

MASARYKOVA UNIVERZITA

PRÁVNICKÁ FAKULTA

# COFOLA 2008 CONFERENCE: KEY POINTS AND IDEAS

The aim of this book is to introduce the key points and ideas from the COFOLA 2008 conference. For full text of contributions please see the enclosed CD-ROM where a complete version of conference proceedings in PDF format can be found. The main reason for this separation of summaries and contributions was our intention to reduce the costs of publication and make the work with the conference proceedings more user friendly. However, both this book and the CD-ROM still remain just one publication and as such should be also cited even though they have separate and different ISBN.

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## FOREWORD

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Dear Ladies and Gentlemen, dear guests and colleagues,

COFOLA 2008 is the II. international conference of doctoral students and young scholars held by the Faculty of Law, Masaryk University. The change of the name of this conference (former PFAMEI) reflects our different philosophical approach. Unlike PFAMEI, which was focused mainly on legal and financial issues, COFOLA 2008 conference has no expressly stated topic for contributions. It is because the aim of the COFOLA 2008 conference is to give to its participants an opportunity to address the most poignant questions from their field of interest, whichever it is.

As the organizers of the conference, we are pleased that also our honourable colleagues from Belarus, Italy, Lithuania, Hungary, Poland, Romania, Ukraine, USA and Yugoslavia participated at the conference.

We are honoured that prof. JUDr. Naděžda Rozehnalová, CSc., the Dean of the Faculty of Law, Masaryk University and Roman Onderka, the Mayor of the city of Brno, have accepted auspices over the COFOLA 2008 conference. We would like to express our thanks also to our donators as their appreciated contributions significantly contributed to the success of the conference.

We hope that we will be able to welcome all participants again next year at the COFOLA 2009 conference.

Jan Neckář  
Martin Orgoník  
David Sehnálek  
Jiří Valdhans

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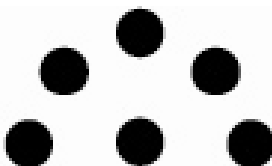
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## INTERNATIONAL PRIVATE LAW SECTION

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# PROBLEMATICAL PROVISIONS OF THE REGULATION CREATING A EUROPEAN ORDER FOR PAYMENT PROCEDURE

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## Key words

Regulation creating a European order for payment procedure, international jurisdiction, application for a European order for payment, form – procedure, remedy

The European legislator decided to create a legal framework for creditors in the European Union for swifter, more efficient and cheaper recovery of probably uncontested pecuniary claims in cross-border cases. The clue shall be a transnationalized “European procedure” with a subsidiary application of national laws, the result of which is a directly enforceable European order for payment. The legal base for it is the Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (hereinafter referred to as „regulation on European order for payment“). The procedure shall relieve also the courts because applications do not have to be necessarily examined by a judge. Although the regulation enters in force only on December, 12 2008, some provisions can be already identified, which will probably cause troubles by their application. The focus of this paper is to analyze these provisions and to suggest some better solutions.

Concerning the **determination of international jurisdiction**, article 6 refers to the regulation Brussels I. However, this does not seem to be suitable for the European payment order procedure. Generally, the defendant has to be sued in the state of his domicile but beside that, the regulation contains many other special and exclusive jurisdiction rules, legal regulation of which is in some cases quite complicated. For that reason, the solution contained in the regulation on European order for payment contravenes the intention to simplify the recovery of probably uncontested claims. The fulfilment of the conditions, that establish the international jurisdiction of a particular court, will have to be examined by a judge and not by an e.g. clerk of court. It would be more convenient to introduce an exclusive international jurisdiction of the courts of a member state where the defendant is domiciled.

It is questionable, whether **exclusion of the claims arising from non-contractual obligations** was necessary as not pecuniary claims or claims on an unspecified amount are not covered by the regulation. Moreover, the question whether there is a non-contractual obligation or not is qualified differently in various legal orders which will cause dissension in application of the regulation.

The procedure is based on seven **forms** intended for its particular phases which are to be completed by simple ticking off. The forms are translated in all official languages of the EU so that a person responsible for the European order for payment procedure can only compare the form in the official language of the court with the form in the official language of the claimant or defendant. The thing is that some data have to be formulated in whole sentences. That is why the problems with translation can not be completely eliminated which might discourage the creditors.

From the text of the regulation it is not clear, in which way the court has to **examine the application** for the European order of payment. Should it be a formal examination or a material one? Apparently, there is no clear answer to the question in the regulation. I hold the opinion that a formal examination of the application is sufficient. The material examination gives more certainty at law indeed; however, it contradicts the aim of the accelerated procedure. On the other hand, the interpretation in favour of the formal examination should be amended at least with the possibility to reject the application if it is clearly unfounded. This solution would permit firstly, that the examination could be made by e.g. clerks of court and secondly, that the examination could be fully automated. In this way, the procedure would be more effective and the courts would be relieved.

In accordance with article 7 section 3, a claimant shall face **penalties** under national law if he declares **untrue information**. However, the provision does not stipulate, whether they shall be criminal, civil or administrative sanctions? This will probably lead to a different application of the regulation.

Concerning the **lapse** of time, there is no rule regulating the maintenance of the term, interrupting the running of time or the beginning of a new term after the rejection of the application. With regard to the aim of the unified transnational procedure, such a rule would be suitable as in the current situation national legal rules will be applicable.

The legal regulation of the **service of documents** is the same as in the regulation creating a European Enforcement Order despite of the wide criticism expressed by legal experts. Moreover, a situation is not regulated when the European order for payment is served in contradiction to the rules for service of documents but the debtor lodges a statement of opposition though. Does that mean that the European order for payment is completely invalid or can it be considered as a beginning of a civil procedure?

After the lapse of the time for lodging a statement of opposition, the defendant is entitled to apply for a **review** of the European order for payment before the competent court in the Member State of origin if certain conditions are met. The trouble is firstly, that the provision contains too many vague notions the courts will have to cope with. Furthermore, it does not explicitly state, which remedy shall be lodged. Will it be possible to break the legal force of the European order for payment? In this context, the remedy seems to be quite problematical as there is neither a time restriction, nor a limitation of its use on particular cases stipulated by the regulation. Such a rule does not bring much certainty at law either.

To sum it up, the regulation on European order for payment procedure has many negatives. On the other hand, it has to be reflected, that it is the first attempt to establish a really transnational European procedure. However, the real effects in the practice will be evident after the regulation enters in force.

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# LEGAL REGULATION OF INTERNATIONAL GROUPS OF COMPANIES

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## Key words

Groups of companies in the international context – Legal regulation of groups of companies – International private law – EC law

With economic integration and growing globalization law has to face new challenges, one of them being company groupings. Where a holding company from one country is linked with a subsidiary from another country and they form larger and more complex economic units, one can speak about international groups of companies. In an international group of companies both, the holding company and its subsidiaries, keep their separate legal personalities, therefore it is important to find a law regulating the relationship between them. However, explicit legal regulation of international groups of companies cannot be found in any source of either national or international law. Keeping in mind the importance of these groups in nowadays business environment, it is surprising to see that their legal regulation does not attract much attention either of lawmakers or of scholars.

Within international groups of companies three basic types can be distinguished: Groups of companies consisting of those from EC countries, groups of companies consisting of those outside the EC and groups of companies consisting of both. This division is crucial for the decision on what law will regulate international groups of companies. It is evident that for the groups of companies consisting of those from EC countries community law will play an important role. On the other hand, for the groups of companies consisting of those outside the EC countries community law will be irrelevant and one will have to look for a different solution. For the groups of companies consisting of both types of companies one will have to combine both legal regulations.

As far as groups of companies consisting of those from EC countries are concerned there is no unified comprehensive legal regulation on the community level. Even though there have been attempts to unify company law, such as the proposal of the Ninth Directive of 1974, they have not been successful so far. The Ninth Directive on company law has never been adopted due to the disputes among member states and it does not seem it ever will. Community law acknowledges the existence of groups of companies; however their legal regulation on community level remains fragmentary and inconsistent. It is dispersed among various sources of EC law many of which do not even deal with company law itself e.g. the Seventh Council Directive on consolidated accounts defines a parent undertaking and a subsidiary undertaking – two terms that clearly are from the sphere of company law. The Thirteenth Directive on takeover bids regulating squeeze-out and sell-out is also very important for the regulation of company groupings. However, the legal regulation of groups of companies on the community level does not cover all relevant issues and to “fill the gaps” one has to look into the sphere of the international private law.

International private law will play an essential role not only for the legal regulation of those aspects of groups of companies that are not regulated on the community level but also for the legal regulation of international groups of companies in general. Within the sphere of international private law the issue can be defined by two main questions: Firstly, which legal order will regulate the relations between the holding company and its subsidiaries in a group of companies if the companies themselves are regulated by different national legal



orders? Secondly, if a group of companies has a contractual basis, will the group be regulated by the legal order decisive for the contract or by a legal order decisive for one of the companies?

The Czech legal practice has so far neglected the issue of legal regulation of international groups of companies. There are no provisions explicitly solving the two questions mentioned in the previous paragraph in the Czech international private law statutes. So far the Czech scholars have not dealt with the issue either. Therefore, for finding the solution it is helpful to look for inspiration into foreign legal orders. Since the Czech company law was highly influenced by the German one, it is particularly useful to look into the German legal regulation of international groups of companies.

Most German scholars agree with the opinion that if the holding company and its subsidiary are from different countries, the legal relationship between them is regulated by the legal order decisive for the subsidiary. It is considered to be the best solution as the subsidiary is the one most negatively affected by the existence of control relationship within the group of companies. The subsidiary can be forced to take steps that disadvantage it economically or legally for the sake of group's prosperity. This should be balanced by the means of protection of the legal order regulating the subsidiary. From this point of view, the subsidiary's legal order is supposed to have the closest link to the issue and therefore it should regulate the legal relationship between the holding company and the subsidiary. This is true also if the group of companies has a contractual basis.

In my opinion, when assessing the situation from the point of view of the Czech legal order one should come to the same conclusion as the German scholars did. However, the situation will be more complex by the groups of companies consisting of those from EC countries since here one has to combine the EC law regulation of groups of companies as well as the subsidiary's legal order. This can clearly lead to very complex and controversial situations in the practice. Therefore it would be highly advisable to take steps for simplification of legal regulation of international groups of companies or at least for unification of the approach to this legal issue. Nevertheless, the story of the Ninth Directive on company law shows us what a big challenge this is going to be in the future.

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# AMIABLE COMPOSITION IN THE INTERNATIONAL COMMERCIAL ARBITRATION

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## Key words

Amiable compositeur, arbitration proceedings, powers, equity

The concept of *amiable compositeur* has its historical origins in French law.

Amiable composition is very often defined synonymously with arbitration in equity or *ex aequo et bono*. It is difficult to specify differences between these two forms of arbitration, the literature identifies the differences as follows:

An arbitrator acting as *amiable compositeur* is deciding the dispute before him according to law and legal principles, nevertheless is authorized to modify the effect of certain non-mandatory legal provisions.

Ex aequo et bono is a dispute settlement out of law, according to moral principles. An arbitrator deciding as ex aequo et bono is allowed to disregard not only the non-mandatory rules, but also the mandatory provisions of law, as long as they respect international public policy.

Traditionally, amiable composition provided an equity correction to strict rules of law applicable to a dispute. Today an amiable compositeur has a power to depart from the strict application of rules of law and decide the dispute according to justice and fairness. This concept is usually chosen by the parties as a substitute for, rather than an addition to, national law.

All of the arbitration rules allow the arbitrator to decide a dispute as amiable compositeur if duly authorized by the parties prior to or during the arbitration.

In some cases, the parties choose a law applicable to their dispute, and at the same time provide for the arbitrator to decide as amiable compositeur. The applicable law in fact determines the limits of arbitrator's decision-making according to equity.

Parties' authorization of the arbitrator to act as amiable compositeur is usually regarded to include the authorization to apply the *lex mercatoria*. But the concept of use of *lex mercatoria* and deciding as amiable compositeur cannot be equated. Although a clause permitting amiable composition might be seen as implying a reference to *lex mercatoria*, an arbitrator does not need to have powers of amiable compositeur in order to apply *lex mercatoria*.

Although the amiable compositeur is obliged to apply neither any national law nor the *lex mercatoria*, in practice, "the amiable compositeurs regard the law as *ratio scripta* and do not find any good reason for departing from its application in particular cases. Nevertheless the arbitrator would not apply national law or *lex mercatoria* if the result contravened his idea of an equitable solution of the dispute. However, even in these cases the arbitrator has to abide by those principles which form part of the international public order or morals.

The arbitrator's powers to decide as amiable compositeur finds its limits in the will of the parties and, as mentioned above, the *ordre public*.

The parties express their will in the directions that they give to the arbitrator as to how to use the equity, and also in the arbitration clause itself. The question is whether the arbitrator acting as amiable compositeur can deviate from or modify the contractual agreement of the parties. The ICC Arbitral Tribunal in one of its awards held that it is generally accepted principle in international arbitration that the paramount duty of the arbitrator, even the amiable compositeur, is to apply the contract of the parties, unless it is shown that the provisions relied on are clearly against the true intent of the parties, or violate a basic commonly accepted principle of public policy. The Tribunal in this award goes further by stating that "the arbitrator sitting as amiable compositeur is entitled to disregard legal or contractual rights of a party when the insistence on such right amounts to an abuse thereof.

Limits of the amiable compositeur powers also lie in the international public order of the applicable law and possible enforcement jurisdictions. The arbitrators have a general procedural obligation to render an enforceable award. Even when acting as amiable compositeur, the arbitrator must ensure enforceability of the award in the state which has a connection with a given case. It depends on the law of the state of enforcement whether it recognizes arbitration conducted under the amiable compositeur concept or not.

Why should the parties provide for such kind of dispute settlement? Literature<sup>1</sup> states four reasons: First, the differences between businessmen and lawyers from different legal environments as regards application of national law might lead them to agree on a less strict standards provided for in equity applied by the amiable compositeur. Second, this system can be particularly suitable in the context of a continuing, long- term relationship, where a degree of flexibility is desirable. Third, deciding as amiable compositeur might make the dispute settlement simpler and thus perhaps less costly. Finally, equity-type clauses can help to "soften" the situation for the losing party. Such adaptability is necessary in international commercial relations, since laws are generally adopted to deal with domestic situations and do not reflect the specifics of international trade.

Although the concept of amiable compositeur has many advocates, there are maybe even more opponents, who criticize lack of predictability, uncertainty and subjectivity of the arbitrator.

The concept of amiable composition is still generally seen with much skepticism. On the other hand it is used by prestigious international arbitration institutions such as ICC Arbitral Tribunal and modern legal systems allow for this concept as well. It remains for the future development of this system of decision-making to determine the scope of powers and limitations of the amiable compositeur and to clarify disputed questions.

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1 Equity in International Arbitration: How fair is „fair“? A Study of Lex Mercatoria and Amiable Composition, Boston University International Law Journal, 12, 1994, p. 234-135

# THE SELECTED TOPICS OF PRIVATE INTERNATIONAL LAW IN CHINA

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## Key words

Inter-regional conflict of laws, “one country, two systems” principle, choice of law in contracts, party autonomy, the closest connection rule

## The Basic Principles of Chinese Private International Law

As a result of China’s integration into the World Trade Organization (WTO) on December 11, 2001, the development in the relations of foreign trade between Chinese and European partners has caused a great number of civil and commercial cases relating to the matters with “foreign element”. The WTO entry has brought about unprecedented opportunities and challenges to the adjudication of foreign related civil and commercial cases in the People’s Republic of China.

The People’s Republic of China belongs to the countries with several different legal systems and in practice it means the problem of dealing with the issue of “inter-regional conflict of laws”. Inter-regional conflict of laws is a new conception in private international law in China. It is a result of the conclusion of the Joint Declaration of the Government of People’s Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong (1984) and the Joint Declaration of the Government of People’s Republic of China and the Government of the Republic of Portugal on the Question of Macao (1987), and the promulgation of *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* and *Basic Law of the Macao Special Administrative Region of the People’s Republic of China*.

China has become from previous country with a single legal district to country with multiple legal regions. Such plural legal system includes socialist law in Mainland China, common law in Hong Kong based on British common law tradition and civil law in Macao as heritage of Portuguese settlement.

The different legal systems adopted in Mainland China, Hong Kong and Macao call for question which regional law should be applied and whether courts in different regions will recognize and enforce the judgments of the courts of other regions. China does not have a formal federal system. Article 31 of the People’s Republic of China Constitution declares that China may establish special administrative regions. These are the Hong Kong and Macao Special Administrative Regions. The most articles of the People’s Republic of China Constitution will not be applicable in Hong Kong and Macao. Both special administrative regions continue to exercise independent legislative, judicial and adjudicate powers to maintain the prosperity and stability.

China does not have a private international code, but Chinese scholars have proposed “*Model Law of Private International Law of the People’s Republic of China*”. China has not any legislative jurisdiction for making national uniform inter-regional conflict of laws and the legislative jurisdiction in this area belongs to Hong Kong and Macao. As a result, China, Hong Kong and Macao have their own private international law.

## Choice of Law in Contracts

Choice of law in contracts determinates the substantive law which will be applicable on the dispute with foreign element. Choice of law issues raise in the People's Republic of China not only between China and other countries, but also between Mainland China and its administrative regions.

Chinese private international law is in the process of its development. There is no private international law code and with the relationships with foreign elements deal the 1999 Contract Law of the People's Republic of China and the 1986 Civil Code of the People's Republic of China.

Until 1980's foreign law was not applied before the Chinese courts. After Mao Ce-tung's era China has started to move closer to the rest of the world economically and necessary legal provisions were adopted by Chinese government. The first choice of law rules were provided in the 1985 *Foreign Economic Contract Law*. The most important provision in choice of law in contracts is presented in the 1999 *Contract Law of China*. Under this instrument Chinese citizens may make contracts with foreign parties for the first time in the legal Chinese history.

Chinese choice of law in contracts is based on party autonomy. According to the Article 126 of the Contract Law, the parties of the contract feel free to decide the law applicable to the contract.

In the case that parties do not make choice of law on their contract, the law which has "*the closest relationship*" to the contract is to be applied. "The closest relationship" is in China neither defined in the 1986 Civil Code nor the 1999 Contract Law and the courts follow the interpretation of the Supreme People's Court.

Notwithstanding these rules, Chinese courts may apply the law of the place to which the contract was found to be the most closely related. Under this approach, China follows flexible approach in determination of governing law with subjective evaluation of the case by judge.

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# BRUSSELS I REGULATION AND “THIRD STATES”

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## Key words

Owusu, Group Josi, Coreck, Brussels I Regulation, third states, non-member state, domicile, jurisdiction agreement, derogation

This conference paper deals with the requirements for application of Brussels I Regulation<sup>1</sup> (hereinafter “Brussels I”) and discuss especially the crucial question of its application in situations with “third state element”. If the dispute is connected not only with the territory of Member State of European Union (e. g. because of the defendant’s domicile) but also with the territory of a non-Member State (e. g. domicile of one of the parties is in the third state, the place of performance, place where the harmful event occurred or may occur) the Brussels I provides no instructions for allocation of jurisdiction. Moreover it is doubtful whether the Brussels I is applicable at all or whether the national procedural law of the member states should provide the rules for allocation of jurisdiction between member state and non-member state. Provisions allocating jurisdiction between member- and non-member state are normally included only in national procedural laws of member states. But in absence of any European mechanism for ceding jurisdiction to third States, are Member States entirely prevented from declining their own jurisdiction in such cases? Are they therefore without exception obliged to apply the Brussels jurisdiction regime? Or is the allocation of jurisdiction in cases with “third state element” under certain circumstances still a matter for national law?

These questions have long provoked academic controversy. There are different judicial opinions of national courts as well as of ECJ. On 1<sup>st</sup> May 2005 the ECJ issued a judgment in Case Owusu<sup>2</sup> (hereinafter “Owusu”). This decision targets the application scope of Brussels I in cases where a strong connection with a third State exists, but the reasoning seems to be very controversial. In order to explain problems concerning the Owusu it seems to be necessary to introduce the earlier cases of ECJ where ECJ addressed different aspects of the same problem: *Group Josi*<sup>3</sup> and *Coreck*<sup>4</sup> case.

Group Josi case concerned proceedings initiated in France by a Vancouver-domiciled claimant against a Belgian-domiciled defendant. The defendant argued that it could be sued only in Belgium (his domicile). This case prompted a question whether Article 2 applied, given that the claimant was domiciled in a third state. The court held that the claimant’s origin was irrelevant to the operation of Art. 2. Although this decision does not

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1 Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

2 Judgment of ECJ, Case C-281/02 from 1st May 2005, Owusu

3 Judgment of ECJ, Case C-412/98 from 13 July 2000, Group Josi

4 Judgment of ECJ, Case C-387/98 from 9 November 2000, Coreck

directly impose the question in *Owusu*<sup>5</sup>, the aim of this decision seems to be clear. A court of a member state has jurisdiction based on the Brussels I regardless of the claimant's country of origin.

The second important decision concerning the application scope of Brussels I in situations with "third state element" was *Coreck* decision. This decision concerned the effect of jurisdiction agreement which laid down an exclusive jurisdiction of a non-member state. The crucial question for the ECJ was whether Art. 17 of the Brussels Convention governs also the validity of a clause which specifies the forum having jurisdiction to settle disputes, or whether it is question for national law to examine the validity of this clause. The ECJ pointed out that "A court situated in a Contracting State must, if it is seized notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including conflict of laws rules, where it sits." <sup>6</sup> If such an agreement is valid, the European regime is inapplicable and the court is allowed to decline the jurisdiction under the national law provisions.

*Owusu* decision concerns situation when the courts of a member states have jurisdiction pursuant to the European regime, but the courts of a non-Member States also have competence (based on its national procedural norms) to decide on a dispute. The key question was when is possible, if at all, to stay the proceedings in a Member State for the benefit of the non-Member State proceedings. The ECJ ruled that Brussels I is applicable in each case, when the defendant is domiciled in a Member state.

This reasoning of ECJ seems to be very controversial. The ECJ has extended the hegemony of Community law norms at the expense of national law in the area of international private law. The reasoning is so general that also the *Coreck* case law and the possibility to decline a jurisdiction in case, when there is a valid jurisdiction agreement for the benefit of a non-member court, seems to be prevailed.

But should we really understand this decision in such a broad way? Should we really apply the ruling in *Owusu* generally and extent it also to the cases which does not share the same pattern as *Owusu* did? These tasks were submitted to the ECJ in the second question, but the ECJ refused to answer.<sup>7</sup>

The risks resulting from the strict interpretation of *Owusu* are really high. Taking these risks into the consideration, we should try to distinguish the *Owusu* case law from other situations which do not share exactly the same pattern. There are many arguments which we could use:

First of all we should ask, whether the question of declining the jurisdiction is governed by the Brussels I at all? In this respect the ECJ concluded three crucial ideas, but no of them help us to answer the first question.

The second possible argument is a nature of *Owusu* case. *Owusu* had four defining features, but neither of them is able to distinguish *Owusu* from other cases, which do not share exactly the same pattern.

Third and the most important argument is argument from Consistency. It seems to be clear that the overall consistency of European jurisdiction regime requires parity of treatment between Member states and third States in the matter of declining jurisdiction. It is inconsistent to allow national courts to decline jurisdiction in cases in favour of Member states but not third states. It is argument from Consistency, which justifies parity of treatment between Member States and third States in the matter of declining the jurisdiction. Therefore, it will be possible to respect e.g. the jurisdiction agreement of parties or exclusive jurisdiction of non-member state court as well as the fact that an action was already brought before a non-member state court. The argument

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<sup>5</sup> The issue in *Group Josi* was whether a court has jurisdiction under the European Regime where a claimant is domiciled in a third state, not whether a court may stay proceedings where such a jurisdiction is acknowledged.

<sup>6</sup> Judgment of ECJ, Case C-387/98 from 9 November 2000, *Coreck*, par. 19.

<sup>7</sup> „Is it inconsistent with the Brussels Convention to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State in all circumstances or only in some and if so which?“

from Consistency would also enable to respect the previous case law of ECJ, especially the Coreck case law, where the ECJ ruled the possibility to decline the jurisdiction following from European jurisdiction regime if a valid jurisdiction agreement exists.

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# NEW TYPES OF EUROPEAN CIVIL PROCEEDINGS IN THE SLOVAK REPUBLIC

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## Key words

European Law – Judicial cooperation in civil matters – Civil Procedure – Cross-border cases – European order for payment – European Small Claims Procedure – Conflict of Jurisdictions

In order to provide the parties of the cross-border disputes better access to justice with regard to cross-border claims, two regulations have been recently adopted: Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (hereinafter referred to as “Regulation on order for payment”) and Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (hereinafter referred to as “Regulation on Small Claims Procedure”, together hereinafter referred to as “Regulations”). The regulation provided by the given Regulations does not mean the harmonization of the national procedural orders of the Member States, but the special procedure available for the parties of the cross-border disputes. The benefit of such procedure shall consist in smooth recognition and enforcement of the judgment in any other EU Member State without exequatur. The Regulations include only basic framework of the procedure. The questions not stipulated in the Regulations shall be governed by the national procedural law of the Member States.

## I.

The cross-border dispute (case) is defined identically in both Regulations, as the one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised. Therefore, it is sufficient if the claimant has his/her residence in one Member State and the defendant has his/her property in different Member State.

The court jurisdiction shall be determined in accordance with the Council Regulation (EC) No. 44/2001 of 22 December 2000, so-called Regulation Brussels I. However, in Regulation on Small Claims Procedure, there is no explicit reference to the Regulation Brussels I. Therefore, the judgments under Regulation on Small Claims Procedure could be rendered also by the court of the Member State which established its jurisdiction under its national law in cases not covered by Regulation Brussels I. (Art. 4 of Regulation Brussels I.)

Both Regulations in question pay attention to the transparent method of service of documents. If the European order for payment or claim form in small claims procedure have been served by a method without proof of receipt by the defendant personally, both Regulations explicitly provide the possibility for the defendant to apply for a review of the judgments rendered in such proceedings. In case of European order for payment, this is possible even after the expiry of the time limit for lodging a statement of opposition to European order for payment. In case of small claims procedure, the provision of Art. 18 of Regulation on Small Claims Procedure raises question, whether the remedy stated in Art. 17 thereof shall be admissible for the parties only in cases where service has not been provided by a method with proof of receipt in situations described in Art. 18. From preparatory works leading to the adoption of Regulation on Small Claims Procedure it is obvious that such an interpretation shall not apply and the given provision shall provide the observance of certain minimum standards of serving documents. However, Member States will have to amend their national law accordingly.

## II.

The Regulation on Small Claims Procedure has also become the source of newly proposed legal regulation in the Slovak Republic – draft amendment of Slovak Code of Civil Procedure. Whereas Regulation on Small Claim Procedure applies to cases with cross-border implications, draft amendment of Slovak Code of Civil Procedure introduces also to Slovak procedural law (i.e. to strictly domestic cases) the concept of small claims, definition of which is not known today and it does not necessarily need to be the same as the definition provided by Regulation on Small Claims Procedure. The aim of this new institute in Slovak civil procedure is to strengthen the principle of promptitude and efficiency of the civil proceedings and to provide the prompt administration of justice and smooth enforcement of law. Nevertheless, this will happen to the detriment of principle of oral and immediate procedure. By the draft amendment, the rules similar to those stated in Regulation on Small Claims Procedure for cross-border cases are being introduced for domestic small claims procedure.

According to the draft amendment of the Slovak Code of Civil Procedure, in small claims procedure the appeal shall not be admissible. It is, indeed, questionable whether the total exclusion of an appeal in small claims procedure will not be contrary to the recommendation on minimum standards for review stated in Preamble to the Regulation on Small Claims Procedure, or to the right for effective remedy.

## Conclusion

Two recent European Regulations, Regulation on order for payment and Regulation on Small Claims procedure keep number of issues open. Eventually, the Regulations in question enable considerable divergence due to the discrepancies in national procedural orders. Moreover, the Regulations contain several provisions which may lead in the future to the breach of the equality or legal certainty of the parties of the given proceedings. Since today approximately half a year remain to the start of the application of Regulations, we will see how their application will look like in practice of particular Member States and how this application will be influenced by national procedural orders and *vice-versa*.

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# LEGAL ENVIRONMENT FOR INTERNATIONAL INVESTMENTS IN UZBEKISTAN

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## Key words

Uzbekistan, Central Asia, transitional economy, market economy, foreign investments, investment legislation

Uzbekistan and other Central Asian Countries sometimes seem to be forgotten by most European foreign investors when looking for a place to invest their capital. This is true even though the Central Asian republics are strategically located and land-locked between Europe and Asia<sup>1</sup>. The question arises if it is so because these territories are geographically quite far from Europe, because of a fear that Central Asia does not offer a secure environment for foreign investments or simply because of not having enough information about these countries, their investment legislation and their actual capability of enforcing such legislation. The purpose of this paper is to provide introductory information about the investment legislation of Uzbekistan, its implementation in practice and also to point out specific problems the foreign investors have to deal with once placing their investment in this country. The reader should receive a useful overview about the current situation and legal conditions for placing a foreign investment on the territory of the Republic of Uzbekistan.

The first part of my paper will briefly describe the country's location and history. Its purpose is to make sure that the reader is provided with at least a basic knowledge of the geographical location of Uzbekistan and its historical background because both of these are important for further elaboration on as well as for understanding the investment issues in this country. The second part will introduce some basic facts concerning the transfer of international capital and the main means of international investment protection. In the final two parts of my paper I will move onto discussing the current investment legislation and the problems connected with its application in practice.

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1 Dowling, M., Wignaraja, G., Central Asia After Fifteen Years of Transition: Growth, Regional Cooperation, and Policy Choices. Office of Regional Economic Integration, Asian Development Bank, 2006.

# LEGAL PERSONS IN PRIVATE INTERNATIONAL LAW AND RELATED CASE LAW OF THE EUROPEAN COURT OF JUSTICE

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## **Key words**

Freedom of establishment, case law, ECJ, corporate statute, company

## **National Framework**

EC law does not regulate the determination of the corporate (or personal) statute of legal persons as well as it does not determine the personal statute of a natural person. The member states are thus free to determine it under their own legal rules. In general, there are two main theories under which the corporate statute can be determined. Both theories are briefly described in the first part of the article.

## **Freedom of Establishment and Registered Seat of a Company**

Free movement of persons is one of the four fundamental freedoms guaranteed by the EC Treaty (hereinafter, ECT) and the freedom of establishment falls within its scope. Article 43 bans the member states from limiting the freedom of establishment, setting up an agency, branch or subsidiary of one member state in the territory of another member state. Freedom of establishment includes the right to set up businesses and especially companies. Articles 45 and 46 of the ECT set forth the allowed restrictions to the freedom on the grounds of exercise of official authority, public policy, public security or public health.

Article 48 of the ECT sets a basic framework for the companies to exercise their right. The Companies have to be formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community. The “enforcement” of those basic principles is demonstrated in the following conclusions based on the ECJ decisions in cases Daily Mail, Centros, Uberseering and Inspire Art.

1. The home country of a company is allowed to set forth the conditions under which a company may transfer its real seat abroad (restrictions upon exit).
2. The host country cannot refuse to register a branch of a validly constituted foreign company which is to be the real seat of that company (restrictions upon entry - secondary establishment).
3. The host country cannot limit the transfer into its territory of the real seat of a validly constituted foreign company (restrictions upon entry - primary establishment).

4. The host country cannot discriminate against a validly constituted foreign company registered in its territory by requiring it to comply with extra set of conditions as opposed to the domestic companies (discriminatory conditions upon entry).

### **Distinguishing the Cases**

It is possible to distinguish between the case law on freedom of establishment in general and special establishment cases related to tax problems. Similarly, ECJ differentiate between the home country and host country restrictions on freedom of establishment, and between natural and legal persons restrictions. Cases *Lasteyrie du Saillant* and *Marks and Spencer* are discussed in order to explain those differences. By holding in *Marks and Spencer* case, ECJ departed from the general freedom of establishment case line to a special tax related regime. This shift has been confirmed in other ECJ decisions later on. Consequently, it is possible to make difference between the national restrictions that are discriminatory, and restrictions which result from the mutual relations between the member states but which cannot be considered as limiting the freedom of establishment.

### **Transfer of Seat by Merging with Foreign Corporation**

According to ECJ cross-border mergers represent a special exercise of the freedom of establishment which has to be respected by the member states. Articles 45 and 46 may limit this freedom. Fraudulent transfer of seat could fall under the respective restrictions allowed by those articles.

### **Transfer of Registered Seat**

Transfer of registered seat under EC law is quite limited. Italian case is used to demonstrate the obstacles posed by national laws to the transfer of the registered seat. As the transfer or registered seat has not yet been clearly classified as falling under the freedom of establishment by the ECJ, it is then only possible to enforce it in the states which allow such a transfer.

### **Cartesio Case – Daily Mail Overruled?**

In the brand new opinion delivered by advocate general Maduro in *Cartesio* case, it is argued that a development in case law over the past decades have made it possible to depart from the original conclusions once made in *Daily Mail* case. Questions however remain even with the *Cartesio* opinion in hands. It is clear that a complete negation of the right to free establishment is not allowed. Even if confirmed by the ECJ, it is still unclear what the scope of restrictions allowed under articles 45 and 46 is. Is this the way where the case law is going in decisions on freedom of establishment as such like it is in the tax related matters? Having in mind the works on the 14<sup>th</sup> directive (transfer or registered seat) it is possible that the final situation will be quite similar to the relation the between *Sevic* decision and the 10<sup>th</sup> directive on cross-border mergers. *Cartesio* decision is being expected to have a huge impact on the national approaches to the incorporation or real seat theory.

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# ARBITRATION CLAUSE AS UNFAIR CONTRACT TERM: SOME OBSERVATIONS ON THE ECJ'S CLARO CASE

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## Key words

Consumer – Arbitration – Arbitral award- Unfair contract term – Arbitration clause – the Claro case – Directive on Unfair Contract Terms – protection of consumers - European public policy- Recognition and enforcement- Failure to raise the unfairness of a term in the course of arbitration proceedings

This paper address the problem of the annulment of an arbitration award by national courts on the grounds that the arbitration proceedings were based on arbitration clause as a unfair contract term under the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (hereinafter “Directive”).

The ECJ decided in the case *Claro v Móvil* (hereinafter “Claro”) that arbitration award may be annulled by national court if it is based on arbitration clause which turns out to be unfair contract term. Moreover, according to the ECJ, consumer has no duty to object unfairness of the arbitration clause in the course of arbitration proceedings. Therefore, the national court may find the term unfair thus void on its own motion. The reasoning behind this was that the arbitration award was at odds with mandatory provisions of the Directive on unfair terms in consumer contracts, which form part, in the view of the ECJ, of the so called European public policy.

Notwithstanding the different opinions on this case, the message from the ECJ is clear. The arbitration is a mean of settlement of disputes which is intended for the B2B disputes. On the contrary, the B2C disputes should be resolved in Alternative Disputes Resolution or before ordinary national courts.

Consequently, I offer some ideas on the potential impact of the *Claro* decision upon Czech legal order. Thus, particularly the existing legal frame for consumer disputes created by the Arbitration Act and Civil Code is analysed. The conclusion of the analysis is that article 33 of the Arbitration Act as well as article 55(2) of the Civil Code are at odds with the mandatory rule contained in the article 6(1) of the Directive, which stipulates that Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

The article 33 of the Arbitration Act determines that court shall refuse the claim which seeks to annul arbitration award based on nullity of arbitration clause, if the party seeking for annulment of arbitration award, did not object the nullity of arbitration clause in the course of arbitration proceedings, although she was able to do so. The requirement of objecting the nullity of the arbitration clause by the consumer only during the arbitration proceedings is, as expressed by the ECJ in the *Claro* case, contrary to the European public policy, i.e. mandatory provision of the Directive.

As for the situation in the Czech Republic, there are principally two ways, how may consumers defend themselves again arbitration clauses included in standard contract terms. First, unfortunately, the improper implementation of the Directive does not *per se* mean that Czech courts are obliged to annul arbitration award

if the consumer did not object the invalidity of arbitration clause in the course of arbitration proceedings. However, the Czech consumer against whom the arbitration award was issued may attack this decision before court on the grounds that the arbitration clause was unfair thus invalid. Consequently, the supplier or seller would object that the consumer did not plead the invalidity of the arbitration clause in the course of arbitration proceedings (under article 33 of the Arbitration Act). Then, the consumer might claim that in accordance with the ECJ's *Claro* decision court seized of an action for annulment of an arbitration award must determine whether the arbitration clause is void and annul that award when it is based on an unfair term, even if the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but solely in that of the action for annulment.

Although the Czech court has no duty to respect the ECJ's decision in the *Claro*, it is, at the very least, obliged to interpret the Czech law, therefore article 33 of the Arbitration Act, as far as possible in accordance with Community law, therefore the article 6(1) of the Directive and the *Claro* decision giving interpretation of the Directive.

The consumer may also ask the court to refer the similar preliminary question to the ECJ as was in the *Claro* case. Then, it is probable that the ECJ would consider the case similarly. In consequence, the national court will be bound by the answer of the ECJ. Yet, it is far from clear how court may give interpretation in conformity with Community law when the article 33 of the Arbitration Act is absolutely contradicted to it.

