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IS IT HIGH TIME TO REDEFINE THE LEGAL FRAMEWORK ON COHABITATION IN FAMILY LAW?

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Abstract Cohabitation is an institution of Slovenian family law quite similar in effect to marriage in that it creates the same rights and obligations. However, unlike marriage, its existence must be proved in each individual proceeding separately which creates difficulties, particularly in practice. This situation is exacerbated by the fact that the existence of cohabitation in the Slovenian Family Code is defined exclusively using rather vaguely defined legal standards. In this article, the author gives an overview of the current relevant case-law of Slovenian courts on cohabitation and discusses the possibilities for future legal regulation of the establishment of this community.

Keywords
cohabitation, family law, new regulation, case law, registration, notary

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1 Introduction

Article 4 of Family Code (DZ)[1] defines a cohabiting partnership or cohabitation as a long-term domestic community of two persons who have not entered into marriage without there being grounds for the marriage between them to be invalid. Such a community shall have the same legal consequences for the relationship between them under DZ as if the aforementioned persons had formalised their marriage, and this community shall have legal consequences in other areas if such is provided by statute. In practice, the problem of establishing the existence of such a domestic community arises because, in the same article, DZ provides that the question of its existence is to be decided when the decision on a legal right or obligation depends on the question of the existence of such of a domestic community. This is therefore determined in the proceedings for the establishment of that right or obligation, and the decision on the question of its existence has legal effect only in the proceedings in which that question was raised and resolved. It is therefore not possible to establish the existence of a cohabiting partnership independently, in the sense that an individual could bring an action for declaratory relief to receive a declaratory decision on that issue.

In concrete terms, this means that the existence of a cohabitation may be confirmed, e.g. in the context of inheritance as a preliminary question[2] (the alleged cohabiting partner being admitted in litigation to prove that she "deserves" this "title"), but will not affect, e.g. the simultaneous determination of eligibility for a widow's pension being made at the same time by the same person. Indeed, the authority deciding on the entitlement of an alleged cohabiting partner to a pension is under no obligation to consider a final decision on the existence of a cohabitation in the inheritance proceedings. Moreover, it is required to re-establish its existence. Such a regime both prolongs the procedures for obtaining rights (and complying with obligations) and causes unnecessary bureaucratic complications for the parties to the proceedings.

The relevant Slovenian case law takes into account a cohabiting partnership already established in another legal proceeding merely as one of the available means of evidence and then reassesses all the circumstances of the same relationship completely anew, which, in our view, is an unnecessary duplication of findings

[1] Družinski zakonik, Uradni list RS, No. 15/2017 et seq.
[2] Judgment of the Higher Court of Ljubljana II Cp 2493/2017 of 21.2.2018.

already established, which would only be justified if facts subsequently arose or were discovered which would require such a re-examination. Thus, in one case from practice, the competent court merely considered as one among other available means of evidence a court settlement which had just been concluded between two former cohabiting partners, and which expressly provided that one of the partners would pay maintenance for a minor joint child.[3] This despite the fact that the final court settlement, which has the status equivalent to a court ruling, made it clear that the partnership of the two persons had broken down and that the partner had therefore undertaken to pay maintenance, the social welfare court carried out the entire procedure of establishing the existence of a cohabitation as a preliminary question again, this time in the context of a dispute concerning the existence of a right to a widow's pension. In this particular case, it indeed made the same finding as had already been made in the court settlement, but it is of course more than just a question to which extent this can be considered as still being at all reasonable.

A further difficulty is that the criteria for recognizing cohabitation are not precisely defined in DZ. These have instead been developed by case-law, which, precisely because of the diversity and variety of life circumstances, often does not always give an individual a concrete answer as to whether his or her relationship with someone else will be legally recognized as cohabitation.

In this article, we address the question of how the problem of establishing the existence of a cohabitation relationship can be more comprehensively and effectively addressed, or whether it is possible to define more precisely such an elusive fact of life as the determination of what does constitute and what can not be recognized as a cohabiting partnership.

2 Cohabitation in DZ and the problem of legal reservations for its recognition

The Slovenian legislator had the possibility to correct the previous regime, enacted under the Marriage and Family Relations Act (ZZZDR),[4] by means of the DZ, which came into force in 2017, but elected not to do so. In fact, there are practically no substantive changes between the provision of Article 4 of DZ compared to

[3] Judgment of the Higher Labour and Social Court Psp 225/2023 of 21.2.2024.
[4] Zakon o zakonski zvezi in družinskih razmerjih, Uradni list SRS, No. 15/1976 et seq.

Article 12 of ZZZDR, which both define cohabitation. The only difference is that previously cohabitation was only possible between a man and a woman, whereas under DZ, the definition was extended to same-sex couples following the 2023 DZ Amending Act (DZ-B).[5]

Incidentally, Slovenia already regulated cohabitation in 1977 when it adopted ZZZDR (Novak in Novak (2019): p. 40), which was quite a rarity in Europe at that time (Novak, ibid., Novak in Kroppenberg et al. (2009): p. 265).

As mentioned in the introduction, DZ continues not to specify the length of the period required for a cohabitation to be recognized as such, but only that it must have the same content (i.e. quality) as the domestic community that exists between spouses. Article 20 of DZ thereby provides that marriage is founded on the free decision to enter a marriage, on a feeling of attachment on both sides, mutual respect, understanding, trust and mutual assistance, which may be regarded as its content.

