader' (this is because only in the latter case the rules on B2C relationships will apply); consumer protection mechanisms must be present even when consumers receive free services and, simultaneously, provide the 'provider' with their personal data (which becomes the "payment" for the services received); the use of direct forms of communication for consumers, such as online forms and chats, should be encouraged; online platforms should clearly explain the classification criteria (price, delivery time, etc.) used to create consumers' search results; it should also be clear to consumers whether the price they are offered is based on automated algorithms that have previously monitored their behaviour as digital consumers.

Secondly, the Commission proposes to introduce specific legal instruments to prevent infringements of consumer rights, to sanction conduct contrary to those rights and to strengthen existing mechanisms and systems: (i) it's necessary to guarantee legal remedy both individual (including compensation for damages) and collective (class-action) to consumers who suffer an infringement of their rights; (ii) it is necessary to strengthen ADR systems and especially ODR (Online Dispute Resolution) systems; (iii) furthermore, it is necessary to encourage uniformity of sanctions for the infringement of consumer rights laid down by the different national systems; lastly, it is appropriate to encourage cooperation between the national authorities of the different Member States.

As will be further examined in the following pages, a few of the legislative proposals adopted in order implement the Commission's Strategy (and the subsequent NDC) have only recently been transposed by Member

States. Therefore, it is still early to comment on their effectiveness in terms of adequate protection of consumer rights. That said, some preliminary and general considerations can be made regarding the Commission's approach to consumer law of the New Information-Digital Age [Grochowski M., 2020: 387 ff.].

If one focuses on the mechanisms to *prevent* violations of consumer law, the Commission's approach appears, in particular, to be based on disclosure duties and on transparency (both of which are imposed on traders before concluding the contract). The effectiveness of such contractual mechanisms has already been called into question in recent years, precisely in the field of consumer protection [Bar-Gill O.-Ben-Shahar O., 2013: 109 ff.]; [Somma A., 2018: 524 ff.]. Indeed, these mechanisms are based on the assumption that the average consumer is a rational individual who — in the presence of all possible available information (both subjective and objective) concerning the contract he or she intends to conclude — will be perfectly capable of understanding whether that particular contract corresponds to his or her needs and economic interests. This approach, which is based on the idea that the consumer is the weaker party in the relationship — thus suffers an information asymmetry — is, in the abstract, undoubtedly functional to protect consumer rights. In practice, however, it risks exposing the consumer to an information overload thus preventing him or her from being able to make a truly informed and genuine decision. The risk of an information overload could be further increased by all the information which, according to the Commission, traders should communicate to the consumer in addition to what must currently already be communicated.

In this respect, the fact that online transactions are substantially carried out in a very short period of time is an indirect sign of how low (if not inexistent) consumer attention is towards information available to them for each single contract. One can consider, for example, the low level of attention consumers have towards the general terms and conditions of a contract. They, in any case, are often not comprehensible to the average consumer.

Moreover, if all mandatory disclosures were actually analysed by the consumer, the time needed to assess every single aspect contained in the traders' disclosures would likely cause an increase in time and transaction costs (in this ideal scenario, the time needed by a consumer to conclude an online contract would have to be much broader than the one-click buying system which is currently the most widespread); on the contrary, from the outset, the aim of EU consumer law has been to reconcile adequate consumer protection with the need for a fast and efficient market.

Lastly, it should be noted that the Commission's approach may not be consistent with the general view of the European Court of Justice on the definition of 'consumer': the Court has in fact ruled that the notion of consumer is independent from the knowledge/skills or from the information that a given person indeed possesses with regard to the specific sector of the services offered by their professional counterparty[5].

2. The DSMS and the Role of Consumer Law

In addition, and without any prejudice to what has been observed above on the Strategy and the NDC promoted by the European Commission between 2015 and 2018, it should be stressed that recent EU legislative initiatives related to the digital economy have undoubtedly contributed to strengthen the fourth industrial revolution and to drive the market out of the strict hierarchical infrastructure that is typical of the offline world and of its economic regime

In this context, EU consumer law can play a crucial role as well [De Franceschi A., 2015: 144 ff.]. However, in this sector, EU law seems to still be «grounded upon the simplistic and ontological dichotomy between a consumer and a professional/trader […]; [the] juxtaposition between the two is definite and evidently entails a rigid […] regime» [Inglese M., 2019: 68]. In fact, despite the evolving interpretation of the European Court of Justice,[6] this dichotomy represents a limit for the entire B2C framework: e.g., peer-to-peer relationships, where all users are acting in a non-professional capacity. Furthermore, it is useful to consider those "hybrid" platforms that involve both private individuals and real traders, where there is a high risk of the consumer being misled with regard to the real identity of his or her counterparty and with regard to the effective applicable regime of legal remedies (the B2C regime applies only when the counterparty is a trader accordingly to the EU consumer law definition) [Lombardi E., 2021: 52 ff.]. Even if some of the most recently adopted EU laws have been intended to cover both offline and online sales, they do not often provide specific rules for online platforms [Iamiceli P., 2019: 399].

This seems to be the case for the 'New Consumer Sales Directive' as well.

[5] See for example ECJ, Case C-498/16 – M. Schrems, judgment of 25 January 2018.

[6] See for example ECJ, Case C-329/19 - Condominio di Milano, judgment of 2 April 2020.