Finally, if the consumer lose the dispute, he may claim damages caused by the defective implementation of the Directive against the Czech Republic. This is perhaps the most probable outcome, although the way leading to the compensation by the Czech state would be thorny and exhausting.

However, there is another path, how the Czech consumers may fight against the using of unfair arbitration clauses by businessmen. My impression is that taking the consumer before a arbitrator due to arbitration clause which turns out to be invalid, thus illegal, amounts to a breach of right to a fair hearing. This right is guaranteed in the Czech Republic by the article 36 of the Bill of Fundamental Rights and Freedoms (hereinafter "Bill of Rights") which provides that *"anyone may claim her right before independent and impartial court and in defined situations before the other institutions."* This article should be read together with the article 38 of the Bill of Rights which stipulates that *"anyone may not be removed from her lawful judge. The competence of court and judge is provided by law."* Therefore, I am inclined to say that the bringing of a consumer before arbitrator due to arbitration clause which is invalid, provided that there was the ordinary court otherwise competent, in which the case might have been heard, means that the consumer was deprived of his right of fair hearing and right to lawful judge.

The most problematic provision in the Civil code concerning unfair contract terms is the article 55(2) of the Civil Code which provides that *"term in consumer contract is considered to be valid thus binding unless the consumer has objected its invalidity."* This conception of so called relative invalidity of unfair contract term has been based on fallacy that consumers are able to consider whether the contract term is advantageous or not. Hence, if the term is favourable to consumer, then he will not claim its invalidity. The good example to illustrate how illusory this conception is might be just an arbitration clause contained in standard business terms, whose far-reaching impact cannot be practically foreseen by consumer. Thus, since consumers have often only limited knowledge about their rights and the consequences of the contractual terms, the article 55(2) of the Civil Code cannot fulfil the requirement of art. 6(1) of the Directive that Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer. At the same time, the article 55(2) of the Civil Code is contrary to the line of the ECJ's cases in *Océano*, *Cofidis* and *Claro*, where the ECJ decided that the court should assess the unfairness thus invalidity of arbitration clause on its own motion

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# TOWARDS FRANCHISING IN INTERNATIONAL TRADE

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## Key words

Franchising, franchise, franchise agreement, competition, franchisor, franchisee, Pronuptia case

There are more definitions of franchising, but usually mean an arrangement whereby the proprietor of trade mark, trade name or other distinctive marketing presentation (the franchisor) grants to one or more parties (the franchisees) a license to use that trade mark, trade name or presentation in the supply of goods or services and to arrange their premises in accordance with the distinctive layout or format associated with the franchisor.<sup>1</sup> The franchisee keeps independency, all risks in trade, including financial risks and shall pay fees to a franchisor (calculated per amount, time, consumption, franchisor's expenses on marketing etc.).

The typical example of franchising company is McDonald's. As everyone knows, there are independent entrepreneurs running their canteens, but they fall under scope of uniformity, regionally same or similar products, same level of services and quality. For "outsider" all the canteens look similar or same.

We may distinguish more types of franchising than the mentioned one:

- Distribution Franchise – the franchisee sells specified goods,
- Service Franchise – the services are offered, typically restaurants and hotels,
- Manufacturing Franchises – the recipient of the franchisee is a producer of some product, example is Coca-cola.

Competition problems may arise partly from production restrictions or partly from distribution restrictions. A condition for exemption is the preservation of freedom with respect to prices and parallel supplies within the franchise system.<sup>2</sup>

There is number of clauses, which are considered as a partial or total distortion of competition. Following clauses may be considered as restrictive:

From territorial point of view: Not to sell contract goods to somebody, who would resell it in the located area (obligation for both franchisor and franchisee); not to sell contract goods to dealers outside the franchising framework; not to set up new franchisee in located area; not to change the location of shops. Price issues: Sell at (minimum) prices laid down by franchisor. Direct competition: Not to sell competing goods (or in certain extend); not to work in competing business during or after end of franchising agreement.

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<sup>1</sup> Roth, P.M., Bellamy, Ch., Child, G., European Community Law of Competition, London : Sweet and Maxwell, 2001. ISBN 0421564407, p. 503

<sup>2</sup> Ritter, L., Braun, W. D., Rawlinson, F., EC Competition Law, Kluwer Law International : Cambridge, 2000. ISBN 9041112677, chapter IV

The case *Pronuptia de Paris*<sup>3</sup> showed that European Court of Justice took a relatively positive attitude to franchising. In this case, Mrs. Schillgalis concluded a franchising agreement under the trade mark *Pronuptia de Paris* to sell wedding dresses.

There are always reciprocal benefits between franchisor and franchisee as well as both sides stipulations, which protect each other interest. The franchisor may extend his/her own business without running many outlets, which is very demanding on capital. The franchisee may start up business easily with no former experience, but with proved methods and know-how granted from franchisor. They both are likely to conclude an agreement with strong provisions restricting the competition. The *Pronuptia* case stated also for future, that provisions which establish the means of control necessary for the purpose of franchise network do not constitute restrictions on competition for the purpose of Article 81.

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<sup>3</sup> Case 161/84, *Pronuptia de Paris GmbH v. Irmgard Schillgalis* [1986] ECR 353.

# PERSPECTIVE OF UNIFICATION OF OBLIGATION LAW IN ASPECT OF IMPOSSIBILITY OF PERFORMANCE

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## **Key words**

Private law unification, obligations, impossibility, performance, Lando Commission, UNIDROIT, international private law, codification, Roman law, pandectists, civil code

The differences that occurred between legal systems constituted a brake in the development of the international trade, therefore, since the end of the 19th century there has been a tendency to unify legal systems, which is called the unification of law. The unification of law has changed the perception of the international private law and to a certain extent increased the role of this domain of the law.

There is a number of reasons that make the unification of law an extremely difficult process. It has to be taken into consideration that it may have the scope limited only to a few countries. Exceptionally it embodies certain fields of the law, predominantly the unification of law concerns exclusively civil law privity with an international element.

The most ambitious undertaking that appeared during last decades in the area of law unification, was an attempt to unify the obligation law. The task of unification of the obligation law is very difficult, especially by means of its social significance and basic differences between different legal systems.

First works on unification of contract law were done before the outbreak of the Second World War, but most important works on unification of contract law like the United Nations Convention On Contracts For The International Sale Of Goods, (CISG) were done in the post-war period. Another significant event for the matter in question, publication of a draft of UNIDROIT Principles of International Commercial Contracts, (UPICC) and publication of the Principles of European Contract Law (PECL) prepared by the Lando Commission. Both projects of the obligation law unification display similarities. They cannot be considered a source of a law in force but they obviously constitute a recapitulation of the current practice in the realm of the international conventional obligations, being at the same time a form of a model legislation for a national legislators.

Most of the institutions which appear in the projects is reflected in current law orders, they were developed as a result of a law-comparative or historical analysis. However some of regulations in both projects was readapted in a manner often revolutionary strayed away from their traditional formulation. To the legal institutions which as a result of the unification work gained a brand new shape, belongs mainly the institution of impossibility of performance. Therefore, this institution has to be particularly examined because this specific example may perfectly show the advantages and disadvantages of the unification of private law process.

The institution of impossibility of performance is known from Roman law, but its modern shape was eventually created in XIXth century Germany. The impossibility of performance is in most of legal systems divided into

initial and subsequent. It means, that the legal result of impossibility of performance depends on if it occurred before or after formation of contract. Initial impossibility leads to the contract is null and void, while subsequent impossibility may lead to debtor's liability.

The project of unified obligation law proposed by UNIDROIT and the Lando Commission is totally opposite to a traditional model. The initial impossibility has no influence on contract validity. As a result a traditional division into initial and subsequent impossibility does not longer exist in those projects. In case of initial impossibility a contract stays valid and it may be a debtors civil liability.

The only country, which decided to introduce the solutions proposed by UNIDROIT and the Lando Commission into its own legal system was Germany. German legislator claim, that the provision of projects of UNIDROIT and the Lando Commission related to the impossibility of performance are concentrated on solving practical problems and more flexible than solution proposed by the Pandectists. Other countries are rather reluctant to introduce the new shape of impossibility of performance into their legal systems. This may be a result of the fact, that states would rather preserve their original legal ideas, which were under the influence of tradition, history and the civil law development level.

That is why unification should be subsidiary, which means it should be conducted only in those areas of law, where it is truly necessary in order to provide efficiency of international economics.

We should also consider if the existing particularism of legal systems is an advantage. The pluralism of private law allows the countries to compete with each other in enforcing of solutions good for entrepreneurs, what is expected by them. But the pluralism of laws will be advantageous only when there will be clear rules of choice of law for the parties.

Historical experience of many countries, which had problems with particularism of law on its territory shows, that unification of private law should be done in few step. First off all the rules of conflict of laws should be unified. The next step after collision norms unification may be a unification of obligation law.

To sum up, the process of obligation law unification is one of the most important processes in modern world, however it still seems to be *in statu nascendi*. Enforcing of the institutions which are totally unknown to the internal legal systems and sometimes which are incompatible to internal legal systems seems to be a step in bad direction. That is why, the best way of unification of private law is to unify provisions of international private law. This would connect advantages of unification with positive sides of existing legal pluralism.

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# WTO NON-VIOLATION COMPLAINT: A MISUNDERSTOOD REMEDY OF THE DISPUTE SETTLEMENT SYSTEM?

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## Key words

World Trade Organization, Non – violation complaint, Dispute Settlement Understanding, legal remedy, Violation complaint, WTO dispute settlement system, International trade law, The Appellate Body, Panel

The dispute settlement system of World Trade Organization is supposed to be unique one. The up to date shape and structure of the procedure is a child of Uruguay Round but the roots of this system were already in 1947 when was created GATT. The system of dispute settlement was contained only into two GATT provisions, namely article XXII and XXIII. The number of GATT contracting parties and latter WTO members has during the time rapidly increased from 23 contracting parties which signed GATT 1947 to 153 members of World Trade Organization nowadays. That two GATT provisions about dispute settlement were not enough to regulate disputes between so many members. The improvement of the dispute settlement was on the agenda of the Uruguay Round negotiations and this situation gave born to the new Understanding on Rules and Procedures Governing the Settlement of Disputes providing more precise rules and guidance of dispute settlements.

WTO dispute settlement system contains three different types of complaints, which can be found in article XXIII. The most common complaint is the so-called violation complaint. To use this kind of complaint requires nullification or impairment of benefit as a result of the failure of another member to carry out its obligation under GATT 1994 or that the situation when the attainment of any objective of GATT 1994 is being impeded. The second type is non-violation complaint which may be used to challenge any measure applied by another member, even if it does not conflict with the GATT 1994 provisions. There also needs to be nullification or impairment of some benefit. The third type is situation complaint which cover any situation whatsoever as long as it results in nullification or impairment. This complaint is not almost used and it was never issued any panel report regarding this complaint. In summary, it can be said that there are two types of complaints which play a practical role in the WTO dispute settlement process, namely violation complaint and far less frequently used non-violation complaint.

This article is concerned in non-violation complaint. In the history there was a handful of this type of complaint. All together was recorded 14 non-violation complaints and 6 of them were successful. It would be wrong to believe that the non-violation complaint has a wide scope of use and is suitable to address all sorts of measures otherwise consistent with GATT 1994 and the covered agreements. Panels and the Appellate Body have mostly stated that non-violation complaint should be approached with caution and should remain an exceptional remedy. The most famous cases which have influenced the up to date image of non-violation complaint were for example EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins, Japan – Measures Affecting Consumer Photographic Film and Paper, EC – Measures Affecting Asbestos and Asbestos-Containing Products.

Aside from GATT 1994 is non-violation complaint regulated also in GATS and its article XXIII named "*Dispute Settlement and Enforcement*" is the one, which deals with the issue of non-violation complaint in its subparagraph 3. The other source of non-violation complaint we can find in Agreement on Trade-Related Aspects of Intellectual Property Rights and its article 64 named "*Dispute Settlement*". Subparagraph 2 of this article deals with five years moratorium for non-violation and situation complaints. During this period the TRIPS Council was supposed to agree the scope and modality for above mentioned complaints<sup>1</sup>. The deadline already passed in 2000 and any goal was not so far reached yet. Similar to TRIPS also Agreement on Agriculture contains in Article 13 named "*Due Restraint*" a provision about moratorium in its subparagraph (a) (iii). This provision is not in force anymore. The last legal source, which should be mentioned here is Understanding on Rules and Procedures Governing the Settlement of Disputes. In this legal source we can find the issue of non-violation complaint in Article 26. Here is written, that where the provisions of paragraph 1 (b) of Article XXIII of GATT 1994 are applicable to a covered agreements.

The core idea of non-violation complaint is to improve competitive opportunities that can be legitimately expected from a tariff concession and to encourage contracting parties to make tariff concessions. The non-violation clause is used to obtain the fairness of the dispute settlement system. The opinions about this remedy differ a lot some people consider it as a legal fantasy and useless and dangerous construction that should have never been included in WTO law, other point to non-violation complaint as keystone element of the WTO dispute settlement system. The international trade agreements were ahead of their time when they contained the concept of non-violation complaint as a protection of legitimate expectations, but today, is however, the concept of non-violation complaint paradoxically behind modern international law.

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<sup>1</sup> Evans, E.G. A Preliminary Excursion into TRIPS and Non-Violation Complaints, vol. 3, nr. 6, 2000, str. 875.

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#### **Key words**

Arbitration, arbitration public bid, domain name disputes

#### **Arbitration and domain names**

Arbitration, as an alternative to the judicial proceeding, is still more used way of dispute resolution in the Czech Republic although the number of disputes solved via arbitration is much more less than those that are litigated at courts. Nevertheless, it is true that there are some types of disputes for which the arbitration is more suitable solution than a court proceeding. One of these areas is the issue of domain names disputes. The most important reason is simple – domain name disputes are very specific. They must be decided in very short time interval of weeks or months. The litigants (especially if the adverse party is a domain speculator) can hardly wait years for the final court decision. And the arbitration is undoubtedly faster than civil court proceeding.

It is understandable that there are attempts to implement arbitration process into domain disputes from the side of the association CZ.NIC, z. s. p. o. (hereinafter CZ.NIC). The association CZ.NIC has chosen a specific approach to implement the arbitration into domain name disputes. It has created a new legal institute called “Arbitration public bid”. This tries to regulate solving possible disputes between the Holder of a domain name and the third party.

This article will deal especially with this new institute and will explain its sense and impact on the parties of future domain disputes.

#### **Arbitration public bid**

The Arbitration public bid is defined in the ADR Rules (they create integral part of contracts between the Registrars and domain name Holders): The Holder hereby irrevocably and publicly pledges to comply with the decisions of the Arbitration Court at the Chamber of Economy of the Czech Republic and the Chamber of Agriculture of the Czech Republic (hereinafter the “Arbitration Court” only) [...] with respect to property disputes in which a compromise can be achieved and in which a third person challenges any Holder's Domain Name, included in the electronic database of domain names under the national domain ccTLD .cz, administered by the CZ.NIC Association; provided that the third person expresses its will to the Holder to pledge to the decision of this Arbitration Court in the given issue, particularly by initiating such proceedings at the Arbitration Court in writing [...]. This is all we can find about Arbitration public bid in all the Rules published by the association. Very important is that there is no penalty settled here for the breach of this provision in the whole contract.

#### **Interpretation**

Prima facie, it seems, that the Holder of a domain name covenants in the contract with the Registrar, that if there appears any third person, who wants to solve the dispute about the domain name via arbitration, the

Holder has no chance to refuse the arbitration, because of the obligation from the Arbitration public bid. It seems that the Arbitration public bid means that the Holder of a domain name is legally bound to conduct arbitration about the domain disputes every time, when some third person calls upon him to start arbitration. But in fact the meaning of the Arbitration public bid is rather different.

The contract about the domain name establishes the legal relationship between Holder and Registrar. It is natural, that there is an enforceable liability for the breach of the contractual obligations between the parties. The contract can't establish the obligations for the third parties and it can't substitute the declaration of will between the one of the contractual party and the third party.

The arbitration agreement is an agreement between the parties that the disputes from their legal relationship between them will settle one or more arbitrators (§ 2 of the Czech arbitration law). The Czech law does not allow entering into an arbitration agreement via "public proclamation" containing an obligation that all the disputes between the one who declares an Arbitration public bid and any other subject will be settled via arbitration. The arbitration agreement is not made even at the moment of service of an action to the arbitration court. The obligation to accede to arbitration is claimable only by the party of a contract, where the Arbitration public bid was incorporated but not by any third subject. This means that when anybody wants to settle the disputes related to the domain name between him and the Holder of a domain name via arbitration, he will have to enter into an arbitration agreement with the Holder irrespective of the existence of any public proclamation. If the Holder refuses to conclude an arbitration agreement to settle the dispute via arbitration, there is no other possibility to solve the dispute than to bring the action before a court.

The only way how to secure the performance of this obligation is to settle some kind of easily enforceable penalty for its breach. In that case the Holder of a domain name should choose what will cause less troublesome consequences, if breach of the contract or its completion. To settle the contractual penalty in a reasonable motivating rate it seems to be the most suitable solution of this situation.

## **Conclusion**

The idea and the sense of creating Arbitration public bid are clear. The association CZ.NIC wanted to implement arbitration as an essential way of disputes resolution. But the practical realisation of this "arbitration implementation" is not planned well to reach the presumed result. This means that the Arbitration public bid in fact does not influence the way of solving domain disputes – although if the Third party brings an action against the Holder at arbitrator, the arbitration agreement will not be created by delivering this action and the domain name dispute will not be settled via arbitration only because of the Arbitration public bid and the action. The conclusions of the article show this principle can't work and explain that Arbitration public bid has no real effect on the rights and obligations between of the Holder, the third party and their domain dispute.

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# SANCTIONS POLICY OF THE EUROPEAN UNION

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## Key words

European Union, sanctions, human rights

Nowadays the European Union (EU) uses sanctions as a tool of its common trade policy (usually as an exception from the rules of the single market) and as a tool of its Common foreign and security policy (CFSP). Both alternatives prove an advanced stage of the European integration process, as the application of sanctions is usually connected with the so-called hard powers rather than soft powers.

## The Development of EU Sanctions Policy

The sanctions policy is present in the European Union since the Communities have been set up. By 1970s the organization had applied only measures authorized by the United Nations Security Council. Procedures for realizing autonomous restrictive measures appeared hand in hand with the European political cooperation in 1970. In fact, the autonomous sanctions were applied for the first time in 1981 (against the Soviet Union, in reaction to the events in Poland). After the Single European Act had been adopted in 1987, the Commission became responsible for sanctions policy and the use of restrictive measures grew up (especially the arms embargoes were used).

Next development of EU sanctions policy was enabled after the Maastricht Treaty, which entered into force in 1993. As a part of CFSP, the sanctions policy was included in the second pillar and particular measures were authorized in the form of a Common position, adopted unanimously by the Council. On the other hand, EU uses sanctions also outside the CFSP frame; such measures are covered by the first pillar and realized through Council regulations. In 2004, a special group RELEX/Sanctions was established by the Council for the member states to exchange information and experience relating to the application of sanctions and to evaluate the results and difficulties encountered in implementing sanctions.

EU applies restrictive measures on states, non-state actors and individuals. In accordance with general trends in international sanctions, EU uses smart sanctions in principle: assets freezing, arms embargoes, trade sanctions. Diplomatic measures (severance of diplomatic relations, expelling of diplomatic staff) are imposed rarely. The application of diplomatic sanctions is quite smart on one side, but on the other side their efficiency and importance is disputable. Very often we can meet travel restrictions (restrictions on admission). Their legal basis lays in a combination of regulation (listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement) and a Common position (listing persons who are not eligible to obtain the visa).

## **Human rights as a sanctions policy target**

The protection of human rights is broadly supported not only in relations among member states but also in their common foreign policy. Violation of human rights in third countries may lead to imposition of European sanctions. By choosing suitable restrictive measures, we should take into account the fact that human rights violations appear very often in the Third World countries. These countries obtain usually financial support or other development aid from the EU. The suspension of financial or material aid may serve as effective restrictive instrument in these cases. Concurrently, other forms of sanctions - arms embargoes, trade sanctions (e.g. oil embargo), assets freezing, restrictions on admission and suspension of military cooperation – are applied.

Although the human rights support represents a frequent target of restrictive measures and the range of used instruments is quite wide, the Union is facing objections over inconsistency of sanctions. In 1992 the Community did not apply sanctions against Algeria after the elections had been cancelled. Restrictions on admission and suspension of military cooperation were authorized against Nigeria in 1993, but the expected arms embargo was not included. Long-lasting disobeying of human rights standards in China is another proof of immaturity of EU sanctions policy in human rights protection.

## **Conclusions**

Sanction policy as an autonomous tool of the Common Foreign and Security Policy has been established since the 1990s and it includes a variety of tools at present. Economic sanctions serve primarily as an alternative of military intervention and at the same time as a response to pressures on incorporating ethical elements into foreign policy. They are frequently used to keep or restore peace and to influence human rights record of sanctioned subjects. Predominantly they are applied as smart measures allowing to avoid for example negative impact on civilians.

Since the beginning of 1990s autonomous application of sanction instruments has been contributing to the establishment of EU as an important security actor not only in the European region but also at a global level. Simultaneously it indicates the shift from the use of the so-called soft powers to hard powers connected with the effort to build and secure its position as one of the key members of the contemporary international system.

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# CONFLICT RULES FOR DELICTS AND QUASI-DELICTS<sup>1</sup>

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## Key words

Conflict rule, delict, tort, non-contractual obligation, private international law, Rome II, choice of law, unfair competition, product liability, unfair competition and acts restricting free competition, environmental damage, infringement of intellectual property rights, industrial action, defamation, unjust enrichment, *negotiorum gestio*, *culpa in contrahendo*

Czech private international law which has been until recently envisaged as exclusively national discipline only with higher number of international sources of law has been coming through fundamental changes connected with entering EC during the last decade. The scope of this contribution is not to analyze the course of events on the field of PIL in general but to concentrate on one of the last PIL communitarian regulations – n. 864/2007 on the law applicable to non-contractual obligation (ROME II). We will refer to unsuitability of present Czech national legal regulation and on the hierarchy of the conflict rules set in innovative Regulation Rome II we will document how a huge shift the regulation will mean for the practise of Czech courts.

First of all we would like to outline very briefly what we think of delict. It would be more accurate to use the term non-contractual obligation which is used in the regulation Rome II. Non-contractual obligation rises not from the contract but from the breach of a duty defined by the objective law while there is no legal but only factually relationship between the parties. Usually two divisions of non-contractual obligation are distinguished. The first one where the irregularity (wrongfulness) constitutes the essential presumption of existence (unfair competition, defamation) and the second group where contrariwise the irregularity (wrongfulness) is absent.

In the present Czech law there is only one legal provision dealing with non-contractual obligation – section 15 of PIL Act. This provision concerns not the delicts/torts as such but only their effect – with the liability for damage. It is found insufficient while it doesn't cover delicts as such and also doesn't cover all possible effect only the liability for damage. On the other hand there are delicts where the existence of damage is not the essential presumption such as the unfair competition where the menace of damage is fully sufficient. Entirely improper the rule is for other non-contractual obligations than delicts such as *negotiorum gestio*, unjust enrichment or pre-contractual liability. The creation of the conflict of law rules has stayed on the Czech doctrine of PIL and on the practise of courts.

The hierarchy of conflict rules in Rome II is more sophisticated. Rome II follows out the trends of the last decades in PIL and puts stress on the principle of autonomy and introduces to the Czech legal system

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connecting factor for delicts which was unknown – *lex electa* (art. 14). Even though this possibility is substantially limited it stands for a huge innovation. Law elected by the parties represents the primary rule which can be used for both delicts and quasi-delicts. Choice can be performed both *ex ante* and *ex post* in relation to the wrongdoing with the condition that *ex ante* can be performed only between professionals.

Choice of law is succeeded by the general conflict rule which is choosing between *lex loci delicti commisi* and *lex loci damni infecti* for the benefit of *lex loci damni infecti*. It is again the illustration of accent of modern trends in PIL when the scope has shifted from choosing of law optimal for sanction of the malefactor to the law optimal for indemnity of sufferer. The general rule shall be used for all torts/delicts with exclusion of those for which the special rules have been formulated – product liability, unfair competition and acts restricting free competition, environmental damage, infringement of intellectual property rights and industrial action.

The Regulation continues with conflict rules for 3 particular delicts – for unjust enrichment, *negotiorum gestio* and *cupla in contrahendo*

Contemporary Czech conflict rule regulation for delicts and quasi-delicts could be hardly described as sufficient or suitable. Soon it will be replaced by the new, modern legal regulation – Rome II which will constitute a sizable drift. We suppose this drift will lead to the easier application of law and higher certainty of parties concerned.

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# LOOKING FOR THE LAW APPLICABLE TO NON CONTRACTUAL OBLIGATIONS IN THE REGULATION ROME II

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## Key words

Rome II, european private law, *lex loci delicti commissi*, *lex loci damni*

Treaty establishing the European Economic Community didn't empower the European Economic Community in competencies to establish private law. Taking the foregoing into account the members of the EEC could cooperate in civil matters only by the way of international conventions. But it was Treaty on European Union from Maastricht which placed the cooperation in civil matters in the so called Third Pillar of the EU. Unfortunately the basic tool of cooperation in the Third Pillar was still the international convention.

In October 1994 the European Council announced the plan which aim was to establish european regulation concerning the law applicable to non-contractual obligations. On the other hand the European Commission introduced the other project prepared by the European Private International Law Group (GEDIP) in the frames of the project Grotius.

The process of projects' preparings showed all the weaknesses of the solution adopted in the Treaty on European Union. The basic tool of cooperation remained the international convention what made it ineffective. The text of such a convention usually wasn't ratified by the all Member States and the whole project collapsed. The second problem was too limited participation of the european institutions. They could only initiate the negotiations and consult the problems but they couldn't lead the official works as they didn't have proper competencies.

Everything changed when the Treaty of Amsterdam came into force in May 1999. The new Title IV transferred the cooperation in civil matters from the Third Pillar to the First one. Thanks to the solutions of the Treaty of Amsterdam the Member States could use the regulation as a mean of unifying of the international private law. According to the Article 249 of the TEU a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. In this way all Member States are forced to apply solutions adopted by regulations. In May of 2002 the European Commission introduced the preliminary draft of regulation on law applicable on non-contractual obligations. It was officially published on the 11th July 2007

The Commission sees Rome II as the next step in the harmonisation of private international law in relation to civil and commercial obligations. The objective of Rome II is to ensure that courts in each of the Member States apply the same choice of law rules to disputes involving non-contractual obligations, thereby increasing legal certainty and facilitating mutual recognition of judgments across the Union. The Commission also contends that the Regulation would facilitate the enforcement of judgments across the Union. Facilitation of the mutual recognition of judgments requires a degree of mutual trust between Member States which is not conceivable if their courts do not apply the same conflict of laws rule in the same situation.

The Commission contends that the application of differing conflict rules by courts in different Member States could provoke a distortion of competition, and such a distortion could encourage forum-shopping. For exactly the same kind of companies which are involved in the same kind of business and sharing the same risks they could at the end of the day, in the same kind of torts, have completely different laws being applied to them just because of the different courts being seised and each court applying a different connecting rule and a different substantive law".

General rule of the non-contractual liability is expressed in Article 4. Paragraph 1 of this article states that unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. But Regulation provides for not only a general rule but also for specific rules and, in certain provisions, for an "escape clause" which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner

In the preamble it is provided that the principle of the *lex loci delicti commissi* is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries varies. This situation engenders uncertainty as to the law applicable. Theoretically, a number of criteria, usually grouped together without distinction under the catch-all heading *lex loci delicti (commissi)* could be applied here, i.e. the law of the place where the event occurs, that of the place where the damage arises, that of the place in which the indirect consequences of the event arise or that of the place of habitual residence of the injured party. All these criteria have a basis in tradition and strong arguments in their favour. All are in fact used in various current systems of conflict rules.

The regulation introduces *lex loci damni*. A connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability. The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.

To sum up the general rule in this Regulation should be the *lex loci damni* provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.

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# SELLER'S LIABILITY FOR COMPLIANCE OF THE GOODS WITH PUBLIC LAW STANDARDS - IN THE LIGHT OF CISG CASE LAW

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## Key words

International sale of goods, CISG, breach of contract, non-conforming goods, public law standards

Probably any kind of goods which may be supplied under a sales contract is subject to some standard imposed by public law. These "public law standards" include, for example, product safety regulations, sanitation and health standards applicable to foodstuffs, rules of packaging and technical norms. In the area of cross-border trade an important question arises which of the different national sets of public law standards apply to the goods exported from one country to another. Does the seller have to comply with the requirements to be observed in the buyer's place of business or in the place where the goods are eventually exported? Or is his obligation to deliver conforming goods fulfilled when the merchandise is perfect according to the rules effective in the seller's own country? The wording of the UN Convention on Contracts for the International Sale of Goods (hereinafter the "CISG"), more specifically Art. 35 CISG, does not provide definite solution. The present paper, therefore, addresses the above problem from the point of view of case law, as required by the principle of uniform application of the CISG set down in Art. 7(1) thereof.

Firstly, the case law confirms that the best way how to avoid disputes over quality of the goods is to stipulate all their characteristics, including applicable standards, directly in the sales contract. For instance, a German court held that a consignment of paprika which contained an amount of ethylene oxide exceeding the limit permitted under the German Food Safety Law did not conform with the contract because the parties were in general agreement that the ordered goods had to be fit to be sold under the said Laws. Similar decision was rendered by a court in the Chinese province of Shandong.

The question, which public law standards apply when there is no agreement, was first dealt with by the German Supreme Court in so called „mussels case“. The court referred to an extensive list of literature alleging that the compliance with specialized public law provisions of the buyer's country or the country of use of the goods cannot be expected. Certain standards in the buyer's country can only be taken into account (i) if they exist in the seller's country as well, (ii) the buyer has pointed them out to the seller, or (iii) if the relevant provisions in the anticipated export country are known or should be known to the seller due to the particular circumstances of the case (because, for instance, the seller has a branch in that country, he has already had a business connection with the buyer for some time, he often exports into the buyer's country or because he has promoted his products in that country). Several other courts later arrived at similar conclusion as in the "mussels case". A Dutch court found unjustified the buyer's expectation that the seller would abide by industrial standards applicable in the buyer's country (as those standards were not explicitly discussed). The Austrian Supreme Court held that the seller cannot be expected to know all special rules of the buyer's country or the country of usage. It is rather for the buyer to observe his country's public law provisions and specify these requirements in the sales contract. The "mussels case" was explicitly referred to in a judgment of a U.S. federal court. The court ruled that the case fit one of the exceptions articulated in the "mussels case" (see

letters (i) to (iii) above) rather than the basic rule, specifically because the seller knew or should have known about the safety standards of the importing country (which he violated) due to “special circumstances”.

On the other hand, there have been also decisions which applied the regulations of the buyer’s state as a matter of course. According to the opinion of a French court, the knowledge of the seller that the ordered cheese would be marketed in France imposed a duty on him to deliver the goods wrapped in the manner required by French law. Also the latest decision concerning the issue of public law standards seems to point this way. In the case of delivery of frozen pork meat suspect of contamination by dioxin and consequently seized by authorities the German Supreme Court first reiterated that the seller could not be generally expected to know the relevant provisions in the buyer’s country or in the country of the ultimate consumer. Despite this, the court held that the goods did not conform to the contract on the grounds that the suspicion of dioxin contamination constituted a hidden defect which had a bearing on the resaleability and tradability of the goods. Put differently, the court considered actual merchantability of the goods to be important for the conformity of the goods with the contract rather than the fact whether the public law standards were observed.

To sum up, two different approaches can be identified in the case law. Prevailing part of decisions apply the rule that the public law standards effective in the *seller’s country* control the quality of the goods. The regulations in force in the buyer’s place of business or in the country where the goods are eventually consumed or utilized are to be respected only in exceptional circumstances when the seller’s knowledge of such regulations can be presumed. However, other rulings prefer the “merchantability” approach which results in considering the infringement of the public law standards of the *destination country* as a breach of contract. The above majority opinion is criticised also in part of literature. We believe that one universally applicable formula does not exist. The right solution, in our opinion, lies in an ad hoc approach taking into account the particular circumstances of each case. Thus, the liability for compliance of the goods with detailed (e.g., technical or health) standards in the destination place should not be transferred to the seller when the buyer failed to specify respective qualities of the goods in his purchase order or during negotiation. On the other hand, the seller should not be allowed to rely on his country’s rules when it should be clear to him, on the basis of his professional experience or plain common sense, that the regulations in the buyer’s country, or in the place where the goods are exported, are different (e.g., export of foodstuffs containing pork or beef to countries in which consumption of such meat is prohibited due to religious reasons). We would therefore recommend (also in view of the principle of uniform application of the CISG) to follow the rules formulated in the “mussels case”, provided that the exceptions set down in this case are construed in a sufficiently extensive way. Still, the most secure way for the parties how to avoid potential disputes is to specify the qualities of the goods and applicable public law standards directly in the contract.

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## EUROPEAN LAW SECTION

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#### Key words

Legal convergence criterion, the independence of national central banks, legal integration of NCB's into the Eurosystem

The “Maastricht” criteria are to ensure the convergence of economic performance as a basis for the introduction of the single currency. There are five conditions, grouped in two classes: the economic convergence criteria and the “legal convergence” criterion. The last criterion is the one of the most forgotten in discussions of the “Maastricht criteria”. Article 122(2) of the EC Treaty requires the European Central Bank (ECB) and the Commission to report, at least once every two years or at the request of a Member State with a derogation, to EU Council in accordance with the procedure laid down in Article 121(1). Each such report must include an examination of the compatibility between, on the one hand, the national legislation of each Member State with a derogation, including the statutes of its national central bank (NCB), and, on the other hand, Articles 108 and 109 of the Treaty and the Statute of the European System of Central Banks and of the European Central Bank. This Treaty obligation applying to Member States with a derogation is also referred to as “legal convergence”.

Article 109 of the Treaty requires that national legislation is “compatible” with the Treaty and the Statute; any incompatibility must therefore be removed. Neither the supremacy of the Treaty and the Statute over national legislation, nor the nature of the incompatibility, affects the need to comply with this obligation. The requirement for national legislation to be “compatible” does not mean that the Treaty requires “harmonization” of the NCB statutes, either with each other or with the Statute. National particularities may continue to exist to the extent that they do not infringe the Community's exclusive competence in monetary matters. Rather, the term “compatible” indicates that national legislation and the NCB statutes need to be adjusted to eliminate inconsistencies with the Treaty and the Statute and ensure the necessary degree of integration of the NCBs into the ESCB. According to the practice of the ECB the legal convergence means: the independence of national central banks; prohibition on monetary financing and privileged access; the single spelling of the euro; and legal integration of NCB's into the Eurosystem.

The areas of the independence of national central banks are the following:

- Functional independence
- Institutional independence: prohibition on giving instructions; prohibition on approving, suspending, annulling or deferring decisions; prohibition on censoring decisions on legal grounds; prohibition on participating in decision-making bodies of an NCB with a right to vote; prohibition on ex ante consultation relating to an NCB's decisions.
- Personal independence: minimum terms of office for Governors; grounds for dismissal of Governor; security of tenure and grounds for dismissal of members of NCBs' decision-making bodies, other than Governors, who are involved in the performance of ESCB-related tasks; right of judicial review; safeguards against conflict of interest.

- Financial independence: determination of budget and the accounting rules.

Legal integration of NCB's into the Eurosystem means that provisions in national legislation which would prevent the performance of Eurosystem-related tasks or compliance with ECB decisions are incompatible with the effective operation of the Eurosystem once the Member State concerned has adopted the euro. Statutory requirements relating to the full legal integration of an NCB into the Eurosystem need only enter into force at the moment that full integration becomes effective, i.e. the date on which the Member State with a derogation adopts the euro.

This paper takes a closer look at the areas of legal convergence criterion and the Czech Republic, especially the independence of national central banks and legal integration of NCB's into the Eurosystem. It can be ascertained that the Czech Republic meets the legal convergence criterion. The Act on the Czech National Bank is essentially harmonised with community law. Therefore gaps occur on the one hand with regard to the accession to the third phase of the EMU and on the other hand in connection with the personal independence, especially the grounds for dismissal of Governor.

**Reviewer:** JUDIT FAZEKAS

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# REMEDIES OF UNION CITIZENS VIS-À-VIS DISCRIMINATION

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## Key words

Citizenship of the European Union – Article 17 EC – Prohibition of discrimination on the base of nationality – Court of Justice – Preliminary ruling – Article 234 EC – Action for annulment– Locus standi – Article 230 EC – Action against a Member State – Articles 226, 227 and 228 EC – Complaint to the European Ombudsman – Maladministration – Right to petition to the European Parliament – Lisbon Treaty

Prohibition of discrimination on the base of nationality is at the core of the dispositions governing Union citizenship: a citizen of the European Union who resides lawfully in the territory of an other Member State can rely on prohibition of discrimination in all situations that fall within the scope *ratione materiae* of Community law. I state in my paper that there are at least three remedies of Union citizens to combat against discrimination on the base of nationality. I give a comparative presentation of these instruments.