It also follows from Article 4 of DZ that there must be no impediments between the persons who wish to have their relationship recognized as cohabitation which would otherwise prevent them from entering a marriage between the same persons, if they so choose. In this respect, account must be taken of the provisions of Article 45 of DZ, which provides that a marriage shall not be valid if there are legal impediments to its formation.[6] These are:

- absence of free will (Article 23 of DZ),
- minority (Article 24(1) of DZ),
- unsoundness of mind (Article 25 of DZ),
- a marriage already contracted (Article 26 of DZ),
- consanguinity and adoption (Article 27 of DZ).

[5] Zakon o spremembah Družinskega zakonika, Uradni list RS, No. 5/2023. DZ-B was enacted on 31.1.2023 and was drafted based on the decision of the Constitutional Court of the Republic of Slovenia U-I-486/20, Up-572/18 of 16.6.2022.

[6] For a brief overview of the grounds that are obstacles to marriage in US and English law see Herring (2014): pp. 9-12.

The explanation for the fact that the legislator did not nevertheless decide to define more precisely the criteria relating to legally establishing cohabitation in Article 4 of DZ is given in the draft bill's legislative material as follows: '[In particular] the term "long-term domestic community between [two persons]" was retained in the first paragraph and not defined in terms of time required, in order to allow the courts to continue to be able to make "subtle" decisions regarding the application of the legal rules to the specific relationship before them.'[7] In other words, the resolution of the substantive issues relating to the recognition of cohabitation in DZ, in virtually the same way as this was already regulated in ZZZDR, is practically left entirely to the relevant jurisprudence. Whether the legislator in 2017 lacked the courage or merely the necessary knowledge to define the entire institution of cohabitation in a more detailed, appropriate and, above all, more operational manner is a dilemma that we shall leave to the reader. In any case, the interpretative burden of defining such unions *in concreto* has once again been placed entirely on the judicial branch. As we shall see below, the difficulties with the current regulation of DZ are already apparent regarding the seemingly straightforward question of adjudicating the legal impediments to the formation of a marriage between two persons in the event that a court will have to on this basis determine the validity of cohabitation between the same two individuals.

First, there is the absence of free will. Under Article 23 of DZ, a marriage cannot be contracted without a free declaration of the will of the future spouses to enter such a union. There is no such declaration of will if it is made in error[8] or under duress, i.e. if it is made by the intending spouse out of fear caused by a serious threat. This is an impediment which is difficult to adapt to the specific features of a cohabiting partnership, where there is no such (solemn) declaration of intention to enter such a relationship, but only the facts establishing its existence are ascertained. At most, this impediment can be applied in a meaningful way in the context of the general presumption of free will in establishing its existence. Thus, for example, there cannot be a cohabitation established between two persons where, for example, one partner holds the other in involuntary captivity for a long period of time, then subsequently asserts as an element that such a cohabitation did exist, and then forces the detained

[7] Legislative material of the Draft DZ, EPA 1682-VII, p. 226.
[8] The error here refers to the person of the other spouse and arises if the first spouse thought he or she was marrying the right person but married another, or if he or she married a person other than the one he or she claimed to be (Article 23(3) of DZ).

partner to declare that he or she was cohabiting with him or her throughout the entire period of time quite voluntarily.

As regards the impediment of minority (Article 24 of DZ), it is only reasonable that a child, as a person who has not yet reached the age of 18, cannot enter into a marriage or be part of a cohabiting partnership, with the sole exception that, at the age of at least 15 but before reaching the age of majority, he or she acquires full legal capacity. This may only be the case if, before reaching the age of majority, it is established by a court decision in accordance with the procedure laid down in Article 77 et seq. of the Non-Contentious Civil Procedure Act (ZNP-1)[9] that he or she is physically and mentally mature and capable of leading an independent life, including life in a marriage or a cohabiting partnership, to such an extent that he or she no longer needs the special protection guaranteed by Article 56 of the Constitution of the Republic of Slovenia,[10] i.e., either parental care, or, in the event of the absence of such care or its inadequacy, guardianship care provisions.[11] This means, first of all, that a cohabiting partnership with a person under the age of 15 can, of course, never validly exist. Moreover, under certain conditions, such a relationship may even be subject to criminal prosecution.[12] The question is whether it can be recognized when it concerns a union with a person aged between 15 and 18. Marriage in such circumstances is subject to prior judicial approval (Articles 76-79 of ZNP-1), whereas cohabitation, by its very nature - as it is an informal de facto union which is always ascertained retrospectively - does not have a formal stage of its formation, so that there is no prior judicial test of a minor partner's maturity and espousal capacity; it is therefore not even possible. This means that, consequently, it should also not be possible in practice to overlook the minority in the recognition of cohabitation, which is currently also supported by the relatively modest relevant case-law, although it is still linked to the previous regime laid down in ZZZDR. Thus, in a 1993 case, the Higher Court of Ljubljana considered a situation where a girl had moved in with an adult man at the age of 16 and was barely of age at the time of the man's death. The Court took the view that even if all the other conditions for the creation of a common-law relationship were met, there was no cohabitation

[9] Zakon o nepravdnem postopku, Uradni list RS, No. 16/2019.
[10] Ustava Republike Slovenije, Uradni list RS, No. 33/1991-I et seq.
[11] See, *mutatis mutandis*, the Legislative Material of the Draft DZ, EPA 1682-VII, pp. 227 and 234-235.
[12] See in particular the first and fifth paragraphs of Article 173 of the Criminal Code (KZ-1; Kazenski zakonik, Uradni list RS, No. 55/2008 et seq.).