3. The New Trends of EU Consumer Law

The debate concerning the 'Internal Market 2.0' legal regime has shifted from a theoretical level to a legislative one and has led to the drafting of a multitude of acts strictly grounded on the Commission's Strategy [Savin A., 2021: 213 ff.].

More specifically, by implementing its Strategy with regard to contract and consumer law, the European Commission enacted two different legislative proposals:

'Proposal for a Directive on certain aspects concerning contracts for the supply of digital content' [December 2015 — COM (2015) 634 final];

'Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods' [December 2015 — COM (2015) 635 final].

After several years of debate, in 2019 the two proposals became, respectively, the directive on the supply of content and services [Directive (EU) 2019/770] and the directive on the sale of goods [Directive (EU) 2019/771]; see also [Manko R., 2017]. As mentioned above, the rest of the present analysis will focus only on the latter one.

4. The European Commission's 'NCS' Directive

On 20 May 2019, the EU legislator has enacted the Directive (EU) 2019/771 «on certain aspects concerning contracts for the sale of goods», which repeals the Directive 1999/44/EC.

The Commission stresses the fact that e-commerce is a key element for growth within the European Union market even if its growth potential is far from being fully exploited (Recitals no. 4). Thus, there is a need for harmonizing certain aspects of contract law — with specific regard to contracts for the sale of goods — in order to ensure a high level of consumer protection, and to achieve a «genuine digital single market» (Recitals no. 3).

With these purposes in mind, the Directive introduces rules on goods' conformity as well as remedies in the event of a lack of conformity (Recitals no. 11 and no. 12).

In particular, the NCSD applies to contracts for the sale of goods, «including goods with digital elements where the absence of the incorporated or inter-connected digital content or digital service would prevent

the goods from performing their functions and where that digital content or service is provided with the goods under the sales contract concerning those goods» (Recitals no. 15). More specifically, the Directive provisions can be applied to B2C sales contracts only. While the expression 'B2C' contracts pacifically refers to contracts concluded between businesses and consumers, the notion of 'sales contracts' within the context of the Directive is less clear. For the purpose of this legislative act, 'sales contract' is defined as «any contract under which the seller transfers or undertakes to transfer ownership of goods to a consumer, and the consumer pays or undertakes to pay the price thereof»; where 'goods' are « (a) any tangible movable items […]; (b) any tangible movable items that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions ('goods with digital elements')» (Article 2).

In terms of its enforcement, the NCSD is what is often considered a maximum harmonization directive, since it explicitly prohibits Member States to maintain or introduce, in their national law, provisions diverging from those laid down in the Directive (Article 4).

Furthermore, contractual freedom is specifically addressed by the Directive, which states that «any contractual agreement which, to the detriment of the consumer, excludes the application of national measures transposing this Directive, derogates from them, or varies their effect, before the lack of conformity of the goods is brought to the seller's attention by the consumer, shall not be binding on the consumer» (Article 21).

In particular, in the event of a lack of conformity — which occurs whenever the good is "defective" — the Directive follows the so-called 'two-step remedy system' [Howells G. et al., 2018: 186 ff.]: the consumer should first claim 'repair' or 'replacement', and only afterwards, and under certain circumstances, he/she is allowed to demand for price reduction or termination of contract (Articles 13-16). The rationale behind this system is to maintain the contract stable for as long as possible so to also reduce transaction costs; «[t] his is the choice to balance the far-going rights the directive provides the consumer with the interest of the seller, who must not be confronted with a claim for termination or price reduction before he had a second chance to properly perform the contract» [Smits J., 2016: 11].

With specific reference to the two-step remedy system, it is appropriate to make a brief general remark. This system has been present in EU consumer law for a long time (the system was already present in Directive 1999/44/EC); from this point of view, the NCSD does not introduce, therefore, a real legislative novelty.

It is also true that laying down remedies practically represents, on closer inspection, a necessary regulatory practice when it comes to establishing rules that shall be transposed into national systems of private law, very different from one another. From a comparative law perspective, this technique is perhaps the only one that makes it possible to achieve — within the framework of a maximum harmonisation directive — the objective of protecting consumer rights in every domestic system that will then transpose the EU legislation (regardless of the specific categories of each national system). If the possibility to identify the legal device deemed most appropriate (also in terms of compliance with each Member State's own "traditional" model of private law) is left up to the different Member States, legal fragmentation, thus non-uniformity of protection within the (digital) single market, become serious risks. In these terms it is possible to explain the continuity, in relation to the remedy system, between the NCSD and the previous legislation.

In addition, it should be noted that the NCSD, to a certain extent, indicates that repairing goods is preferable to replacing them. This preference is expressly based on the concept of 'sustainable consumption': «enabling consumers to require repair should encourage sustainable consumption and could contribute to greater durability of products [...]. For instance, it might be disproportionate to request the replacement of goods because of a minor scratch, where such replacement would create significant costs and the scratch could easily be repaired» (Recital no. 48; see also Article 13 and [Terryn E., 2019: 851 ff.].

Moreover, the Commission had already underlined the importance of environmental issues in the NDC, indicating them as one of the key elements of the new EU consumer protection policy: on the one hand, through the commitment of encouraging consumers to choose more sustainable products and services; on the other hand, through the aim of protecting consumers from misleading information on the environmental features of products and services (thus, for example, protecting consumers from so-called greenwashing practices).