First of all, Union citizens can bring an action directly or indirectly before the Court of Justice against dispositions of Community and national law. I argue for that it is more useful for an individual to bring a proceeding before a national court, and to ask the national judge to suspend the proceeding and to refer questions to the Court of Justice on the interpretation or on the validity of Community law than to bring an action for annulment or an action for damages. Although the parties in the national proceeding cannot enforce the preliminary ruling, since, according to fourth paragraph of Article 234 EC, it is only a court or tribunal adjudicating at last instance is under the obligation to bring the matter before the Court of Justice, an individual has a minimum protection in a case if he or she cannot enforce preliminary ruling in the final national proceeding and thus the decision of the national court causes damage to individuals of the Member States by the serious and manifest breach of Community law.

A non-judicial tool for Union citizens is to submit a complaint to the European Ombudsman. Comparing to the action to the Court of Justice or to a national court or tribunal, it is an alternative way of solution of a debate and complements the Union and Member State courts and the parliamentary petitions committees. The power of the Ombudsman is wider than solely discrimination cases; it investigates cases of maladministration in the activities of the Community institutions and bodies.

Ombudsman proceedings are flexible, swift and no cost for the parties. They may in some instances be quasi-judicial by the review of legality both in substance and procedure, but generally they display typical features of mediation: win-win types of solution, consensual settlement, broader standard of review, non binding solutions, no enforcement or follow up procedure. There is no express locus standi restriction, so it means that it is not necessary for a citizen to show any specific interest in order to complain to the Ombudsman. The European Ombudsman is vested with broad powers of inquiry on one hand, but more limited powers to undo the maladministration on the other hand; he cannot quash an administrative decision. His proceeding usually does not remedy the maladministration occurred, but helps to promote better administrative behavior in the future.

The third possibility of Union citizens is to address a petition to the European Parliament. Its subject matter is wider than the remit of the Ombudsman, as well as a petition may concern any matter which comes within the Union's fields of activity. Another important difference is that most of the work of the Committee on Petitions of the European Parliament concerns the application of Community law by authorities of the Member States. While the work of the Ombudsman with citizens' complaints has no political implications in principle, it is generally assumed that the form of petition is more appropriate for political issues. Judicial review on the decisions of the Committee on Petitions is excluded. An alleged maladministration of the Committee could be, in principle, subject of the review of the European Ombudsman; however he refuses to conduct inquiries on petitions, because he does not consider himself as investigator of the European Parliament. Although, according to Article 194 EC, a matter addressed to the European Parliament must affect the petitioner directly, this condition does not restrict the circle of petitioners in practice, contrary to similar condition of bringing an action for annulment before the Court.

There is a strong interaction between the three instruments. On one hand, it appears on practical level: the Committee on Petitions transfers, with the consent of the petitioner, any petition containing an allegation of maladministration in the activities of the Community institutions and bodies to Ombudsman, to be dealt with it as a complaint, and vice versa. The other level of interaction is more theoretical. The European Ombudsman, as well as the Court of Justice, became a novel source of law, especially, a source of soft law in the European Union. This 'administrative soft law' of the Ombudsman may be 'crystallized' into hard law via legislation or via judicial case law.

The Lisbon Treaty will reinforce the prohibition of discrimination on base of nationality of Union citizens in some instances. It takes into one unit, into Part Two of the EC Treaty, the provisions governing prohibition of discrimination and Union citizenship, under the title of 'Non-Discrimination and Citizenship of the Union'. It will expand the circle of contestable acts in the way of action for annulment before the Court of Justice also. In the field of reinforcement of protection of fundamental rights, a further innovation of the Lisbon Treaty is the decision on accession to European Convention for the Protection of Human Rights and Fundamental Freedoms.

**Reviewer:** JUDIT FAZEKAS

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# HUNGARY “TOWARDS SUSTAINABILITY”

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## Key words

Sustainable development, requirements of sustainability, implementation of sustainability by organisations, programmes, plans and legislation

Report of Rome Club created a great international stir by presenting steady growing environmental damaging, overusing of natural resources and giving out of non-renewable resources as “aftermaths” of economic development. It started a bitter controversy over the conflict between the economic growth and the environment.

Ideology of sustainable development was created for solving the conflict between economic growth and environment by the World Commission on Environment and Development in 1972. Sustainable development meets the needs of the present without compromising the ability of future generations to meet their own needs. Sustainability also consists of three main characters: preservation of general quality of life, ensuring available of natural resources and avoidance of steady environmental damages.

In order to implement sustainability it is required common action of the countries all over the world. The European Community undertook fulfilment of requirements of sustainability in the Fifth Environmental Programme “Towards Sustainability”. The Programme determines European Community’s policy for environment and sustainable development particularly. It defines as fundamental requirements maintaining of natural resources and avoiding of environmental pollution on the interest of living quality. The plan determines factors and activities that can cause environmental damages or giving out of natural resources.

Harmonizing with the action of the European Community for implementing sustainability Hungary created its special programmes, plans and legislation, moreover there were established two special bodies in order to influence on the sustainability aspects of the decisions. The Sustainable Development Committee has the main duty of working out of sustainable development’s domestic concept with its special national tasks and promoting of preparing for national exercises arise from sustainable development strategy of European Community.

The National Council of Environmental Protection is special advisory organ that “protects” the environmental “side” of sustainable development. It takes a stand on the matters of principle of various environmental programmes, on the legal rules, all decisions and other issues related to environment.

There are two main legislative framework for implementing sustainable development in the aspect of environment. The Act of 1995 on the General Rules of Environmental Protection has the object providing for the environmental conditions of sustainable development that is determined as a principle of all use of environment. The Act XXI of 1996 on Regional Development and Land Use Planning has the fundamental objective creating conditions for sustainable development that requires the land sparing, appropriate rainwater management and creating of green areas.



Implementation of requirements and instruments of sustainable development are found in strategic programmes and plans mostly. The New Hungary Development Plan has the main objective of expanding employment and creating the conditions for long term growth. In order to achieve these developmental efforts will concentrate on Priority of Environment and Energy development that requires reducing influences damaging the environment, by preserving the natural environment.

The centre plan of sustainability development in the aspect of environment is the National Environmental Programme II. The Plan requires taking into account the principles of sustainable development in all use of environment that is according to Herman Daly, "progressive social betterment without growing beyond ecological carrying capacity."

The National Development Policy Concept targets the implementation of sustainable development in terms of environmental, social and economic sustainability alike. A development is considered sustainable based on the Concept, if the development takes environmental and human resource criteria into account moreover it protects the built environment, cultural heritage and creates economically sustainable production.

The National Spatial Development Concept aims at sustainable territorial development and protection of heritage that ensures besides the safeguarding of environmental, natural and cultural value the safe utilization of the resources necessary to economic functioning, while taking into account the intrinsic qualities of the area. According to this the Concept states that regions and areas must be turned into sustainable systems whose value, heritage, resources and integrity are not merely safeguarded, but further strengthened.

For implementation of sustainable development of Hungary is required concerted action of all participation of all „person” in the country. The public administration has the duty of realization of the aimed middle-range policy in compliance with the environmental requirements and interests of the social. Local governments have the primary duty of participation in local implementation of sustainability and promoting it by working out of regional environmental plans.

Non governmental organizations, professional groups and representations are required active co-operation in environmental information, PR activities, in deepening of social relationship and in consultation as well. For elimination and prevention environmental problems there is required the partnership with the economical actors and the scientific partners as well are responsible for changing of the social environmental attitudes in the direction of environment consciousness and sensitiveness. Moreover all the nationals have the duty of consideration sustainability in all ordinary human activity.

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# THE DRAFT COMMON FRAME OF REFERENCE: WHAT FUTURE FOR EUROPEAN CONTRACT LAW?

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## Key words

Private Law, European Private Law, Contract Law, European Contract Law, Common Frame of Reference, Consumer Law, Maximum Harmonisation, Full Harmonisation, Europeanization of Private Law

The Draft Common Frame of Reference has accelerated the discussion on the European Contract Law and raised number of questions concerning the desirability and feasibility of European Civil Code. The final result of the vivid discussion is however a move toward the maximum / full harmonization of Consumer Acquis, what is not welcomed by number of academics, including the author of this paper.

This paper will try to give an overview of the debate and the current problems in the European Contract Law, analyze to the greater detail some of the problems, which surfaced in connection with the DCFR and finally attempt to show that the readiness of Europe for any fundamental harmonization of the contract law has to be balanced by more fundamental changes in the multi-level system of governance.

The introduction of the paper serves as a dictionary of the terms used in the paper as well as the discussion in general. Second part of the paper explains the way toward the Academic Draft Common Frame of Reference ((A)DCFR) from the early 80s until present.

The future of the (A)DCFR is further discussed in the part 3 of the paper, which is an issue closely linked to the question of legal basis for such an instrument. The option of Official Approval by publication in Official Journal is discussed, the possibility of adopting it as an Intra-Institutional Agreement, as an Optional Instrument or an International Treaty is examined. Finally, the most likely prospect in the situation as it stands now is that the (A)DCFR will serve solely as a non-binding instrument (which does not need any legal basis), as a toolbox helping the EU institutions to develop more coherent body of European Private Law.

Another issue however is, whether this is a final or solely an intermediate stage. There is a good ground to believe that if the European Court of Justice starts referring to the (A)DCFR in its judgments, the grow of authority of the text and spontaneous harmonization might take place. That will finally lead again to the questions of desirability and feasibility of European Civil Code

Part 4 of the paper discusses the structure of the (A)DCFR and draws our attention to the unexplained division of the Principles of European Contract Law (PECL) in the two parts, strikingly reminding us of the structure of all the 'BGB' group of civil codes.

Part 5 of the paper concentrates on the content of the (A)DCFR. It highlights the imbalance in the content of the (A)DCFR, ie. the PECL, now forming the general contract law part is based on the “best solution” rationale<sup>1</sup>, while the parts dealing with existing Consumer Acquis are based on “restatement” rationale<sup>2</sup> and thus sometimes perpetuating outdated or inapt models<sup>3</sup>. This renders the whole project rather fuzzy. The (A)DCFR has eg. adopted very a narrow definition of the consumer (the reason for this was explained above), which is lower than current standards in large number of the Member States. Further on, it aims to regulate all kinds of contracts, i.e. C2C, B2C and B2B, but eg. the control of unfairness of contract terms is bound to the fact that the terms were not individually negotiated, which can hardly suffice in case of C2C contracts. Finally, the (A)DCFR has overtaken the PECL’s concept of the *Principles Recognized as Fundamental in the Laws of Member States* in a very fuzzy way.

Finally, the paper tries to explain why the EU does not have legitimacy to adopt either the European Civil Code or harmonize fully the consumer acquis. Various L&E literature proved that the contract law does have distributive dimension, which from the 2WW include the protection of consumers as weaker parties to the contract. After the liberalization of the network industries, the Services of General Interest have come into the ambit of the private law rather than the sector specific regulation and these openly admit the social justice consideration.

On the other hand, the EU has two main objectives: the creation of efficient internal market and the efficient competition; how these coexist with the private law measures has been clearly demonstrated by the piecemeal approach adopted in case of consumer protection. The question of solidarity or distribution of wealth among the citizens from other than the efficiency of the above mentioned objections is not part of the EU considerations. The whole recent debate on the tracks of solidarity in the EU law has shown that these are rather tiny.

Given that the contract law incorporates many solidarity or social justice considerations, transferring the competences to legislate fully in the matters of private law to the EU level is not feasible as long as the EU does not embrace wider objectives than the above mentioned ones. Otherwise, the EU will legislate fully on matters where it does not have a competence to take all considerations duly into concern. Any full harmonization of the European contract law should follow only after the EU undergoes some fundamental changes.

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1 It means that the creators tried to find the best solution available. See eg. [http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/survey\\_pecl.htm](http://frontpage.cbs.dk/law/commission_on_european_contract_law/survey_pecl.htm)

2 The example might be the input of Acquis group, which worked more on the principle of restating the existing consumer contract law then constructing the better solutions.

3 Eg. regulation of Agency was strongly disputed on the Conference ‘The Draft Common Frame of Reference’, organized by the Academy of European Law, 6th and 7th March 2008, Trier, Germany.

# CROSS-BORDER ENFORCEMENT OF EC CONSUMER LAW - CPC REGULATION

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## Key words

EC consumer protection, administrative cooperation, public enforcement, cross-border enforcement

Public enforcement authorities in the Member States play a decisive role in ensuring that consumer protection laws are correctly enforced. Regulation (EC) No 2006/2004 on Consumer Protection Cooperation was adopted in 2004 to tackle the growing cross border problems in the Internal Market. It lays down the framework and general conditions under which authorities, responsible for enforcement in the Member States, are to cooperate. The Regulation links up national, public enforcement authorities in an EU-wide Enforcement Network which has been given the means to exchange information and to work together to stop rogue traders or any other cross-border breach to consumer protection laws.

There are two main EC law instruments containing specific provisions on powers to enforce consumer law: a 1998 Directive<sup>1</sup> and a 2004 Regulation<sup>2</sup>. The purpose of the Directive 98/27 is to approximate laws, regulations and administrative provisions of the Member States relating to injunctions in order to protect the collective interests of consumers included in the Directives listed in the Annex. CPC Regulation allows cooperation between Member States for consumer protection. The Regulation establishes a network of authorities responsible for monitoring the application of legislation concerning consumers. The aim is to ensure compliance with the legislation and the smooth functioning of the internal market. Whereas the action for injunction under the Directive may be taken for either domestic or cross-border problems, the Regulation applies only to intra-Community infringements of consumer protection legislation. The above acts create combined effects on a number of conceivable transnational enforcement scenarios.

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1 DIRECTIVE 98/27/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 May 1998 on injunctions for the protection of consumers' interests, O J L 166/51, 11. 06. 1998. Hereinafter referred to as the Directive 98/27.

2 REGULATION (EC) No 2006/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 October 2004, on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) (Text with EEA relevance).

OJ L 364, 9.12.2004, p. 1–11 amended by: DIRECTIVE 2005/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (Text with EEA relevance), OJ L 149, 11.6.2005, p. 22–39; Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007

amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Text with EEA relevance) OJ L 332, 18.12.2007, p. 27–45. Hereinafter referred to as the CPC Regulation.

Why a legal framework for improving co-operation between consumer protection enforcement authorities has been needed? Consumer protection laws – like virtually all legislation – are only as good as their enforcement. The Directive 98/27 gives national consumer enforcement bodies and consumer associations nominated by the Member States the power to seek injunctions in courts (on their own or other Member States initiative) to stop traders infringing EU consumer protection directives. What was lacking, it was the ability for these bodies to cooperate effectively in cracking down on rogue traders who operate cross-border. Commission in the Green Paper acknowledged that a framework for systematic information exchange was essential for effective market surveillance, lack of formal co-operation within the EU also had the consequence that the EU was unable to co-operate effectively with third countries.

The key elements of such a legal framework according to the Commission's reasoning in the Green Paper were the following: the nomination of competent authorities by each Member State to co-ordinate enforcement co-operation among national, regional and local bodies and act as a single point of contact; the establishment of common databases and communication networks that respect confidentiality requirements; the establishment of reciprocal mutual assistance rights and obligations among the Member States (that could cover information exchange on request and spontaneously, reciprocal use of national notification, surveillance, investigation and seizure powers); the possibility for Member States to carry out co-ordinated enforcement actions (simultaneous investigations, injunctions etc.) albeit under national enforcement powers; the establishment of obligations on Member States to supply information (statistics, complaints, risk patterns, emergencies) to the Commission for dissemination, to other Member States to enhance the co-ordination of market surveillance; the possibility for the EU to enter into co-operation with third countries on enforcement and join global enforcement networks; the possibility to carry out common EU and national projects such as the creation of information and communication networks, common databases, training, seminars, exchanges and common inspections. Most of the member states' governments strongly supported the Commission's ideas. Therefore according to Article 1 of the Regulation there are two specific objectives to achieve. First, providing for cooperation between enforcement authorities in dealing with intra-Community infringements that disrupt the internal market. Second, contributing to improving the quality and consistency of enforcement of consumer protection laws and to the monitoring of the protection of consumer economic interests. Article 2 limits the scope of the regulation to intra-Community infringements of EU legislation that protects consumers' interests.

To sum up, CPC Regulation - the most extensive piece of Community law legislation focusing on enforcement of consumer law undoubtedly strengthens public enforcement. The Regulation seen as complementary to the Injunctions Directive adds to the remedies available under it. The major purpose of the CPC Regulation is to create a network of national authorities responsible for enforcing EC consumer law and to oblige them to work together. These mechanisms until now remained unexplored in the consumer law context. Therefore we can perfectly say that the Regulation cuts out a potential avenue to harmonised consumer protection that could work better than the wholesale harmonisation of private law. Having come to such a conclusion we shall wait for the first Member States' reports to the Commission on the application of the Regulation.

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# THE TREATY OF LISBON: EUROPEAN „PHILADELPHIA“? COMPARISON FROM THE JURISTIC POINT OF VIEW

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## Key words

Treaty of Lisbon, European Union, constitutionalism, European constitution, US constitution

The Treaty of Lisbon has been adopted after a failure of the Treaty Establishing Constitution for Europe (“the Constitution”), as a kind of its successor; it preserved the key elements of the failed Constitution, while dropping constitutional terminology. However, as it will be argued in this contribution, it has also a constitutional character.

A constitution in a broad sense is the law that establishes and regulates organs of government. The notion of constitution can be perceived in three different ways, having regard to the “contents” of the constitution: material, formal and ideal. In its material meaning, a constitution is formed by all of the legal norms regulating power structures in the state, its organization, functioning and relations to the individuals, while no attention is paid to the substantial form of the constitution. In the formal sense, a constitution is a document which regulates matters mentioned above and has a special, more rigid form, combined with a higher legal force. A constitution in this sense is a document different from “ordinary” laws. In ideal point of view, the attention is paid to the substance of a constitution; to norms which should be entailed in such a document.

The constitutionalism, the term in one of its meanings describing the extent, to which a particular legal system possesses the features of the notion of constitution, in the EC developed gradually over time. The EC has developed from an international organization to a supranational entity that confers rights and duties directly to its individual citizens and in which the controls on the exercise of public power are similar in nature to those found in nation states. The existing Treaties do meet the criteria enlisted above. The decision-making in the Council, by the qualified majority, rather than unanimity, the existence of the European Parliament and the Court of Justice, as well as institute of Union citizenship, principles of direct effect and primacy of communitarian law are the most prominent features of line of thought leading to this conclusion.

Also, the interpretation of the Court of Justice (“ECJ”), according to the Article 234 Treaty Establishing the European Community and corresponding relationship between national courts and the ECJ has had a profound effect on constitutional development of the Communities and Union. There has been a significant shift of the ECJ’s attitude to the constitutional character of the Treaties. In *Van Gend en Loos*, the Court spoke on a new legal order of international law for the benefit of which the member states have limited their sovereign rights. The question of relationship of new established European law to the national law was not addressed at that time.

It was precisely this question that created momentum for the Court to change the view mentioned above. In *Costa v. ENEL*, the Court held that in contrast with the international treaties, the EC Treaty has created its own legal system, which had become an integral part of the legal system of the Member States and which their courts are bound to apply. Thus, in the accord of *Van Gend en Loos* reasoning, the Treaties have established a

new legal order, that is different from international law and consequently, the EEC Treaty forms automatically after ratification a part of national law.

The last shift occurred in *Les Verts*. The Court has addressed the question of the role of founding Treaties in this legal order. The Court stated that the Treaty is a basic constitutional charter for the Communities. This view enabled it to hold that the Communities are based on a rule of law and to establish a system of remedies that ensured legality to be observed. This line of reasoning was further strengthened by establishing the principles of indirect effect in *Von Colson* and governmental liability in *Francovich*. Constitutionalism in the European Union thus might seem to some observers to be a sort of by-product. As I will argue later in this article, this is certainly not the case.

However, although the EU possesses characteristics of constitutionalism, it does not possess a constitutional document. This kind of document was almost accidentally produced as an outcome of the deliberations of the Convention on Future of Europe, in the form of the Draft Treaty Establishing the Constitution for Europe.

The constitutional experience of the USA and the EU has in common more than is usually accepted. The Philadelphia convention, besides laying foundation of the republican federalist order of the USA, founded a congressional, not a presidential system. This is very similar to the position of the European Parliament in the present-day constitutional setting of the EU. Also, the American constitution regulated relations between the federal government and states, which is not dissimilar to the separation of powers introduced, or perhaps better put, clarified, by the Treaty of Lisbon. The American system favors smaller states, like the European constitutional settlement does.

If we look at the process of framing of the two constitutions, there are would be also some similarities if we compared the Philadelphia convention to the Convention on the Future of Europe. However, the process of constitutionalization in the EU has been rather a longer term evolution, than a single act. Thus, from the procedural point of view, there are not many similarities and procedurally, it can be said that experience of the USA and the EU is of a totally different nature. Whereas the USA started with the written constitution and only gradually developed constitutionalism, the EU experienced the process of constitutionalization first, without having a formal written constitution. Nevertheless, it was judiciary in both cases, that promoted supranational, or supranational, legal order aimed at guaranteeing the development of the common markets.

We can conclude that there are some significant similarities in the constitutional settlement of both entities. Thus, the Treaty of Lisbon cannot be perceived as a unique event, a kind of European Philadelphia, even if we consider it to be a direct successor of the Treaty establishing Constitution for Europe; we'd better view it as a part of gradual constitutional development of the European integration process. Nevertheless, the central role of the judiciary in the constitutional process, as well as substantial similarities in the constitutions of both entities allow us to pose a question whether there can be a possibility to learn some lessons from the evolution of the US constitutional settlement in respect to the EU.

**Reviewer:** DAVID SEHNÁLEK

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# COMPETITION IN ELECTRICITY MARKET ACCORDING TO THE REGULATION OF DIRECTIVE 2003/54/EC

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## Key words

Electricity market, competition, energy supply, European regulation

The main element of European energy policy is the creation of internal gas and electricity markets. From 1<sup>st</sup> of July 2007 all consumers can choose their electricity and gas services free. It sounds very simple, but it is not so simple legislative task for member states. Common market for gas and electricity promotes the use of renewable energy sources, increases the safety of gas and electricity supply and competitiveness of the European Community. The directive of 2003/54/EC determines the main elements of competition in electricity markets and the legal tasks of member states and undertakings. In my presentation I'm going to examine in three main subjects (discrimination, public service obligations, and conditions of activities) effects of European directive on competition in electricity market.

Energy market is a special element of European economy. Electricity power has advantages and disadvantages. Electricity is mostly produced in the Community, it is not depends on import and it can be generated using different technologies and raw material. But electricity can't be stored, so supply has to follow consumers' demand. We don't use electricity in its original forms, the use always needs transformation of electricity to light, heat etc. and at last electricity services are fixed to network, so all actors of the market must access to the network-system. The most important speciality of electricity supply is that it is a public service, because everyone wants continuous and safe supply, so member states mainly restricted competition in this sector. Liberalization of electricity market doesn't mean free competition, because electricity supply is still public service, and it still has specialities, so some restriction must be remained. General competition rules in themselves can't be useful in this sector, special regulation is needed, which takes account the characteristics of this market and completes the general rules of competition.

Member States "shall not discriminate between these undertakings as regards either rights or obligations." But some exemptions can be found: relicts of previous national legislation (for example: long-term contracts) and some infringements determined by the directive. In spite of principle of competition electricity supply is still a public service and member states still have the right to determine public service obligations but in a common legal frame. The rules of public service obligations have two groups: when member states shall determine PSO, and when it is possible for member states to regulate these types of services.

The main element of electricity supply is the access to system and electricity transport. The good state of systems is evitable and member states can't leave out of consideration the person of system operator. The directive emphasis this distinguished place of operators in electricity supply. Transport is not free for competition, because only by the state appointed operators have the right to provide these activities, so transmission and distribution operators have exclusive rights, but they mustn't take part in other activities: in



generation and in services. This restriction of competition can be owned to specialities of electricity sector, namely to system fixity. On consumers side consumers can't choose between operators by reason of exclusive rights, but also operators can't choose between systems' users, if they refuse transmission, their decisions have to be based on technical, non-discriminatory conditions. This measure is important to guarantee the highest level of competition and to avoid collusion of market's actors.

If system operator is part of a vertically integrated undertaking, the rules of unbundling come to the front. Unbundling has four forms: ownership-, legal-, and management unbundling and unbundling of accounts. Management or functional unbundling is the minimum obligatory level of unbundling. It means, that persons, who takes part in management of the transmission system operator, can't participate in the decisions of the integrated electricity undertaking, which directly or indirectly provide generation, and supply of electricity. These persons make their decision independently and have effective decision-making rights, independent from the integrated electricity undertaking. Unbundling of accounts: Member States shall ensure that undertakings keep separate accounts for each of their activities, separately for transmission or distribution and separately for supply and generation. National authorities have the right to access to the accounts of electricity markets.

Opening up electricity market has not resulted free competition, although this principle can't be the aim of special regulation due to characteristics of this sector. With the rules of Directive 2003/54/EC the European Community would like to regulate the best conceivable level of competition in all member states. Some elements of the Directive have preserved restrictions of competition, while others have resulted competitive electricity market in member states.

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**Full version of this contribution can be found in the *Conference proceedings* on pp. 227 – 235.**

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# COMMON FRAME OF REFERENCE FOR EUROPEAN CONTRACT LAW: A TOOL-BOX OR A BASIS FOR A FUTURE EU CIVIL CODE?

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## Key words

Contract law, European Civil Code, Common Frame of Reference, Unification of Private Law

The project of a Common Frame of Reference for European contract law (CFR) deserves more attention that its inconspicuous title would suggest, because there are many who link it with efforts to create an EU-wide uniform contract law or even a full-blown civil code. Since the idea of such unification is highly controversial and faces significant opposition the project is an extremely sensitive issue.

The project has its origins in Commission's action plan of 2003 called "A more coherent European contract law". This one was a reaction to the results of a public debate initiated in 2001 by Commission's Communication on European contract law, whose subject were *inter alia* possible problems in the contract law acquis and the question whether the co-existence of national contract laws "directly or indirectly obstructs to the functioning of the internal market, and if so to what extent".

This consultation process showed that most Member States did not support a comprehensive harmonisation or even unification of contract law systems. There appeared to be no consensus on the overall scale of the problems and the extent of additional costs attributable to differences in national contract laws. The consultation rather indicated problems in the EC law such as the use of abstract legal terms in directives that were either not defined or too broadly defined and inconsistencies in directives.

Thus, in the action plan the Commission presented an instrument - the CFR - that appears to be targeted at the problems found in the contract law acquis. The Commission outlined it as a "toolbox" or a handbook containing fundamental principles, definitions of key terms and concepts and model rules in the area of contract law. This "toolbox" would be used by the Commission and the EU legislator when revising existing and preparing new legislation in the area of contract law. In Commission's view the scope should cover above with general contract law and all the relevant cross-border types of contract such as contracts of sale and service contracts.

Nevertheless the Commission has envisaged also other possible roles of the CFR that hinted that it had not abandoned its harmonising wishes. Accordingly, the CFR could become "an instrument to increase convergence" between the Member States' contract laws; national legislators could take it as a point of reference when transposing EU contract law directives or draw on the CFR when enacting legislation not regulated at EC level, which might diminish divergences between national laws. The CFR could also serve as a basis for the development of a EU-wide standard contract terms or a so-called "optional instrument" being explained as EU-wide contract law rules which would exist in parallel with national contract laws.

The Commission decided to establish a net of researchers (assisted by two expert nets) who were to present a draft, which could represent a basis for its own document, which would probably appear in the form of a

White Paper. The Commission would discuss the preparation with the Commission and the EP who were asked to present their positions on the project.

The Commission stated repeatedly that it did not intend to propose an EU civil code or an extensive harmonisation of private law. However, many aspects of the project may raise doubts in this respect. The British House of Lords expressed a concern that the CFR might be a "Trojan Horse" leading to the civil code. In its view, when the CFR is in place, the Commission may be expected to search for opportunities for its use and to try to maximise the "benefits" of such a large investment. There could be then an increased pressure for harmonisation of contract law across the EU. The House of Lords was above all worried about the idea of an optional principle and the link between the CFR and it, because the "optional instrument" in time could be turned into a draft harmonisation measure.

Another remarkable fact that may support the "Trojan Horse" concern is the composition of the researchers net. One can note that the leading role got personalities engaged in various academic initiatives pushing for creation of an EU-wide private law, i.e. first of all members of the Study Group on a European Civil Code led by Christian von Bar.

The positions of the Council and of the EP are already known. The EP, which has several times called for creation of an EU civil code, pleads for the highest ambitions and widest use of the CFR. On the other hand, the Council will be much more reserved. The Council would like to shape the CFR as a set of non-binding guidelines for lawmakers at EC level offered to them as a source of inspiration in the lawmaking process, which they could "take into account" when drawing up new legislation or reviewing existing one.

In December 2007 the researchers presented an interim outline edition of their draft. If it were to be described in one sentence, it looks like a model code of obligations or a non-completed model civil code. It covers not only contractual but also non-contractual obligations and in its full and final edition it will also cover some matters of movable property law. The full and final version of the draft is to be submitted to the Commission in December 2008.

The ball is now in the court of the Commission. It has at its disposal the first edition of the DCFR, it knows the opinions of the Council and of the EP. We can only await the results of its work, which are expected to come out in 2009. Once the out-put appears, there will be fewer questions and ambiguities, although others will remain and will be answered only in the farther future.

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# EUROPEANIZATION AND UNIFICATION OF PRIVATE INTERNATIONAL LAW

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## Key words

Europeanization, European private international law (conflict of laws), unification of private international and substantive law, private and inter-state unification groups

With the growth of private transactions and migration of the EU citizens, the original economic organization has been tending to more social and political one. Administrative rules and measures have no longer been sufficient for regulation of private contracts, legitimacy of ownership and proprietary relations, family and marital issues, inheritance as well as resolution of disputes arising out of these legal relations. Private legal transactions have become a stimulus to the integration and accomplishment of the Four Freedoms – the free movement of goods, persons, services and capital. This onward process of integration has heightened the exigency of unified norms in the European area.

Recently, the common European legal tradition as a basis for unification of law has been revealed by numerous comparative legal researches. There are two ways of unification. First, the international treaties and conventions still personify the traditional means of the conflict of laws (so called *hard law*). They are concluded on an inter-state level, usually under the patronage of an international organization.

Second, as an antipole or an alternative to the traditional way of the international treaties we can find non-binding private codifications of general legal principles and model laws, generally called *lex mercatoria* (*soft law*). Although these private codes and principles are not obligatory, their formulation, comparison, exchange of opinions and cognition of other legal institutes might serve as a motion to self-reflection and subsequently to more effective solutions. They form a modern stream of the unification of law.

However, disadvantages of both of them – on one hand, rigidity and prolixness of ratification procedure, and only recommendatory nature on the other – have led to searching for a solution *per medias vias*. Such a solution might be presented by unified conflict-of-law rules, either in a form of an international treaty (lengthy procedure), or recently rather in the form of the EC measure. As the EC secondary law assures the unified application of the law in the whole European area of justice, it leaves minimal space for the application of dissimilar national legal orders and the result of a case should be the same irrespective of a forum.

If there is a time in the future for a modern version of *Ius Commune*, a body of unified European substantive law, so far we have to be appreciative of the means of choosing the most proper applicable law, avoiding the crumbled national legal regulations.

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# SOME LEGAL ASPECTS OF AGRI-ENVIRONMENTAL EFFORTS IN THE COMMON AGRICULTURAL POLICY

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## Key words

Agri-environmental law, agri-environmental protection, sustainable development, principle of integration, CAP-reform, the human right for healthy environment

The legal aspect of agri-environmental protection, the agri-environmental law forms a point of contact between agrarian law and environmental law convert them into „Siamese twins”. It’s naming gives true expression to it’s borderland nature.

The first steps of the transformation of the environment can be bound to the agriculture, livestock production and cultivation of the land. The interaction of the society and nature became objectified, the so called noosphere<sup>1</sup>, the area conquered by the determinate human activity, has been growing since the beginning mostly due to the increase of the agricultural activity, one of the most important sectors of the economy these days, too.

In an economic sense agri-environmental protection – as well as the legal aspect of it – as an obstacle of the agricultural economic activity takes aim at holding back the endeavours displaying the economic interests.

The environmental action programs advertised the importance of the integration continuously, but the actual enforcement of the environmental requirements is put into practice when the CAP has to confront the „economic compulsion”, for example with the steadily growing overproduction. Easily reasonable, that the agricultural economy was assigned by the environmental action programs to be the first area where the necessity of introducing the integration of the environmental requirements comes on the scene<sup>2</sup>.

For the legal aspect of the environment protection, as a „cross-lying” area of law and for the horizontal natured environment politics have to prevail spectacularly inside other law branches and in politics, too. This is a „sine qua non” of it’s efficiency.

The agri-environmental law and the collection of programs that encourage improved conservation and environmental performance in agriculture, the so called agri-environmental policy of the EC (EU), which took shape in a narrow, one and a half decade before the turn of the millennium is the experiment of the achievement of sustainability in the agricultural sector. The challenge of sustainable development requests building the environmental interests into all politics of the Union, and their efficient enforcement inside them.

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1 CSEMEZ ATTILA, MŐCSÉNYI MIHÁLY: Egyedi tájértékek jelentősége a rurál táj fejlesztésében, In.: Természetvédelem és mezőgazdaság, Bp., MTA, 1999., p. 103

2 Horváth Zsuzsanna: Az Európai Közösség agrárpolitikai reformjának környezetvédelmi aspektusai. In: Tanulmányok Veres József egyetemi tanár 70. születésnapjára, Szeged, 1999. /Acta Universitatis Szegediensis de Attila József nominatae. Acta juridica et politica. Tomus 55. Fasc. 1-34./, p. 139

The „integration-principle“ of environmental law is the connecting link between sustainability and agri-environmental efforts.

Agri-environmental protection is practically doing the best endeavours to soften the growing environmental damages of agricultural land and all of the environmental elements in connection with it, pursuing agricultural activities in the highest sense of the principles of precaution, prevention and restitution. This special field of environmental protection is incarnated in the harmonisation of the agricultural policy and the environmental policy.

Trying the briefest definition of agri-environmental law we can ascertain that it is the entirety of the norms of environmental law being against the environmental pollution of the agriculture. In a wide sense it contains the rules of the general part of environmental law (horizontal division, weaving in all special fields of it) and the ones of the special part (with a vertical division) which can be applied in the agricultural sector. In a narrow sense only those norms belong to it that choose as addressees exclusively environment-users of this sector.

The more sensitive, positivist definition of agri-environmental law can be derived from the normative concept<sup>3</sup> of the environmental protection with a teleological<sup>4</sup> approach. Those rules of law, legislative measures and other legal devices of measure of state management, and those regulations of latter ones, that are aiming at – firstly the prevention or reduction of environmental risking, degradation and pollution which can be ascribed to activities bound to the agriculture directly or indirectly, secondly the reduction or ceasing of damage (damaging) of the environmental media and processes in them, and thirdly the restoration of an antecedent state of them just like before the activity entailing the mentioned effects (environmental in integrum restitutio) – belong to the concept of agri-environmental law, filling it entirely.

The CAP-reform starting in 1992 developed the multi-purpose model's construction of the agriculture. Since then the guiding principle of the sustainable agricultural development are the most important target areas of agri-environmental protection: providing the long-term protection of natural resources and a related anthropocentric aim, the quality of food, the residue- and pollutant exemption (food safety) of agricultural products intended for human consumption.

According to this agri-environmental regulation Member States have to start multiannual zonal programmes which shall be drawn up for a minimum period of five years. These multilevel special programs, „the agri-environmental programs“ are earmarking the dissemination of environmentally friendly farming techniques. The number of the programs are significantly different in the Member States, they must not cover each other, and it is important to form a coherent system, which must be understandable for the smallholders, whose participating is voluntary.

The important steps of agri-environmentally relevant legislation cover the medial-, causal- and vital fields of environment protection which are involved. The special fields dealt with thoroughly in the literature – according to the degree of the human-hygienic relevance and the involvement of the environmental media – the quantitative- and qualitative water protection, the similarly two-way protection of the soil, or nature conservation dealing with the only living environmental element (too), finally the one that became popular recently, the speciality dealing with the environmental risks of the genetic modifications of genetic engineering, the so-called agrár- or „green biotechnology“<sup>5</sup>.

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3 See the Hungarian act on the general rules of environmental protection, No 53. of 1995, 4. §, point 32.

4 As per the sentence of Aristotle things must be defined from the points of their purposes, goals (teleology). See on the subject EDWARD GOLDSMITH: Scientific Superstitions: The Cult of Randomness and the Taboo of Teleology; The Ecologist, 27/5/1996, 1997 IX.

5 This special field of agri-environmental law is the youngest one. In the German agri-environmental literature it is called shortly „Gentechnikrecht“

Compared to these the fields of the protection of air quality, the protection against noise- and vibration, the animal protection and the waste management are under-represented in the legislation and specialized literature of agri-environmental law because of their indirect involvement (the latter one can be caught practically just from the viewpoint of soil-, and water protection and air quality management) or because of their significance regarded as relatively smaller one.