for the very reason that in such circumstances it would also be impermissible for the marriage to be contracted between the two persons.[13]

On the other hand, the impediment of unsoundness of mind at the time of the formation or duration of the marriage, if a specific cause of unsoundness subsequently arises during marriage which prevents the formation of that union with the content attributed to it by DZ (Article 25), similarly acts as an obstacle to the establishment of the existence of a cohabiting partnership. However, this proviso will, of course, come into play more often than not in cases where the temporary or perhaps even permanent unsoundness of mind of one or both of the partners is present during the actual course of the relationship, rather than at the time of its formation, which, in the formal sense, does not exist in the case of a cohabiting partnership by virtue of its informal nature. The purpose of cohabitation is to determine *ex post* the quality of the domestic community of two persons, which must outwardly and inwardly correspond to the content required by DZ for marriage, and thus also for cohabitation (*mutatis mutandis* Article 25 DZ). Whereas the existence of marriage is always presumed from the time of its solemnisation and registration in the relevant register, and its actual quality is only exceptionally tested, the existence of cohabitation must always be proved, and thus the quality of the domestic community of two persons must also be demonstrated, the moment at which that relationship begins existing, by its very nature, of much less significance than in the case of marriage.

The presence of an existing cohabitation with another person, in a manner comparable to the existence of an existing marriage at the time of the (attempted) formation of a new marriage (Article 26 of DZ), also precludes a person from being in cohabitation with a third person. First of all, it is, of course, undisputed that the existence of a marriage *a priori* prevents the simultaneous existence of cohabitation.[14] Nor, as a general rule, is it possible for one person to be in two concurrent cohabiting partnerships with two other persons. However, the inherent nature of cohabitation as a de facto relationship, which must retrospectively attain a certain quality to be legally recognized, may complicate proving this, since, unlike the marriage registry,

[13] Judgment and decision of the Higher Court of Ljubljana I Cp 2113/93 of 26.5.1993.
[14] This is also the established position of case law, see e.g. the judgment of the Supreme Court of the Republic of Slovenia II Ips 294/98 of 15.4.1999, the judgment of the Higher Labour and Social Court Psp 21/2010 of 24.3.2010, the judgment of the Higher Court of Ljubljana I Cp 1133/2018 of 12.9.2018 and the judgment and decision of the Higher Court of Ljubljana I Cp 258/2018 of 29.8.2018.

there is (of course) no record of cohabitations in force at a given time. Thus, in practice, it may happen that one person is nevertheless in a more serious relationship with two different persons at the same time, them often without the knowledge of each other. In such a case, the court has the ungrateful task of deciding which of these relationships has the quality of cohabitation and the legal consequences that follow from it, and which of these relationships has the quality of a mere amorous affair, which consequently does not, of course, benefit from the legal protection of cohabitation.[15] Such a finding has, in particular for the paramour, who may not even have been aware of his or her role, difficult and often irreversible consequences in the area of civil law and, in particular, in the area of inheritance law.

Finally, as regards the impediment on consanguinity and adoption set out for marriage in Article 27 of DZ, this has a relatively similar effect as regards the recognition of cohabitation. Consequently, it cannot be recognised between blood relatives in the direct line or relatives related collaterally up to four times removed, nor between an adoptive parent and an adoptee. A question which may continue to burden case-law in the future, in a manner comparable to that which already applies to the disregard of the minority impediment (Article 24(2) of DZ), is whether, for the recognition of cohabitation, it is nevertheless also possible to disregard the relationship between the children of (half-)brothers and (half-)sisters. In short, whether it is even possible to recognise a cohabitation between these categories of persons. This type of impediment must, however, be distinguished from that of minority, since the latter is of a purely temporary nature, whereas consanguinity is a permanent characteristic which can be negated at most by (full) adoption and nothing else. The two legal goods protected are also different. In the case of minority, an orderly childhood is also protected during adolescence, as a necessary developmental stage of the human being, the success of which is, as a rule, essential for his or her future life and, above all, for the quality of the latter. In the case of the relationship between cousins, protection is dictated by the reservations of descent and genetics and, above all, by concern for the order of a particular family. In our view, in weighing these two legally protected goods against each other, the protection of an orderly childhood, which consequently deserves a higher degree of legal protection, prevails over the reservation of kinship between cousins. This means that, in the case of an impediment of this kind, even though Article 26 of DZ refers to the formational phase of the conclusion of marriage, which does not exist

[15] Judgment of the Higher Court of Ljubljana II Cp 2051/93 of 1.6.1994.

in the case of cohabitation, the competent court would still not recognise that the cohabitation nevertheless exists, despite the impediment, provided that there are, of course, specifically justified reasons for overlooking the impediment in this case.

3 Recognition of cohabitation under the relevant case-law

If an individual wants to understand what all the relevant criteria for the recognition of a cohabitation are, he or she would have to go through a fairly extensive body of case-law, which is at least a time-consuming exercise. Moreover, the case-law is at times extremely confusing, since not all the criteria are always applied in the same way in all proceedings.