5. The Recent Transposition into Italian Law

On 25 November 2021, Legislative Decree 4 of November 2021 (no. 170) has directly implemented the NCSD in the Italian Consumer Code (hereinafter CC; Articles 128–135 septies), that entered into force on the 1st of January 2022.

While the requirements for the conformity of the goods are substantially aligned with those provided for by the existing framework, the new Article 129 of CC classifies these requirements into two categories: 'subjective' and 'objective'. A good is in conformity with the sales contract, when both the requirements are met.

To satisfy the subjective requirements, the good: must correspond to the description, type, quantity, quality indicated in the sales contract — and it should also possess the functionality, compatibility, interoperability indicated by the sales contract; has to fit into the specific use requested by the consumer and communicated by the consumer to the seller at the latest at the time of the conclusion of the sales contract accepted by the seller; must be supplied with the accessories and the instructions — including installation instructions — as set out by the sales contract; and must be provided with any updates described in the sales contract.

With respect to the objective requirements, the good must: be fit for the purposes for which goods of the same type are normally used, taking into account EU and national law, technical standards or, in the absence of such standards, the applicable sector-specific industry codes of conduct; possess the qualities and correspond to the description of a sample or model that the seller has made available to the consumer before the conclusion of the contract (where applicable); be delivered together with any accessories, including packaging, installation instructions or other instructions, that a consumer can reasonably expect to receive (where applicable); be of the quantity, and possess the qualities, presented in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements made by or on behalf of the seller or other persons in previous links in the chain of transactions.

If the good does not meet the requirements described above, the seller that wants to be exonerated from liability will have to prove that the consumer was specifically informed of the fact that a particular characteristic of the good deviated from the objective requirements of conformity and that the consumer expressly and separately accepted this deviation at the time of the conclusion of the contract (new Article 130 CC).

In addition to the above requirements, for a good to be considered as a good 'with digital elements', the seller must ensure that the consumer is provided with any necessary update — including security updates — to keep such good compliant with the contract (new Article 130 of CC).

In accordance with the Directive, in the event of a lack of conformity, the consumer has the right to have the good repaired or replaced. Only

subsequently, and under certain conditions, he/she can ask for the price reduction or the termination of the contract. The regulation of these remedies (new Articles 135-bis, 135-ter and 135-quarter of CC) remains substantially unchanged with regard to the Directive 1999/44/EC and the former version of the Italian Consumer Code, in accordance with the "traditional" so-called 'hierarchy of remedies' [Jansen S., 2018: 13 ff.]; [Cafaggi F., Iamiceli P., 2017: 575 ff.].

Pursuant to the new Article 135-*bis* of CC, the consumer may also refuse to pay the whole price, or part of it, until the seller has solved the lack of conformity.

The terms of duration of the legal guarantee and limitation of the consumer's action have remained unchanged. However, the consumer's obligation to report defects within two months of discovery has been cancelled. In this regard, even if the Directive left Member States free to maintain or introduce a deadline of at least two months from the discovery of the lack of conformity, the Italian legislator has chosen to ensure a higher level of protection to consumers and has not introduced a similar provision.

Whenever a lack of conformity is discovered within a year from the delivery, the lack of conformity is presumed to exist since the time of delivery; the new version of Article 135 of CC has extended this term from six months to one year.

It will be interesting to observe how the CC — as modified by the implementation of the NCSD — will be applied in case law.

Conclusion

Until the courts implement the new legislation, it may be interesting to observe that, in a certain sense, Italian case law had already "anticipated" the favourable regime laid down by the NCSD (and the CC) for consumers. According to a recent ruling of the Italian Supreme Court of Cassation,[7] the buyer generally always has the specific burden of proving the defects of the purchased good. Conversely, in the case of a sales contract subject to the rules of the CC — as mentioned above — any lack of conformity which becomes apparent within a year of time from when the goods were delivered, shall be *presumed* to have existed at the time when the goods were delivered (Article 135; see also Article 11 of NCSD).

[7] See: Italian Supreme Court of Cassation, no. 11748/2019, judgment of 3 May 2019.

Thus, the protection needs of the buyer-consumer ensure the buyer-consumer a much more favourable regime than the one applied to the ordinary-common buyer.

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Comment

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Key Issues in the Intellectual Property Court' Presidium Rulings

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Abstract

The comment reviews key positions in the rulings of the Presidium of the Russian Intellectual Property Court (IPC) issued in October and November 2021. This Chamber hears cassation appeals against the decisions of the IPC first instance and deals primarily, but not only, with matters of validity of registered intellectual property rights. Therefore, this review predominantly covers substantive requirements for patent and trademark protection, as well as procedural issues both in the administrative adjudicating mechanism at the Patent office (Rospatent) and at the IPC itself. The current review covers such issues as the procedure for challenging a Eurasian patent term extension (supplementary patent), legal costs, appeals against the decisions in the areas of unfair competition, well-known trademarks, signs that are contrary to general interests, challenging the validity of a utility model, the adoption of interim measures, the registration of a trademark under Article 6. *septies* of the Paris Convention.

Keywords

Russia, case-law, Intellectual Property Court, Rospatent, Eurasian Patent, supplementary patent, Trademarks, well-known trademarks, utility models, unfair competition, legal costs, interim measures.