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**Full version of this contribution can be found in the *Conference proceedings* on pp. 261 – 271.**

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# ISSUES RELATED TO THE TRANSPOSITION INTO THE ROMANIAN LAW OF THE FRAMEWORK DECISION 2002/584/JHA ON THE EUROPEAN ARREST WARRANT AND THE SURRENDER PROCEDURES BETWEEN MEMBER STATES

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## **Key words**

Judicial cooperation, criminal matters, mutual recognition, European arrest warrant

In 1999 the European Council decided that the principle of mutual recognition should become the cornerstone for judicial cooperation in criminal matters. A first response was given with the 2000 EU Convention on mutual assistance in criminal matters. In the 2005 Hague program, the Council reaffirmed the importance of full implementation of the principle of mutual recognition in all stages of criminal procedure.

As a reflection, in the field of the third EU pillar, at 13 June 2002, the Framework Decision on the EAW and the surrender procedures between Member States was adopted. This Framework Decision has been regarded as the first and most striking example of the extensive judicial cooperation in criminal matters adopted within the third EU pillar and based on the principle of mutual recognition.

Although the principle of mutual recognition was well known in the context of the first pillar, it was a new concept in relation to criminal matters. In its Communication of 26 July 2000 on mutual recognition of final decisions in criminal matters the Commission stated the following:

„Mutual recognition is a principle that is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are acceptable as equivalent to decisions by one's own state. Mutual trust is an important element, not only trust in the adequacy of one's partners' rules, but also trust that these rules are correctly applied”.

Mutual recognition in its purest manifestation implies that it should be possible to execute a judicial decision of a member state in any other member state. The fact that the decision could not have been issued by the executing member state in a similar domestic case may not be a reason not to execute it.

Although was sustained by the most important organisms of the EU, the principle of mutual recognition within the EU third pillar had raised serious objections from some member states. We can give the example of Germany and Italy.

According to the decision of Federal Constitutional Court from 18 July 2005 the cooperation should be based on a limited mutual recognition within the EU third pillar. And the Italian law which transposes the EAW framework decision appears to be one which negates the framework decision, rather than implementing it,



because it offers to the Italian executing state new ground of refusal and impose to the Italian courts to control the merits of the case and also to effectively judge the foreign state and its constitutional system.

In the Romanian system, the implementation of the EAW framework decision was realized by the introducing into the Law no. 302/2004 of a third title which dispositions had entered into force in the first of January 2007, in the moment of the integration of Romania in the EU.

The implementation of the EAW Framework decision caused constitutional problems in several member states mainly because their constitutions prohibited extraditing their own nationals as required in the Framework decision. Based on this rule, the Constitutional Tribunal of Poland declared on the 27 April 2005 that the implementing law is unconstitutional.

The article 19 of the Constitution was modified by the Law no. 419/2003 and, in its new form, disposes that the Romanian citizens can be extradited from Romania only if the following conditions are observed: 1) the application of an international convention in which Romania is a part; 2) on the basis of reciprocity; 3) in the conditions of the law.

The EAW framework decision is not a convention. But this framework decision is rooted in the TUE (article 31 and 34) which is an international convention. So, the law implementing the EAW framework decision is based on an international convention and, in conclusion, the Romanian system does not have problems with the constitutionality of the procedure of surrender the Romanian citizens to another member state.

The principle of mutual recognition was interpreted by the Supreme Court of Justice and by the Constitutional Court. The Supreme Court declared in the decision no. 4045/2007 that „it is not in the competence of the executing court to analyze the existence of factual basis and the validity of the accusations, the principle of mutual recognition and trust being applied”. Also, in the decision no. 2862/2007, the Supreme Court declared that the Romanian court, in the quality of executing authority, does not have the competence to make an analysis concerning the opportunity or the legality of the prosecution in the issuing state, or concerning the opportunity of the preventive detention decided by the issuing state. This kind of analysis would infringe the principle of mutual recognition of the judicial decisions in criminal matters.

The Constitutional Court has the same view. In the decision no. 400/2007 the Court declared that the Romanian judge does not have to make an analysis concerning the opportunity or the legality of the prosecution or of the conviction in the issuing state, or concerning the opportunity of the preventive detention decided by the issuing state. This kind of analysis would infringe, in the eyes of the Constitutional Court, the principle of mutual recognition of the judicial decisions in criminal matters.

In conclusion, in the Romanian system, the confidence in the criminal justice systems of the others member states is absolute. The implementation law and the national jurisprudence, in the same way like the framework decision, do not impose any type of control over the criminal justice system of others members state. In the Romanian system, the judicial decision of the issuing state is put into practice without any type of preliminary control of the factual basis and of the legality of the acts of the issuing judicial authority.

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# PUBLIC SECURITY, PUBLIC POLICY AND PUBLIC HEALTH AS POTENTIAL GROUNDS FOR IMPOSING RESTRICTIONS ON THE RIGHT OF FREE MOVEMENT OF PERSONS

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## Key words

Free movement of persons – restrictions of free movement of persons- public policy – public security- public health

Free movement of persons has a central, distinguished place among common politics. Working in the territory of another Member State is a right of every citizen of the Union and also of their family members. However the realization of this principle was motivated originally by economic aims, the principle of free movement is more than merely just regulating economic questions.<sup>1</sup> The rules regulating the free movement have been changed a lot since this principle was first declared in the Treaty of Rome. The most important turning point was the Maastricht Treaty, which established that not only workers, but also every citizen of the Union has the right of free movement. In the meantime the EU-level regulation of this topic has become really complex, two regulations and nine directives contained rules in relation to this issue, therefore the simplification of these norms was of high priority. Therefore the 2004/38/EC Directive was accepted for simplifying these rules, and it has replaced the former fragmented and sectorial regulation. Although the goal of the Union is to ensure the right of free movement of the citizens, i.e. the right of entry and residence, to the possible maximum extent, there are some cases, when it could be restricted. The grounds of these restrictions could be the public politics, public security and public health, amongst others.

## COMMUNITY RULES OF RESTRICTIONS ON FREE MOVEMENT

The legal basis of the restrictions on the free movement of persons was set out in the EC Treaty, pursuant to which the right of free movement could be restricted. Consequently the above-mentioned provisions of the Treaty allow Member States to not to admit citizens from other Member States to their territory or to expel them. Nevertheless, neither the EC Treaty, nor Directive 64/221/EEC had determined, which kind of situations and behaviour could be qualified as to be dangerous to public policy, public security or public health.<sup>2</sup> According to the case law of the European Court of Justice, this notion has to be interpreted strictly. Member

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1 GYULAVÁRI, Tamás – KÖNCZEI György: Európai szociális jog, Budapest: Osiris Kiadó, 2000., p. 86., ISBN 963 379 641 5

2 GYULAVÁRI, Tamás: Az Európai Unió szociális dimenziója, Budapest: Szociális és Családügyi Minisztérium, 2000., p. 58., ISBN 963 00 3854 4

States must take into account different general and individual conditions, if they want to restrict the right of residence of citizens from other Member States.<sup>3</sup>

Directive 2004/38/EC has replaced Council Directive 64/221/EEC and contains elements of certain former secondary legal sources and the related case law of the Court of Justice of the European Communities.<sup>4</sup> The aim of this Directive was to impose stricter conditions in respect of determining the circumstances under which citizens of the Union and their family members could be declined to enter in the territory of other Member States or could be expelled from that countries. In addition, it has defined stricter procedural safeguards as well.<sup>5</sup>

## CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

However the protection of public policy has been codified in the EC Treaty,<sup>6</sup> the Member States are not allowed to use the notion of public policy and public security arbitrarily. The European Court of Justice has expressed this opinion in the Bouchereau-case,<sup>7</sup> One of the most often cited cases is the Van Duyn-case,<sup>8</sup> in which a woman of Dutch nationality was not allowed to enter into the United Kingdom to work as a secretary at the "church of scientology".<sup>9</sup> British politics did not assist the "church of scientology", and however it was not forbidden; according to the standpoint of the British politics it was socially harmful. The problem in the case of Commission of the European Communities v Kingdom of the Netherlands<sup>10</sup> was that the general legislation of the Netherlands made it possible to establish a systematic and automatic connection between a criminal conviction and the issuance of expulsion orders.<sup>11</sup> The Court declared that the Netherlands has failed to fulfil its obligations under Directive 64/221/EEC<sup>12</sup>

Although the one of the most important goals of the European Union is to bring everyone in the position to be able to use the opportunities of free movement and to realise the four freedoms to the highest possible extent, there are some cases when the Member States are interested in to not to admit certain persons into their territory or expel them from there. The main purpose of my paper was to present such cases where the principle of free movement could be restricted. The grounds for such restrictions might be the public policy, public security or public health. I summarised the safeguards, which ensure free movement against restrictions; the strict conditions of expulsion and denial of entry; and the most important cases related to this topic.

**Reviewer:** ZSUZSA WOPERA

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3 A személyek szabad mozgása az Európai Unióban - munkavállalás és tanulás a magyar állampolgárok számára, Forrás: Külügyminisztérium, see: <http://mathom.dura.hu/mszeib/eubovites/szabadmozg.htm> (20.04.2008.)

4 ASZTALOS, Zsófia: Új irányelvek az uniós polgárok és családtagjaik szabad mozgásáról. In: Európai Tükör, 2004/7 október sz., p. 104.

5 Directive 2004/38/EC, preamble, section 22.

6 BANKÓ, Zoltán: Válogatás az Európai Bíróság munkajogi ítéleteiből, Munkavállalók szabad mozgása, Budapest: KJK-KERSZÖV Jogi és Üzleti Kiadó Kft, 2004., p. 21., ISBN 963 224 774 4

7 Case 30-77. Régina v Pierre Bouchereau, Judgment of the Court of 27 October 1977., European Court reports 1977 Page 01999

8 Case 41/74. Yvonne van Duyn v. Home Office, Judgment of the Court of 4 December 1974., European Court reports 1974 Page 01337

9 Case 41/74. Yvonne van Duyn v. Home Office, Grounds, point 2.

10 Case C-50/06. Commission of the European Communities v Kingdom of the Netherlands, Judgment of the Court (Third Chamber) of 7 June 2007., European Court reports 2007 Page I-04383

11 Case C-50/06. Commission of the European Communities v Kingdom of the Netherlands, Pre-litigation procedure, point 17.

12 Case C-50/06. Commission of the European Communities v Kingdom of the Netherlands, Judgement

**Full version of this contribution can be found in the *Conference proceedings* on pp. 281 – 291.**

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# APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU IN THE UNITED KINGDOM AND POLAND ACCORDING TO THE LISBON TREATY

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## **Key words**

European Union, Lisbon Treaty, human rights, Charter of Fundamental Rights of the European Union, legal force, the United Kingdom, Poland, Protocol, European Court of Justice

## **The Charter in General, its Legal Force and its Inclusion in the Lisbon Treaty**

It is a well-known fact that the Charter of Fundamental Rights of the European Union (hereinafter “the Charter”) was solemnly proclaimed by the Presidents of the European Parliament, the Council of the European Union and the European Commission in Nice European Council on the 7<sup>th</sup> December 2000. The Charter was not annexed to the fundamental Treaties and its legal force remained undetermined. However, there are several reasons why the Charter should be legally binding. First, the Charter shall be binding at least on the European Parliament, European Commission and European Council due to the fact that the Charter was proclaimed by the presidents of these institutions. As the Commission put it nicely, “the institutions that have proclaimed the Charter, have committed themselves to respecting it”. The Charter could be therefore regarded as a binding inter-institutional agreement. Second, certain provisions of the Charter must be considered as binding on all institutions of the EU and also on Member States. These are provisions that consolidate the existing law (mainly the case law of the ECJ). Moreover, we cannot hide the fact, that the Charter has been already used by the European Court of Human Rights in its decisions and also the ECJ mentioned the Charter (although very carefully).

The debate on legal force of the Charter shall be finished when the Lisbon Treaty comes into effect. After the ratification process is finished, the Charter shall be legally binding for institutions of the EU and for the Member States when they are implementing Union law.

## **The Approach of the United Kingdom and Poland towards the Charter**

The United Kingdom expressed its general objection against a legal binding European bill of rights already during drafting the Charter. The British politicians were afraid that such bill of rights (administered by the ECJ) could mean more interference from Europe in British domestic affairs. Particularly, the British opposed a large concept of the so called rights of solidarity (Title IV of the Charter) because of very liberal conditions and rules governing this area in the UK. An acceptance of this part of the Charter as legally binding would visibly change the legal system of the United Kingdom. Therefore the UK decided to attach a special protocol to the text of the Lisbon Treaty in which an opt-out from the Charter was realized

The Polish reason to object the Charter is a more political one. The Polish government led by the Prime Minister Jaroslaw Kaczynski was not satisfied with the provision of the Charter prohibiting discrimination on the grounds of sex and with the definition of the right to marry and the right to found a family. These provisions aim among others to the legal recognition of the same-sex union; however, the Polish government assumed that such recognition would violate the country's cultural heritage. There fore Poland joined the UK protocol. The new Polish government, formed after elections in October 2007, has no such objection. Nevertheless, the new government needed the support of Jaroslaw Kaczynski's party in order to reach the two-thirds majority required to ratify the Lisbon Treaty as a whole. As a result, the Polish attitude towards the Charter remained unchanged.

### **The Possible Practical Results**

Although there is not any express ban on applying the Charter in Poland and the UK in article 1 paragraph 1 of the Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (hereinafter "the Protocol"), this provision does not allow the ECJ and national courts to find out that some Polish or UK legal rules are incompatible with the Charter. Paragraph 2 of the article 1 of the Protocol seems to limit this general ban only to Title IV of the Charter (solidarity rights). However, such interpretation would be contrary to the aim of Poland which objects to rights contained in other parts of the Charter. There fore the second paragraph of art. 1 of the Protocol apparently has just an illustrative or explanatory character. The same could be said about two Polish declarations annexed to the Final Act of the conference that adopted the Lisbon Treaty, i. e. these declarations do not limit the scope of general ban on application of the Charter in Poland.

However, the idea of the Protocol that the Charter will not be applicable in Poland and the United Kingdom could be easily overcome by one important European actor – the ECJ. As mentioned above, fundamental rights as a general principle of EU law are protected through the case law of the ECJ until now. This case law is then based on legal cultures and constitutional traditions of Member States, on European Convention on Human Rights and other international human rights instruments and of course on the case law of the European Court of Human Rights. Although it is presumable that the ECJ will respect the provisions of the Charter and apply them, nothing can possibly prevent the court from adopting an extensive interpretation of the Charter and rule beyond its provisions. We must also bear in mind that the scope of application of the Charter is limited only to EU institutions and to the Member States when applying the EU law. However, the case law of the ECJ on the field of human rights has no such limitation. More over, the ECJ is a well-known protector of the single market and the four freedoms. Thus if some human rights (particularly the solidarity rights) are more restricted in one Member State than in others, the ECJ could regard it as a hindrance to the single market or infringement of the said freedoms and promote the protection of such rights only on the basis of the provisions of the fundamental Treaties without any regard to the Charter.

In Conclusion, the United Kingdom and Poland will not be formally bound by the Charter provisions. However, if the ECJ decides that a certain human right (e.g. right to strike or right to live in a same-sex union) form a human right which is inherent with the EU or whose restriction could threaten the single market, the United Kingdom and Poland will be bound by this decision – and indirectly by the Charter. Nevertheless, such decision of the ECJ would be a political one and it is hard to say whether the ECJ finds courage to rule in this sense.

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# TERRITORIAL COOPERATION AFTER 2007

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## Key words

European territorial cooperation, cohesion policy, EGTC, IPA, ENPI

The study deals with the territorial cooperations, which appear nowadays as one of the most important area of the European Union's cohesion policy. The contribution can be divided into two main parts: in the first part, I look after the types of those cooperations, which are creatable along the internal borders. In these cooperations, the EU's member states can take part and build cooperation up, to find common solutions for the common problems. The second part of the study concerns on the territorial cooperations, which can be build up along the external borders of the Community.

The formers belong to the cohesion policy and are regulated under the objective „European territorial coooperation“, established by the Regulation 1083/2006/EC<sup>1</sup>, the so called general cohesion regulation. These cooperations are granted support from the structural funds of the Community. In the latter case of the cooperations, so wchich are creatable along the external borders, the European Neighbourhood Policy (ENP) contains the related provisions, and has special assistance to support them (IPA and ENPI).

Looking from the other side, in the case of territorial cooperations, the two policies, so the cohesion and neighbourhood policy means the two dimension of a same instrument. Considering that, lawmakers agree, that it is undesirable to handle these two common policies separately. Instead of this, connecting them can be a suitable solution in the future.

Within the territorial cooperations, which are built up along the internal borders, we can differ three different dimensions from one another. The cross-border, transnational and interregional cooperations mean three different strand. The main goal of the cross-border cooperations is to integrate areas, which are facing with same problems, but they are separated by internal borders. These cooperations primarily concentrate on developing competitiveness in border regions, but shall also approve the economic and social integration on both sides of the borders.<sup>2</sup> Participation is opened from the beginning for the twelve new member states; the only condition is, that these programmes shall consist of at least two partners, coming from different member states, i.e. from different sides of the borders.

As a type of territorial cooperations, under transnational cooperations strategically important questions, problems, challenges can be manage and solve.<sup>3</sup> Cooperations between regions, the so called interregional

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1 Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, OJ L 210, 31.7.2006, p. 25-78

2 2006/702/EC: Council Decision of 6 October 2006 on Community strategic guidelines on cohesion, OJ L 291, 21.10.2006, p. 11-32

3 Council Decision 2006/702/EC, OJ L 291, 21.10.2006, p. 32.

cooperations primarily conform to the objectives of the renewed Lisbon Strategy: strengthening innovation, small- and medium enterprises, environment and risk-prevention also play a dominant role in creating interregional cooperations.

In addition, based on the latter type of the territorial cooperations, there are two complementary programmes too (the ESPON 2013 and the INTERACT II), which – as network programmes – help to make more efficient and more effective the working method of the territorial cooperations by sharing the experiences, which are accumulated in the field of cross-border, transnational and interregional cooperation. Practically, they can be regarded as sub-branches of the cooperations existing between regions.

The European Grouping of Territorial Cooperation (henceforth EGTC) is the new cohesion policy's very new and important instrument in the programming period 2007-2013. It is a cooperation form having legal personality that Community law offers to partners involved in territorial cooperation. It is very important, that EGTC has legal personality. Its main aim is to facilitate and promote cross-border, transnational and/or interregional cooperation between its members with the exclusive aim of strengthening economic and social cohesion, so it functions as management tool during the appropriation of the EU structural funds.

When we examine the different types of the territorial cooperations, we should notice, that not only inside the Community, but also along its external borders is there a possibility to build cooperations up. With respect of this, the second part of my study concerns on those cooperations, which are creatable along the external borders of the EU.

As a result of the EU's enlargement in 2004 and in 2007, the length of external borders are increased, so the Community shall take into account lots better the problems, challenges and possibilities, which appear by the altering of the borders. In the past few years, a recognition has strengthened, in accordance with working for the cohesion of the EU can not be enough: cohesion policy and the territorial dimension shall be closely linked with the neighbourhood policy. The cohesion policy not can be hardly separated from the neighbourhood policy, what is more, with the help of the neighbourhood policy instruments, cooperations can be created more efficiently between member states and candidate, potential candidate and partner states.

Along the external borders, we can differ two types of the cooperations: some of them are creatable by EU member states and candidate (or potential candidate) countries, while others can build up with the EU's partner countries. However, this distinction is not so marked, because all of these cooperations are regulated under the EU's neighbourhood policy. Accordingly, the differentiation is justified because of the available financial instruments, i.e. the IPA and ENPI.

In consequence of the eastern enlargement of the EU, the importance of creating cooperations along the external borders has also increased. The Community has emphasised, that cooperations between member and candidate countries have special role: they function as mediators, which bind Central-East-Europe and the Western Balkans with the European Union.

Cooperations, which are creatable along the external borders can be supported by the IPA (Instrument for Pre-Accession Assistance) established by Council Regulation No 1085/2006/EC.<sup>4</sup> The assistance should support the candidate and potential candidate countries in their efforts to strengthen democratic institutions and the rule of law, reform public administration, carry out economic reforms, respect human as well as minority rights.<sup>5</sup>

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4 Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: „The European Consensus“ (2006/C 46/01), OJ C 46, 26.2.2006., p. 1-19

5 2006/ C 46/01, in point 13



Looking from the other side, it is undesirable, that the dividing lines, existing between these countries and the Community, also function as political and economic boundaries, which share in a wider sense grasped European into two parts. To prevent this, the Community has created a new assistance within the neighbourhood policy, which supports cross-border cooperation programmes between member and permanent outsider countries.

The main instrument in creating cooperations with third countries is the ENPI (European Neighbourhood and Partnership Instrument) established by the European Parliament and Council Regulation 2006/1638/EC.<sup>6</sup>

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<sup>6</sup> Regulation 1085/2006/EC, in the recital 13

# AN OPINION ON ENVIRONMENTAL IMPACT ASSESSMENT IN THE LIGHT OF THE PRACTICES OF THE CZECH SUPREME ADMINISTRATIVE COURT AND THE EUROPEAN COURT OF JUSTICE, ESPECIALLY IN THE LIGHT OF PRINCIPLES OF EQUIVALENCE AND EFFECTIVENESS

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## **Key words**

Environment, Directive 85/337/EEC, Supreme Administrative Court, principle of equivalence, effectiveness and loyalty, opinion on environmental impact assessment, European Court of Justice

## **Introduction**

The objectives of the European Communities (EC) have changed during an ongoing integration process of the democratic European states. This development reflects the aim of the Member States as well as the European Communities to achieve / secure a sustainable development which is inter alia determined by the environmental protection. This was the main impetus, why the gap, reflecting the lack of interest in the environmental matters when establishing the European Communities, was remedied by the Single European Act in 1987 due to which the environmental matters were incorporated within the scope of the Treaty establishing the European Economic Community. Since that time, the environmental protection requirements must be integrated into the definition and implementation of the European Communities policies, whereas a fundamental of that protection constitutes a prevention principle. For that purpose, the European Council adopted the Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment on 27 June 1985 (EIA Directive).

## **Opinion on the environmental impact assessment**

The EIA Directive was transposed into the Czech legal order by Act No. 100/2001 Coll., on Environmental Impact Assessment (EIA Act). The purpose of the EIA Directive and subsequently the EIA Act is to prevent any undesirable effects on the environment caused by the public and private projects specified in the annexes to these documents. The core of the screening process set up upon both documents represents an opinion on the environmental impact assessment (Opinion). No project which falls within the scope of the EIA Directive / EIA Act should be realized without prior consent reflecting the above mentioned Opinion. Pursuant to the Czech regulation, however, an administrative authority granting the final consent may reject the requirements stipulated in this Opinion. The Opinion itself therefore does not constitute a legally binding document. This results in an erosion of the main purpose of the EIA Act, i.e. adopting the final decision regarding the environmental projects upon an objective and qualified document, and moreover in a breach of the prevention principle under Community law.

## Praxis of the Czech Supreme Administrative Court

The legal nature of the Opinion has therefore become a subject to interpretation of the Czech Supreme Administrative Court (SAC). The SAC held that the Opinion is not a decision pursuant to the Act No. 150/202 Coll., the Code of Administrative Justice since it itself does not interfere with the rights of individuals and therefore it cannot be reviewed separately, but only in proceedings related to the decision upon the Opinion. On the other hand, however, the SAC following the EIA Directive qualified in its judgment of June 14, 2007, No. 1 As 39/2006 an important condition for proceedings which deal with the Opinion - the administrative action must be granted a suspensive effect in order to secure fair, equitable and timely procedure.

In later cases of June 26, 2007, No. 4 As 70/2006-72 and of August 29, 2007, No. 1 As 13/2007-63, the SAC must face the proposals to submit preliminary question to the European Court of Justice (ECJ) whether the complainants are entitled pursuant to Art. 10a of the EIA Directive and Art. 9 sec. 2, 3 and 4 of the Aarhus Convention to claim a separate review of the Opinion directly and immediately, i.e. not only in connection with the final administrative decision. The SAC, however, considered the interpretation of the above mentioned articles in both cases to be *act clair* and subsequently denied the motions.

## Principles of equivalence and effectiveness

The answer on the question whether an acting of a Member State's authority, in particular the SAC, is in breach with the Community law is of a crucial importance in context on the one hand of the principles of equivalence and effectiveness which are closely connected with the procedural autonomy of the Member States and on the other hand of ECJ judgments focusing on the correct application of Community law by the national courts. This is due to a fact that the ECJ explicitly recognized in its judgment of January 13, 2004, Kühne & Heitz v. Produktschap voor Pluimvee en Eieren (C-453/00) the possibility of re-opening of a final administrative decision which, notwithstanding that it was subsequently confirmed by a national court having failed to refer the issue to the ECJ, is in breach with Community law, provided that all conditions established by the ECJ are fulfilled and at the same time the procedural rules of the particular Member States allow this re-opening proceedings.

## Conclusion

As mentioned above, the Czech EIA procedure pursuant to the EIA Act does not fully comply with the EIA Directive. The SAC, however, hold the conformity for unquestionable using the doctrine of *act clair*. As shows the ECJ practice, an interpretation of a particular case being held for an *act clair* is not unchangeable and may differ in time. The way how the SAC proceeded may therefore be considered as omission to refer the preliminary question to the ECJ, i.e. as breach of Community law which may lead to a liability of the Czech Republic under the infringement proceedings. Moreover, provided that the incorrect acting of the SAC would be confirmed (e.g. by the ECJ within infringement proceedings) the principles of loyalty together with the principles of equivalence and effectiveness might apply. This would mean that already valid and effective decisions regarding the EIA procedure might be under certain conditions contested in respect of the "appellate theory" of the ECJ. A subsequent liability of the Czech Republic for the caused damages would be indisputable.

**Reviewer:** FILIP KŘEPELKA

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# EU CITIZENSHIP

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## Key words

EU citizens, non-citizens, erased persons

## Definition of EU citizenship

The paper is focused on the European Union citizenship. First, origins of EU citizenship and its definition and legal adoption were presented. Aim was to emphasise the economic dimension of EU citizenship and distinguish between the citizenship in material sense and “European Union citizenship” as set of rights of citizens of member states.

Characteristics of EU citizenship were briefly summarized, i.e.:

- Derivativeness (citizenship is dependent on the citizenship of member states, the member states solely may decide on who is their citizen, with the exception set in case *Micheletti v. Delegacion del Gobierno en Cantabria*<sup>1</sup>),
- content of the citizenship is limited by EU competences,
- mediateness,
- subsidiarity, proportionality (these principles must be kept when applying citizenship rules)
- connection to integration stage,
- inviolateness by flexibility principle
- interstate element, (the Court of Justice stated several times that the citizenship rules cannot be applied to wholly internal situations, see e.g. C-148/02, p. 31)
- supremacy.

EU citizenship, expressed in the Maastricht Treaty, gave a set of rights to citizens of member states that can be divided into three groups:

- Economic
- Political

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<sup>1</sup> Judgment of the Court of 7 July 1992, *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*, Reference for a preliminary ruling: Case C-369/90.

- Right to diplomatic and consular protection

### **Who is EU citizen?**

It is the power of the member states to determine who their national is, and therefore the national of the European Union. The paper focuses on the most obvious examples of the consequences of such an approach. First, the example of Great Britain who made a declaration to the accession treaty is being discussed. Great Britain divided its citizens into three categories but just one of them are citizens of the EU. The case Kaur (C-192/99) tried to challenge the conception of British Overseas Citizens and British Dependent Territories Citizens as set in the British declarations. The Court however approved the functionalist approach of Great Britain to definition of EU citizens.

Paper also mentioned the situation in Germany and Spain.

Main focus was however laid on discriminatory cases of granting citizenship. In Latvia, after the dissolution of the USSR, former USSR citizens with Russian origin was given a specific status of “non-citizens”. These don’t possess any citizenship, they have right to reside in Latvia and other right, except political rights. They are however not EU citizens and they cannot move freely within the Communities.

Other example is the situation of erased citizens in Slovenia after dissolution of Yugoslavia. People from former Yugoslavia who were so called new minorities - ethnic Serbs, ethnic Croats and ethnic Bosnian Muslims, ethnic Albanian Kosovars and ethnic Roma didn’t acquire Slovenian citizenship, they were erased from register of permanent residents, some of them were forced out of the country.

### **Conclusion**

EU member states decide on who are their citizens. Some of them have even created a functionalist approach and classified different categories of citizens. Due to colonial history of some countries, such approach may be comprehensible. The case of Latvia or Estonia shows the perils of this approach: thousands of people living in the country, thus having a genuine link with the state, are not regarded as nationals and posses an unprecedented status that doesn’t allow them to take advantage from EU law. This concept shows us that nationals of member states enjoy often different rights.

According to the Fifth Report on Citizenship of the Union, the Commission is aware of these problems (mainly of non-citizens) and has received a number of complaints, NGO reports, petitions and EP questions concerning problems in certain Member States linked to the acquisition and loss of nationality. Though it is not in EU powers, the Commission has sought to contribute to solutions linked to this issue by promoting integration and by using the Community instruments at its disposal such as ensuring that Member States strictly implement EC anti-discrimination legislation.

There seems to be one solution of the problem that has already been proposed by the Commission but hasn’t found the necessary consensus among the member states to become a binding legal act: granting the EU citizenship rights to persons with permanent residence.

The idea is actually not as a major breakthrough as it would seem: some citizenship rights are in fact granted to persons with permanent residence (such as petition right), some rights – such as right to vote and stand as candidate in the European Parliament elections – are, as seen in the case of Spain vs. UK, not restricted strictly to nationals of member states.

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# RECOGNITION OF QUALIFICATIONS: EU LAW

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## Key words

European Law, Recognition of Qualifications, Directive on the Recognition of Professional Qualifications

There are two distinguishable types of recognition of qualifications – the academic recognition and the professional recognition.

The academic recognition means recognition of diplomas, qualifications or study periods of any (domestic or foreign) educational institution by another one, either in order to entrance to an advanced study, or in order to reduce the study duties duplication. It's a very important tool for a student's mobility.

Even if the European Union is concerning about the education (inside its competences boundaries), it is not concerned about the academic recognition at all. The professional recognition, on the other hand, is a very in the scope of view of the European Union.

The free movement of persons as well as the free movement of services fall into the basic freedoms of the European Union. It is necessary to withdraw all obstructions – present and prospective - in order to reach those free movements. One of such an obstruction is the natural difference between qualifications gained in various member states. This difference is being overcome by the professional recognition of qualifications.

The professional recognition concerns in the evaluation knowledge and competence of the certain person. They can be proved by a diploma confirming successful completion of the educational level, by a document proving exercise of the regulated profession *de facto* or somehow else (by the compensatory measures). The result of the process is a decision whether the person is capable to practise the profession or not.

The old system of professional recognition of qualifications was growing up in the 1970's, 1980's and 1990's and was consisted of the general system of the recognition of qualifications and the sector system.

The general system was covered by the three general system's directives:

Directive 89/48/EEC on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration;

Directive 92/51/EEC on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC; and

Directive 1999/42/EC establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications.

This general system should ensure, that any European Union Member States' citizens have right to have vocational qualifications gained in one member state recognized by other. There were a few conditions to be

discharged in order to be covered by the general system directives which were covering all various professions, except those, which were regulated by the sectoral directives.

The sector system was consisting from the several sectoral directives, which represented the special regulation on certain professions.

Those professions and their directives were following:

- Advocates – 77/249/EEC and 98/5/EC;
- General care nurses – directive 77/452/EEC;
- Dentists – directive 78/686/EEC;
- Veterinarians – directive 78/1026/EEC;
- Midwives – directive 80/154/EEC;
- Architects – directive 85/384;
- Pharmacists – directive 85/433/EEC; and
- Doctors – directive 93/16/EEC.

By the time administering the various systems of recognition set up by the sectoral directives and the general system had proved cumbersome and complex. There was therefore a need to simplify the administration and updating the directive system to take account of scientific and technical progress, in particular where the minimum conditions of training are coordinated with a view to automatic recognition of qualifications. In order to ensure the effectiveness of the system for the recognition of professional qualifications, uniform formalities and rules of procedure should have been defined for its implementation, as well as certain details of the pursuit of the profession.

So that, the new complex Directive 2005/36/EC on the recognition of professional qualifications, has been issued. It covers almost all of the substance into the one directive, except the advocate's profession, and set up a lot of practical measures. It makes the process easier, faster and more available for all potential migrant workers or service providers.

In some points of view, the directive does not set up a new system at all, however it makes it easier and better working. It simplifies the rules allowing access to a number of industrial, commercial and craft activities, in Member States where those professions are regulated, in so far as those activities have been pursued for a reasonable and sufficiently recent period of time in another Member State and extends the general system to those cases which are not covered by a specific system, either where the profession is not covered by one of those systems or where, although the profession is covered by such a specific system, the applicant does not for some particular and exceptional reason meet the conditions to benefit from it.

The Member States should bring into force the laws, regulations and administrative provisions necessary to comply with the directive 20 October 2007 at the latest. The Czech Republic still has not been on time. The Act on the Recognition of Professional Qualifications has already existed since 2004. The novel transforming rules done by the new directive, unfortunately, is still waiting to be completed.

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#### **Key words**

Ethics, European Union, law, harmonization, economics.

Although ethics as a concept have been pondered in considerable detail by many intellectuals and in various points in time of human history, the concept itself still seems to evade accurate definition. The contributions of John Locke and Immanuel Kant, although they were not contemporaries, are very helpful when we wish to illustrate the varying approaches to ethics and how it is still difficult to define ethics even through a simplified approach. The cultural aspect of ethics further complicates the definition of this concept. While identifying differences between two countries which geographically do not belong to the same cultural heritage is relatively not so complex, such a distinction only relies on particularities and cannot be generalized. Moreover, it is difficult to define the boundaries of culture in general and a merely geographical criterion is not sufficient and even if a definition of such a criterion were possible, it is not desirable to take cultural aspects into account when trying to establish a definition of ethics in its most general form.

Although the origins of economics were beyond any doubt closely connected to ethics, it would be difficult to identify this connection in most areas of interest of economic theory. In spite of the fact that it might seem that this connection has been severed entirely, it would be erroneous to consider economics entirely independent of ethics, for ethical considerations are imperative even if they are merely considered as an accompaniment of economic theory and in addition to that, the link between ethics and economics remains relevant at least on a theoretical level and the interconnectedness of ethics and economics cannot be denied even in recent history. This is an extremely important conclusion which becomes very useful when the relationship between ethics and law is analyzed because the relationship between ethics and economics is an integral part of the aforementioned relationship between ethics and law. However, in spite of the close connection between ethics and law, it would seem that the role of ethics is more of a marginal nature, if we presume that the role of ethics ever was significant at all. The complexity of the relationship between ethics and law can be readily identified when we look at specific examples of the connection between legality and ethicality. While it can generally be said that once something is considered illegal, it is most often also considered unethical, the opposite implication does not apply. Furthermore, it is quite troubling when we realize that the ability to manipulate this imbalance between the unethical and the illegal is valued very highly in financial terms...

One of the problems emerging from the unsatisfactory role of ethics in the process of legislation in the European Union is the alarming level of redundancy in terms of the laws governing certain areas of human interaction. The problem consists not only in the legislative process itself, but it also stems from the unnecessary detail and depth of regulation which rids the member states of the European Union of their economic freedom in terms of disallowing broader competition through excessive restraints on the functioning of the market. Devising laws which aspire to comprehensively regulate all aspects of human interaction to the utmost detail is quite obviously a conceited ambition which hopefully is not the norm in the case of any

member state, yet it is logical that given the imperfection of laws which are in force in individual member states of the European Union, one would hardly expect the same process to work on the much greater scale of the European Union, not to mention if this were to be achieved by a mere summation of existing laws of individual member states.

From a purely pragmatic point of view, the role of ethics should be more significant in the legislative process because they would inherently offer a unifying perspective which is difficult (if not impossible) to achieve without them. Furthermore, due to the complexity and magnitude of the process of integration, it is necessary to constantly bear in mind that the main aim of the whole project which has today become known as the European Union was to increase market accessibility and facilitate economic cooperation. However, this initial aim has apparently been forgotten because the market is becoming intensely and inefficiently standardized, which is possibly partially also the indirect consequence of the influence of the importance of sovereignty of individual member states.

Given the complexity and scale of integration and bearing in mind that laws and legislation of individual member states certainly cannot claim to have been drawn up without noticeable flaws, it is not advisable to underestimate the significance of ethics in the harmonization process. While excessive details in individual laws certainly result in unnecessary constraints of the free functioning of the market, it could hardly be argued that excessive ethical requirements would have the same consequences. The role of ethics is not only to counterbalance the impersonality of the market, but more importantly, it is the most convenient element of unification, partly because it is already present in the concept of lawmaking, but it must be incorporated into the legal process more rigorously and more directly. Whether it is done through directives or regulations is not so important because the process itself relies on the pillar system (which may be cancelled) and practical issues such as the relatively recent problems in corporate governance in Europe prove that the general role of ethics is indispensable and cannot be replaced by detailed regulation alone.