Summarising the review of the case law under ZZZDR and DZ, it can be concluded that, to be recognized as cohabiting, a partnership between two persons must, as a minimum, cumulatively fulfil at least the following conditions, which are described below.[16]

In order to be recognized by the court as a cohabitation, a domestic community of two persons must not be of a transitory or short-term nature but must exist for a longer period of time with a content and quality equivalent to that of marriage. Lest we forget, stable relationships are linked to high levels of emotional, financial, physical, and social health and well-being (Manning et. al. (2016): p. 947). This means that, as a general rule, its existence is recognised if it lasts for at least several years.[17] As a rule, a year or so[18] or less is not enough,[19] unless the relationship produces the birth of joint children.[20] However, it is not possible to speak of the existence of

[16] See also Weber, in Weber (2024), pp. 37-41.
[17] Judgment of the Higher Court of Koper Cp 817/94 of 25.10.1994.
[18] In its judgment and decision II Cp 140/2023 of 8.3.2023, the Higher Court of Ljubljana considered a situation where the "partners" lived together for one year and four months, then broke off the relationship for nine months and then lived together again until the death of one of the partners. The Court stated that a domestic community that lasted one year and (almost) four months could not be considered as a long-term domestic community needed to formalize cohabitation.
[19] The Supreme Court of the Republic of Slovenia, in its judgment II Ips 76/94 of 8.9.1994, took the view that an incomplete period of six months cannot be regarded as such a long-term period. The Higher Court of Ljubljana, in its judgment II Cp 107/2009 of 15.4.2009, held that the litigants had broken off their relationship several times and that the periods during which they had lived together could not be counted towards the last period, which lasted only seven months, which was not a long-term domestic community.
[20] Decision of the Higher Court of Ljubljana I Cp 1891/2016 of 7.12.2016, judgment and decision of the Higher Court of Ljubljana III Cp 948/2015 of 12.8.2015.

cohabitation if there is a joint child has been born but there is no economic community, no emotional attachment and no intimacy between the partners.[21]

In principle, the couple must live together, but exceptions are possible. The presumption of a shared residence may exceptionally be overlooked if there are objective reasons for the couple to live apart. Case-law considers reasons beyond the control of the couple (health, old age),[22] attending university or working in another place or country, taking care of close relatives, forcible separation of the partners,[23] work or housing situation.[24] If other conditions are met (economic interdependence, a typical emotional and intimate relationship), the couple does not have to live together continuously.[25] In one case, the Court took note of the fact that one of the partners had divorced but had not, however, taken up with a new partner; for example, longstanding intimacy, a deep emotional attachment, mutual business cooperation, working together in the hospitality industry and spending leisure time together were not sufficient to establish cohabitation between them, precisely because of the lack of shared residence.[26]

On the other hand, a shared residence is not always a decisive indicator of cohabitation if there is a lack of emotional connection, respect, affection, mutual trust and conversation, intimacy or bed-sharing between partners, especially if one of the partners is unable to live elsewhere and even if living together is otherwise unsustainable.[27] Mere companionship and an occasional (albeit frequent) shared residence and emotional attachment without a conscious element of living together in the full sense of the word is also not sufficient to recognise this community as cohabitation.[28] Nor is a mutual friendship or relationship of a prolonged duration, even of an intimate nature, in which there is no will to establish an economic and social community between the two persons in the couple, sufficient.[29] In some decisions, the courts have considered the internal component, i.e. the will of each of

[21] Judgment of the Higher Court of Ljubljana II Cp 10/2016 of 9.3.2016.
[22] Judgment of the Higher Court of Ljubljana I Cp 1079/2021 of 14.9.2021.
[23] Judgment of the Supreme Court of the Republic of Slovenia II Ips 37/2010 of 24.11.2011.
[24] Decision of the Higher Court of Ljubljana IV Ip 1040/2023 of 19.9.2023.
[25] Judgment of the Supreme Court of the Republic of Slovenia II Ips 302/94 of 8.11.1995.
[26] Judgment and decision of the Higher Court of Ljubljana II Cp 2108/2017 of 10.1.2018.
[27] Judgment of the Higher Court of Ljubljana II Cp 1165/2017 of 21.2.2018.
[28] Judgment of the Higher Court of Koper Cp 1261/2010 of 23.8.2011.
[29] Judgment of the Higher Labour and Social Court Psp 216/2021 of 24.11.2021.

the two partners to establish shared living and economic community, to be decisive for the recognition of cohabitation.[30]

A community must exist between the partners which has sufficient economic, domestic and residential cohesion to be considered as a unit. Economic community means the joint management of the earnings of the two partners in a cohabiting partnership, in the sense that the couple decides together on investments, spending, savings and so on.[31] Cohabitation is also manifested externally in the joint management of the couple's income,[32] but it cannot be said to exist if the two partners, for example, manage their own money completely separately (except for individual exceptions - e.g. payment of certain bills), if they do not pay their living expenses together, if they each buy their own meals, or if they are not authorised to access each other's accounts.[33]

There must be an intrinsic emotional bond between the two partners, based not only on a moral and spiritual but also on a sexual bond (which does not imply the necessity of sexual relations, but does imply the necessity of feelings arising from sexual attraction).[34] In this respect, the possible age difference between two partners in a relationship is not, in principle, a circumstance which precludes the recognition of such a relationship as a cohabiting partnership, nor is this circumstance in itself a barrier to the formation of marriage. However, this circumstance is sometimes considered when assessing the genuineness of the emotional relationship between the two partners. For example, in one case, when assessing a domestic community of three years between a man who was 71 and a woman who was 54 at the beginning of the relationship, the Court remarked: "A significant age difference would be a significant barrier to a genuine emotional relationship even for significantly younger partners."[35] If there is doubt as to the genuineness of the emotional relationship (e.g. a significant age difference between the two partners; the female partner became a widow only two months before the alleged start of the relationship; they did not marry, although both had been married in the past before the start of the relationship), cohabitation can not be established.[36] Interestingly, the Court in