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1. Contesting Renewal of a Eurasian Patent

Renewal of a Eurasian patent in the Russian Federation may be contested in the Intellectual Property Court

Decision of the IPC Presidium dated 22 November 2021 in case No. SIP-1030/2020

A company turned to the IPC with an appeal to the Eurasian Patent Office to cancel the renewal of a Eurasian patent in Russia on the grounds that the renewal was carried out with an extension of legal protection.

The first instant court dismissed the case because it believed that the dispute was not a matter for the court. The court based its holding on the fact that, according to the procedure for challenging the renewal of a Eurasian patent lifetime set out in Rule 16 of the Patent Regulation under the Eurasian Patent Convention as approved by the Administrative Council of the Eurasian Patent Organisation (EAPO) on 01 December 1995 ("the Patent Regulation"), the respective parties do not file any claims to national courts of the member countries either against the renewal of the patent lifetime or against decisions made upon consideration of the objection and the appeals against them. Proceeding from these norms, the court of first instance concluded that the procedure for contesting decisions of the European Patent Office stipulated in the international law did not provide for a possibility to turn to a national court of a member country including the IPC in Russia (Part 1 Art. 45 of the Constitution of the Russian Federation).

Overruling this decision of the court of first instance, the IPC Presidium ordered to re-examine the case on the following grounds.

In accordance with Part 1, Article 13 of the Convention, any dispute related to validity of a Eurasian patent in a particular Contracting State

or violation of a Eurasian patent in a particular Contracting State shall be resolved by the national court or any other competent agencies of that state on the basis of the Convention and Regulation; such a decision shall only be applicable in that Contracting State.

The Court rejected the Company's arguments about the significance of the Regulation, citing Part 4, Article 15 of the Constitution. The said norm only applies to international treaties while the Patent Regulation is a document issued by an intergovernmental agency on the basis of an international treaty.

Thus, the court of first instance erred in defining the nature of the Regulation norms in the framework of the legal system regulating matters of controversy and unreasonably referred exclusively to the provisions of Para. 4 Article 15 while failing to take into consideration the provisions of Article 46 and 79 of the Constitution.

The Convention as an international treaty of the Russian Federation does not imply that the possibility of contesting the validity of a Eurasian patent in a particular Contracting State may be ruled out at the Regulation level. Any other approach would create a situation where it would be impossible to judicially review the existence in the Russian Federation an exclusive right to an invention; this may violate the interests of an unlimited range of persons, including public interests in providing access to the results of scientific creativity, development of science and technology, ensuring public health and safety.

The lifetime of the disputed patent was renewed in the Russian Federation only and the claims made in the present dispute challenge the validity of the patent with account for its renewal exclusively in the Russian Federation as a Contracting Party to the Convention. Under these conditions, the conclusions of the court of first instance that the national court did not have jurisdiction contradicted the above-mentioned norms of the Russian Constitution and the Convention.

The administrative procedure stipulated in the Regulation to contest the renewal of a patent in a particular state cannot be considered in this case and as a mandatory pre-trial procedure that prevents direct recourse to the courts in the sense of Para. 52 of the resolution of the Plenum of the Supreme Court of the Russian Federation No. 10 dated 23 April 2019 "On Application of Title Four of the Civil Code of the Russian Federation" (hereafter — resolution No. 10). The administrative procedure stipulated in the Regulation is, in the sense of Russian law, an alternative judicial

procedure for dispute resolution, which may be applied alongside the judicial procedure. The presence of an alternative administrative procedure for dispute resolution is as typical of the Russian law and order as the presence of a compulsory administrative procedure. E.g., there is an alternative administrative procedure for antimonopoly disputes (Para. 61 of the resolution of the Plenum of the RF Supreme Court No. 2, dated 4 March, 2021, "On Certain Issues Arising in Connection with the Application of the Antimonopoly Legislation by Courts").

Since the Regulation stipulates an alternative administrative procedure for dispute resolution and not a mandatory one, the company should not exercise the right granted to it by the rules of the Eurasian patent law and apply to the Eurasian Patent Office with an objection to the renewal of the disputed patent on the basis of Subpara. "a" Para. 7, Rule 16 of the Regulation. The claim filed by the company was to be considered by the court on its merits.

The Eurasian Patent Office has not established a mandatory pre-trial procedure in relation to the provisions of Para. 1 Art 13 of the Convention, hence the procedure for consideration of disputes on invalidation of patents due to violations of the rules of their renewal must be applied.

Para. 2 Art. 1248, Para. 2 Art. 1363, Para. 2 Art. 1398 of the Civil Code of the Russian Federation (hereafter — CC RF) does not establish a mandatory administrative procedure for such disputes, therefore these are to be considered by court in accordance with the rules of action proceedings. By virtue of Para. 2 Part 4 Art. 34 of the Code of Commercial Procedure (hereafter — CCP RF), this dispute falls under the jurisdiction of the Intellectual Property Court.

2. Recovery of Court Costs

In recovering court costs, courts cannot rely on an "average" cost of services without regard to the specific circumstances of the case.

Decision of the IPC Presidium dated 18 November 2021 in case No. SIP-764/2020

It is well known and does not require proof that the cost of legal services rendered by a professional representative, especially in protecting the interests of the person represented in a non-standard dispute, is not limited to some average rates and can amount to a considerable sum.