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# EXTERNAL TRADE RELATIONS OF THE EC AND ITS MEMBER STATES: ADMISSIBLE GENERAL EXCEPTIONS

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## Key words

External trade, exclusive competences, restrictive measures, international trade, GATT

The European Community has replaced Member states to a great extent within the field of regulation of international trade. The legal basis of this competence in external relations can be found in several provisions of the EC Treaty. The most important are those contained in Chapter 2 labeled as Prohibition of quantitative restrictions between Member states.

The character of competence of the European Community in the sphere of international trade must be exclusive. Otherwise the system wouldn't work. This implies that it is the European Community and not Member states that is in charge in case of negotiation and conclusion of international trade agreements. The European Community has the power to act, speak and vote in international trade organizations.

The question of the division of powers between the European Community and Member states was of a high importance. As the EC Treaty was rather vague in this respect, it was the European Court of Justice that contributed to the solution of this problem. In its several opinions<sup>1</sup> the European Court of Justice helped to clarify this issue. However, the significance of these opinions is nowadays lessened as the Treaties of Amsterdam and Nice the provisions of the EC Treaty amended respective provisions on common commercial policy.

At this moment the European Community has the exclusive power to regulate import and export of goods and services (however some services are explicitly excluded and fall within the shared competence of the European Community and its Member States – namely agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services). The exclusive competence of the European Community covers also issues of the commercial aspects of intellectual property.

The above mentioned text implies that a vast amount of international trade agreements is negotiated and concluded by the European Community instead of Member states (where the competence is exclusive). Such international trade agreements are one of the sources of the Community law and their effects in the sphere of Member states is also given by the Community law. Member states, however, still have the right to maintain and conclude international trade agreements with third countries or international organisations in so far as such agreements comply with Community law and other relevant international agreements.

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<sup>1</sup> According to the Art. 300 Sec. 6 6. the European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union.

The question is whether Member states may independently on the European Community adopt any restrictive measures in order to protect some important values (eg. protection of human, animal or plant life or health, protection of public moral etc.).

The international trade law (for example Art. XX of GATT) generally allows such restrictions on import and/or exports of goods subject to condition that they are proportional to the aim which they shall pursue. However, the question still remains, because as the party to the GATT is the European Community and not Member states. The division of powers between the European Community and Member states may imply that since most of these issues fall within the area of exclusive competence of the European Community, any action of Member states is precluded. This is not, however, the truth.

Notwithstanding the exclusive character of the European Community competence in the sphere of international trade with goods, most of services and also in issues related to commercial aspects of intellectual property, Member states still may protect their interests. They are allowed to adopt restrictive measures which are justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property.

According to my opinion such restrictive measures may only be adopted by Member states in the form of prohibitions on imports or other quantitative restrictions or surveillance measures. On the other hand, customs duties on imports and charges having equivalent effect which would be adopted solely by Member states are prohibited absolutely and cannot be justified under any condition.<sup>2</sup>

A different approach would be illogical and against the interests of Member states since even the more integrated internal trade within the European Community may be hindered under same conditions.

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<sup>2</sup> For same opinion see Říhová, Kateřina. *Nástroje obchodní politiky ES týkající se ochranných opatření - 2. část* [online]. E-polis.cz, 22. duben 2006. [cit. 1. June 2008]. Available at: <<http://www.e-polis.cz/mezinarodni-pravo/141-nastroje-obchodni-politiky-es-tykajici-se-ochrannych-opatreni-2-cast.html>>. ISSN 1801-1438.

# THE GREEN PAPER ON THE REVISION OF CONSUMER ACQUIS: SOME OBSERVATIONS

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## Key words

Green paper – consumer acquis – revision - harmonization – horizontal instrument

## Introduction

The aim of the presented paper was to examine proposals of the Commission of the European Communities concerning revision of eight directives of the European Communities on consumer protection (the so-called consumer acquis), which were introduced by the Commission in the Green Paper on the Revision of Consumer Acquis in February 2007. The structure of the paper followed content logic of the Green Paper - divided into two major parts, the first one was dedicated to possible methods of revision of consumer acquis – with special regard to so-called horizontal instrument as a revolutionary change in the regulation of consumer protection on Community level, the second one dealing with the most suitable levels of harmonization of legal norms regulating consumer protection in the EC/EU. Each method of revision and level of harmonization were assessed, comparing the current state with the proposed amendment, and conclusions and recommendations were made.

## Approaches to revision of consumer acquis

The Commission presented three alternative approaches to revision of consumer acquis - vertical approach lying in the amendment of individual directives, mixed approach lying in the creation of a so-called horizontal instrument functioning as a general basis of harmonization for all revised directives, and preservation of the existing state. The vertical approach – which expected revision of individual directives one after another – did not seem as a very clever solution of current situation. It is true, on the one hand, that individual approach to each directive would guarantee a really quality revision. However, such means of revision would not constitute a real improvement to current state of affairs (the level of protection within the EC/EU would remain ambiguous) and it would definitely present a burden for the Community institutions in the legislative process. Therefore, this approach to revision had to be rejected as inconvenient.

As far as the second (mixed) approach is concerned, the situation looks much more promising. The core idea of this approach – creation of a so-called horizontal instrument – suggests that consumer acquis could gain a terminology basis common for all eight directives. Furthermore, purchase contracts should form part of the instrument, and – last but not least – main institutes of consumer protection legislation (such as the length of cooling-off periods or the possibility to exercise the right of withdrawal) would be removed from individual directives and incorporated in the instrument. The idea of the instrument is in general naturally praiseworthy, however, some trouble occurs here. First of all, in case basic institutes really were to form a part of the instrument (while at the same time they would „disappear“ from the directives), it would be crucial to secure

that these institutes become so to say applicable to all eight revised directives. Another problem might occur if purchase contracts became part of the instrument and at the same time relevant directives would be repealed – the question here being which are the relevant directives and whether the provisions on purchase contracts could apply also to „remained“ directives. Suggested solution here was either to create a general instrument (with definition of basic terms and major institutes of consumer protection legislation) applicable to all eight directives or create one instrument and repeal the eight directives at the same time. As far as the scope of the instrument is concerned, the Commission suggested three alternatives – applicability of the instrument both to national and cross-border transactions, to purely cross-border transactions or to all distance contracts (no matter whether national or cross-border). This paper argues that the best solution regarding the scope of the instrument would be the first one, i. e. a universal applicability to all consumer transactions carried out within one or more of the eight revised directives.

The last proposal of the Commission – maintenance of the current state – is quite naturally not satisfactory. As argued at the very beginning of the Green Paper, current situation of consumer protection in the EC/EU is discriminatory. Due to principle of minimum harmonization, consumers as well as professionals from different member states do not have sufficient legal certainty when entering into mutual relations. Therefore, absence of a revision seems not a solution.

### **Levels of harmonization**

In its second part – as well as the second part of the Green Paper – the paper dealt with level of harmonization of consumer acquis. The Commission suggested three alternatives – revision of the acquis leading to full harmonization, minimum harmonization together with principle of mutual recognition and minimum harmonization together with the country of origin principle. As far as the second and the third proposals are concerned, their first weak point is the maintenance of minimum harmonization. As indicated above, minimum harmonization does not seem a suitable method in the field of consumer protection, as it brings non-equal position of consumers and professionals across the EC/EU. Furthermore, the conception of both mutual recognition and country of origin is in my opinion not applicable to consumer matters. We can hardly expect the member states to refrain from creating obstacles to consumers or – especially – professionals from other member states. This applies especially to principle of country of origin, where also the reluctance of more protectionist member states to accept professionals from other member states with less strict (minimum) rules plays its role. Therefore, the conception of full harmonization together with revision of the acquis appears to be the most suitable one, although one might argue that full harmonization hardly leaves any space for the activity of member states and – in the current state – is contrary to the EC Treaty.

### **Conclusion**

After having examined all Commission proposals concerning methods and levels of harmonization, we came to the conclusion that in order to ensure the same level of consumer protection within the EC/EU, the revision of consumer acquis – by creating a horizontal instrument - together with full harmonization are necessary.

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# PROTECTION OF MINORITIES BY THEIR KIN-STATES IN THE EU – THE CASE OF HUNGARY

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## Key words

Minority rights, non-discrimination, Schengen, Venice commission, Hungarian minorities, status law, kin-state

The paper studies the case of the protection of the minority-rights by their kin-states. This issue can be discussed from the viewpoint of the non-discrimination principle of the EU, but the new Schengen borders and the unified visa-regime are also in question.

The Parliament of Hungary, carrying out Article 6 par. (3) of the Constitution - *“The Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary.”* - and also responding to the inquiries of the Hungarian organizations from the neighbouring countries – adopted the Act on „Hungarians Living in Neighbouring Countries” only in 2001, at the time of rightist Fidesz-cabinet.

This law, scheduled to step into force on 1 January 2002, provided several benefits and assistance basically for the “persons declaring themselves to be of Hungarian nationality who are not Hungarian citizens and who have their residence in the Republic of Croatia, the Federal Republic of Yugoslavia, Romania, the Republic of Slovenia, the Slovak Republic or the Ukraine” (Article 1). In some aspects, the act shall be applied to spouses and children of the mentioned persons. Person falling within the scope of this Act were entitled to benefits and assistance on the territory of Hungary, as well as in the country of their residence (Article 2). The Act provided mainly the following benefits and assistance: *Culture, science; Social Security Provisions and Health Care; Travel benefits; Education, student benefits, training for teachers; Employment; Assistance of Organizations operating abroad.*

The Republic of Slovakia and Romania – where the biggest communities of Hungarian minorities live – protested against the adoption of the Status Law, arguing with the following reasons:

*Extraterritoriality:* The most frequently used argument against the Status Law is that it contains extraterritorial elements, i.e. that the effects of the law extend to another state’s territory in ways that its sovereignty.

*Discrimination:* The law is discriminatory inasmuch as it makes a distinction among citizens of the Neighbouring States, in this case on an ethnic basis. *Objection to Benefits Going beyond Educational and Cultural Support:* the Status Law provided benefits for example on the field of rural tourism and employment.

The Romanian delegation to the Council of Europe in June 2001 started to collect signatures in favor of the Romanian initiative protesting against the Hungarian Status Law. The Council finally decided that it will give a mandate to the Venice Commission study the case.

The Commission in its Report stated that the responsibility for minority protection lies primarily with the home-States. The Commission notes that kin-States also play a role in the protection and preservation of their kin-

minorities, aiming at ensuring that their genuine linguistic and cultural links remain strong. The report included some particular observations applicable to the Hungarian status law.

The Hungarian minorities had to see in 2003 that the national means of minority protection are rather limited, because the Hungarian government diverged from the Status Law in order to comply with the EU-expectations just before the EU accession. The amendments not supported by the Hungarian Standing Conference – an institution presenting the Hungarian main parties, government, and the organizations of the Hungarians living abroad – were justified by the arguments and statements of the Venice Committee. It caused frustration widely, and a bitter experience, that the Hungarian government was unable to find the right solution for protecting the kin-minorities by means compatible with the international law and the EU-requirements.

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# CONSTITUTIONAL REVIEW OF THE LISBON TREATY – A COMPLAINT LODGED TO THE CZECH CONSTITUTIONAL COURT

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## Key words

European Union, Treaty of Lisbon, review of constitutionality, Czech Senate, Czech Constitutional Court

The conformity of the Treaty of Lisbon (TL) with the Czech constitutional legal order has become a part of debates at the Czech political scene; this led the Senate to lodge a complaint to the Czech Constitutional Court.

In its complaint the Senate generally asserts that the TL brings fundamental amendments of the present state of law which touch the substantial features of the Czech statehood; it requires a general review of the constitutional conformity based on two reasons:

- whether the TL is in conformity with the constitutional characteristics of the Czech Republic – sovereign, unitary and democratic state governed by the rule of law (comp. art. 1/1 of the Czech Constitution), and
- whether the TL does not change the essential attributes of a democratic state governed by the rule of law (comp. art. 9 par. 2 of the Czech Constitution).

This general constitutional review is supported by several arguments which are presented as being of a demonstrative character.

First, the Senate reflects the wording of the art. 10a of the Czech Constitution, under which it is possible to limit and transfer only certain powers of the Czech state organs. The Senate points out that the TL brings explicit classification and division of competence and, in its opinion, such a division of competence is characteristic for federal states. The category of exclusive EU competence (explicitly enumerated in the new articles) constitutes complex areas in which the competence will be transferred from the Czech Republic organs to the EU. This could be in breach of the wording of art. 10a of the Czech Constitution which allows transfer of only certain powers to the EU.

The Senate challenges the new art. 2C TEU which deals with the competences shared between the EU and its Members States. According to this article the shared competence will exist in the enumerated principal areas (such as the internal market, social policy, environment, consumer protection, etc.). The Senate alleges that the category is not a closed list but only a demonstrative as it talks about “principal” areas.

Second, the Senate specifically suggested a review of the constitutionality of the provision of revised art. 308 par. 1 Treaty on the Functioning of the EU (further TFEU) – so called suppletive legal basis. At present the application of art. 308 is limited to the adoption of rules in the course of the operation of the common market; newly this article could be used without specific limits in all policies defined in the treaties. The Senate asserts

that this provision creates a blank norm which enables to adopt measures outside the EU competence – this being in breach of art. 10a of the Czech Constitution. This may touch areas of cooperation in criminal matters and, thus, bring these areas in the exclusive jurisdiction of the Court of Justice with the contested lack of procedural guarantees for the protection of fundamental rights.

Third, the Senate points out to the provision of new art. 48 par. 6 and 7. The art. 48 deals with the revision procedures of the founding treaties. Its paragraph 6 suggests to introduce the simplified revision procedure (so called *passerelle*); paragraph 7 enables that in case the TFEU provides for legislative acts to be adopted unanimously, the European Council may unanimously decide that the acts will be adopted in an ordinary legislative procedure. Similarly, a shift from the special legislative procedure to the ordinary procedure is under specified conditions possible. The national parliaments must be notified and they may oppose; if they do it within the period of six months, the decision of the European Council referred to above will not be adopted.

Fourth, the Senate complains about the art. 216 of the TFEU which concerns the conclusion of international agreements by the EU. These agreements are concluded by qualified majority by the Council and are binding both to the EU and its Member States. According to the Senate conclusion of this agreement will not require the consent of the Czech Republic; there is no ratification process and the review of the constitutionality of the agreement according to the Czech constitutional rules is excluded.

Fifth and sixth, the Senate complains about the single legal personality of the European Union which would mean that the EU would gain legal personality also in the second and third pillar. In these areas the EU would adopt decisions also by qualified majority and thus potentially more conflicts between the EU and national standards on the protection of human rights would appear. Further it is noted that the status of the Charter of Fundamental Rights of the EU was changed and also its content is disputed. Human rights are also a basis of the last point mentioned by the Senate – that is the broadening of the scope of EU values on which the EU is founded (art. 2 TEU) and its possible impact on the use of the procedure of art. 7 TEU.

**Full version of this contribution can be found in the *Conference proceedings* on pp. 384 – 390.**

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# COMMUNITARIZATION OF THE EU THIRD PILLAR TODAY AND ACCORDING TO THE LISBON TREATY

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## Key words

Third pillar, first pillar, intergovernmental cooperation, Community legal order, police and judicial cooperation in criminal matters, general principles, conferral of powers, shared competence, subsidiarity, proportionality, supremacy (primacy), direct effect, indirect effect, liability for damages (Francovich), qualified majority voting, emergency brake, enhanced cooperation, cross-border double jeopardy principle (*ne bis in idem*), substantive legality principle, European Council, Commission, European Parliament, Council, Court of Justice (ECJ), national parliaments, yellow, orange, red card

In this paper I tried to describe and analyze the developments of the dynamic evolving area of police and judicial cooperation in criminal matters, which although still entailed within the primarily intergovernmental framework of the so-called third pillar of the EU, has been constantly a progressively influenced and more and more governed by the Community principles, rules and mechanisms.

As a good evidence of this process, the extensive case-law of the ECJ is remembered, starting with *Pupino* judgement transposing indirect effect and the principle of loyal cooperation into the third pillar and finally pointing to the *Environmental Crimes* and *Ships source pollution* judgements of the ECJ on Community competence over certain aspects of criminal law.

Then the large novelties in this area of police cooperation and criminal matters under the Lisbon treaty are introduced. The new role of the key institutions (the Commission, the EP, Council, the ECJ and national parliaments) as well as the mechanisms of functioning of this area (including co-decision with qualified majority voting and direct effect) are described and analyzed.

Finally, illustrating some of the problems of the current situation in both procedural and substantive criminal area on two pieces of legislation (*procedural rights in criminal proceedings* and *criminal sanctioning of the employers of the illegally-staying third country nationals*), conclusions are attempted to be drawn as to the possible advantages, respectively disadvantages and risks of the newly introduced framework, while emphasizing the special characteristics (such as mechanisms of *emergency brake* and *enhanced cooperation* in two variations) of the new arrangements which might lessen the future risks of undesired unification and centralization of criminal matters at the Union level.

At the very end, the questions are raised as to the future exercise of the completely new mechanisms. The success or tragedy (or most realistically something in between) of the development of criminal area within the Union will namely depend on the quality and activity with which these new powers will be performed by the respective actors (i.e. Union institutions and national parliaments as well).

**Reviewer:** FILIP KŘEPELKA

**Full version of this contribution can be found in the *Conference proceedings* on pp. 391 – 406.**

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# LIFELONG EDUCATION - LEGISLATION AND IMPORTANCE NOT ONLY FROM THE VIEWPOINT OF FUNDING OF HIGHER EDUCATION INSTITUTIONS

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## Key words

Lifelong education, legislation, financing higher education institutions

Importance of lifelong education can be considered from different viewpoints. For instance, from the purely economic point it is a potentially important source of financing a higher education institution or another organization providing lifelong education. However, it is of significant importance for the whole society. The need for lifelong education is ever increasing and reflects fast occurring obsolescence of acquired knowledge. A driving force of the development of lifelong education in the European Union countries is a fact that the growth of national prosperity and competitive force of respective countries depends on human workforce, its education and ability to accept and further develop new knowledge and technologies. Authors of the White Book<sup>1</sup> are convinced that new forms of study will play a dominant role in the lifelong education, based mainly on the use of new information and communication technologies, which will substantially affect the development of the whole tertiary system of education. This is undoubtedly true. The importance of lifelong education has not been fully appreciated in many cases. Therefore it is the task of educational institutions to respond to the needs of practice and to design a broad range of programs and courses of lifelong education.

Lifelong education provided by higher educational institutions is part of lifelong learning. The Czech government approved the new strategic document "Strategy of Lifelong Learning in the Czech Republic" (resolution No. 761 of 11 July 2007). This document<sup>2</sup> provides a survey of lifelong learning and particularly introduces proposals for the development and support of this area. According to this document, lifelong learning represents a substantial conceptual change in the conception of education and its organizational principles, where all opportunities to learn - whether within traditional educational institutions in the framework of the system of education or outside them - are conceived as an integrated whole, which enables varied and numerous transitions between education and profession and which enables acquisition of the same qualification and competence in various ways and at different times during one's life. Lifelong learning can be divided into two main phases, which are called initial and further education.

According to Section 60 Act on Higher Education Institutions<sup>3</sup>, such an institution may provide programs of lifelong education focused on the performance of profession or interest-based within the framework of its

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<sup>1</sup> National program of development of education in the Czech Republic: White Book, Prague: Institute for Information on Education, Tauris, 2001, 98p.

<sup>2</sup> Strategy of lifelong learning in the CR. [cited on 26 March 2008]. Available at: <http://www.msmt.cz/eu/strategie-celozivotniho-uceni-cr-1>

<sup>3</sup> Act No. 111/1998 Coll., on Higher Education Institutions and on modification and amendment of other acts (Act on Higher Education Institutions) as amended.

activities, and this either free or for a fee. Detailed terms of lifelong education are set by an internal regulation, about which participants in lifelong education courses must be informed in advance. Participants in lifelong education do not have the status of students, pursuant to Act on Higher Education Institutions. However, in case a participant in lifelong education is subsequently accepted for the study of a study program, he may be acknowledged up to 60% of credits obtained in a lifelong education course, necessary for the due completion of study, this under the amendment of the Act of 2001<sup>4</sup>. Higher education institutions issue certificates of completion to participants in lifelong education programs.

Funding of higher education institutions is substantially affected by Act on Value Added Tax<sup>5</sup>, which regulates the sphere of education in Section 57. Under paragraph 2, delivery of goods or services within the framework of education by a person mentioned in paragraph 1 is exempt from tax. It is the wording of paragraph 1 that in my view was subject to important amendments in the area of educational activities provided by higher education institutions, which strengthen the importance of lifelong education.

The original wording of Section 57 paragraph 1 contained a merely general definition of education for the purposes of this Act as an educational activity provided among others at higher educational institutions with reference to Act on Higher Education Institutions. Upon approval of the amendment to Act on Value Added Tax<sup>6</sup>, education in the area of higher educational institutions is deemed educational activity provided at higher educational institutions

1. in accredited undergraduate, graduate and doctoral study programs;
2. in lifelong education programs organized within the framework of accredited undergraduate, graduate and doctoral study programs;
3. in lifelong education programs organized under special statutory regulations;
4. in lifelong education programs organized as the University of the Third Age.

By the adoption of this legislation, conditions of educational activities provided in accredited study programs and lifelong education programs were unified. Provision of clause 3 should be mentioned, which regulates educational activity provided at higher educational institutions in lifelong education programs under special statutory regulations. As an example of such special regulation the legislator mentioned Act on Pedagogical Staff<sup>7</sup>. However, there may be examples in other areas, such as in the competence of interior, work and social affairs or health.

The aim of the submitted contribution was to deal with lifelong education, its importance and legislation. As far as the legislation is concerned, the question is whether lifelong education, or at least its basic principles, should not be regulated by a uniform regulation. Due to the above mentioned increasing importance and the wide

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<sup>4</sup> Act No. 147/2001 Coll., which amends Act No. 111/1998 Coll., on Higher Education Institutions and on modification and amendment of other acts (Act on Higher Education Institutions) as amended by Act No. 210/2000 Coll., and Act No. 451/1991 Coll., which determine certain other prerequisites for the performance of certain offices in state bodies and organizations of the Czech and Slovak Federative Republic, Czech Republic and Slovak Republic, as amended by subsequent regulations.

<sup>5</sup> Act No. 235/2004 Coll., on Value Added Tax, as amended.

<sup>6</sup> Act No. 377/2005 Coll., on supplementary supervision over banks, savings and credit co-operatives, electronic money institutions, insurance companies and securities dealers in financial conglomerates and on the modification of certain other acts (Act on Financial Conglomerates).

<sup>7</sup> Act No. 563/2004 Coll., on Pedagogical Staff and on the modification of other acts, as amended.

range of both providers and participants, I think this should be the case. The future of lifelong education is promising, and the legislative process is bound to respond to it.

**Reviewer:** DANA ŠRAMKOVÁ

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# FINANCING OF THE PUBLIC RESEARCH INSTITUTION

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## Key words

Public research institutions, public allowance organization, legal personality, property

With effect from 1. 1. 2007 a new corporation of public law has been formed into severally types budget organisations in Czech Republic – Public Research Institution. It have happened under authority of the Public Research Institution Act No. 341/2005, which have been accepted on 28. 7. 2005 and became operative on the day of publication 13. 9. 2005. Depending upon law construction mentioned § 31 subs. 1 this act selected public allowance organizations have been transformed into public research institutions with effect from 1. 1. 2007 and have been registered in official registry of public research institutions which is guide Ministry of Education. The reason of acceptance new corporation in the sphere of suicidology and research was the fact, that until then dominant form of allowance organization was not convenient in long-term aspect. Particularly depending on membership of Czech Republic in European Union. Member countries of EU is not analogue in corporations of research and development because its legal personality is restricted of having no holding and having no guarantee-ability for obligations (it is usually either autonomous corporation including all discretions and duties or activity appropriate of public abroad). Until date legal personality there was barriers to direct cooperation with foreign institute and to participation in consortium on solutions to projects of framework programs EU as well as other activities European research area which gave rise to diminishing returns of means embedded by Czech Republic. But not all departmental research institutes were transform by admitted legal form. This transformation have been out of small proportion of research and development allowance organisations and some of allowance organisations researching mainly specification as public order. As well as research institutes which are activity appropriate of public could not be converted to new form according to above-cited Act because these institutes had not legal personality. Public research institution have become propered variant for the transform of this departmental research institute's part which had a form of public allowance organizations, universal form for public and for statutory founders which are acting in public service area – i.e. in educational field, public health, etc. This readjustment of law allow better and more effective utilisation of financial resource by the research institutes and raise alternative resources for financing of research and development e.g. attainment of makings from other activity, confinancing from the private sources, unnecessary property release, better organization savings, participation in external programs etc. It brings higher autonomy and liability research station especially at economic sphere. Thanks this readjustment of law can be done much more for better support and better remuneration foexcelent research worker, for reciprocal profitable university interface, for marked consolidation direct cooperation with bussines sphere which is of benefit to both parties, for effective developing another activities of workplace, for construction of spin-off companies and other institutions, which are going to support to better use to researching work – all in compliance with criteria of law and under the conditions of not break an open economic competition by this new activities and under the conditions of not using general budget's grants for commercial purpose and over the ambit of this legislation. Public research institutions have got over first year of availability. This year was in token of administration and staffing arrangement, including modification of property relations. On the subject

of previous legal regulation, this regulation contribute to more effective using potential financial resources in the sphere of research without question.

The Public Research Institution is corporation its main object of activity is research, including assurance of research infrastructure, which is definition by support of research and developement act. The public research institution assurance research by its main object of activity. This research is support especially from public funds, under the conditions for providing public support which are given by the European Community due.

**Reviewer:** PETR MRKÝVKA

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# THE ROLE OF FINANCIAL STANDARDS IN THE CONSTITUTIONS OF THE COUNTRIES OF THE VISEGRAD GROUP

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## Key words

Public funds management, constitutional regulation, Visegrad Group

*„Money speaks sense in a language all nations understand.”*

/Aphra Behn/

Cooperation between people and nations is one of the oldest and most important things in the world. Many kinds of cooperations came into existence in the course of years, for example domesticities, economic, political, social and professional collaboration. Nevertheless, what does a state explicitly need to establish relations of this kind? In this highly globalised world, one of the most simple answer is money. We know naturally that common interest is the ground of every cooperation, but in general, these cannot work for a long time without money, moreover, they cannot start to work at all. That could be one reason why states cannot help or support each other, or why they cannot cooperate. However, we also know that in order to preserve and develop competitiveness in our days it is a must.

On the grounds of what I have mentioned above, the first standpoint in my research was that all states have to manage their public finance with extraordinary diligence, which is not only a remarkable thing in a state's life, but a challenge at the same time, as well.

In my essay, I focused on the Visegrad Group's economic cooperation<sup>1</sup>, and especially on their constitutional framework concerning public finance. The reason for this is that I think it is important to have a comprehensive constitutional regulation concerning public finance in every democratic country, just like in the countries I did my research on.

On the score of contents, I can tell that there are some common regulations in the constitutions of the V4 countries concerning public finance (Table 1.), that are needed but, in my opinion, are not enough.

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<sup>1</sup> Czech Republic, Hungary, Poland and Slovakia.

These are the following:

1.	The draft law on the state budget and the draft law on the state annual account is presented by the Government.
2.	It is always the Parliament that shall adopt the state budget.
3.	The National Bank is the central bank in each state that, first of all, is responsible for the currency stability.
4.	The State Audit Office is an independent organization, which executes inspections of the management of state property and the fulfillment of the state budget.

Table 1: Common regulations of the V4 countries

I think that some other regulations must be inserted too into these constitutions. As follows:

1.	The Parliament shall adopt, as a law, a budget <b>for all state income and expenditure and for each year.</b>
2.	The Parliament may adopt a <b>supplementary budget</b> , on the proposal by the Government, during the budget year, when additional financial measures are needed.
3.	Proposed amendments to the national budget or to its draft must be accompanied by the <b>necessary financial calculations</b> , which indicate the sources of income to cover the proposed expenditures.
4.	If the Parliament does not adopt the national budget by the beginning of the budget year, it is better to adopt a <b>transitional budget law</b> for some months.
5.	It should be the Parliament again that must have the right to decide on the question of public debt.
6.	The <b>appropriation accounts</b> must be a right (fiscal) control over the function of the government, and if it is appropriate, the government should get exculpation.
7.	The <b>referendum concerning public finance</b> must be prohibited.

Table 2: Proposals concerning public finance

My conclusion is, in order to have a viable international relationships among states, one of the most important things is to have a stable constitutional framework. However, in the member states of the Visegrad Group, this condition needs amendments concerning public finances.

Namely, I believe that there are some essential regulations concerning the field of financial law that should be deemed fundamental in every democratic country to have appropriate public funds management. That is why, in my research, my aim was to make an international survey relative to the Central-European region, and as a result of this, to make a proposal concerning this topic.

**Reviewer:** ANDRÁS PATYI

**Full version of this contribution can be found in the *Conference proceedings* on pp. 427 – 431.**

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# ROMANIAN TAX PROVISIONS INCONSISTENT WITH THE RIGHT TO A FAIR TRIAL

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## Key words

Right to a Fair Trial – Article 6 ECHR – Access to Court – Stamp Duty – Binding Judicial Decision – Public Authorities and Institutions – Forced Execution – Effective Remedy – Right of Property – Proof of Payment – Compulsory Litigation Procedure – Right to a Judgement Within a Reasonable Time – Criminal Charges – Fiscal Sanctions – Obligation to Cooperate – Right of Silence – Administrative Procedures

As the European Court of Human Rights has often said, the right of a fair trial enshrined in Article 6 of the European Convention of Human Rights and in Article 21 par. 3 of the Romanian Constitution reflects the fundamental principle of the rule of law in a democratic society.

The Court held that an excessive impediment of the access to the court, such as the imposition of a fee for lodging an action to the amount of an average annual salary, is incompatible with Article 6. This is particularly the point where Romania encounters serious problems, as it has suffered a number of convictions before the European Court. Of course, the leading case on that matter is Weissman and others v. Romania, where the Court held that a stamp duty of EUR 323,264 (approximately 1% of the value of the goods reclaimed) is an excessive obstacle for access to a court incompatible with Article 6 par. 1. Although this was only the first case to be heard in Strasbourg, the Romanian Government did not provide any remedy for this particular inconsistency so far. Of course, this matter can be brought to an end if effective solutions, such as the determination all the costs and fees at the end of the trial and, would be adopted.

As the European Court has often said, „the right to a court” would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. At this point, one must notice that the Romanian legislation concerning the execution of judicial decisions concerning public authorities and institutions is problematic. To be more specific, according to the provisions of the Government Ordinance no. 22/2002, the party that obtained a final and binding judicial decision imposing on a public authority or institution to pay a sum of money could obtain the execution of such a decision only if the respective amount was contained in the budget of the public entity. According to some new rules introduced in 2007, public authorities and entities are obliged to take all the necessary steps in order to pay the amounts claimed, as long as a final binding decision is presented. If the respective public entity fails to do so within a prescribed term of 6 months, the creditor is entitled to obtain the forced execution of the judicial decision, following the provisions of the Romanian Code of Civil Procedure. Although such a regulation is a sure step ahead, we do believe that there is still no sufficient evidence that the new provisions offer an effective remedy for the execution of binding judicial decisions.

According to one particular tax provision, Land Registered Authority is entitled to refuse such registration of the right of property as long as the proof that income tax has been paid by the other party of an land or building apportionment procedure is not presented (article 77<sup>1</sup> par. 6 Romanian Fiscal Code, in fine). The purpose of

such a provision is clearly that of ensuring the payment of income tax to the state budget. In our view, such a provision is clearly inconsistent with the right to a fair trial and also unconstitutional with reference to article 21 of the Romanian Constitution. The party that asks for the registration of the right of property asks for the execution of a final binding judicial decision; in this respect, according to the *Hornsby* jurisprudence, the state authorities must refrain from making such a judicial decision ineffective. Also, the fact that income tax has not been paid is not attributable to the new owner, as he has no obligation to pay tax.

The Romanian doctrine has often claimed that the obligation to comply with a previous and compulsory litigation procedure before the tax authorities (article 202 and the following of the Romanian Code of Fiscal Procedure), prior to having the case heard by a „court” within the meaning of the European Convention of Human Rights, is contrary to the right of access to justice. Despite the jurisprudence of the Romanian Constitutional Court on this matter, we believe that such a procedure is a clear and unjustified restriction of the right of access to justice and the Romanian legislator should make the necessary changes to the Code of Fiscal Procedure and eliminate this restriction as soon as possible.

Article 6 par. 2 and 3 of the European Convention of Human Rights grant to the persons facing a „criminal charge” special guarantees: recognition of the presumption of innocence, the right of silence, rights and facilities of the defense and so on. On the contrary, the relevant provisions of the Romanian Code of Fiscal Procedure are rather shy when it comes to the same solution. In our view, this deficiency is caused by the fact that the Romanian legislator and the tax authorities do not consider fiscal procedure is covered by the right to a fair trial. On the contrary, based on the *Benedoun* jurisprudence, we believe that the criteria are met in order to consider that there is a „criminal charge” involved and that article 6 is applicable in certain cases. We believe that the Romanian legislator should act quickly and provide for the guarantees enshrined in article 6 paragraphs 2 and 3 of the European Convention when a „criminal charge” in the tax field is involved. Especially, the above-mentioned guarantees should be granted in all cases where evidence collected in the administrative procedures (such as the tax procedures) is to be used in forthcoming criminal procedures.

**Reviewer:** ION DELEANU

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## Key words

Legal institute, interpretation, duty to edit, tax administrator's binding examination

My answer to the question of whether I would support the institute of obligatory appreciation would probably sound "yes". At the same time, I need to point out that I would not support the representation which nowadays constitutes a part of the legal order. Although the entrepreneur are calling for the obligatory appreciation yet another travesty should for sure not contribute to the clarity of the legal order, far from being an instrument to increase legal certainty of the taxpayers. Rather, the opposite would be the case. I dare to claim that the authorities entitled to issue the obligatory appreciation are not competent to do so, particularly as far as the professional qualification of the employees as well as their numbers at the respective positions or the offices equipment etc. are concerned. I am particularly worried about the possible of the tax offices and, as a consequence, about the much higher costs within the tax administration. What if, according to the principle of judicial review, such an incorrect decision was consequently to be revised by the court? Moreover, the court would not be bound by these obligatory appreciations. Thus, the number of legal proceedings aimed at the administrative justice will increase. It is evident from the statistics that within the tax system there are most often objected the procedural regulations, not the substantive law acts regulates the individual taxes. This can even lead to the overloading of the courts.

I also think the taxpayers are not only going to appeal for a change of a decision, but they would also be going to demand the compensation for the damage which aroused from an inaccurate decision of the tax administrator. It is a sphere of big money. The corporations' taxes constitute a substantial and indispensable part of the state budget. The legal subject might suffer from enormous losses. As long as the receivers general are concerned, the effects of the inaccurate decision will probably affect them at the service level only. Such damages caused by the inaccurate decision will subsequently have to be paid by the state, respectively by the taxpayers', which means by those who themselves demanded the obligatory appreciation.

I believe one of the possible solutions to the situation would be either the centralization of this competence and its transmission into the framework of the Ministry of finance, or the establishment a specialized institution which would provide professionals in field of tax law. Anyway, the matter of finding and 'buying' a sufficient number of experts who would put their minds to such a professional pursuit, as well as the question of an adequate payment for them, would be a problematic one. The institution could also deal with drafting the high-quality laws in the area of finance law. Nonetheless, there arises a question of whether the institution would not stand for the legislators, as well as whether, having undergone the legislative process; the high-quality laws created by the institution would not become a sheer tangle of formulas. In this case, the modification of the legislative process would be a need.

Concerning the situation in Poland, there has been a substantial change and quite a compact modification of the tax system has come into being after several years of not very promising experiences with the obligatory appreciation. Nevertheless, there also are a couple of phenomena to be criticized. The substantial



centralization of the system has apparently taken place. However, from the pragmatic point of view, the minister can depute the competence to the subordinate authorities and the term 'centralization' may turn into a blank term. Setting an exact time limit for issuing an interpretation is what I regard positive. Our country lacks regularization; in my view, the implementing legislation or, as suggested, the one by the medium of the internal direction, are entirely insufficient. This contributes neither to the clarity of the tax system, nor to the confidence of the legal entities.

I appreciate the Polish lawmaker's courage to determine him self to modify the institute much earlier than in the Czech republic. On the one hand, the Czech ministry claims that they are not willing to accept the not-system solutions and that they do not want to be rash and make the same mistakes Poland has done. On the other hand, they act quite similarly to Poland. The law modification on tax administration and charges is fragmentary, incomplete, and it does not fit the required needs.

I constantly speculate upon several questions: why should we accept only the partial and incomplete resolutions? Why should we waste time by working on them? Why should we deal with the problem without dealing with its essence? Why to deal with the secondary problems such as obligatory appreciation?

Let us focus on the primary problem which is the unclarity of Czech laws in general, in our case that of the Czech tax system. If we eliminated this problem, we would not need any further institute. The elaborated editing of clearer and more comprehensible laws and, above all, the restraint from any law editing is much better than any other duty.