[30] Judgment of the Higher Court of Ljubljana II Cp 1821/2020 of 11.2.2021 and decision of the same court IV Ip 1040/2023 of 19.9.2023.
[31] Judgment of the Higher Court of Koper I Cp 961/2002 of 10.6.2003.
[32] Decision of the Higher Court of Ljubljana Cst 562/2019 of 17.12.2019.
[33] Judgment and decision of the Higher Court of Ljubljana I Cp 2114/2004 of 15.6.2005.
[34] Judgment of the Supreme Court of the Republic of Slovenia II Ips 500/98 of 13.5.1999.
[35] Judgment of the Higher Court of Ljubljana I Cp 1427/2019 of 25.8.2020.
[36] Ibid.

another case took the perhaps controversial view that it is somehow not possible to be "attached" to two persons at the same time, i.e. to both the ex-wife and the new "partner": "Attachment to the ex-wife means that by the nature of things (since polygamy is not recognised by the Slovenian legal order) there can not be attachment to the new partner, or that the attachment does not reach the level necessary for the establishment of the existence of cohabitation."[37]

On the other hand, according to case-law, cohabitation exists despite the cessation of the emotional attachment of one person in the couple, provided that, on the other hand, all the other elements for the existence of a cohabiting partnership are still fulfilled.[38]

Last but not least, the fact that the domestic community must be outwardly visible (i.e. notorious) as what it actually is, i.e. that it also visibly fulfils all the necessary conditions, such as the shared residence of the two persons, their shared household, and thus a mutual economic community, is also important for the surrounding public.[39] It is not enough for the persons to act outwardly as a couple, but they must also act as spouses.[40] In addition to this external component, there is also an internal component to be taken into account, i.e. how each "partner" perceives his or her relationship to the other "partner" and whether the two partners' wishes are at least substantially in agreement.[41]

In short, an in-depth examination of the main decisions of the relevant case-law leads to the conclusion that the legislator's decision to entrust the courts with the task of determining the existence of cohabitation, where the courts have only a number of legal standards to assess, which they must repeatedly fill with the relevant content, was rather ill-considered and, at the very least, in any event inappropriate. In practice, such a system, which does not contain at least certain specific criteria for decision-making, creates an incalculable risk that, in the face of substantially identical facts, the courts might decide differently, which is, of course, in direct contravention of the rule of law. Sometimes, even in cases, where the assessment of the domestic

[37] Decision of the Higher Court of Ljubljana I Cp 724/2022 of 2.6.2022.
[38] Decision of the Higher Court of Ljubljana I Cp 1076/2016 of 4.5.2016.
[39] Judgment of the Higher Court of Ljubljana I Cp 1381/2013 of 11.12.2013, judgment of the Supreme Court of the Republic of Slovenia II Ips 1112/2008 of 23.6.2010 and judgment of the Supreme Court of the Republic of Slovenia II Ips 127/2003 of 19.2.2004.
[40] Judgment and decision of the Higher Court of Ljubljana II Cp 2108/2017 of 10.1.2018.
[41] Judgment of the Supreme Court of the Republic of Slovenia II Ips 264/2010 of 19.12.2013 and judgment of the Higher Court of Maribor I Cp 636/2023 of 12.3.2024.

community of the same two persons is being made, but in different legal proceedings. Consequently, for these reasons alone, it would be necessary to provide for additional legal mechanisms which would not only facilitate the establishment of evidence, but also enable those proceedings to be carried out more expeditiously in practice. The fundamental principle of equal treatment is also at stake here, since a review of the case-law also shows that the courts, when assessing the existence of a cohabitation, often require a much higher quality of presence of all the relevant circumstances of the alleged domestic community for cohabitation to be established than is otherwise needed for the domestic community, that is the formative basis for a couple living in a (registered) matrimonial union.

4 Proposal of new solutions

In Slovenia, there have been ideas about the registration of cohabiting partnerships, which were particularly evident at the time of the adoption of the now superseded legal regulation of the registration of same-sex partners (Registration of Same-Sex Civil Partnerships Act (ZRIPS)[42] (Novak (2019): p. 51). Nevertheless, the proponents of the new family law regulation enacted in the DZ retained the quite informal way of establishing the formation of a cohabitation for the reason that otherwise the question might have arisen as to why cohabitation would still be considered as any different form of a domestic community of two persons as opposed to marriage (Novak in Novak (2019): p. 42, Zupančič in Zupančič (2009): p. 22, Žnidaršič Skubic (2007): p. 213.). The predominant opinion was that, in the event of a requirement for its registration, cohabitation would no longer be a viable alternative to marriage, and thus no longer an institution of family law worth preserving (Novak in Novak (2019): p. 43, Zupančič in Zupančič (2009): p. 43, Zupančič (2009): pp. 23, 142, Žnidaršič Skubic (2007): p. 216). It is true, on the other hand, that in Slovenia, cohabitation is now on an equal footing with marriage in terms of rights and obligations, and Slovenia is consequently one of the countries with a more liberal approach to this important subject matter (Kraljić (2019): p. 48, Miles (2016): p. 107).