Hence, the court must proceed from the specific circumstances of the case. The opposite approach may result in a violation of the rights of per-

sons represented who pay considerable money for professional legal services rendered to them, which money the court will in any case reduce to some "average" amounts on the grounds that it exceeds the average cost of legal services in a particular region.

3. Challenging a Decision of the Office of the Federal Antimonopoly Service

The antimonopoly authority is not entitled to conclude in its decision to terminate the proceedings that there is unfair competition in the actions of a person if no opinion has been prepared on the circumstances of the case in accordance with the Law on Protection of Competition.

Decision of the IPC Presidium dated 18 November 2021 in case No. SIP-1037/2021

A company applied to the IPC to invalidate the decision of the Office of the FAS to terminate proceedings in the case regarding the conclusion that the company's actions constituted unfair competition under Part 1 Article 144 of the Federal Law No. 135-FZ "On Protection of Competition" ("the Law on Protection of Competition").

The court of first instance granted the claim, and the IPC Presidium upheld the decision, on the basis of the following.

Part 3.3 Article 41 of the Law on Protection of Competition stipulates requirements to the content of the substantiation part of decisions taken by the antimonopoly authority, including requirements to the substantiation part of the decision to terminate consideration of a case. The substantiation part of the decision may contain conclusions on the merits of the violation committed. However, these conclusions can be permitted only if they are made in accordance with the Law on Protection of Competition.

As Part 1 Article 48.1 of the Law on Protection of Competition stipulates, before the completion of consideration of a case of violation of antimonopoly law, the committee must make a conclusion on the circumstances of the case in deciding whether the defendant's action (inaction) constituted a violation of antimonopoly law.

Pursuant to Part 2 Article 48.1 of the Law on Protection of Competition, the conclusion on circumstances of the case is to be executed as a separate document, signed by the Chairperson and members of the committee, and is to contain the circumstances specified in this provision. The conclusion is then to be forwarded to the persons involved in the case,

and the case is to be postponed to give such persons an opportunity to analyse the Committee's conclusions, give explanations and present their arguments to the Committee (Parts 3 and 4, Article 48.1 of the Law on Protection of Competition).

Thus, a conclusion on the circumstance of the case must precede the finding of a violation. The Law on Protection of Competition does not provide for any exceptions from this rule for any acts of the antimonopoly authority such as a decision to end consideration of a case of violation of the antimonopoly law (Article 48 of the Law on Protection of Competition). A different approach would contradict the essence of the legal regulation: When an opinion is expressed on a violation committed in the dismissal of the case, it is unacceptable to offer a person in such a case guarantees of legality of the antimonopoly authority's decision that would be less than the guarantees in cases of decision on the merits. In this case, the antimonopoly authority did not make any decision on the circumstances of the case.

Upon establishing that the deadline stipulated by Article 41.1 of the Law on Protection of Competition expired and the case is to be dismissed, the antimonopoly authority is entitled not to perform all the actions prescribed by law for consideration of the case that were not performed by the time the deadline was missed. However, in a situation where not all the actions required by the Law on Protection of Competition to establish a violation have been performed, there are no grounds to conclude that the person involved in the case of violation of the antimonopoly law has committed an act of unfair competition. In a situation like this, the substantiation part of the antimonopoly authority's decision may contain a reference to the dismissal of the case before the end of its consideration and, in view of this, the impossibility to conclude if the alleged perpetrator has or has not been involved in unfair competition, but no conclusion may be made on the existence of the set of elements of an offence before the all statutory procedures have been completed.

4. Recognising a Trademark to be Well-known

A specific sign may be well known even if it has been previously used in a differing form but the consumer has shifted the previously used sign's recognition to the new one (which is pending for recognition as a well-known trademark).

Requiring Rospatent to re-consider the application for recognition of a service mark as a well-known trademark is not a proper remedy for the

owner in a situation where Rospatent examined the application on three occasions and each time cited new grounds on which the sign in question could not be found to be well-known, after the first instance court had established all the necessary material facts of the case. In a situation like this, the court may recognise the disputed sign to be a well-known trademark on its own.

Decision of the IPC Presidium dated 29 October 2021 in case No. SIP-155/2021

A company applied to Rospatent for recognition of the О'КЕЙ ('Okay') service mark as a well-known one. After Rospatent decided to reject the claim, the company challenged that decision before the IPC.

The first instance court analysed the trademarks used by the company in its operation and concluded that they all shared the О'КЕЙ verbal element that performed the primary differentiating function. The court actually recognised that, in perceiving any of the trademarks, namely OKEY HYPERMARKETS, О'КЕЙ сеть гипермаркетов, О'КЕЙ Экспресс, О'КЕЙ Опережая желания!, the consumer would note the О'КЕЙ verbal element first and would relate the services being purchased to the company. In that situation, the court held that Rospatent had been wrong in overlooking the documents in the administrative case file that concerned the use of all the above-listed signs, including the said trademarks.

Rospatent's position that consumers' perception is largely influenced by the 'shopping cart' image or additional verbal elements printed in small type is not based on substantive law provisions that establish the rules of identifying strong elements of trademarks, and fails to take into account the actual perception of those signs.

In Para. 162 of its resolution No. 10, the RF Supreme Court points out that trademark analysis should take into account trademarks' strong elements, and the Chamber for Commercial Disputes of the Supreme Court of Russian Federation, in its decision No. 300-ES20-12050 of 15 December 2020, stresses that a strong element gives rise to a series.