I would put the formation of the new law to the experts and professionals, not to the politicians. I understand that 'giving up some parts of the competence' must be quite difficult for the politicians. That is the reason why I believe the most suitable solution, however by far not the easiest one, the formation of a brand new law. If we want to fulfill the idea of the modernization of the public administration, the essential point is the efficient tax administration, which constitutes the essential part of the idea. The law should also be divided into the substantive and the procedural part. Thus, controversies and obscurities would be avoided.

**Reviewer:** MICHAL RADVAN

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# WORK CONTRACT ON SYSTEM INTEGRATION SELECTED PROBLEMS OF APPLICATION

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## **Key words**

System integration, work contract, outsourcing, categorization of defects, implementation, complex projects, information technology

The implementation of comprehensive projects in the field of system integration includes a variety of complicated relationships between the participating subjects and whatever is useful to accommodate the selection of adequate contractual partners and appropriate, clear and consistently specific types of contracts to guarantee technical and legal links. Since current Slovak legal regulations do not define complex specifics which, in a single legal branch of law, would adequately regulate all relationships arising in the information technology field, in the case of system integration projects whose purpose is to develop, utilize and evolve information systems and information technologies with the aim of achieving optimal integrated combinations and the integration of suitable products and services from a number of suppliers into a compact and mutually-functioning, interconnected unit, what is often used in practice is a so-called “innominate” and thus anonymous contract according to provisions of § 269 par. 2 of the Commercial Code, as amended, (often a contract to provide system integration services) or a work contract according to provisions of § 536 of the Commercial Code, but this governs only general principles and matters connected with implementing system integration projects and therefore it is essential to have such a contract tailored to the particular situation in the field of information technologies and information systems. Considering the fact that a component of systems integration is also the delivery of either a computer program or software that is subject to copyright, part of the contractual relationship has to be provisions to govern the extension of rights to a work of software (especially computer programs, databases, etc.) where the author is entitled to remuneration from the customer for authorization to use and also expand his or her work by an agreed means, including acceptance of other sections of the Copyright Act. Provisions of § 536 et seq. of the Commercial Code, which govern work contracts, and the Copyright Act, as amended, are the foundations for a legal perception of the implementation of system integration projects. Because the implementation of a system integration project is a highly specialized area, many activities within complex solutions, when obligatory relationships are created, are performed in practice based on the principle of commercialism.

To be able to achieve the required objectives of system integration projects, it is critical for the contracting parties to have clearly defined conditions of cooperation, above all demand and supply, so that the result is in reality an integrated product, not just isolated parts and partial services. One of the most fundamental requirements of a work contract to implement system integration is a detailed, substantial and understandable definition of the purpose of the contract. A definition or a close concretization of the comprehensive purpose of the contract is often presented in technical appendices of the contract (e.g. in functional specifications), once an analysis of the information system has been finalized and accepted and functional specifications have

been submitted. From a technical point of view, this procedure can be branded as logical, yet when preparing a draft contract, it is necessary at least to specify the outlines of a purpose to the contract so that it is clear and sufficiently fixed, in order to define the criteria for a flexible definition of the purpose of the contract in all of its stages and to let the customer have the ability to cooperate when the information system and the functional specifications are analyzed. It is an important condition for the customer to have the ability to make notes on conditions and subsequently approve them. For the above reason, it is necessary when structuring the framework contract to define the relationship of the framework contract and its appendices to the implementing contract. The contracting parties may anticipate possible uncertainties in interpretation by placing alternative solutions for an information system's individual functionalities in an annex of the framework contract before functional specifications are finalized.

Since implementing system integration is a comprehensive project that consists of many consecutively linked stages or parts, one of the most important provisions in a contractual engagement is the problem of defects in the work. If the contracting parties have not precisely defined what can be regarded as a defect in the work within the individual stages of implementation, there is a risk of vague interpretation and thereby potential problems when specifying the transfer and assumption of work, which may result in failure to meet performance deadlines, the price not being remitted and other problems. In commerce, especially when implementing an ongoing work contract that is performed in stages over a long term, work contracts are concluded in practice with increased attention especially paid to transferring and assuming the work, guarantees, warranty and post-warranty service and how defects are removed. In specifying removal of faults, "categorization" of defects, which for the contracting parties particularly means summarizing deadlines for removing faults, is regarded as how fast intervention takes place.

The process of preparing contractual relationships for implementing system integration has to be understood as teamwork between specialists in the information technology field and lawyers. When neither party is inadequately communicating, a clear summary and compatible contractual documentation cannot be prepared that would, in a goal-directed manner, respond to practical needs. An essential condition for a well-functioning obligatory relationship during the process of implementing system integration is also familiarization by management, project managers and other IT specialists who are participating in fulfillment with the contents and the interpretive reading of the contractual documents so that accepted rules of cooperation are not violated in practice.

High-quality preparation of a comprehensive work contract to implement system integration demands a thorough analysis of the contracting parties' conditions, strong expertise in the applications environment and legislative conditions and, last but not least, cooperation among the interested parties.

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# VARIOUS KINDS OF SECURITIES

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## Key words

Securities, kind, form, type, share, capital market, investment instrument, financial market instruments

The aim of this article is to analyze various kinds of securities and their legal regulation as it is present in the Czech Law at the beginning of 21st century. The author will take into account the regulation of securities in the area of Capital Market Law and connected regulation in the area of Securities Law.

There are a few ways to categorize the securities from the different points of view. Various categories may not be interchanged because it is a division of securities from completely different criteria. This paper also analyzes securities as used generally in the Czech Law with absent definition, securities according to the definition of particular Acts (like Foreign Exchange Act No. 219/1995 Sb.), investment instruments and instruments of the financial market. The author takes into account the ways of division by the current Czech law and adds the theoretical knowledge from this area. Besides currently effective legal acts also specialized publications and electronic publications are included as the sources of this paper that are processed using scientific methods and systematic interpretation.

Dědič is defining securities in their broader sense of the word when he is pointing to any documents that are proving occurrence of the subjective right, are necessary for claiming the right and are integral part (substance) of the right.<sup>1</sup> Securities in this sense may include documents such as the Deed of Association, Letter of Appointment, Locatio Operis etc.

The narrower group of the securities are securities defined in the way as they take part on the capital market, i.e. in the narrower sense of the word. At this point these documents are incorporating a right or more rights into them and they offer the possibility to use and benefit from these rights and sometimes also to dispose with the rights to their holders.

As we can see further these documents does not necessarily have to be in the documentary form but also in the form of data records containing these rights in the different way. Data records are usually booked entries in central securities records or in particular securities records.

In the Czech Republic there is no general definition of the securities directly stated in the Act. There are some particular definitions usable for single acts – specifically it is the case of the legal definition in the Foreign Exchange Act only for the purposes of this act – it defines securities as the documents or substituting records connected with the right to share on the property or the right to pecuniary consideration.<sup>2</sup> As we can assume from this definition it also counts with book entry securities that are subordinated to the records substituting documents.

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1 Vide Dědič, J. In Dědič, J., Pauly, J.: *Cenné papíry*, Praha: PROSPEKTRUM, 1994, 220 p., ISBN 80-85431-98-X, p. 17.

2 See § 1 char. e) Act No. 219/1995 Sb., Foreign Exchange Act, in the current statutory text.

Theoretic definition regards the security as an object having four features – document (1) on right (2), which is closely bound to the document (3) and this right is the private law property right (4). This definition would not include book entry securities created by records in the central records by the Prague Securities Centre or particular records. This definitional malfunction may be solved by replacing „document“ with the word „carrier“ after which this definition also includes book entry securities.<sup>3</sup>

Currently effective Act on Securities is offering demonstrative enumeration of securities kinds. Therefore another institutes may also be securities if they fulfil the theoretical definition of securities.<sup>4</sup> They must be issued on the legal basis. Kinds currently regulated by the Czech law are:

- shares,
- interim certificates,
- share subscription certificates,
- unit certificates,
- bonds,
- investment coupons,
- coupons,
- option warrants,
- bills of exchange and promissory notes,
- cheques,
- bills of lading,
- warehouse certificates,
- agricultural warehouse certificates.<sup>5</sup>

The paper is also including the discussion on the concept of investment instruments which was transposed from the European Community Law. It includes investment securities, collective investment securities, securities that are usually dealt in on the money market (money market instruments) and derivatives.<sup>6</sup>

As the most general concept the author is mentioning the concept of financial market instruments as *the object of business on financial market*.<sup>7</sup>

The paper then analyzes more particular questions in the area of securities regulation in the Czech Republic including further categorization of various kinds of securities like shares and bonds.

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3More to this definition in Vitek, J. In Kotásek, J. et al.: *Kurs obchodního práva: právo cenných papírů*, Praha, C. H. Beck, 2005, 728 p., ISBN 80-7179-855-X, p. 19 – 20.

4 See Dědič, J. In Dědič, J., Pauly, J.: *Cenné papíry*, Praha: PROSPEKTRUM, 1994, 220 p., ISBN 80-85431-98-X, p. 20.

5 Compare § 1 par. 1 Act No. 591/1992 Sb., on Securities, in the current statutory text.

6 Vide § 3 par. 1 Act No. 256/2004 Sb., on Business Activities on the Capital Market, in the current statutory text.

7 Citation from Kotáb, P. In Bakeš, M. et al.: *Finanční právo*, Praha: C. H. Beck, 2003, 721 p., ISBN 80-7179-667-0, p. 528.

# THE DISCIPLINE OF PUBLIC FINANCES. ANALYSIS OF THE CONCEPT

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## Key words

Responsibility for violating the discipline of public finances, financial law, public finances, budget, competitive tendering, accounting, public resources, donation, a unit of public finances sector, inventorying, State Treasury, a unit of the local government, tax-criminal responsibility, disposer of public resources

Articles of the financial law put on the disposers of public resources (the state budget resources and budgets of the local government units) numerous obligations. They include collecting and expending the public resources (the law of public finances, self-government acts), rules and procedures of expending the public resources (competitive tendering law), correctness of management of goods of the units of public finances sector and reporting obligations (accountancy act), realization of public-legal commitments, paying insurance fees and payments to special funds (social insurance system act, laws which regulate the financial economy of special funds). Correctness of realization of obligations imposed by articles of the public finances management act as well as other articles of the financial law is included under a particular system of responsibility, that is: the responsibility for violating the discipline of public finances.

The law of responsibility for violating the discipline of public finances does not contain the legal definition of the „discipline of public finances” concept, therefore individual elements that make up the distinguishing features of this institution should be reconstructed from the entirety of regulations of the law itself and from its particular articles.

The legal responsibility means to suffer predicted by law negative consequences of events or states of things which come under negative prescriptive classification. Discipline is understood by the legal literature as discipline, order or an obligation to submit to specified rules. Finally, the concept of „public finances” includes processes connected with collecting public resources and their allocation.

The discipline of public finances shall be understood also as prescriptively set classification of rules which are related to the correct management of public resources. This concern not only *stricte* financial law, but also norms that come under competitive tendering law or accountancy act. The discipline of public finances in a positive point of view means such system of public resources management which is in conformity in formal and financial respect with public finances act. If this system differs from the one imposed by the employer – we are dealing with discipline of public finances in a negative sense (known as discipline of public finances *sensu stricto* or in a narrow sense), understood as a classification of acts which when made (in an active or passive way, that is feasant or nonfeasant) the legislator recognized as reprehensible enough and harmful to public finances, to be hedged around with many sanctions (caution, reprimand, fine or ban on serving as a person responsible for disposing public resources even up to five years). Objective range of responsibility for violating the discipline of public finances is characterized by homogeneity which relies on linking the acts which make the distinguishing features of these violations empty with legal norms that regulate the public finances order. Protection of articles of the act of responsibility for violating the discipline of public aims at providing regularity

among processes that make up the prescriptive term „public finances”, however the regime does not concern customs charges and tax charges.

Classification of violations of the discipline also includes the following fundamental areas: collecting public incomes, expending public resources, taking out obligations, granting and using budgetary donations, accounting for budget, carrying out inventorying and reporting obligations. The legislator attaches particular significance to expending public resources which come from European Union budget. The range of the subject of behaviours which cause the responsibility for violating the discipline of public finances includes feasant or nonfeasant incompatible with rules which regulate these areas of activity, committed by people mentioned in the act (disposers of public resources), culpable, harmful to public finances.

Responsibility for violating the discipline of public finances is independent from responsibility specified by other legal regulations. Actions defined by act as financial transgressions may be the subject of penalization also by other regulations. The meeting point of responsibilities for financial transgression is possible first of all with criminal responsibility and tax-criminal responsibility when violation of the discipline of public finances constitutes a fragment of a criminal action of a person prosecuted based on a penal act. Among other things, economic offences, crimes against activity of state institutions or local government as well as crimes against reliability of documents are taken into account. Responsibility based on civil law regulations is conceivable too (e.g. compensatory on account of unlawful deed, contracted in form of contractual fine or a sanction of nullity of making an agreement concerning competitive tendering without observing the written form). Responsibility for violating the financial discipline frequently remains in coincidence with disciplinary responsibility suffered based on labour law regulations. To system sanctions, applied on the basis of act of public finances, belongs, first of all, the institution of blocking planned budgetary expenses used in case of identifying mismanagement, delays in realization of some tasks, excess in the amount of acquired resources or violation of rules of financial economy, deprivation of the right to use the budgetary donations for three years, or when the donation was not used for what it was intended.

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# ECOLOGICAL FISCAL REFORM

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## Key words

Ecological fiscal reform, tax on natural and other gases, tax on fossil fuels, tax on electricity, strategy 20/20/20

The paper deals the ecological fiscal reform. It focuses particularly on the fiscal reform made in Czech republic by the act 261/2007 Sb., which is based on the Council Directive 2003/96/EC. This act established three new taxes. The tax on natural and other gases, the tax on fossil fuels, and the tax on electricity. These new taxes are called ecological taxes, since they are taxing commodities harmful in their effects to the environment. These taxes are to be so-called first steps to the internalisation on externalities. The aim of these taxes is to slowdown increasing consumption of stated commodities through increasing their price.

Czech republic was forced to introduce these taxes as well as a minimum taxation level by the Directive. This tax was to be forceable till 31. 12. 2007 when ends the transition period given to new EU member states.

The Czech legislative previously used an unusual form of transposition of these taxes. Instead of developing a whole new tax legislative act containing solely ecological taxes, the Czech government and parliament incorporated these to one extensive, summary act where were are included many other thematically separate paragraphs changing different branches of the law. The paper criticizes this approach as well as the problematic aspects of these taxes, where are stated exceptions form the general application of the tax meant to protect some particular businesses. This protection is compared to the tax obligation applied on general citizens and is shown a possible injustice and persecution of citizens against privileges of the businesses.

The paper tries to capture the complexity of the evolution of the ecological fiscal reform following the intentions of the European Commission. The text mentions the strategy „20/20/20“ proposed by European Commission and shows also the potential challenges in this matter for Czech government during Czech presidency in European Council in 2009.

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# DELIVERING IN THE TAX ADMINISTRATION – COMPARISON OF PROCEDURAL RULES

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## Key words

Legal institute, alternative delivery, delivering, tax procedure, administrative procedure, civil proceedings

Legal institute is a body of laws which regulates homogenous relations. The legal institute of delivering is concretely the body of laws which regulates relations which are related to delivering and which can be met across whole law spectrum. Delivery is characteristic institute of public law and intrinsic institute of procedural law (is integral component of proceeding which is held in front of public authorities). The object of delivering is always the real acceptance by the recipient. The delivering has to be unambiguously documented due to higher peace and participants' protection and the whole process must follow procedures defined by law.

By higher mentioned reason many common institutions can be found within all procedural rules, especially in the procedures of tax, administrative and civil law. Despite the similar regulation, several differences could be found. These differences result from specific conditions of these procedures.

My paper deals with the delivering in the field of tax administration, i.e. the delivering in compliance with §17-20 of the Tax and fees administration law. Delivering is a vital administrative procedure of a tax administrator and is necessary for attainment of the object of the Tax and fees administration law. This procedure is often omitted. Is explicitly specified that the right can be conferred or duties can be imposed on the subjects in the tax procedure solely by means of resolution which has been properly delivered or communicated. Resolutions are forceful towards the participants only after their proper delivering and solely in this way they can inure and become enforceable.

Delivering is consequently a way for the participants in order to get acquainted with the substance of administrative resolutions issued in compliance with the Tax and fees administration law, to use their rights ensured by the constitution (right to even pleading) and to assert effectively and efficiently their rights. The nature of this matter indicates though that not only resolutions are delivered concerning the procedure according to the Tax and fees administration law. Other documents delivered are various invocations, summons, etc

In the Tax and fees administration law is demonstratively determined, who is allowed to delivery documents of the tax administrator. It is able to deliver by means of holder of postal license (the most often by Czech Post), tax administrator employee and the other subject. Than is in the Tax and fees administration law regulated where can be delivered – in flat, premises, showrooms, offices or workplace. If fit is impossible to identify these places it can be delivered wherever the deliverer catch the addressee.

The personal delivery is the qualified form of delivering in Tax and fees administration law. This is the way for the documentation delivering in such cases when it is determined by law, when the date of delivering is

determining for beginning of course of the terms a when it is stated by tax administrator. The other papers are sent due to tax administrator discretion ordinarily or by registered mail. The institute of eventually delivery is used in situation, which is due to Tax and fees administration law presumption for legal fiction of delivery. When is delivering unsuccessful, the addressee is properly notified about deposition of delivery on post office or municipal office, than the addressee have 15 days for picking up. After this time-limit becomes the legal fiction of delivery which means that the impact is ex lege same as if it was delivered to recipient.

The other ways of delivering due to Tax and fees administration law are delivery by public notice (the recipient cannot be catch at home or in registered office or this place is unknown), abroad delivery, delivery to the electronic address, delivery by collective precept list.

Due to Administrative law are the deliverers - the holder of postal license, deliverers of administrative body, municipal office and sometimes police body. Administrative law recognizes three basic forms of delivering – the personal delivery (the law enumerating every item), by registered mail and ordinarily. Is allowed to entitle the third person for personal delivering and the recipient has an opportunity to announce address for delivering to the administrative body. The delivery to electronic address is possible too. Administrative law knows institute of alternative delivering as well as Tax and fees administration law. Deposited delivery can be picked up till 15 days from depositing however the legal fiction of delivering is effective from 10<sup>th</sup> day. The other ways of delivering are delivery by public notice and abroad delivery.

Law of Civil Procedure prefers direct delivery by proceedings or judicial act against indirect delivery by the hand of deliverers or internet. Due to Law of Civil Procedure is in the case of individual delivered to flat, registered office, workplace or the place where the individual stays. In case of the legal entities are the potential places registered domicile or address of actual residence. The other special articles of Law of Civil Procedure are devoted to delivering to entities such as lawyers, solicitors, notaries, state, administrative bodies, municipal authorities and etc. Alternative delivery and legal fiction of delivery occurs by 3<sup>rd</sup> day (ordinary delivery) or 10<sup>th</sup> day (personal delivery). Civil procedure knows delivery by public notice as well.

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# IMPROVING THE SYSTEM OF TAX ADMINISTRATION IN THE CZECH REPUBLIC

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## Key words

Tax administration, tax office, Financial Directorates, organization, administrative authority, customs administration, tax administration, reform

In this time, the system of tax administration is obsolete due to the turning points in the recent years. A lot of changes have been performed in the area of tax administration since May 1, 2004 – the accession date of the Czech Republic to the EU. The main change has occurred in the field of the Customs Administration, because one of the four basic freedoms, on which the EU is set, is the free movement of goods. The administration of the customs duty falls to one third of the former level of activity in the customs section due to the fact that all neighboring states became members of the EU at the same time.

The purpose of the Customs Administration is recently the aim on the post-action control concerning the customs duties in the Czech Republic. Other activities are focused on the collection of VAT (in case of border transfer), collection and administration of consumption taxes and ecological taxes and on the shared administration.

The existing tax administration has many weak points. For illustration it is possible to show some of them: the high number of tax administration bodies, the expenses for the tax administration are one of the highest in Europe, uneconomical activity due to duplication of some procedures etc.

The aims of the new draft law, which should be in action in 2010, are the unification of the tax administration in only one system of administration bodies, consolidation of the collection and exaction of the taxes, decrease of employees by 16%, constitution of a Specialized Tax Office.

The proposal created by the Ministry of Finance bargains on the constitution of the Financial and Customs Administration of the Czech Republic, which will be under the supervision of the Ministry of Finance. It will be composed of General Financial and Customs Directorate, territorial financial authorities (consisting of Financial Directorates, tax offices and Specialized Tax Office) and of the Customs Guard (consisting of Customs Guard Directorate and Customs Guard Inspectorates).

The second variant of the institutional reform envisages the development of Financial Administration of the Czech Republic as a system of administrative offices subordinate to the Ministry of Finance of the Czech Republic. Financial Administration of the Czech Republic would form:

- Financial Directorate
- regional financial institutions, consisting of a Supreme Financial Office (with a nationwide coverage), financial offices and a Specialized Financial Office.

The above mentioned variant solutions to the institutional reforms of tax and customs administration are only a first step, which should be followed by a transfer of competencies to a selection of a premium on public health insurance, social security and employment policies of the State. This second step should be in action in 2012.

The proposal of the new legal regulation is the first step in the legislative procedure, therefore the question for future is, what the reality will be.

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# FLEXIBILITY AND TREATY OF LISBON: ENHANCE COOPERATION IN FINANCIAL LAW?

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## Key words

Flexibility, enhance cooperation, multi-speed Europe, European Union, Treaty of Lisbon, tax administration

## Enhance cooperation

With a progressive extend of the European Union and together with the increasing number of political community questions it has been very difficult to promote the integration on unified level between all member states. As a reaction to the extend member base it was essential to find new instruments for differentiation of rights and duties in certain areas of common politics. The principle of enhance cooperation<sup>1</sup> represents an exemption from the fundamental general obligation of the European (Community) law for all member states. The enhance cooperation enables a cooperation between a group of member states who want to work together more intensive. In fact it means the specific way of solving problems with respect to their divergence. However, this cooperation is admissible only if the clearly set conditions are fulfilled. Thanks to the enhance cooperation it is possible to be more flexible and accelerate the integration between some of the member states. On the other hand, there are also some negatives - there may be created the "second category" membership.

## Three forms of enhance cooperation are possible:<sup>2</sup>

- "The multi-speed Europe" ("Europe á plusieurs vitesses"), when all member states agree on the integration measure but are not qualified for setting it up at the same time;
- "Variable arrangement" ("géometrie variable"), when some member states decline from the integration measure (completely or in part);
- The differentiation according to the "own will selection" ("Europe á la carte"), which means non-acceptance of the community regulation because of the compelling reasons and maintaining the national one.<sup>3</sup>

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<sup>1</sup> Also called the close/closer cooperation or flexibility

<sup>2</sup> See [http://www.sagit.cz/pages/lexikonheslatxt.asp?cd=156&typ=r&levelid=EU\\_197.HTM](http://www.sagit.cz/pages/lexikonheslatxt.asp?cd=156&typ=r&levelid=EU_197.HTM)

<sup>3</sup> See the Treaty Establishing the European Community, Article 95(4)

## **The history and regulation of the enhance cooperation**

The legal regulation of the enhance cooperation may be found both in the Treaty on European Union and in the Treaty establishing the European Community (which contains a special provision for the first pillar).

The Treaty of Lisbon may be seen as the last (but not really new) regulation of the enhance cooperation within the European integration process.

In 1974 the German Chancellor Willy Brandt outlined the concept of necessity of the various integration degrees in dependence on the varied economic powers of the nine members of European Community. Certain regulation may be found also in the original Treaty establishing the European Community.<sup>4</sup>

The mechanism of so called close cooperation brings the Maastricht Treaty in 1992, which has changed the decision-making procedure. The Treaty of Amsterdam enabled close cooperation only within the first and third pillars (in the area of foreign security politics this principle was suspended). However, the goals of this treaty were to demanding and we can find their revision in 2000 in the Treaty of Nice. Here is the term enhance cooperation used instead of close cooperation in all three pillars.

## **Enhance cooperation and the financial law**

The close/enhance cooperation may be logical in the area of taxes, social policy, environment or consumer protection. However, the flexibility in these areas may be very problematic because of the essential impact on the single market.

It is clear that the Treaty of Lisbon is not able to eliminate all of the differences within the financial and especially fiscal policy<sup>5</sup>.

It is also necessary to mention the arguments against using the institute if enhance cooperation in the area of the financial law, which is the possibility of abuse it against the disinterested member states. The indirect taxes (VAT, excise taxes and environmental taxes) create a specific area - those taxes may deform single market and create abnormality. For this reason there have been the indirect taxes already harmonized and the general conception is based on the equal terms in all member states.

In our opinion there is still one area in which may be the enhance cooperation definitely useful. It is the tax administration where every state still has its own organizational and functional structure which makes the international cooperation very complicated.

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<sup>4</sup> Nevertheless, there are also several examples when only several member states cooperate: e.g. the Schengen area.

<sup>5</sup> There are many historical reasons as well as the social factors and various economic conditions.

# IS THE CRITERION OF CADASTRAL TERRITORY WELL FOUNDED FOR REDISTRIBUTION OF SHARED TAXES?

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## **Key words**

Local budgets, budgetary determination of taxes, shared taxes, acreage of cadastral units, cadastral territory

From the beginning of this success, an amendment of the budgetary determination of taxes was passed, which bring lots of changes in budgetary determination of taxes for municipalities. There were many discussions about the setting of the calculation method for allocation of shared taxes during the legislative process in the Czech Parliament. The necessity of new legal regulations was evoked by political changes, another reason was the approval of stabilization of public budgets. This Act could create a decrease of taxable incomes to local budgets.

Basic changes of budgetary determination of taxes:

- Supplementation of some new criteria for redistribution of share taxes – acreage of cadastral territory and population of the cadastre. The balance of both criteria is 3 percent,
- modification of existing criterion counted number of the population,
- increase of portion from shared taxes for municipalities.

This amendment of Act had eliminated some problems of budgetary determination of taxes but I think that there will be other discussions because of the criterion cadastral territory for redistribution of shared taxes. At first sight it is a minor problem because of the balance 3 percent but next table shows that there are variations in value among comparable municipalities.

Table No. 1: The supreme increases of taxable incomes for municipalities in 2008

REGION	MUNICIPALITY	Population	Acreage of cadastral territory (ha)	Prediction for 2008 without changes of budgetary determination of taxes (thousands Kč)	Prediction for 2008 after changes of budgetary determination of taxes (thousands Kč)	Increase %
Plzeňský	Modrava	55	8 163,47	265	4 193	1579,45%
Ústecký	Kryštofovy Hamry	56	6 842,20	270	3 578	1323,80%
Plzeňský	Prášily	155	11 227,85	954	6 280	658,59%
Ústecký	Český Jiřetín	74	3 360,30	357	2 058	576,24%
Plzeňský	Horská Kvilda	70	2 991,41	338	1 859	550,20%
Jihočeský	Vlkov	16	576,2381	77	374	484,57%
Karlovarský	Přebuz	87	2 978,89	420	1 963	467,57%
Jihočeský	Stožec	214	10 477,96	1 380	6 311	457,19%
Jihočeský	Nové Hutě	90	2 324,44	434	1 675	385,70%
Jihočeský	Přední Výtoň	214	7 783,03	1 380	5 045	365,47%

The area of municipality is defined by the Communities Act. According to law municipality has one or more cadastral territories. Institution of cadastral territory is defined in the Act of real estate cadastre. Some mayors say that this criterion reflects real expenditure needs of municipalities. But reality show that expenses are determined by urban area where municipalities invest lots of money to infrastructure, village roads, etc. I think that this criterion is more objective acreage of cadastral territory. I hope that it will be reflected during preparation of new budgetary determination of taxes.

**Reviewer:** IVANA PAŘÍZKOVÁ

**Full version of this contribution can be found in the *Conference proceedings* on pp. 506 – 511.**

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# ON THE LEGAL STATUS OF THE PREFERENCES OF CUSTOMS IN THE EUROPEAN UNION

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## Key words

Preferences of customs, contractual and autonomous preferences, forms of appearance of preferences, General Agreement on Tariffs and Trade

In our days – in Hungary especially from 01. 05. 2004 – the legal status of the law of customs could be a question which deserves special attention, considering in particular if it were not be reasonable to move the customs and the law of customs from financial law to commercial law, while emphasizing their role in economic policy – it is time to change paradigm.

Preferences of customs mean a reduction of tariff items which produces a tariff reduction, therefore the preferences constitute a part of the customs facilitation system involving the same consequences. The elements of this system show, above all, the following structure: customs preference defined by public acts of customs or customs preference according to the law of customs, special reliefs of duty on the evidence of international agreements, institutional neutralization of customs and tariff customs preference.

According to the juridical status of preferences, we can differentiate between contractual (e.g. compacts entered into with the Mediterranean countries and the agreement with EU-European Economical Region) and autonomous preferences (e.g. Lomé I-IV. Agreements), and the basis of this classification whether these preferences are provided on the evidence of bi- or multilateral agreements or unilaterally. The literature usually makes mention of the preferential agreements among the regional agreements, however we can find among them such ones (the Cotonou Agreement), which break through the borders of regionality because their regional force touches upon more continents.

The agreements providing preferences of customs are of enormous economical importance, today they cover a significant part of the world trade and the parties can contribute to the increasing of the trade – so we have to look up in the prescriptions of the General Agreement on Tariffs and Trade. In Europe the founders have already defined the bases of customs preferences in 1957 with the signing of the Roman Treaty aimed at creating the EC. The essay analyzes the actual legal state, as well as the common characteristics of this legal institute.

As a conclusion it can be said that the juridical status of the preferences of customs may be examined from the viewpoint of the source of law and from that of reciprocity, mutuality. From the viewpoint of source of law one can assume that the preferences can be provided in the course of multilateral or bilateral agreements, which can be either regional or global in territorial respect. Moreover, the preferences can be given on reciprocal, contractual grounds and in an autonomous way as well. We also find an example for the case (in the

Cotonou Agreement) that the preferences given in an autonomous way are gradually succeeded by preferences given and got on a reciprocal ground.

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# POSSIBILITIES OF MUNICIPALITIES TO INFLUENCE REAL ESTATE TAX

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## Key words

Real estate tax, exemption, location rent, municipal coefficient, local coefficient

Many legal and tax theorists would agree that the revenue from local taxes is the income of the municipal budgets. On the other hand there are other theorists which say that for the definition of local taxes the budget destination is not the only one criterion. They add that the municipalities must have right to influence local tax – its rate, tax base, etc. From this point of view, Czech real estate tax is just partial local tax, because Czech municipalities do not have many possibilities to influence real estate tax. And to tell the truth, they do not administrate this tax at all; it is administered by the state offices called financial offices.

What are the possibilities of municipalities in the Czech Republic to influence real estate tax? There are two possibilities of exemptions - exemption of real estate attached by natural disaster and exemption of agricultural lands. And there are three possibilities to apply or change coefficients that can influence the tax rate: location rent, municipal coefficient and local coefficient.

When eliminating consequences of natural disaster, a municipality may, by its generally binding ordinance, fully or partly (as a percentage) exempt the real estates, which are located within its area and which were affected by a natural disaster, from the real estate tax for a period of up to five years. To tell the truth, this kind of exemption is not very popular and often. If there is a natural disaster, the municipality needs more money than usual and it does not offer this exemption. More over, it is difficult to say which real estates were affected by a natural disaster.

The arable lands, hop-gardens, vineyards, orchards and permanent grass growths can be exempt by municipality's generally binding ordinance. This exemption can not be applied on lands in developed area and build-up area of the municipality if the ordinance sets so and if these lands are determined in the ordinance by the parcel number and the cadastre area. This exemption is very new and it can be used for the first time in the taxable period of 2009. According to the reaction of many mayors it will not be used a lot: small villages with many lands that can be exempt would lose a lot of money and in cities there are not many lands like that.

Coefficient called location rent – a coefficient according to the number of inhabitants – is used only for several kinds of real estates: development lands, residential buildings, other structures that provide facilities for residential buildings, flats and non-residential premise not used for running business and as garages. The location rent multiplies the standard tax rate. The basic value of the coefficient is set in the act. The municipalities have right to increase or reduce a basic coefficient by a generally binding ordinance. This coefficient is used by many Czech municipalities and it has quite a long tradition especially because of its fiscal function.

Municipal coefficient can be used for the some buildings if the location rent can not be used, it means for houses and family houses used for individual recreation, other structures that provide facilities for houses and family houses used for individual recreation, garages, structures for business activities, non-residential premises used for business activities and as garages. The municipalities have right to set this coefficient by their

generally binding ordinance for particular types of structures. The value of the coefficient is at 1,5 and it multiplies the standard tax rate. This coefficient is quite often in the Czech municipalities especially because of its fiscal function.

The municipalities have new rights to increase the real estate tax from the beginning of 2009. They can set by a generally binding ordinance for all real estates on their area a local coefficient at 2, 3, 4 or 5. This coefficient multiplies the tax duty of the taxpayer for particular kinds of lands, buildings, non-residential premises and flats. As the mayors say, taxes are political questions and they want to be elected again. That is why they do not want to use this coefficient and increase the taxes twice, three times, four times or even five times.

As we can see, the legal regulation of real estate taxation is not perfect. We have to solve many problems not only with coefficients and exemptions. The most urgent thing to do is to change the tax base – to replace existing unit taxation to ad valorem taxation. The tax base should correspond with the market value of the real estate. The value should be set by municipalities that have the best knowledge about the prices in their territory without any experts or assessors. The municipalities can create the map of value zones for the purpose of the real estate tax base.

The municipalities should have the right to set the tax rate but in the act there should be some interval (for example 0,05 – 0,5 %). The other (usually higher) tax rate should be applied on development lands and the real estates serving for running business. Lower tax rates can be used for the real estates like family houses and flats for living.

The municipalities should be the only real estate tax administrators.

This solution would mean modern European system of the real estate taxation and easier orientation for the taxpayers. What is the most important is the taxpayer: in his tax return he should complete just identification data necessary to set the tax base. The tax administrators task should be to set the tax base calculate the tax and assess it. Everything mentioned above would fill one of the most important principles of the tax law – principle of effectiveness: the tax administration would not trouble the taxpayers too much but it should reach the aim of the proceedings, it means assess and collect the taxes not to cut the tax incomes. And last, but not least: real estate tax would become real local tax and the Czech Republic would respect the economic autonomy of municipalities set in the European Charter of Local Self-Government without any exemptions.

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# (IL)LEGALITY OF ON-LINE BETTING

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## Key words

On-line betting, free movement of services, Department of Finance of Czech Republic

## *Bets and games within European Law*

Legal status of bets and games within the European Union countries is effected by cultural, social, but also historical development; because of whom there is a difference in legal norms within the European Union member countries. The servicing of betting games is regulated by the paragraph 49 and 50 of the Treaty Establishing the European Community, and they are also regulated by new and established prohibited obstacles of free provision of services. The obstacle in the freedom of service provision can also be inner-state legislation of the member states, which limits or even prohibits gambling games and that even in the situations when the legislation is applied indiscriminately. This obstacle is also disregarded when the aim of the state, which is limiting (prohibiting) the gambling games, is the prevention of the criminal activity or protection of the public morale.

## *The current problem of the Czech legal reform in the field of bets – on-line betting without the limits*

The technical revolution, linked with the evolution of games, is happening too fast and the current legislation is not able to respond; or is only able to respond at times. The betting on the internet is looked upon as a “gray area” of the law. The opinions of the “know-hows” on the on-line betting are diametrically different and the legal reforms (mainly outdated) do not consider this phenomenon.

The Czech market has been inundated by various foreign companies (Interwetten, Bwin, etc.) with the aim of becoming a foreign provider of the internet sport betting. But according to Department of Finance of Czech Republic internet betting is illegal. The foreign companies refuse to accept the illegality of the running of the business as they point to their own European license. The company's representatives maintain their own license (being obtained from the member states) and pay their taxes within the EU. They claim that the EU legislation is superior to inner-state legislation and this is why they are allowed to run a business within Czech Republic. The headquarters of these companies are mainly based in Malta or Gibraltar, where they do not have to pay any, or only minimal, levies.

The Gambling Act does not explicitly prohibit the placing of the bets on the Internet or via other means. On the other hand, in a Czech betting company the bets cannot be placed on the Internet, as is indirectly stated in the statute paragraph 21, section 1 (Lottery Act no. 202/1990 Sb.), which determines the rules of the proviso of the placing of the bets and endorses the gaming plan of the betting agencies. Currently, the Department of Finance did not grant any gaming plans that permit Internet betting.

The next argument against the on-line betting is the inability to decide if the 'on-line gambler' is an adult (person over 18). The betting supporters say that there are safeguards in place to disallow persons under the age of 18 to bet, as the clients have to registers with most of the on-line agencies and they must also safeguard a financial deposit (which must be bank account or credit card); and in the case of a win the gamblers must provide betting agency's headquarters with the copy of the passport. The betting supporters also point out that there is a bigger chance of under-age betting in the 'real' betting agencies. If you turn up to a 'real' betting agency to place a bet, nobody asks you for your name, where you are from or where you got your money from.