Nevertheless, in the light of the current regulation of DZ, the establishment of the existence of a cohabitation, which is left to the courts to decide on a case-by-case basis, and even then, only as a preliminary question, is often an extremely difficult

[42] Zakon o registraciji istospolne partnerske skupnosti, Uradni list RS, No. 65/2005 et seq.

task in the absence of more definite criteria. This legislative solution is certainly not a satisfactory one, since the constant need to establish and then prove the veracity of a person's life is already putting into question the very institution of cohabitation, which is practically ubiquitous in practice and which has extremely important, sometimes even irreversible legal consequences in practically all areas of social life.

Since cohabitation has direct consequences in several areas of law, such as family, inheritance, housing, corporate, criminal[43] and tax law,[44] it is almost incongruous, and above all counterproductive, that even an authoritative finding by a public authority on this issue should not have at least an indirect bearing on another authority's finding of fact on the same subject matter. At best, this is a duplication of decision-making, and at worst it is a direct reflection of legal uncertainty and the risk of the adoption of contradictory decisions by the authorities on the same factual issue, which is, of course, contrary to at least the fundamental principle of the rule of law, on which the Constitution of the Republic of Slovenia is based, as well as the Charter of Fundamental Rights of the European Union.[45] This unsustainable situation calls for a new approach and, even more importantly, for much more practical solutions, of which there are several possibilities.

As regards the procedure for establishing the existence of cohabitation, it would make sense to still leave it to the courts to decide in any case where this subject arises for the purpose of exercising certain rights or obligations. The court would, by a special declaratory decision, recognise or reject the existence of cohabitation, deciding based on partially adapted and modified rules of civil procedure. Such a declaratory decision would have *erga omnes* effect, i.e. it would apply to all proceedings in which the existence of the cohabitation is relevant for the final ruling. For this reason alone, we also propose the creation of a special register, like the central register of wills, which would allow courts and other competent State authorities to have access to decisions on the existence of cohabitation that have already been issued.

[43] For example, the exemption from the duty to testify against a partner who is a defendant in criminal proceedings under Article 236(1) of the Criminal Procedure Act (ZKP; Zakon o kazenskem postopku, Uradni list RS, No. 63/1994 et seq.).
[44] It is beyond the purpose and scope of this paper to review all the different rights and obligations that arise from these aspects.
[45] OJ C 326, 26.10.2012, p. 391–407.

The question to be left open for the time being is the choice of the type of civil court proceedings in which this declaratory decision is to be taken, namely whether it is to be taken in contentious or in non-contentious civil proceedings. In this context, it should be borne in mind that the adjudication of matrimonial and family disputes was initially reserved for civil contentious proceedings. Following the entry into force of DZ in 2017 and, in particular, of ZNP-1 in 2019, as a direct consequence of the alignment of the procedural provisions with DZ, the area of the regulation of family relations has been transferred from the regulation of Civil Procedure Act (ZPP)[46] to ZNP-1, which, of course, argues in favour of considering that the existence of a cohabiting partnership might also be entrusted to the rules and regulations of non-contentious proceedings. However, we consider that such a solution would be less appropriate, in line with the very purpose of the non-contentious procedure, since it lays down rules for the judicial regulation of the relationship between the participants in the proceedings, rather than for the adjudication of a claim by one party against another. Non-contentious proceedings are concerned with the adjudication of issues in respect of which there is no direct dispute between the participants in the proceedings and, if there is a dispute, they are referred to civil litigation in any event.

However, the determination of the existence of a cohabiting relationship in the light of its very loose definition, which is based on a series of legal standards, inherently contains a much greater potential for disputes to arise between current and, moreover, former life partners. For that reason alone, a specific declaratory decision on the existence of cohabitation would be more appropriately dealt with by the rules of civil litigation, which, however, would be subject to certain adjustments and modifications in view of the specific nature and, above all, the consequences of a declaratory decision on the existence of a cohabitation. Such a declaratory judicial decision would thus be subject to the ordinary legal remedy of appeal. In view of the possible simplification of the procedure, it might be worth considering, given the very nature of such a declaratory decision, the possibility of limiting the possibilities of extraordinary remedies to only the possibility of reopening of the proceedings. In any case, it would be appropriate to define rules of ZPP, specifically tailored to all of the above, in particular as regards the question of preclusion or the prohibition on the introduction of new facts and evidence, since it is the established facts that

[46] Zakon o pravdnem postopku, Uradni list RS, No. 26/1999 et seq.

are essential for the fulfilment of the criteria and parameters, and thus also the legal standards, which determine the existence or non-existence of cohabitation.

Why do we consider that the existence of a cohabiting partnership should be decided by a decision rather than by a judgment on the merits? Primarily because the dilemma of a possible judgment by default would not arise or would in practice be more difficult to arise. Such a judgment cannot be challenged on appeal on the ground of an erroneous or incomplete finding of fact, pursuant to Article 338(2) of ZPP. The essence of adjudicating on the existence of a cohabiting partnership is precisely to consider whether, in practice, certain circumstances are sufficiently present regarding the personal relationship between two persons which, in turn, give that relationship the quality of a cohabitation. It is therefore always a question of weighing up the quality of the relationship in the light of a series of factual circumstances, since, in determining whether a community of persons exists, the court has nothing to go on but legal standards which are almost at the level of generalised guidelines. It is therefore even more important that the proceedings should establish the factual situation as fully as possible, which, of course, excludes in concept the possibility of a judgment by default.