It is the strong element that is most vividly remembered by the consumer, and memories of that very element lead the consumer to establish an associative link to a previously seen sign as he/she turns to new signs.

In this case, О'КЕЙ is obviously that very element of all the above marks that the consumer retains in their memory. That is why an application was filed to recognise that element as a well-known one.

The first instance court found the Rospatent decision unlawful and obligated Rospatent to re-examine the application. The IPC Presidium disagreed with the choice of remedial action and noted the following.

As the first instance court obligated Rospatent to consider the application by the company for the fourth time, it actually required that administrative agency to consider the facts that had already been examined and duly evaluated by the court — along with facts that there was no need to examine; the evidence assessed by the court were sufficient for finding that the disputed sign should be declared a trademark well known in the territory of the Russian Federation. The legally relevant facts had been established and duly evaluated by the first instance court.

Besides, in choosing the remedial action, the first instance court should have taken into account that Rospatent had already considered the application by company for the recognition of the disputed sign as a well-known one in the territory of the Russian Federation on three occasions.

Notwithstanding the instructions given by courts in the cases Nos. SIP-354/2017 and SIP-370/2019 and the facts established by the courts, on each new examination Rospatent cited new grounds whose existence precluded the recognition of the sign in question as a well-known trademark in the territory of the Russian Federation.

Such conduct by an administrative agency cannot be permitted: It contradicts State protection of rights guaranteed by Part 1 of Article 45 of the Constitution of the Russian Federation.

In this situation, individual procedural irregularities on the part of Rospatent must not entail the return of the application for still another examination by Rospatent, for the facts established by the court are sufficient for recognising the trademark a well-known one.

Requiring Rospatent to examine on its own the facts examined and evaluated by the court and to finally take the legal and well-founded decision, while being legally correct, effectively frustrates the company's legitimate expectations of due and timely consideration of, and decision on their application by the State.

On the basis of the foregoing and given that the first instance court has properly found the disputed decision of Rospatent to depart from the requirements of Article 1508(1) of the CC RF, the IPC Presidium deemed it necessary, without returning the case for re-examination, to alter the decision as regards the restoration of the violated rights of the company. In view of the specific circumstances and given that the first instance court

has established all the required legally relevant facts of the case, the service mark shall be recognised as a trademark well known in the Russian Federation.

5. Signs Contrary to Public Interest, Principles of Humanity and Morality

Registration of a sign consisting of a prominent saint's name or image, requested for goods and services unrelated to religious activities, must be denied as being contrary to the public interest and/or principles of humanity or morality.

Decision of the IPC Presidium dated 29 October 2021 in case No. SIP-181/2021

The claimant and the Rospatent both challenged the first instance decision that had overruled the Rospatent decision to deny legal protection to the *SAINT-VINCENT* verbal trademark in respect of some ICGS Class 16, 33, 35, 29 and 42 goods and services.

In the course of invalidity proceedings Rospatent had found that the registration of the disputed sign offended religious feelings, was contrary to the public interest and/or principles of humanity or morality. The name or image of a saint recognised by a duly registered religious community could not be granted legal protection as a trademark; religious organisations ought to be free to use religious symbols of the religion to which they belong.

The first instance court overruled the decision of Rospatent on the grounds that the finding about the disputed trademark's sense and meaning had been based on an incomplete review of the evidence available in the file and had ignored circumstances that actually existed as the claim of invalidity was examined and excluded the finding that had unambiguously related the *SAINT-VINCENT* sign to a Christian saint and had entailed the conclusion that its sense and meaning had a religious connotation. Furthermore, the court did not find any evidence of a breach of the sanctity of religion.

The IPC Presidium ruled to grant the cassation appeals and overruled the IPC decision. Without ordering a retrial, the IPC Presidium has adopted a new judgement to declare the trademark invalid on the grounds of Article 6(2) of the Law on Trademarks № 3520-1 dated 23.09.1992.

According to Article 6 (2) of the Law on Trademarks (currently Article 1483(3.2) of the CC RF), signs that are contrary to the public interest and/

or principles of humanity or morality may not be registered as trademarks. These include indecent speech and images, inhumane calls and affronts to human dignity, religious feelings, etc. That rule is based on the need to support the rule of law and to protect consumers' moral feelings and values. It aims to defend the historic and cultural values of a society in which religion is an essential component or public life, including spiritual culture.

In view of this, the IPC Presidium concluded that Rospatent had properly found that the very registration of a saint's name as a trademark contradicted the public interest and/or principles of humanity or morality. The fact of the *SAINT-VINCENT* sign reproducing the name of some prominent religious saints was sufficient for finding that the disputed sign could not be registered as as a trademark for goods or services unrelated to the performance of religious activities. What mattered was not which specific St. Vincent the consumer would identify the designation with, but the existence of saints of that name that was a well-known fact of religious culture.

It is not the finding on whether the disputed sign can be used at all and on the consequences of its use, particularly to mark wine products, that is material to the correct consideration of the issue, but rather the assessment of whether one commercial entity may properly be granted the exclusive right to the sign in question as a means of differentiating its products. The question of whether the sale of any goods affects believers' feelings is immaterial to the application of Article 6(2) of the Law on Trademarks.