Last year, the Czech people gambled over four billions of Czech koruna on the Internet, which shows that the on-line betting is fast growing business in Czech Republic. As only foreign companies offer the Internet betting within Czech Republic, all proceeds went abroad and no taxes were paid with CZK; which is the 'sore point' for the Department of Finance. But if we compare this with the on-line shopping, nobody questions the buying of the products through the e-shops, where the taxes are paid into the country, where the internet site, which provides the sale, is registered. Because the Department of Finance did not grant any licences to the betting agencies, they cannot expect any taxes from the companies.

The main fact is, are the agencies *providing* or *not providing* their Internet services from the territory of Czech Republic? Is it compulsory to acquire a license and pay taxes for the agency that is registered within the foreign country, which is subsequently visited (through the use of the Internet) by a Czech national that places bets using Czech koruna? The answer is probably not. The view of the Department of Finance is opposite, and they say that any agency that provides on-line betting is breaching the law on the grounds of illegal provision of services or on the grounds of illegal provision of lottery and similar gambling games. If this is their view, why doesn't the Department take adequate legal steps in order to invalidate or prohibit these websites?

The Czech betting agencies said that they are not against the on-line betting and that they are prepared, or are actively preparing for the 'betting through the Internet', but they are waiting for the necessary changes in the legal ruling. The agencies' point of view is that this is probably discrimination, as the foreign agencies are 'allowed' to run a business within certain rules, which the Czech agencies would welcome also. Currently, the Czech legislations does not offer this possibility and the government is not able to ensure that the same conditions apply to all subjects. But the Czech betting agencies do not support the ability to bet 'across the border'.

The interesting point is that Czech 'gamblers', whom place bets outside the Czech Republic, are committing an offence, as the statute paragraph 4, section 11 of the Lottery Act explicitly states - the involvement in placing bets in foreign countries is strictly forbidden. The Statutory Government Control Office can fine each participant, which participate in betting, up to 50,000.00 CZK. Though, such as fine has not been observed as yet. It is also interesting that the Income Tax Law (no. 586/1992 Sb.) does not take into account the winnings from lotteries, bets and similar gambling games that are provided in foreign countries, which excludes the foreign business from the income tax.

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# ORIGINATION A RESOLUTION OF DOUBLE TAXATION

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## Key words

Origination of double taxation and its structuring, Take precautions against prevention of double taxation, Exclusion of double taxation

Specialised literature in the Czech Republic has not attended much to the issue of international taxation for a number of years. Yet a number of fundamental legislative changes have taken place over the past 11 years. The Czech Republic entered the European Union, more than 40 new treaties for the avoidance of double taxation were ratified, the OECD Fiscal Committee several times updated the model treaty for the avoidance of double taxation and the commentaries on it and the decision making practice of Czech and international courts moved forward the interpretation of problematic provisions. A number of fundamental changes occurred in the domestic legislation and the Czech Republic's entry to the European Union in 2004 had considerable importance in this area.

The ever increasing number of professionals grappling with the issue of international taxation in practice cannot choose but search, gather and evaluate, in a relatively complicated manner, information from various sources for their reference, a necessity faced by all tax professionals with the ever more intense involvement of the Czech Republic in the globalised economy. A vast array of small and large companies held by foreign owners is active in our territory. Many of them are part of large international corporations where the knowledge of international tax issues is an essential kit for economic managers. Investments of Czech entrepreneurs abroad are also not unique nowadays. An extensive migration of employees in both directions takes place, the tax context of cross-border investments, dividends and transfer pricing must be dealt with. The issue of international taxation has thus become a daily experience also for tax advisors, company tax experts, auditors and the personnel of regional revenue authorities.

If this contribution opens a way for tax experts to begin a new specialisation, mine goal will be achieved.

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**Full version of this contribution can be found in the *Conference proceedings* on pp. 533 – 539.**

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# THE BASIC PRINCIPLES OF IMPACT OF THE EUROPEAN LAW ON THE LAW REGULATION OF FINANCIAL MARKETS IN SLOVAK REPUBLIC

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JANA ŠIMONOVÁ

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KATEDRA VEREJNEJ SPRÁVY A VEREJNÝCH FINANCIÍ, AKADÉMIA POLICAJNÉHO ZBORU V  
BRATISLAVE

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## **Key words**

The supervision of financial market in the Slovak republic, the law regulation, the main principles of the European effect, the law principles, the institutional principles

The article deals with the basic principles of impact of the European law on the law regulation of financial markets in conditions of Slovak republic. The aim is to mention on the selected principles of the European effect and to make a framework of them. The structure of the basic principles of impact of the European law on the law regulation of financial market in Slovak republic is divided into two aspects and that is the law principles and the institutional principles. The author also comment on expected impact of new rules on the banking sector not only in terms of required level of capital, but also in other terms of quality which the European law has huge effect. In consideration of huge issue, the author as tried to approach only its specific questions suitable for discussion.

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## ADMINISTRATIVE LAW SECTION

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# HUMAN ORGANS DONATION AND TRANSPLANTATIONS FROM THE POINT OF VIEW OF LEGAL NORMS OF ADMINISTRATIVE LEGISLATION

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## Key words

Healthcare legislation, donation, excision, transplantation, transplantation 'ex morturo', expected consent, stating of death of the brain, influence of relatives of the deceased to excision

An important part of the material administrative law are, apart from others, also legal norms that relate to legal relations in healthcare. Even though we cannot talk about codification yet, a set of these norms is more and more frequently regarded as healthcare law, or medicine law. Specialised literature also uses the term European healthcare law, due to the impact of European international and supranational law on internal healthcare of the EU member states.

The abovementioned legal norms form a part of a number of legal provisions with various legal forces. In spite of the fact that majority of them is a source of administrative law, healthcare law also has civil law elements. Moreover, legal provisions from the area of material criminal law, process criminal law, etc., have a significant influence on this area, too.

A specific part of healthcare law – excision and transplantations of organs, tissues and cells – also has such multidisciplinary character.

This multidisciplinary character does not stem only from the fact that this legal area is regulated by several legal areas. The questions arising with the issue of excisions and transplantations are not merely medical and legal, but also ethical, moral and religious.

It is possible to deduce opinions, approach and a certain level of development of a nation that adopted the given legal norm from the legal norms regulating the regarded issues.

Thus, a quality of transplantation programme is influenced also by the legal organisation of the given state and traditions of the nation. Apart from this, important is also public opinion, as no other issues engage public opinions as strongly as organ excisions and transplantations.

However, it needs to be remembered that the public opinion represents a mirror, reflecting ethics, morale, religion and all areas, in which opinions of people forming the nation and creating its ideological basis cumulate.

Donation, excision, testing, processing, conserving, storing, transport or distribution of tissues or organs is, within the meaning of effective Act No. 576/2004 of the Statute concerning healthcare, services related to providing healthcare and concerning change and amendments to some acts as amended, together with biomedical research and sterilisation, considered healthcare in special cases.

Even though law does use the term transplantation, it does not define it. Experts in medicine distinguish between the terms excision and transplantation, where transplantation replaces the so called transfer, defined in Act no. 576/2004 of the Statute as a process, in which tissues, organs or cells are transferred to the organism of a recipient.

Semantic difference between excision and transplantation results also from the way these terms are used by experts: the so called transplantation activity and excision activity.

However, the aim of this article is not to discuss terminology, but to explain basic terms and differences in their legal definition and provisions in legislation of the Czech Republic and the Slovak Republic. We consider this as a basic condition for explaining issues of transplantations ,ex morturo', which is the main objective of this article.

Transplantations ,ex morturo' are connected with many legal and ethical questions. The basic problem is, above all, the issue of death of an individual, particularly, what is considered a death of a human being – whether it is death of brain or arrest of heart activity and, consequently, of blood circulation.

Another basic predisposition in expression of consent of the person with excision after his/her death, alternatively a question of replacing on this consent with consent of other persons.

As concerns the first round of problems, the current legal state is clear. It is regulated by the Act no. 576/2004 of the Statute and by the Special Regulation of Ministry of Healthcare of the Slovak Republic concerning donation, excision of human organs from bodies of living and deceased donors; testing of donors and transfer of organs from bodies of living and deceased donors to recipient no. 28610/2006 OZSO. This Special Regulation cancels the Special Regulation from 1996.

A significant change, introduced by the Special Regulation, is that it regulates not only excisions from deceased but also living donors. Another change that, within the meaning of the Special Regulation, this regulation stresses clinical diagnostics of brain death without a necessity of its validation by the so called brain panangiography. The aim of this change is the possibility to clinically diagnose brain death in potential donors, in case of which, even in case of major brain damage incompatible with life, a complete arrest of brain circulation does not take place.

In relation with giving consent with excision after death, two systems are used: the so called opting-in system and opting-out system. In majority of the European countries, a system of assumed consent applies. This system is based on a premise that if a person does not agree with excision of his/her organ after his/her death, he/she has to state this during his/her life, either in writing or by some other documented means.

The advantage of such principle is mainly the more frequent and faster utilisation for transplantation, which increases the chance for saving lives. However, the mere application of the principle of assumed consent is not enough. At present, there are not enough suitable donors of organs and tissues for transplantations in Slovakia. Therefore, the Slovak Government passed the so called ,National transplant program' in March 2008, the aim of which is to help eliminate losing of suitable deceased donors of organs or tissues. This can be done by the so called transplant coordinators – hospital coordinators, whose task it is to look up a potential donor and his/her entering into a regional transplant centre.

The main question in case of the , ex morturo' transplants is the question whether relatives of the deceased potential donor have the right to refuse excision of an organ or not. From the formulation of the cancelled Special Regulation, as well as from the formulation of the § 37 of the Act no. 576/2004 of the Statute it results that, unless the deceased left any document, relatives do not have the right to refuse the excision of organs. Consequently, excision indication then strictly follows medical criteria.

The current practice is that a transplant coordinator will contact relatives of the deceased only because of the last will of the deceased, but without their legal right to refuse the excision of organs.

Doctors follow this procedure due to existence of the § 15 of the Civil Code, pursuant to which, After the death of an individual the right for personal protection belongs to a spouse and children, and if there are none, to the individual's parents.' § 15 deals with protection of physical integrity; with dead body as an integral part of a person. This applies at all times when the physical remains of a person are able to be individualised.

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# INSTITUTIONAL PRE-UNDERSTANDING IN THE ADMINISTRATIVE DECISION-MAKING PROCESS

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## Key words

Administrative body, pre-understanding, decision-making process, preknowledge, directive idea, interpretation, official interpretation, instructions, hard cases, legal hermeneutics

This article deals with a theoretical analysis of the subjective structures of legal understanding in the administrative decision making process. Ideas forming the grounds of this article are also the essential premises of author's doctoral thesis, the topic of which has been "Theory and Reality of Legal Interpretation".

The article intends to introduce a close connection between legal hermeneutic and neo-institutional theories and administrative theory of limits of administration in legal decision making process. Preunderstanding, pre-knowledge and above all dependence of an administrative body are presented as the crucial characteristics of administrative decision-making. Ideas and conceptions of individual theoreticians are presented and creatively analysed in the text. After a theoretical analysis, some practical examples of consequences of these constructions working in interpret's mind are mentioned.

As a result, the ability of solving legal "hard cases" by administrative bodies is critically considered. As another conclusion, the possibility of spreading an incorrect legal conclusion throughout the system of administration in a certain resort is mentioned. The main conclusion of the whole article is that the quality and characteristic features of administrative decision making depends on the hermeneutic structures of pre-understanding and directive ideas of administrative bodies.

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**Full version of this contribution can be found in the *Conference proceedings* on pp. 559 – 570.**

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# SELECTED LEGAL INSTRUMENTS OF THE COUNCIL OF EUROPE IN THE FIELD OF PERSONAL DATA PROTECTION

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## Key words

Council of Europe, Convention CETS No. 108, personal data, automated data banks, automated data file, data security, transborder data flows, basic principles, entry into force, Additional Protocol, Amendment to Convention, European Communities

The Council of Europe is the international organization, which deals with the protection of individuals and human rights. In 1960's the Parliamentary Assembly of the Council of Europe asked the Committee of Ministers of the Council of Europe to examine, whether the protection of personal data is adequate. Special Committee of Experts studied legal situation in member states and realized, that the granted protection is insufficient. Most of the member states have no special legislation for personal data protection (beyond Sweden, Belgium, Federal Republic of Germany) and also protection from the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005) in Article 8 is not very effective for new age („Everyone has the right to respect for his private and family life, his home and his correspondence“). The Committee of Ministers was alarmed, because of increasing number of new technologies and new systems of collecting and providing personal data. It means that there existed more dangerous situations in data collecting and storing – using computers and other new technologies made easier some operations – collecting, sending information, sharing information, speed of these operations etc.

The Committee of Ministers decided to use resolutions as the first step to improve personal data protection. The first one was Resolution (73) 22 on the protection of the privacy of individuals vis-à-vis electronic data banks in the private sector and the second one was Resolution (74) 29 on the protection of the privacy of individuals vis-à-vis electronic data banks in the public sector. Both resolutions were concerned with individuals. The resolutions contained basic principles in personal data protection, especially the method of collecting, storing, correcting information. Member states had to decide which means they could use to fulfill these resolutions. Some of the states created new acts, and some of them improved their legislation.

The Committee of Ministers knew, that protection personal data needs more attention. There existed more questions: what about data, that must be transferred to another countries and what legislation will apply? The committee of experts was instructed to prepare convention for personal data protection. The committee cooperated with Organisation for Economic Co-operation and Development, with some other states and also with European Communities. The Committee of Ministers decided to open the Convention for signature on the 28th of January 1981. The Convention entered into force on the 1st of October 1985. The Convention entered into force in the Czech republic after the signature and the ratification process on the 1st of November 2001. And what are the most important points of this Convention? We can find basic terms, which are used in the Convention and in other legislation and these definitions help member states to define their own terms in their legislation. It is „personal data, automated data bank, automated processing and controller of the file.“ Another part of the Convention deals with basic principles, which have to be fulfilled in data processing.

The Convention is also focused on transborder data flows. It is much more easier to send data to another country because of new technologies. The principle is, that states are not able to control transborder data flow, except some special situations. The Convention is also focused on cooperation between member states. The member parties must designate special authority and the authorities have to cooperate, help each other, help to data subjects resident abroad.

Maybe the most important part of the Convention is focused on data security and rules for data processing. The individuals must be informed about automated data file, to obtain information, whether data are still stored and some other. Data relating to data subject must be obtained fairly, be stored for specified purpose, be accurate and some other qualities are required. Special protection is provided to data related to race, political opinions, religious, health, sexual life of the data subject.

Some states created new legislation, some of them only changed their legislation, another states have the principle of personal data protection in their constitutions and there exists states. Some of the member states of the Council of Europe still didn't sign the Convention (Russia, Turkey, Ukraine etc.) .

During the years, the Council of Europe and the Committee of Ministers realized, that the Convention is a good legal instrument, but needs some improvement. The two substantive provisions were added. Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of personal Data regarding supervisory authorities and transborder data flows was opened for signature on the 8th of November 2001 and entered into force on the 1st of July 2004. The Czech republic was the fourth state, which signed this Additional protocol. Moreover the Czech republic decided to apply this Convention also to personal data which are not processed automatically (this is not basic principle, but states can choose this application as well as the states can decide to apply the Convention to another groups of persons or associations – legal or not legal personalities).

The first part of the Additional protocol deals with supervisory authorities deals with establishing authorities in each state. These authorities must have power of investigation, intervention and they are established to help individuals to protect their rights with regard to the processing of personal data. The second part of the Additional protocol deals with transborder data flows to recipients which are not under jurisdiction of the party to the Convention. The new provisions set that the recipient state must guarantee adequate legal security.

The European Communities try to cooperate with the Council of Europe. They want to become one of the Parties to the Convention. That is why the Council of Ministers on the 15th of July 1999 approved Amendments to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. It contains formal changes and more important changes in voting. Member states of the European communities who are also parties to the Convention and transferred their competencies to the European communities are not able to vote – the European Communities have right to vote.

There is no doubt that the Council of Europe has helped to protect personal data in past years and has been one of the first organizations on this field. The Convention is still the key legal instrument in the personal data protection.

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**Full version of this contribution can be found in the *Conference proceedings* on pp. 571 – 578.**

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# UNIFICATION OF DECISION-MAKING FROM THE PARTIES' POINT OF VIEW – PROCEEDINGS BEFORE EXTENDED SENATE OF SUPREME ADMINISTRATIVE COURT

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ONDŘEJ MORAVEC

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## Key words

Unity of decision-making, fair trial

The topic of this article is unification of decision-making of higher courts and the role of parties in these procedures. It is inspired by my author's experience from practice.

In the background of the goal of unification decision-making we can see three values of rule of law. There are: principle of equality, foreseeability and courts' authority.

Conception of unifying of jurisprudence in Czech Republic has been changed in last years. Abstract opinions have been replaced by unifying through decision-making in concrete cases. The interest of unified decision-making is typical of courts. Also at lower court we can identify procedures which are used for unifying of practice. These procedures are often informal and based more on social relations between judges than on legal norms. The second possibility of harmonizing decision-making is internal procedure running within court behind closed doors. Finally third alternative is represented by open procedures within proceedings of trial. In the next part of article the procedure before extended senate of Supreme Administrative Court, as an example or possibility how to unify decision-making is analyzed.

Proceedings before extended senate is enacted in § 17 SRS (Act about judicial review of administrative acts) which says: "If senate of Supreme Administrative Court has reached during decision-making the opinion different of another opinion which had already been formulated in former decision of Supreme Administrative Court, then senate would remit the matter to extended senate. When remitting the senate shall justify its opinion." From quoted norm we can identify some characteristics of proceedings before extended senate. At first, unification of jurisprudence is realized via decision-making in concrete case. At second, the task of extended senate is to decide the case as such and not only to answer disputed legal question in general. At third, procedure is obligatory so there is a duty of senate to remit the case to extended senate. At fourth, the procedure is opened for parties, Supreme Administrative Court does not decide behind closed doors.

We can see three dimension of problem:

1. right to initiate proceedings,
2. application of decision in future,
3. revision of decision of extended senate.



There is no right to make proposal to start proceedings before extended senate. On the other hand, when legal conditions fulfilled, senate has to start proceedings so we can speak about the right of individual of access to extended senate. Legal term opinion is often understood as only ratio decidendi. Obiter dictum is from this view not opinion which binds Supreme Administrative Court for future. These conclusions are incorrect in my view. Supreme Administrative Court is bounded by each opinion which has been formulated in its decisions.

In continental legal system the court judgment traditionally has no significance for future. Therefore it is not possible to apply judgment by the same way as the acts of legislator. Reference to judgment is admissible only if the judgment is published and if it provides answers on parties' arguments. If this condition is not fulfilled it is necessary to react on these arguments straight in individual judgment of this party and plain reference to the decision of extended senate is insufficient.

I think that the decision of extended senate can theoretically be overruled because it remains to be a court decision which is not binding in the sense of formal source of law. Therefore Supreme Administrative Court is entitled to overrule its opinion if parties' arguments are so strong that they are evidence that previous opinion of Supreme Administrative Court was incorrect.

In my opinion it would be conducive to fortify the role of parties and attorney in procedure of unification decision-making. Such change would be useful both from subjective point of view (for the purpose of protection of parties' individual rights) and the objective one, because decision adopted in more open procedure should be more resistant to influence of future cases and parties' arguments used in these cases.

**Reviewer:** JAN FILIP

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# LEASE OF WORKS (IS POSSIBLE IN THE CASE OF ALLOWANCE ORGANIZATION ESTABLISHED BY SELF-GOVERNING TERRITORIAL UNITS?)

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## Key words

Self-governing territorial units, municipality, region, allowance organization, public non-profit institutional health service, health service, hospital, works, undertaker, business activities, contract on the lease of works, main activities, additional activities

The Czech state decided to transfer some of his health services to self-governing regions under the rule of law no. 290/2000 Coll. The legal form of the transferred health services, as provided by law, was allowance organization. The key question of present for the self-governing regions and the municipalities is whether the allowance organization is the best legal form to provide public services assigned to them by law. There are discussed alternatives of another legal forms applicable for health services as business company and also is discussed the possibility of lease or sale of works.

A new legal form of “public non-profit institutional health service” established by the law no. 245/2006 Coll. has not been available for real conditions of health services. Even Constitutional Court canceled some parts of the law as unconstitutional. That is why there does not exist any health service in a legal form of “public non-profit institutional health service” in Czech republic.

The proposed contribution deals with a lease of works with the purpose to briefly outline some problems of legal regulation in force related to the basic question of possibility and legality of lease of a health service in a legal form of an allowance organization of self-governing territorial units. The main starting points of presented ideas are the current legal regulation of Czech administrative law defining the relation of regions and municipalities to their allowance organizations and also the current legal regulation of Czech business law defining the legal concept of works, undertaker, business activities and legal essentials of the contract on the lease of works.

Allowance organizations are legal entities established by the municipalities or the self-governing regions to perform some of their duties. The self-governing territorial units and allowance organizations relations law regulation is included in law no. 128/2000 Coll., law no 129/2000 Coll. and law no. 250/2000 Coll. The allowance organizations established by the self-governing regions (municipalities) are usually founded as non-profit organisations to provide services of public interest in various fields including public health. Law no. 20/1966 Coll. defines that regions (municipalities) can establish and control legal entities providing health services.

The current legal regulation of allowance organizations does not presume the possibility of lease of works; on the other side it is not illegitimate. In my opinion self-governing territorial units as an integral part of public

administration are strictly limited in relations to allowance organizations and cannot do anything what is not provided by law.

One of the key questions for that one who would like to make a lease of works is whether an allowance organization is (has) a works. The contract of lease of works is defined by law no 513/1991 Coll. There is also defined a principal legal concept of works in the Czech Commercial Code. Works is a set of material, personal and immaterial assets of business activities. At the same time business activities as a hallmark of works are defined as a systematic and independent activities performed by an undertaker with a purpose of profit.

Hospitals and another health services established in a legal form of allowance organization of self-governing territorial units do not meet constituent elements of business activities. Substance of main activities of allowance organizations rests in provision of non-profit public health services to citizens of municipality or region. Profit is not the purpose of activities of allowance organizations providing health services. That is why there is no works in the case of allowance organization providing health services established by self-governing territorial units. Strictly said there is no subject of the contract of lease of works in the case of such allowance organization.

Business activities can be provided as collateral economic activities of an allowance organization. These collateral economic activities are usually performed on the basis of trade (or similar) licence. While providing these collateral economic activities, allowance organization is in position of an undertaker. In my opinion it is possible to make a contract of lease of works only in the case of collateral economic activities of allowance organization established by self-governing territorial units.

On the basis of exercised analysis I come to the conclusion that it is not legal (by Czech law) to make a contract of lease of works in the case of allowance organization providing health services established by self-governing territorial units (with reservations as to collateral economic activities of allowance organization).

I am aware of different legal opinion in presented matters. Some municipalities have even made a contract of lease of works relating to an allowance organization (hospital) as a whole (including health services).

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**Full version of this contribution can be found in the *Conference proceedings* on pp. 593 – 600.**

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# INDIVIDUAL ADMINISTRATIVE ACT

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## Key words

Administrative Law, public administration, activities of administrative bodies, administrative act, individual administrative act, normative administrative act, measure of a general nature

Individual administrative acts represent one of the most important and significant result and also legal form of realization of public administration and Administrative Law itself.

Public administration is a subject matter of the Administrative Law. It is regulated by norms of Administrative Law. Therefore results of activities of administrative bodies (bodies and institution of public administration) have legal character and different legal consequences. Administrative Law is carried out namely by public administration and its bodies. Subject matter of the Administrative Law is public administration in its two meanings. First of them describes public administration as a structure of different bodies and institutions. It defines who namely realizes the Administrative Law and public administration. These bodies are made to ensure the activities of public administration. This second conception defines public administration as an assignment package that is realized by administrative bodies. Both concepts (public administration as organization and activity) are closely connected. And is it the Administrative Law that regulates both sides of conception of public administration. Public administration is the activity that is exercised as scope of executive power, with perceptive character that is strongly bound by laws. Public administration can be defined as administration of public affairs provided by public law subjects that are obliged to do it. This public law subjects creates the public administration as organization.

“Administrative activity” is another definition that helps to define public administration as the activity. Within this process are realized norms of the Administrative Law. The Administrative Law regulates different forms of realization of public administration. Thanks it these forms can create legal consequences and influence the legal relations and rights and duties. Forms are kind of administrative activity. Legal forms of so called “administrative activity” can be divided namely into:

- normative administrative act (legal description)
- individual administrative act (administrative decision) and
- measure of a general nature.

All three types mentioned above are special kind of the “administrative act”. Administrative act is the most important and also most frequent form of realization of the Administrative Law and public administration. Administrative act can be, in general, defined as one-sided act of public authority. According to its legal effects is later divided into normative, individual and measure of a general nature.

Normative administrative act is result of normative activities of public administration. Import is that is also regarded as the Administrative Law itself. It is a legal enactment. Public administration so creates other legally binding rules and legal norms. It can be done only if the law makes it for public administration possible. Public administration must respect laws. These acts, issued by administrative bodies, are results of regulatory procedure. The law including the Czech Constitution, uses various names, so the concept of “normative administrative act” is abstract and comprehensive.

Individual administrative act, on the other side, are result of the laws, constitution and, which is very important, normative administrative act. Administrative normative acts are ground for the individual administrative acts. These acts are acts of application of the Administrative Law. They do not regulate code of conduct that is binding for anybody but they relate to individual case with individual and concretized participants. They solve individual legal question.

Last legal form of so called “administrative act” is the measure of a general nature. This legal institution was added to the Czech legal system because of objective need. It was necessary to regulate this institution and proceedings its result is the measure of a general nature. Czech Administrative Law was strongly inspired and influenced by regal regulation in German spoken countries. According to section 171 Code of Administrative Procedure (500/2004 Sb. act of the 24th June 2004) measure of a general nature is not piece of legislation or a decisions. It contains signs of administrative acts mentioned before, so its is general and individual. This act is thus mixed.

My entry also focuses on used terminology that is different. The differences were made during the development of the Administrative Law and were influenced by pre-war literature. It must be said that this problem has not been resolved yet. The practice of the courts also have not done step to make the situation more clear and united.

**Reviewer:** SOŇA SKULOVÁ

**Full version of this contribution can be found in the *Conference proceedings* on pp. 601 – 610.**

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# LEGAL PERSONS OF CHURCHES IN THE LIGHT OF A NATURE OF CHURCH REGULATIONS

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## **Key words**

Church, Self-governing Corporation, Statutory regulations, Church regulations, Spiritual corporations, Evidence, Registration

My entry deals with the question: “Do the spiritual corporations come into being on the church regulations background?” This is an old question. However, I am trying to look at it from another point of view.

First of all we have to clarify the nature of church, the nature of church regulations and the concept of spiritual corporations.

## **Church**

Church becomes a legal person by the act of registration. We can divide corporations into Public Law Corporations and Civil Law Corporations. In my opinion, churches are the public law corporations because the state grants them execution of so called special rights.

Furthermore, we should mention the concept of self-government. Self-government could be statutory or private. Religion self-government is the statutory one, because it does not deal only with its internal problems and aims.

To conclude, if the church is autonomous self-governing corporation, it is enabled to issue statutory regulations.

## **Statutory regulations**

We can see two issues in the field of concept of statutory regulations. The first deals with the nature of statutory regulations as legal enactments. The prevailing opinion says that statutory regulations can not be legal enactments as they do not have a form of legal enactment. Statutory regulations are not generally binding and they are not enforceable by state power. Minority opinion, however, considers statutory regulation as a legal enactment. We agree with the prevailing opinion.

The second issue solves classification of statutory regulations. One group of theoreticians claims statutory regulations are, together with internal normative instructions, the part of internal norms. Another group argues that statutory regulation is independent group of norms which has nothing to do with internal normative instructions. They are reasoning by the nature of internal normative instructions which are applied in the field of relations of subordination. Compared to that, statutory regulations are not applied in such a field.

They are issued in connection with the self-governing bodies. We also talk about autonomous legislation: “The right to autonomous legislation consist in the fact that law expressly admits that certain subject has right to issue regulations and by them to regulate public matters in its independent authority.” Thus, we should ask “Is the creation of Spiritual Corporation, which executes public tasks, the same as regulation of public matters?” We came to conclusion: “Yes, it is.”

### **Spiritual Corporations**

There were several discussions about the nature of spiritual corporations. However, many authors were replacing concept of spiritual corporations by concept of legal persons of church (as a bodies of churches). Definitely, bodies are not entitled to have a legal personality. We should talk about spiritual corporations which churches form as their institutions, instead.

Shall other corporations create their own institutions? For example, civil corporations are entitled to create so called secondary legal persons.

What competencies do the churches have? Before registration they are able to create monastic and other spiritual institutions. It is connected with the right to issue own regulations, because when church wants to create something it needs to adjust it by regulations, norms.

To conclude we should ask: “Has the nature of church regulations any impact on opportunity of Spiritual Corporation to gain legal personality on the basis of church regulations?” If statutory regulations arrange public affairs and we say that creation of Spiritual Corporation with mission to execute public tasks is an arrangement of public affairs, then spiritual corporations are created on the basis of church regulations. Furthermore, the Spiritual Corporations have certain rights and the effects of their acting come into being after they are recorded by the Ministry of Culture.

The autonomy of churches, their independency from state offices and under certain conditions their provision of public affairs makes special statutory corporations of churches.

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**Full version of this contribution can be found in the *Conference proceedings* on pp. 611 – 617.**

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# VALIDITY AND LIABILITY OF LOCAL REFERENDUM FROM THE EMPIRICAL POINT OF VIEW

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NEJvyšší správní soud

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## Key words

Local Referendum, Validity and Liability

The paper deals with the topic of the fundamental form of direct democracy at local level in the Czech Republic – so called local referendum. Wherever direct democracy exists, it has not replaced representative democracy but has complemented the work of elected body and political parties. Clear direct democracy is dangerous and undesirable. Nevertheless, it is obvious that instruments of direct democracy are important elements of the democratic supervision. The principal method of direct democracy is a referendum. It is a direct vote in which an entire electorate is asked to either accept or reject a particular proposal.

Czech law permits referendums only at the level of communities, not at the level of regions. Local referendum is held on local issues related to the conduct of policy in a municipality. Issues, such as the municipal budget, local duties, election and recall of the mayor and other members of local elected body, issues treated by special processes, structure of the municipal office, contracts governed by public law, municipal ordinances and issues which were subjected to a referendum during the preceding two years cannot be addressed by referendum.

The most important effect of the referendum is its validity and liability. The result of the referendum is binding on local authorities. The decision of the referendum is valid if, at least, one half of the persons with right to vote cast a ballot. The high turnout quorum means that local referendums are often declared invalid, which indeed tends to weaken citizens' motivation to participate in political life of the municipality.

The experience shows that the most important factor of the participation in a referendum is a number of inhabitants in a municipality (R. Dahl said: "*size matters*"). The bigger municipality, the lower participation (see below). The high turnout quorum, that is unified for all communities in the Czech Republic, unfortunately does not respect this empirical evidence.



Total number of entitled persons living in a community	Average turnout	Number of referendums (valid)
up to 250	71,5 %	30 (30)
251 to 1000	54,5 %	32 (23)
1 001 to 2 000	51,1 %	18 (13)
2 001 to 10 000	34,1 %	10 (2)
10 001 and more	24%	6 (0)

Table 1: Relation between average participation in local referendum and number of entitled persons living in a community in the Czech Republic (2004-2008); source: author's research.

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## Key words

Better Regulation, Better Lawmaking, Meta – Governance, Legislative flood, Legislative overflow, Legislative rules of government, rule-making, Regulatory impact assessment (RIA), Policies, Sunset - Legislation, Gold – Plating, Mandelkern Report, Lisbon agenda, Office of Information and Regulatory Affairs (OIRA) /USA/, Compliance Cost Assessment

## Introduction

A politology view on this problems is using for „Better Regulation“ a term „Meta-Governance“. The term „Meta-Governance“ was defined by R. Jessop (*Review of International Political Economy 4*) as „a counter-process to governance whereby economic and political co-ordination is achieved despite the limitations of governments, states, firms, governance, and clans“. In this paper, the general term „Better Regulation“ is used – as it is in the Mandelkern Report – in contrast with „Better lawmaking“. In practice, these expressions are not generally clearly defined and no clear distinction is usually made between them, which occasionally leads to misunderstandings. Better lawmaking refers only to those measures whose purpose is to support the process of lawmaking with a view to improved output (meaning the preparation, drafting and enactment of legal acts).

## The term „Better Regulation“

„Better Regulation“, in contrast, is a substantially broader term, which does include the area of lawmaking, but is not limited to that area. The acts and political programmes on the European level are based on two different understandings<sup>1</sup>: On the one hand regulation is understood in the narrow sense to be the enactment and specification of government regulations, on the other hand it is also understood to be government guidance and programmes as a whole. The common denominator is that regulation in any case encompasses more than just legal acts, and that „Better Regulation“ does not refer just to the process of policy formulation, but also to the implementation and application of policies. We can see it on an example of two versions of art. 2 (first version and last amended version) of Czech Legislative rules of government. The phenomenon well known as „Gold-Plating“- means „over-implementation of a European directive by the creation of extra national requirements going beyond those in the directive“<sup>2</sup>.

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<sup>1</sup> According to the terminology of Baldwin, R., Cave, M.: *Understanding Regulation: Theory, Strategy, and Practice*, Oxford 1999

<sup>2</sup> Mandelkern Group on Better Regulation, Final Report, 13 November 2001, EU, pg. 82

## **Beginnings of Better Regulation Policy in the EU – Lisbon Agenda**

An initial step towards improving the regulatory environment in the Institutions of the EU was taken when the European Union Institutions adopted the drafting guidance recommendations contained in the Inter-Institutional Agreement of December 1998. The purpose of this was to improve the quality of draft legislation. The Edinburgh European Council of 1992 made the task of simplifying and improving the regulatory environment one of the Community's main priorities. However, it was not until the mid-nineties that the search for better quality became systematic. The Heads of State and Governments of the European Union met in Lisbon in 2000 and launched a series of ambitious reforms at national and European level as part of an overall strategy.

## **Quality of Regulation – Mandelkern report**

One of the practical measures taken to deliver this policy was the establishment of a group, representative of Member States, under the Chairmanship of a judge of the Council of State in France, Mr. D. Mandelkern, to examine ways in which policy – making and regulation drafting could be improved in the Institutions of the EU. The group reported in November 2001 and produced a blueprint for Better Regulation in the European Union. The report was met with universal acclaim and its recommendations were largely adopted by the EU Institutions.

## **Better Regulation and law of European communities**

The development of Better Regulation in the European Union accelerated further with the EU White Paper on Governance. The White Paper suggests that there are link between good governance and the drive for Better Regulation.

## **Regulatory Impact assessment**

Regulatory Impact assessment is an effective tool for modern, evidence-based policy making. It provides a structured framework for informing the consideration of the range of options available for handling policy problems and the advantages and disadvantages associated with each. It does not replace the need for a political decision-rather, it provides in a structured manner some of the factual information essential to a good policy development process and a well-informed final decision.<sup>3</sup>

## **Conclusion**

Progress has been made on each of these fronts by the Institutions of the European Union and, with the renewal of the Lisbon strategy in 2005, emphasis was put on the development of Better Regulation policy in the Member States of the European Union. Having reached the half-way stage of the Lisbon process started in 2005, the Commission decided to re-launch the strategy with a focus on growth and jobs and a streamlined process to enhance Member States ownership of their reform programmes.

**Reviewer:** PETR HAVLAN

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<sup>3</sup> Mandelkern Group on Better Regulation, Final Report, 13 November 2001, EU, pg. 19

Full version of this contribution can be found in the *Conference proceedings* on pp. 629 – 639.

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# NOTES ON HIGHER-LEVEL TERRITORIAL LOCAL GOVERNMENT IN CZECH REPUBLIC AND POLAND

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## **Key words**

Public administration, local government, regions, Poland

## ***Constitutional basis***

Legal basis of local government in Czech Republic and Poland is similar. In Czech Republic the local government of local units is guaranteed by Constitution, Art. 8. Polish Constitution is more concrete in its Art. 15 and 16. Decentralization of public power is engaged by territorial division in Poland.

Local government is provided concretely in Chapter VII of Polish Constitution (*Samorząd terytorialny*) like in Czech Constitution. Higher-level units of local government were expected by Czech Constitution and realized by Constitutional Act. No. 347/1997 Coll. Only basic units of local government – municipality (*gmina*) is directly provided by Constitution. Keep in mind that municipalities in Poland are much larger than in Czech Republic. Higher-level units of local government are not set by the Constitution specifically in Poland.

## ***Polish reform of public administration***

The biggest distinction between Czech Republic and Poland is that there are two levels of Czech local government whereas Poland has three levels – municipalities (*gminy*), districts (*powiaty*) and voivodships (*wójewództwa*).

Polish administrative reform could be divided into 3 periods. Gminas were created in the first period in 1990, powiats reestablished and number of voivodships reduced in 1998 (second period), local-governmental institutions of powiats and voivodships were established in 1999 (third period).