The judgment by default is based on the irrebuttable presumption that the defendant, by its passivity, admits the plaintiff's factual allegations on which the plaintiff bases its claim. In such proceedings, the Court thus does not take evidence or test the truth of the applicant's factual allegations, but merely makes a declaratory assessment as to whether there is a conflict between the allegations and the evidence adduced. However, there can be no such conflict if the evidence does not confirm (although it does not contradict) the factual allegations made in the action, since, having already stated the reasons, the facts alleged in the action are deemed to be admitted and, as has already been pointed out, the Court does not even examine their veracity. [47] The purpose of the judgment by default is therefore to penalise the party who fails to take care of his or her rights in the litigation. But this civil sanction would, of course, be excessive and disproportionate if it were to affect a whole range of rights and obligations of a party which depend on a judicial establishment of the existence or non-existence of a cohabiting partnership.

[47] Decision of the Higher Court of Celje Cp 139/2022 of 5.5.2022.

The extraordinary remedy of a reopening of the proceedings would be available here in the context of a modified litigation procedure - in non-contentious proceedings there is in principle no reopening (cf. Article 54 of ZNP-1) - for the sole reason that its initiation is also subject to the existence of new facts and evidence which would enable one of the parties to the proceedings to obtain a more favourable decision for that party. Establishing the existence of cohabitation, which can be an extremely dynamic relationship by its very nature, is a matter of establishing facts which support or refute the hypothesis that a domestic community of such quality exists between two persons that it can be recognised as a cohabitation on those grounds alone. In light of the legal standards set out in the previous section of this article, which are derived from the applicable rules of DZ, it is, in principle, appropriate to maintain this form of extraordinary remedy even in the event of a declaratory decision of this kind, since a reopening of the proceedings is also permissible on grounds which essentially relate to the establishment of the facts. It is, of course, the facts which are of fundamental importance, when the law merely provides for a series of legal standards, which have, of course, the inherent nature of vague legal concepts, to be used as a basis for judicial decision-making. It is the fulfilment of these standards that is the task of the "subtle" decision-making of the case-law in the field, since it is only after the fact that the case-law establishes the criteria and benchmarks that must be met for a given standard to be considered to have been met in fact. It is true, however, that the legislator may decide, for the very reason already mentioned, namely that the cohabitation partnership is an extremely dynamic relationship in relation to all the relevant criteria and benchmarks, that the extraordinary remedy of reopening of the proceedings is not to be granted in such cases and that, as a consequence, the corresponding decision may only be modified in a new proceeding if the circumstances on the basis of which the decision was originally given have changed.

It is important to bear in mind that a court's finding that a cohabitation between two persons actually exists at a given moment in time cannot in any way be the basis for an irrebuttable presumption that it exists indefinitely. It would be more appropriate, in such cases, to establish a legal presumption that the cohabitation continues to exist for a certain period, say at least two years, which is the period over which the two persons have been living together, and which is already generally regarded in practice as sufficient to establish the existence of a cohabitation between the two. A longer duration of this presumption would be permissible, in cases where a couple already living together in a relationship of a sufficient quality to be considered a

cohabiting partnership gives birth to a joint child. In such cases, and in particular if the child is a minor at the time of the court's decision, it would be permissible to fix the validity of the legal presumption of cohabitation at a period of at least five years, for example, since that is the minimum period of time when a child is growing up, during which the intensive involvement of both partners in its upbringing and care is all the more important. The legal presumption of the existence of a cohabiting partnership would not, of course, be irrebuttable, as it could be refuted during its existence in certain limited and expressly defined cases, but at the same time the court will also have to have the possibility and the right to verify the facts *ex officio*, in order to prevent possible abuses in practice, e.g. if a quasi-cohabitee were to seek to obtain tax benefits unjustifiably or to abuse the possibility of being exempted from testifying in criminal proceedings against his or her quasi-cohabitee. The introduction of a legal presumption, whereby, if the existence of a cohabitation is established, it would continue to be presumed for some time into the future, is an added value that would facilitate the resolution of issues relating to this fact in various judicial and administrative proceedings. At the same time, it would limit the possibility of abuse by limiting it to two years or, in the case of joint children, to a maximum of five years, which would be further limited by the possibility for the competent court itself to verify certain facts ex officio if abuse is suspected. In any event, it would also be appropriate to provide for the possibility of ex officio termination of the presumption, for example, if the court receives an application from at least one of the two persons who are otherwise presumed to be cohabiting for the judicial division of their co-owned property or for the judicial determination of the care, upbringing and maintenance of, or contact between, one or the other of them and their children living with them. It should, of course, also be possible to have the dissolution of a cohabitation already established declared by a court, both where both partners agree and, of course, where one of them requests it based on a declaratory procedure.