6. Challenging a Utility Model Patent

The procedure for reviewing a patent challenge is different from that for expert examination of an alleged utility model. In the former case, the protectability of the disputed technical solution will be checked in the light of the arguments advanced in the patent challenge and the materials attached to it. In contrast to expert examination, at the challenge examination stage, in the presence of relevant arguments, the administrative agency must check whether the closest analogue really possesses the deficiency that the disputed utility model seeks to address.

Decision of the IPC Presidium dated 28 October 2021 in case No. SIP-405/2021

Rospatent received an objection to the issuing of a patent to a utility model stating that the model failed to meet the 'novelty' condition of patentability and that the application documents failed to disclose its essence fully enough for an expert in the field to implement it.

According to the arguments in the patent challenge, the closest analogue lacked the deficiency that the technical solution behind the disputed utility model aimed to address; consequently, the causative link between its distinctive feature and the stated technical result or the former's influence on the latter was not shown.

Rospatent's decision, later upheld by the first instance court, rejected the challenge.

The IPC Presidium overruled the above decisions and obligated Rospatent to re-examine the challenge in the light of the following.

In its written notes to the cassation appeal, Rospatent had expressed the following position: 'The applicant overlooks the fact that the check for compliance with the test of sufficient disclosure of the utility model's essence includes review of the application documents, particularly the description (Para. 38 of the UM Requirements[1]), rather than the closest analogue (patent document).'

Disagreeing with that position, the IPC Presidium noted that Rospatent overlooked the fact that the UM Requirements regulate the relations arising at the stage of the examination of an alleged utility model. The patent challenge examination procedure is largely different from the procedure for the examination of an alleged utility model: the disputed technical solution will be checked for protectability in the light of the argument in the challenge and of its accompanying documents.

Indeed, the purpose of the analysis at the examination stage is to establish, *inter alia*, whether the causative link between specific features and the stated technical result has been properly shown. This does not include a check of whether the closest analogue really possesses the deficiency that the disputed utility model purports to address. At the same time, at the challenge examination stage both new information sources (not previously known to Rospatent) may be introduced and arguments may be put forward based on the same information sources as those indicated by the applicant in respect of the disputed patent. In the latter case, in the presence of relevant arguments in the challenge, the administrative agency must check particularly whether the closest analogue really possess the deficiency that the disputed utility model seeks to address.

[1] The requirements applicable to the documents accompanying an application for a utility model patent, approved by Order No. 701 of the Ministry for the Economy and Economic Development dated 30 September 2015.

Otherwise, the utility model institution (Article 1351 of the CC RF) would be legally destroyed: to have certain features recognised to be material (and utility model novelty is only established by its material features — Article 1351(2) CC RF), an applicant would only be required to ascribe a deficiency to its closest analogue and to formally reflect in the description how that invented deficiency would be eliminated.

That, in turn, would reinstate the situation that the Federal Law No. 35-FZ 'On Amending Titles One, Two and Four of the Civil Code of the Russian Federation and Individual Legislative Acts of the Russian Federation' sought to address; The law adjusted the utility model institution and obligated Rospatent to perform substantive examination in the process of State registration of utility models, i.e. legal protection would again be granted to technical solutions that constitute no technological advancement.

Moreover, the approach suggested by the administrative agency would also preclude challenging such 'technical solutions' intended to solve an imaginary and non-existent problem.

In examining a challenge filed in connection with the reference to the closest analogue indicated by the applicant himself in his description of the disputed utility model, that closest analogue's protectability will certainly be not checked. At the same time, in the light of the argument in the challenge, it should be examined how the disputed utility model's technical result is formulated; by reference to which closest analogue its achievement is being justified; and whether the closest analogue chosen by the applicant actually possesses the deficiency to which that applicant refers.

7. Interim Measures

Adopting interim measures requires not only a check of the claimant's compliance with procedural legislation in filing the claim, but also the establishment of a legal link between the interim measures and the dispute's subject matter.

Decision of the IPC Presidium dated 28 October 2021 in case No. SIP-889/2021

While requesting cancellation for lack of use of a combined trademark containing the words '*Moskovsky Provansal*' (Moscow Provençale [Mayonnaise]), the claimant concurrently moved for interim suspension of the Rospatent proceedings to declare the *Moskovsky Provansal* verbal sign a well-known trademark in the Russian Federation. The first instance court granted the motion.

Rospatent and the owner of the disputed trademark appealed to the IPC Presidium against the order to impose the interim measures. Overruling the first instant court's order, the IPC Presidium referred to multiple violations of both procedural and substantive law, namely non-compliance with the respective provisions of the CCP RF and the positions adopted by the Plenum of the RF Supreme Arbitration Tribunal in its resolution No. 55 'On the Application of Interim Measures by Arbitration Tribunals' dated 12 October 2006.

Thus, the IPC Presidium pointed to a gross procedural irregularity in two aspects. Firstly, contrary to procedural law rules and clarifications by superior courts, the court had considered the claimant's application and taken the interim measures sought outside any stage of arbitration proceedings, because, at the time of the order appealed against, acceptance of the main claim was still pending and no proceedings had been instituted. Secondly, the claimant's request for interim measures was included in the wording in the letter of claim, so it could not be deemed an application for interim measures in the sense of Article 99 of the CCP RF. It should however be noted that the IPC Presidium disagreed with the position of Rospatent that taking such interim measures before the administrative agency was brought into the proceedings constituted a procedural irregularity. The very act of taking interim measures that prohibit Rospatent from taking certain actions without / before bringing that administrative agency into the proceedings does not indicate that a decision was taken in respect of the rules and obligations of a person not brought into the proceedings.