Another, perhaps comparatively less invasive, solution would be to provide for the specific possibility of recognising judgments which contain a decision on the existence of a cohabiting partnership between two persons and which are based on the same state of facts, also in other legal proceedings in which one or both of the persons are parties, as the legislator has already done with regard to the relation between criminal and civil proceedings. Article 14 of ZPP provides that, where a claim is based on the same facts as those on which a decision has already been taken in criminal proceedings, the court is bound by the final judgment of conviction

handed down in the criminal proceedings, but only as regards the existence of the offence and the criminal liability of the perpetrator. It would therefore be possible to recognize the existence of a cohabitation in a similar way if it has already been established in any proceedings by a final court settlement or a court ruling, subject, of course, to additional safeguards to prevent any abuse of this solution. This solution would presume that cohabitation exists until the presumption is refuted, in a similar way to the next solution, official registration, also with the possibility of *ex officio* dissolution, in particular in cases of proposals for the division of co-owned property and for the determination of the care, upbringing and maintenance of or contact to joint children, as well as for the establishment of the dissolution of the cohabitation on the basis of a proposal by agreement of both partners or, if there is a disagreement between them, on the basis of a declaratory proceeding, on the basis of a proposal by one of them alone or, if there is a disagreement, on the basis of a proposal by one of them alone.

Consideration should also be given to an even simpler solution, perhaps in the form of introducing the possibility of voluntary notarial registration of a particular domestic community as a cohabiting partnership. There is no particularly good reason why a couple should not be able to do so on the basis of a voluntary declaration by a civil law notary that they are living together as a cohabiting partnership, although it might be appropriate to provide for at least a few legal safeguards to prevent possible abuses, which would, of course, be a task for notaries as well as for any legal remedies that might be available to challenge this registration. After all, the celebration of a marriage is also based on a free declaration, the invalidity of which can be proved by all those who have a legal interest (Article 48 of DZ). Of course, in this case, too, there should be a central register of such declarations, which would enable all those entitled to it, and in particular the courts, to have access to this information, if they were deciding on proceedings where the existence of a partnership of this kind is now normally established as a preliminary question. It may also be appropriate to provide for separate procedures for such registration, in a manner comparable to that which was formerly provided for in the same-sex partnership registration procedure under the ZRIPS Act, for the determination of the invalidity or annulment of the registration. The Partnership Act (ZPZ),[48] which replaced ZRIPS in 2016, would not be of much use in this respect, since it refers practically everywhere to the analogous application of ZZZDR,

[48] Zakon o partnerski zvezi, Uradni list RS, No. 33/2016 et seq.

subsequently DZ, regarding the issues of the conclusion of a partnership. The latter solution is also the most straightforward from the point of view of the possible dissolution of the cohabitation. Registration would thus create a presumption of the existence of the cohabitation until the parties by mutual agreement make a submission to a notary or one of the parties requests a (judicial) declaration that the cohabitation does not exist (which would be an exception to the fact that negative facts cannot be proved). In any event (even if the alternative solution of recognising a cohabitation already recognised by a decision of another authority were to be chosen), the cohabitation would terminate *ex lege* when the court receives either a petition for judicial determination of the care, upbringing and maintenance of or contact to joint children or for judicial division of the co-owned property.

5 Conclusion

Cohabitation has become an inevitable feature of modern life. It is a fact of everyday life that is unavoidable (also in law). As such cohabitation is a widespread occurrence all around the Western world (Liefbroer et al. (2006): p. 219), even if some meaningful differences from country to country and region to region can be established (Soons et al. (2009): pp. 1143-1144). Nevertheless, informal cohabitation relationships particularly in the West have taken over the role of the modern form of "common law marriages" (Fassin in Waaldijk (2005): p. 187). There might be several reasons for this, but the prevailing notion seems to be that partners in modern cohabitation relationships, as opposed to the past, may be more evenly matched and economically independent types who necessarily do not need long-term support obligations from the other partner and therefore currently tend to avoid them (Dnes (2007): p. 91). However, as this paper has shown, establishing its existence, which often has permanent and irreversible consequences for the rights and obligations of the individual, is a rather demanding task, which is also often unnecessarily duplicated and, in exceptional cases, even tripled. It is true that it is never an easy task to regulate relationships that first emerge in practice and consequently have their own inherent characteristics and peculiarities, which are difficult to place under a common denominator. However, we believe that a different regulation is necessary, not at least because, according to the latest officially published statistics from January 2021, the total number of families in Slovenia is 587,448, with the share of cohabiting partnerships amounting to 17.4% (Statistical Office of the Republic of Slovenia, 2024). In short, at least one in six families in Slovenia is currently a cohabiting family of at least two persons. However, the court

proceedings relating to family relationships and related property rights represent one of the most constant and persistent generators of litigation. These are further complicated by the fact that these relationships are rooted in an individual's inherent intimate and emotional needs, with the property involved being primarily intended to meet the joint needs of the family, which of course often becomes very complicated in the event of the breakdown of a couple's domestic community. Solutions that can facilitate, if not at least speed up, the implementation of these procedures in the future are therefore of particular importance for the aforementioned rule of law being respected also in this utmost important area of law.

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Povzetek v slovenskem jeziku (Abstract in Slovene language)

Zunajzakonska skupnost je institut slovenskega družinskega prava, ki je po svojih učinkih zelo podoben zakonski zvezi, saj ustvarja enake pravice in obveznosti. Vendar pa je za razliko od zakonske zveze njen obstoj treba dokazovati v vsakem posameznem postopku posebej, kar v praksi povzroča težave. Te težave dodatno poglablja dejstvo, da je obstoj zunajzakonske skupnosti v slovenskem Družinskem zakoniku opredeljen z uporabo precej ohlapno določenih pravnih standardov. Avtorica v prispevku podaja pregled aktualne relevantne sodne prakse slovenskih sodišč glede zunajzakonske skupnosti ter obravnava možnosti za njeno prihodnjo pravno ureditev.