Further, the IPC Presidium agreed with the cassation appeals in that the court had taken the interim measures apparently unrelated to the dispute's subject matter. Thus, the submissions accompanying the application for interim measures failed to identify the subject matter of the application for declaring the sign or trademark a well-known trademark in the Russian Federation and, consequently, to relate the subject matter of the main claim filed by the claimant to that of the owner's application for declaring the sign/trademark a well-known one. In taking interim measures in respect of an object outside the scope of the dispute, the first instance court disrupted the balance of the parties' interests as it ignored the fact that the specific interim measure sought by the claimant was legally unrelated (or, at least, not proven to be related) to the subject matter of the claim brought and, consequently, would not lead to the actual attainment of the goals of interim measures as set out in Article 90(2) of the CCP RF.

8. Non-protectable Elements in a Sign

A creative sign consisting of non-protectable elements only may be registered as a distinctive combination, requiring no further proof that the such sign has acquired distinctiveness.

Decision of the IPC Presidium dated 25 October 2021 in case No. SIP-12/2021

The Disputed Sign

Rospatent denied registration of a sign consisting of an expression in Russian, 'off-season wedding parties', the Latin alphabet letter W, the French word 'bureau' and the number 12, arranged in a certain graphic and colour scheme, in respect of some ICGS Class 41 services. The applicant then appealed to invalidate the Rospatent decision that had upheld registration denial, and to obligate the administrative agency to register the sign while finding all its component parts non-protectable. The IPC decision, upheld by the IPC Presidium, found the Rospatent decision invalid due to non-conformity to Article 1483(1.1) of the CC RF.

The first instance court disagreed with the administrative agency's conclusion that the disputed sign constituted no original design, and, referring to the provisions of Article 1483(1.1) of the CC RF and taking into account the use of various type faces, sizes and colours, superimposition of individual elements and width alignment between the verbal elements, found the image to have an inventive graphic design, which also consists in a distinguished typeface of the '1' and '2' digital characters with swashes different from a standard font's serif endings. The disputed sign thus consists of non-protectable elements that form a distinctive combination.

The IPC Presidium also cautioned against confusing two different rules set out in Article 1483 (1.1) of the CC RF that establish different grounds for non-applying the requirements of Article 1483(1): 1) a designation acquires distinctiveness as a result of its use; and 2) an image consisting of a combination of elements possesses distinctiveness from the outset. In the latter case, there is no need to establish the disputed designation's acquired distinctiveness for the purpose of applying the rule in Article 1483(1.1) of the CC RF.

In view of the above, the IPC Presidium rejected Rospatent's argument that evidence of distinctiveness, acquired by the disputed sign as a means of differentiating the services provided by the applicant, had to be provided and examined.

9. Registration of a Trademark by its Owner's Agent or Representative Without the Former's Permission

The provisions of Article 1512(2.5) of the CC RF and Article 6. *septies* of the Paris Convention may serve to protect the interests of a group of affiliates if a trademark proprietor in a State party to the Paris Convention and the manufacturer of the goods marked are not one and the same person. The existence of agency or representation relations in the sense of Article 6.*septies* of the Paris Convention is established on a case-by-case basis and may be broadly interpreted.

Decision of the IPC Presidium dated 25 November 2021 in case No. SIP-224/2020

The applicant went to court to challenge a decision that had invalidated the registration of the *Magyarica* trademark for a list of food products and beverages on the grounds of Article 1512 (2.5) of the CC RF and Article 6. *septies* of the Paris Convention. The foreign company and its affiliate that jointly challenged the legal protection of a sign and had it cancelled were referring to earlier registration of a similar trademark in Hungary in the name of the person in question and to the fact that the person that had registered the disputed sign in Russia was purchasing products marked by that sign from the company for sale in Russia.

According to the provisions of Article 1512(2.5) of the CC RF and Article 6.*septies* of the Paris Convention, the registration of a trademark in an agent's name may be challenged by the trademark's rightsholder in a State party to the Paris Convention. The existence of agency relations between that person and the one who registered the disputed trademark in its own name must be confirmed in this case.

The IPC Presidium believed that the first instance court had properly recognised the group of affiliates, among which one is the owner of the trademark in the goods' country of origin and another is the manufacturer of the goods identified by the trademark, to be 'the proprietor of [the] mark in one of the countries of the Union' in the sense of Article 6.*septies* of the Paris Convention.

Further, the court agreed with the parties in that the relations that had arisen as the products with the disputed sign were purchased from the foreign company and marketed in the Russian Federation met the definition of agency and representation relations in the sense of Article 6.*septies* of the Paris Convention.

As the set of the required circumstances was established, the IPC Presidium upheld the conclusions of Rospatent and the first instance court that had found the registration of the disputed sign in the agent's name in the Russian Federation invalid.

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ЕЖЕКВАРТАЛЬНЫЙ НАУЧНО-АНАЛИТИЧЕСКИЙ ЖУРНАЛ ТОМ 3

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Вопросы права
В ЦИФРОВУЮ ЭПОХУ

ЕЖЕКВАРТАЛЬНЫЙ НАУЧНО-АНАЛИТИЧЕСКИЙ ЖУРНАЛ

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