New Polish Constitution in April 1997 was the starting impulse for realization of the reform of higher-level local government although the preparations started in 1993. Local government is strongly guaranteed by this Constitution.

## ***Powiats***

Creation of about 300 powiats was expected during the preparations of the reform since the first proposal in 1993. This number results from existence of ca. 300 historical local centers. Other proposals were not successful. However, Poland has 379 powiats (including 65 gminas with powiat status).

Existence of powiats is legally regulated by Act on Powiat Local government, published 5<sup>th</sup> June 1998 (Dz.U. z 1998 r., Nr 91, poz. 578 z późn. zm.).

## ***Voivodships***

Number of voivodships was more discussed. There were 49 small voivodships till the administrative reform. To reduce the number of voivodships and create large, strong regions was one of the main aims of the reforms. The proposal supposed to create 12 regions.

But other big centers wanted to keep the status of the centre of the voivodship. Therefore there were many counter-proposals drafting creation of 14-17 voivodships. Creation of more voivodships was supported by the opposition in the Parliament. Finally, Parliament passed a bill creating 15 regions. But Alexander Kwaśniewski, Polish President in that time, refused to sign the bill.

In the end, 16 voivodships were established by the Act on Voivodships Local government (Dz.U. z 1998 r., Nr 91, poz. 576 z późn. zm.).

## ***Comparison with Czech Republic***

Interesting thing is that the large of powiats in Poland is very similar to the large of Czech districts (okresy). These units in Czech Republic have neither local government nor state administration (with some exception). But we can say, the districts towns are also local economical and cultural centers like in Poland. My opinion is that execution of administration on this level would be applicable. Czech reform of public administration as realized was not successful in my opinion. On the other hand we have to take into consideration that the main purpose of the territorial division from 1960 was to direct the economy. Therefore it is also not ideal solution for today.

Comparing Czech (14 regions) and Polish (16 regions) situation we can see that the Polish voivodships are larger and therefore more operational. 16 regions in Poland correspond to ca. 4-5 regions in Czech Republic. Such number is probably not realizable. Both Czech Republic and Poland have disparities in the number of citizens of particular regions.

In my opinion, the reform of public administration in Czech Republic was a lost opportunity. The smallest units – microregions with the natural attraction center (mostly town) – had to be created first. These units could be integrated to larger units after that. Two levels of higher-level local government (districts and regions) like in Poland would be acceptable from my point of view.

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**Full version of this contribution can be found in the *Conference proceedings* on pp. 640 – 644.**

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# DECISION ACTIVITY OF MUNICIPALITY WITHIN THE FRAME OF ENVIRONMENTAL MAINTENANCE

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## Key words

Environment, territorial self-government, municipality, environmental maintenance, unlawful act, environmental damage, decision-making of municipality within the frame of environmental maintenance, local roads as artificial part of environment, responsibility for damage, compensation of damage, administrative-legal responsibility, executive title

The article points out the unfavourable relation of nowadays society towards environment. It is a global problem of whole society, whose consequences are visible on each regional level – the local as well. Territory self-government meets the unlawful act on many places. Slovak municipalities have to deal with excessive expansion of „black waste dumps“. Among other problems belongs damage of local and tertiary roads owned by municipality, whose administration is provided by municipality, as well as sewerage water discharge to surface and subsurface waters, washing the cars and mechanisms in surface waters or in uncovered subsurface waters, or in places from which the leaked fuel could get to surface or subsurface waters, etc. In all such cases it is environmental damage. Municipalities fulfil tasks in the field of environmental protection according to the Act No. 369 / 1990 Zb. of communal establishment as well according to special regulation, f. e. The Act No. 50 / 1976 Zb. of land-use planning and construction regulation, the Act No. 543 / 2002 Z. z. of nature and land protection, the Act No. 223 / 2001 Z. z. of waste, the Act No. 23 / 1962 Zb. of hunting, etc.

Municipality within the frame of environmental maintenance realizes its competences by:

- a) normative activities – by issuing the directions of binding force
- b) signing up the public legal agreements – mainly agreements regarding municipality establishment
- c) decision-making on rights and duties of natural and legal persons in administrative procedure - by the decisions of mayor
- d) other public acts – by issuing the attitudes and statements, conceptual instruments approval.

The article focuses on competences of municipality in the field of issuing the individual legal acts regarding environmental maintenance, what means that it focuses on decision of municipality signed by its mayor. Empirical experiences point out that mainly municipalities and smaller cities are often not able to deal with realization of their competences in the field of individual application of law related to environmental maintenance.

The article presents the model situation, which points out the possibilities of municipality to perform tasks in the field of environmental maintenance by its own decisions, in the concrete related to local roads as artificially

created part of environment. It points out as well the possibilities to make decisions constrainedly by municipality in the given field. By course of the Act No. 135 / 1961 Zb. of land roads as amended by later statutes: "Local state administration related to the local roads and purpose-built equipment is performed by municipalities as transferred state administration activity ..." Municipality, in relation to local roads and purpose-built equipment, acts as the state control within the frame of keeping the duties and conditions of using the roads.

Crucial is the question of how the municipality, in relation to contravener of law, should set up a claim to reimbursement of costs, which have been spent by unlawful act of this person. The main problem is whether the municipality is legitimated to make decision, by which it would lay an obligation to recompense the damage arising out of unlawful act of violator in relation to environment by violator of law. Mentioned damage presents the most often spent cost of municipality related to reinstatement of given part of environment. The question is also, whether such a decision of municipality is able to become an executive title in the case of not voluntary payment by violator of law. Counter solution is that in such a situation the municipality has to apply to the court of general jurisdiction with action for damages caused by law breaking which rose out as the consequence of unlawful act of violator. By such a solution it is of course first the enforceable decision of court as qualified executive title.

In spite of the diction of the Act No. 233 / 1995 Z. z. of judicial executors and executive activity as amended by later statutes according to which: "It is possible to perform the execution also on the base of enforceable decision of public administration and territorial local self-government", if we do not find legal enabling clause, which would justify the public administration body to issue the objective decision, the act of public administration body can not act as the qualified executive title and executive court already by decision making regarding issuing the commission for performing the execution on the base of such act has to condemn the request by resolution. The village thus has to apply to the court of general jurisdiction with the action for damages caused by law breaking.

The article also points out to concurrence of legal liability for damage and administrative-legal liability related to breach of duties imposed by the rules of environmental protection. It points out already § 29 of the Act No. 17 / 1992 Coll. of environment as amended by later statutes, according to which: "The fines or other measures according to those rules are inflicted for the breach of duties appointed by special rules of environmental protection; thus according to general legal regulations, the potential criminal responsibility as well as liability for damage is untouched". Municipality will thus set up a claim to compensation of damage by civil trial and can inflict a fine for this unlawful act up to level appointed by law. Such a decision has already its legal base, so in the case of not voluntary acquittal imposed by decision of municipality on infliction of a fine for violation or other administrative tort, after the decision become enforceable; the ... decision becomes executive title according to Act No. 233 / 1995 Z. z. of judicial executors and executive activity, as well as according to Act No. 71 / 1967 Zb. of administrative procedure as amended by later statutes.

**Reviewer:** JOZEF SOTOLÁŘ

**Full version of this contribution can be found in the *Conference proceedings* on pp. 645 – 653.**

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# THE MATTER OF PUBLICITY AND PROCESS OF MAKING INFORMATION AVAILABLE IN SLOVAK INFORMATION ACCESS ACT

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JOZEFA ŠAFÁRIKA V KOŠICIACH

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## Key words

Right to information, access to information, trade secret, confidential information

The matter of publicity and process of making information available is regulated by Free Information Access Act No. 211/2000 Coll. The purpose and meaning of the act is to realize and help to realize the constitutional right to information in full. It is not possible to interpret the act in other way than which enables realisation of constitutionally guaranteed rights to information in full. This obvious principle is to take into account at explanation of provisions of Free information Access act and their application in practise, mostly in cases, when there is their alternative explanation possible.

The constitution of Slovak republic guarantees the possibility of limitation of Access to specific information, if conditions of art. 26 par. 4 of Constitution of Slovak republic are fulfilled. Free information Access act sets certain categories of information, to which access may be limited, although so-called obliged person would otherwise have the duty of publication or making information available. In the given category are included also information, that create the object of trade secret in the meaning of Commercial Code. However, Free information Access act does not limit access towards those information, meant by contractual parties as confidential. However, if the information meets the condition of access limitation given by the Constitution of Slovak republic, it is possible to reject access to them, even the information is not included in the specific category of Free information Access act.

**Reviewer:** MÁRIA KIOVSKÁ

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# ISSUING OF VERIFIED STATEMENTS FROM PUBLIC ADMINISTRATION INFORMATION SYSTEMS - CZECHPOINT

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## Key words

Act on Public Administration Information Systems, Issuing of Verified Statements from Public Administration Information Systems, Czechpoint, e-Government, Available Registers, Authorised Subjects

This article deals with the matter of issuing of verified statements from public administration information systems as an important part of the e-Government. Aforementioned institute was introduced to the Czech law by the Act No. 365/2000 Coll., on Public Administration Information Systems.

## Aim of the Article

The aim of the article is to introduce all important innovations included in the above mentioned Act and to provide the basic overview of the issuing of verified statements from public administration information systems. However the defined length of the paper does not allow us to focus on all legal aspects concerning issuing of verified statements from public administration information systems. Therefore aspects such as obligations of authorised subjects, negative legal consequences of breaching of statutory rules or interrelations to another Czech legal regulation had to be missed out.

## Disabled people

The changes of the Act on Public Administration Information Systems are not only meant to simplify the communication between the Public Administration and an “ordinary” citizen but also to make the communication accessible to those who have a various kinds of handicap. According to the aim of the Act any user shall be able to access public internet websites, including sightless and persons missing upper limbs. Therefore the obligation to enable the public administration’s and local government’s internet websites to be accessible by the disabled persons has been settled by the above mentioned Act. Such concept fulfils one of the essential principles of Good Governance, the principle of Public Administration as a Public Service.

## Czechpoint

The availability of issuing of verified statements from public administration information systems as well as the statutory obligation to enable the public administration’s and local government’s internet websites to be accessible by the disabled persons is closely connected to the governmental project called “Czechpoint”. In fact this project initiated all the important changes in the electronic communication in public administration and to a large extent makes the Czech Government to be a real e-Government. The purpose of the project is to create

network of contact places, or more precisely the network of Czechpoints, i.e. Czech Handling Verifying Information National Terminal. It is a fundamental contact point, where a citizen will be able to at the only one spot, in a minute:

- collect all data, copies of entries and statements, which are in central public registers and which concern his/her person, possession and rights;
- collect all data, copies of entries and statements, which are in central closed registers and which concern his/her person, possession and rights;
- verify the documents, papers and signatures,
- convert documents into the electronic form, and
- gain information on the course of current proceedings that concern this citizen and are conducted by the State or other Public Authority.

At this moment the first stage of the project Czechpoint which means implementation of issuing of verified statements from the four essential registers, i. e. Companies Register, Trades Register, Land Register and the Penal Register, has been finished. Those four registers mainly represent central public registers; nevertheless central closed register is represented in the Penal Register.

### **Issuing of Verified Statements from Public Administration Information Systems**

As mentioned above the article mainly deals with the matter of issuing of verified statements from public administration information systems. In this part the article names the subjects that are authorised to process the statements, describes the legal changes implemented in relation to those subjects and provides some statistics concerning the number of processed statements. This statistics proof high interest from the wide public to the innovations introduced by the Act on Public Administration Information Systems.

### **Conclusion**

Implementation of above mentioned innovations is not that revolution. As the Prime Minister Mirek Topolánek has said at the International Conference Internet in State Administration and Local Governments on 2nd April 2007: „This is the first step. After the approval of the Act on e-Government, which is prepared now, citizens will be able to have their CZECH POINTS at home on their computers connected to the Internet. Then it will be possible to manage these matters from their homes. But this is not the revolution either. It is the second step. Then there must be the third step taken: permanent metamorphosis of the public administration in the spirit of "on-line philosophy".”

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**Full version of this contribution can be found in the *Conference proceedings* on pp. 663 – 671.**

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# THE INSTITUTION OF GOOD ADMINISTRATION IN THE COUNCIL OF EUROPE

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## Key words

Good administration, Council of Europe

“The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress.”<sup>1</sup> “Greater unity between its members” – the aim of the Council of Europe may be furthered in a range of different ways. Article 1 of the Statute of the Organization makes specific reference to the Council of Europe’s mission in maintaining and promoting human rights and fundamental freedoms as a way of achieving this “greater unity”. Administrative procedure requires common European regulation by all means, as this is that special field of law by which the administrative body directly meets the citizens. Consequently these cases carry danger that fundamental rights of citizens may be impaired – its occurrence in a constitutional state is undeniably not desirable by any means. Considering the present national administrative systems, the administrative official procedural law is being emphasized. Main tendencies in practice are to constrain the executive power of the state within constitutional frame of law and to guarantee gradually expand the fundamental rights of citizens, establishing the “good administration”. Regarding the European administrative law, does European administrative procedural law exist at all? What forms and levels of standardization can be expected? The answer can be given through the documents of the Council of Europe achieved in this field of law.

Before turning our attention to this process, we have to clarify the meaning of good administration. The expression has become somewhat fashionable and appears in various instruments both in European and in national level, but different authors give different definitions. According to Theodor Fortsakis, “the principle of good administration is at once a long-standing idea and a ground-breaking one. Its specific content has gradually been nurtured within the framework of the long-established concept of user protection and this principle, enshrined and elaborated on in various instruments and European case-law, now stands as one of the cornerstones of modern administrative law.”<sup>2</sup> Good administration (some call as useful administration) means that “administrative bodies have a duty to exercise the powers and responsibilities vested in them by existing laws and regulations, by drawing on the prevailing concept of law, in such a way as to avoid an overly rigid application of the statutory provisions. In other words, not only must they avoid any unfair doctrinal approach but they must also endeavor to adapt the legal rules to social and economical realities.”<sup>3</sup> The principle has an ambivalent function, “on the one hand, it acts as an umbrella, under which separate rules are clustered

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<sup>1</sup> Statute of the Council of Europe, Chapter I, Article 1.

<sup>2</sup> Theodore Fortsakis: Principles governing good administration. European Public Law, Volume 11, Issue 2. Kluwer Law International, 2005. p. 207.

<sup>3</sup> Fortsakis, p. 209.

together around a common, guiding idea, namely the idea of good administration; [...] on the other hand, it can itself serve as a springboard for specific new rules relating to the same idea.”<sup>4</sup> The first interpretation is affirmed by Klara Kanska, who says that “the notion ‘good administration’ developed as an umbrella principle, comprising an open-ended source of rights and obligations”.<sup>5</sup>

**Full version of this contribution can be found in the *Conference proceedings* on pp. 672 – 679.**

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<sup>4</sup> Fortsakis, p. 211.

<sup>5</sup> Klara Kanska: Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights. European Law Journal, Vol. 10. No. 3. Blackwell Publishing Ltd. 2004. p. 305.



# THE TERMS AND SPECIFICS OF AN EMPLOYMENT CONTRACT IN GERMANY

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## Key words

Employment contract, labour law, liberty of contract, labour-law regulations, employee, employer, law, codex of law, directive, collective agreement, company agreement, labour market, working time, overtime work, remuneration for work, probation, notice, terms of notice, reasons of notice, principle of subsidiarity

Nowadays in time of globalization and wide liberalization labour law plays a very important role in selection of business place and place for exercising a profession. On part of employee and employer Europe is one big employment market which provides possibilities for their realization and exercising. The relations between employee and employer should be somehow regulated. European labour law is not the instrument which would regulate the area of labour-law relationships completely. European Union bases on the protective function of labour law and sets the basic framework for the functioning of labour law relations, nevertheless labour law is first of all in scope and competency of single member states and social partners and differs from state to state. European labour law doesn't regulate the commencement, change or termination of employment either and leaves this question to member states as well. EU considered it necessary to subject employment relationships to formal requirements which would provide employees with improved protection against possible infringements of their rights and to create greater transparency on the labour market. According to the Council Directive Nr. 91/933/EEC every employee must be provided with a document containing information on the essential elements of his contract or employment relationship. This document should cover the following information like the identities of the parties, the place of work, the title, grade, nature or category of the work which the employee is employed, a brief specification or description of the work, the date of commencement of the contract or employment relationship. In the case of a temporary contract or employment relationship, the expected duration. Then the amount of paid leave, the length of the periods of notice to be observed by the employer and the employee, the length of the employee's normal working day. This information must be given up to one month from the commencement of the contract or employment relationship. Member States are to adopt the laws, regulations and legislative provisions necessary to comply with this Directive. So did Germany and implemented this Directive into its legal order. Legal regulations in each single member state result from its own requirements and needs and can be distinguished in a way and complexity of regulation. There are countries like Czech Republic, Slovakia, Poland, Hungary with the complex regulation of labour-law relations in one single codex of law and on the contrary there are some like Great Britain and Ireland which lack such a complex legal regulation. Germany ranks among the latter because there is no codex of labour law and German labour law can be found in many laws within the federal and land legislature. In contrast to Czech employment contract the German one is not contracted on the basis of provisions taken from the codex of labour law, but on the basis of so called „contract of service“ regulated by Civil code. The commencement of an employment contract is bound to a consent of both parties to a contract. According to the German law natural persons and corporate bodies can become employers. Law distinguishes corporate bodies of private law and of public law. Employee is a central concept of labour law because only the one who is an employee falls within labour law's cognizance. The

concept of employee in Germany is understood completely in a different way than in Czech labour law. In Germany retired people, pupils and students, soldiers, judges, tradesmen, clerks are not considered to be employees. The basis of employment relationship in Germany is a contract governed by private law. It is common knowledge that German employment contract doesn't have to be closed in a written form, but only orally. The written form is not required but there is a requirement that employee must be provided with a document containing information on the essential elements of his contract or employment relationship within one month from the commencement. This requirement is fully in compliance with EU law, especially with Directive Nr.91/933/EEC which was implemented into the German law (Nachweisgesetz, 1995). Liberty of contract of both parties to an employment contract in Germany is limited by peremptory rules and collective agreements, in other cases the content of an employment contract is freely regulated. There are some essential concepts which must be presented in each German employment contract. Such an essential provision is working time which must be determined precisely and unambiguously in order not to cause problems. Fixed-term contract can be closed for the period of two years and there is no statement of the reasons needed. An employment contract in Germany is often concerned with probation which can last max. 6 months. Employee can notice even within this probation but he is obliged to comply with the terms of notice (the length of notice - 2 weeks). Remuneration should be stipulated individually or by a valid collective agreement if there is some. Individual remuneration has to reach at least 70 % of comparable remuneration specified by collective agreement. An extreme disparity between employee's work output and amount of his remuneration is not allowed. The minimum wages are not determined by law in Germany but by the provisions of collective agreement which have the same legal force as law. Employee should know all the matters concerning the commencement of employment contract but also its termination. The termination of employment is regulated by Civil Code as well and the most important and common reason for termination in Germany is a notice. German law differentiates between regular proper notice, irregular immediate notice and conversion notice. A regular proper notice will turn up after a certain lapse of time. Civil Code determines certain lengths of notice period depending on the length of employment. The minimal notice period is 4 weeks. The longest notice period is 7 months and is connected with employment which lasted at least for 20 years. The irregular immediate notice is bound to the existence of an important reason of notice (bad employee's performance, breach of confidence etc.). Except this case, no reason has to be stated in a notice in Germany, such requirement is not demanded. According to the all mentioned information, in Germany is a wide liberty of contract limited only by peremptory stipulations or by those from collective agreements. In spite of this wide liberty of contract, lots of employers see a disincentive in present German legislature. Mostly they complain about the higher cost of bureaucracy, stiff formal provisions and complicated protective law connected with the termination which deters employers from employing new employees. Labour law ambiguity and disunity and also overharmonisation is criticized. In relation of principle of subsidiarity the integral and unified EU regulations should be accepted only there where it is necessary in the interest of labour market crossing its borders.

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# POSTING OF EMPLOYEES IN THE FRAMEWORK OF THE EUROPEAN COMMUNITIES

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## Key words

Free movement of services, posting of workers, directive 96/71/EC, work conditions

Free movement of services embedded in Article 49 of the Treaty establishing the European Community is one of the four basic freedoms guaranteed within the internal market of the European Community (hereinafter referred to as “EC”). The freedom to provide services includes the right of service provider settled in one of EC Member States to post its employee temporarily to perform the work in a Member State other than the Member State in which he/she usually performs his/her work.

With the gradual development of the internal market, it has often occurred in practice that service providers settled in the Member State in which the standards of minimum working and wage conditions were lower than in another Member State, posted their employees to work in this Member State and paid them minimum wage based on internal legal regulations of their Member State. However, such a wage was far from reaching the minimum wage stipulated in the Member State, to which the employees were posted. This led to intervention in the required competitive background among service providers and also to social dumping. EC Member States tried to prevent the arisen conditions by, among others, the introduction of various regulatory provisions, which were often contrary to Article 49 of the Treaty establishing the European Community.

With regard to the increasing number of posted employees, there are many issues to arise and to be dealt with. Therefore, the Directive of the European Parliament and Council 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services (hereinafter referred to as the “Directive”), which was aimed at reaching the conformity of the right of companies to provide cross-border services in accordance with Article 49 of the Treaty establishing the European Community on one part and the rights of employees which are temporary posted to foreign countries for the purpose of provision of such services, on the other part, was adopted.

Also companies established in one of EC Member States, which temporary post their employees to another EC Member State within international provision of services, come under the personal competence of the Directive, except for companies of merchant fleet and their crews, to which the Directive does not apply. Under the Directive, the term “posted employee” is understood as an employee who performs his/her work for a limited period of time in a Member State other than the Member State in which he/she usually works, while it is not conditioned by the citizenship in one of EC Member States. Therefore the posted employee may also be a citizen of a third country.

The crucial part of the Directive presents the list of working and wage terms which must be complied with by the employer, which posts its employees temporarily to another EC Member State for the performance of work, regardless of the law decisive for the employment relationship. Such terms may include for example maximum working hours, minimum holiday term, or minimum wage.

In addition to the specification of minimum standard wage and work conditions of posted employees, the Directive imposes the duty on the Member States to secure required cooperation during provision of information concerning such conditions (under Article 4), to take required regulatory measures for securing the compliance with the Directive (under Article 5) and to enable the posted employees to claim the right for minimum working and wage conditions guaranteed by the Directive directly at the courts of the Member State, to which they were posted (under Article 6).

The implementation of the Directive in the law of the Czech Republic was performed by Act No. 155/2000 Coll., which, with the effect as of the day of accession of the Czech Republic to the European Union, i.e. 1 May 2004, modified the provision of Section 6 paragraphs 2 to 4 of Act No. 65/1965 Coll., Labour Code, as amended. This regulation showed a number of defects, which were eliminated in part by legal regulation included in the mandatory provision of Section 319 of Act No. 262/2006 Coll., Labour Code, as amended (hereinafter referred to as the "Labour Code").

Contrary to the previous legal regulation, provision of Section 319 of the Labour Code applies only to situations in which the employee employed by an employer from other EU Member State was posted to perform work in the Czech Republic within international provision of services, unless the legal regulation of the Member State, from which he/she was posted, is more favourable to him/her.

Compared to its predecessor, the present Labour Code expressly states one of the concept attributes of employee posting, i.e. the connection to international provision of services. The second concept attribute, the time limit of posting the employee to perform work, is not stipulated in the Labour Code. It is believed that it might be very suitable to include such attribute in the internal legal regulations due to legal security of parties to employment relations.

The missing option of the posted employee to claim his/her rights arising from the Directive in case the posting employer has no property, company or organizational unit in the Czech Republic and the fact that the jurisdiction of the Czech courts is not specified under Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, are regarded as significant deficiencies of Czech legal regulations, which have not been corrected yet. Such a deficiency of court competence may be regarded as the breach of duty by EC Member State to implement the Directive properly and it may be considered whether the non-implemented provision of Article 6 of the Directive has a direct effect or not in this particular case.

If the posted employee claimed the application of such provision of the Directive at the national court of the Member State, in the territory of which he/she temporarily works, against the employer, he/she would claim the horizontal direct effect of the Directive, i.e. the Directive would directly prescribe rights and duties to individuals. However, under the related judgements of the Court of Justice of the European Communities, such effect may not be conferred to the Directive. Therefore, it is claimed that the provision of Article 6 of the Directive not implemented properly has no direct effect.

**Reviewer:** ZDEŇKA GREGOROVÁ

**Full version of this contribution can be found in the *Conference proceedings* on pp. 690 – 704.**

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# THE EUROPEAN YEAR OF EQUAL OPPORTUNITIES AND IMPLEMENTATION OF COUNCIL DIRECTIVES 2000/43/EC AND 2000/78/EC

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## Key words

Equality of treatment, discrimination, equal opportunities, Council Directive 2000/43/EC, Council Directive 2000/78/EC, implementation, Antidiscrimination Act in Czech Republic, Antidiscrimination Act in Slovakia, labour law

The year 2007 was declared by the European Union as the year of equal opportunities which underline accentuating focus on this sphere by the bodies of European Communities. At present the legislation in the European Union regulating the principle of equal treatment and prohibition of discrimination is quite extensive. There were already adopted many documents (primarily in the sphere of primary law and followed by the secondary legislation). To the most important documents of secondary law belong, regardless of directives which regulate gender equality, Council Directive 2000/43/EC prohibiting discrimination on grounds of race and ethnic origin and Council Directive 2000/78/EC establishing general framework for equality of treatment in employment and occupation, because employment and occupation are key elements in guaranteeing equal opportunities for all.

Nevertheless effective implementation of these directives in member states is not so easy which we can show in this contribution, especially on example of the Czech Republic and Slovakia. Since the right implementation of Council directives consists not only in their formal transposition to the legal order of the concerned member state, but also in high-quality of the content of relevant antidiscrimination provisions. We can demonstrate this on Slovak Antidiscrimination Act which came into force already in 2004, but despite of this the Slovak republic was included in member states against which were launched infringement procedures for non-conformity of national legislation with Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. As the most problem of Slovak antidiscriminating legislation was taken exception definition of basic terms. But there were some other problems too. For example art. 8 par. 8, regulating some affirmative action, was also the object of judging of the Slovak Constitutional Court at the point of view its conformity with Slovak constitutional law. Due to these facts the Slovak republic adopted extensive amendment to the Antidiscrimination Act realized by the Law No. 85 of 14 February 2008 which came into force on 1 April 2004. The decision if this text of the Antidiscrimination Act is already conform with objective Council directives will be depend on judging of the European Commission, especially in the Annual report on Monitoring the Application of Community Law of 2008, but already now some critical opinion appears by the voice of the professional public, especially to the new regulation of affirmative action in art. 8a.

In the Czech republic the Antidiscrimination Act was not approved yet, although its draft is at present in the law suit. It is already the second draft which was submit to the Chamber of Deputies on 12 July 2007 and is

negotiated as the parliamentary press No. 253. The first one was submit to the Chamber of Deputies on 21 January 2005 and was negotiated as the parliamentary press No. 866. But the Senate refused it and after him the Chamber of Deputies too. So the fate of the first draft of the Antidiscrimination Act was set seal upon.

At present the second draft of Antidiscrimination Act was on 19 March 2008 approved by the Chamber of Deputies and on 31 March 2008 was passed on the Senate and there is negotiated as the senate press No. 225. If this draft (or in which form) will be approved also by the Senate and then underwritten by president is the question, but already now is possible to recognize some indispensable problems.

The explanatory report to the draft of the Antidiscrimination Act at the page 25 states that the main aim of this Antidiscrimination Act is completion missing legislation in order to fulfil claims obliged to the Czech Republic, as one of the member states, by the European Union and also achievement transparent, intelligible and linked legislation in the frame of the Czech legal order. Nevertheless despite of this enunciation there is not expressed the relation to another laws regulating the principle of equal treatment and prohibition of discrimination anywhere in the whole text of Antidiscrimination Act. Only in the explanatory report to this draft of Antidiscrimination Act on the page 23 is said that the Antidiscrimination act is a general law and another legal rules regulating equal treatment are special to it and in the case of discrepancy these special laws are applied in preference.

The second problem is systematic organization of Antidiscrimination Act. There are quite in detail specified definitions of basic terms inspired by the dictions of directives. If this definitions are not sometimes too general and uncertain will be reviewed by the European Commission. But the prohibition of discrimination and the basic right of all individual itself is expressed only „impliedly“ within the regulation of the scope of the Antidiscrimination Act (art. 1 par. 3) and within the definitions of terms (art. 5 par. 3), although they should deserve separate article. Controversial from the view of the European Union will be probably also prescription different age limits of retirement age only on the ground of sex (art. 6 par. 2) which would be non-conform with the art. 6 par. 2 Council Directive 2000/78/EC.

The last problem which I would like to mention here (but that is not complete enumeration of the problematic provisions of the Antidiscrimination Act) is moving burden of proof. This is very discussed institute in many member state, also in the Czech Republic and Slovakia, because member states solve the problem of mobbing through actions related with it. The basic aim of these actions is not protection against discrimination at real but only discreditation of the defendant without the real base. The Slovak Republic at first requested from plaintiff to prove the chilled facts by him but the last amendment the Slovak Antidiscrimination Act changed this only into the submission of the reasonable facts. The same solution was chosen also by the members of Czech Parliament through the accepting amendment draft of parliamentarian Benda.

If the present draft of the Antidiscrimination Act hold out at the appreciation of senators and then at the European Commission is the question but already now I think I can say that it is not the final but the first step to the quality antidiscriminating legislation in the Czech Republic.

**Reviewer:** ZDEŇKA GREGOROVÁ

**Full version of this contribution can be found in the *Conference proceedings* on pp. 705 – 720.**

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# LABOUR CONTRACT CANCELLATION IN HUNGARY

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## Key words

Termination of labor contracts, labour law, ordinary cancellation, extraordinary cancellation

The essay is introducing the Hungarian cancellation of contract in the field of labour law. Due to the fact of market economy (after 1989) it became more and more important not only the static (content) of a labour contract, but also its dynamic (establishing, cancellation) – not only for employees, but also for employers.

The beginning of the essay shows the reader, that the historical evolution of the so called “modern” labour law began for 20 years before. It started with passing the law about stoppage of work, which was not only important from a labour law perspective, but it meant also a symbolic act of democracy.

This was followed with the creation the basic law material concerning labour law in 1992. Basically, in Hungary, there are 3 documents (laws) which are regulating labour relationships: two laws dealing with the status labour law relations in public service and one for the labour law relations in the private sphere. The essay is concerned with the last mentioned area – the termination of labor contracts in the private sphere. A part of the work is dealing with the termination of a labor contract based on agreement, which has to be also “formalized” – it has to be done in written form, while the intent of both sides contractual sides has to be clear and without any doubts.

In the case of one-sided (unilateral) rescission of a contract, one can speak about the so called “notice of cancellation or resignation”. A general picture of unilateral cancellation models in the modern western countries is drawn, while it is stated, that the Hungarian model belongs to the fixed systems. This means, that an ordinary one sided contract cancellation is allowed only based on fixed reasons, while the extraordinary – e.g. immediate (instant, hour-notice) cancellation is allowed only in exceptional cases based on exceptional reasons.

The cancellation of a labor contract has to be done exclusively in written form only. In the case of an ordinary labour contract cancellation emerges the question of the term of cancellation. Generally this term is 30 days long, while it can be raised to 90 days, depending on the years spent at one employer, however the term of cancellation can be also longer, depending on a bilateral agreement, but it never may not be longer than one year.

The ordinary cancellation from the employers side has to be always reasoned, and there are also some requirements concerning the content of the cancellation. In terms of a decision no. 95. of the Hungarian Supreme Court (MK 95.) a cancellation is legally conform only when it is clear, real (existing reason) and well reasoned. On the other hand, the employees ordinary resignation has not to be reasoned. In the end of the essay is the legal institute of extraordinary cancellation described.

**Reviewer:** LÁSZLÓ PARDAVI

Full version of this contribution can be found in the *Conference proceedings* on pp. 721 – 731.

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# IS THE PROTECTION OF EMPLOEEYS WITHIN THE TERMINATION OF CONTRACT OF EMPLOYMENT SUFFICIENT?

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JINDŘIŠKA FIALOVÁ

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VRCHNÍ SOUD V OLOMOUCI

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## Key words

Protection of employees; new Labour Code; the ways of termination; agreement; notice of termination; termination period; prohibition of termination; redundancy payment

In the beginning of this paper an attempt is made to discuss the constitutional judgement no. 116/2008, which, in its substance, creates the third new Labour Code. However, the institute of employees' protection when terminating the employment relation has not been changed much

An employment relation can be terminated only on the bases of the legal acts and legal facts named by the Labour Code. The concretisation of methods of termination itself creates a basic protection of both sides of employment relation. The paper is restricted only to evaluation of protection of employees when an employment relation is terminated by agreement or by notice of termination. These two ways are considered by the author to be the most frequent.

The part dedicated to termination of employment relation by agreement is relatively brief taking into account the fact, that it is the most simple way of termination. The requirement of written form must be met and reasons of termination must be mentioned as well, as it is important for considering a title for redundancy payment.

Termination of employment relation by notice of termination is not so unambiguous particularly because of the fact, that both sides of the relation have different duties. When an employer terminates the employment relation by notice of termination, he can do so only for reasons taxatively named by the Labour Code, which he must be able to defend at the court. He may mention more reasons of termination, however, they can't be interchangeable and he cannot change them later anymore. This legal regulation was created in order to prevent casual and uncontrolled terminations.

The reasons of terminations are divided into three groups, when so called „redundancy“ of an employee is one of the most used reasons. The decision of an employer must forego, it is not, however, judicially reviewable according to its subjective character. When reorganizing the employer, the number of employees can increase as well, it depends on the work experience and qualification of employees.

The termination period is an institute, which's aim is to reduce the serious effect of termination of employment relation on the employee's life. At the same time it provides both sides some time to find a new employer, new employee. The Labour Code regulates a minimum length of termination period, however, different agreement is allowed. During the termination period it is possible to terminate the employment relation by different legal ways.

The prohibition termination is another of protective institutes and is designed namely for those employees, whom the termination could cause difficulties. An employer cannot terminate the employment relation with

the employee, who is in the so called „ protective period“, which is, for example, during temporary absence due to illness, which has not been caused by the employee himself. It is necessary to point out, that the regulation of protection period in the § 53/1 is out-of-date. The notice of termination made during this period is invalid. For the prohibition of termination, it is significant the situation, when the notice of termination is delivered to the employee.

The purpose of the institute of redundancy payment is to somehow compensate the employee for the loss of employment without fault of his own. All employees, whose employment relation was terminated due to „organisation reasons“, are entitled to the redundancy money. Redundancy money is made up from three-multiple of employee's average income and is paid all at once.

In conclusion, the author summarises, that the law-maker paid enough (maybe too much) attention to the regulation of protection of employees when terminating employment relation, because there is not much space for the sides of employment relation for negotiations. However, it would make no sense to pass a new, complicated law, if there would be no effort, on the sides of employees, to stand for their rights.

**Reviewer:** MILAN GALVAS

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# THE PERFORMANCE OF GAINFUL ACTIVITY DURING THE VACATION IN THE FEDERAL REPUBLIC OF GERMANY

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## **Key words**

Vacation, purpose of vacation, recovering, Federal Republic of Germany, Vacation Code of Germany

The article is dealing with the institute of vacation, especially in the Federal Republic of Germany. The most important meaning of vacation and its taking is the sanitary and health significance. In particular Germany is one of the European countries that accent the recovering function of the vacation. The vacation should primarily be instrumental to the restoration of a human and to regeneration of his labour force.

In comparison to the Czech Republic that has the regulation about vacation within the Labour Code, there is a special code about vacation in Germany (Bundesurlaubsgesetz). This Code uses the conception of vacation as „vacation for the purpose of restoration“. To achieve this purpose it is prohibited by the law to perform some activities that are incompatible with the recuperation.

## **Vacation Code of Germany**

As it was said above, it is not allowed to perform labour that would contradict the intention of vacation. That means that the employee shouldn't use this free time to find another short-term job, because that would completely destroy the objective of vacation and would certainly lead to the exhaustion of this worker.

## **Prohibited labour during the vacation**

Prohibited is every gainful activity that contradicts the intention of vacation. It is not only forbidden to continue working by the same employer, but it is also denied to continue working in a persons own business if there is the reason to suppose that it contravenes the purpose of relaxation. A gainful activity is not only the activity made for money, but also for valuable things or for valuable consideration. If the activity is done for favour or kindness and it is not expected to get any consideration, then this activity doesn't fall within this prohibition. To distinguish if the activity is prohibited or allowed depends on circumstances of every special case.

It is possible to summarize that the activities you do for yourself are mostly allowed but the activities you do for values for other people are mostly prohibited.

## **Consequences of breaching the prohibition**

The consequences of breaching the prohibition are following:

- Nullity of the contract concluded for the time of the vacation
- The right of the employer to require forbearing of the activity
- The right of the employer to get repaid the money paid for the vacation
- The right of the employer to get compensation of a damage
- Counting off the time of vacation even through performing the prohibited activity

The best for the employer is to require forbearing of the activity and also to require compensation of the damage. It is mostly arranged in employment contracts that the employer has the right to get a special amount of money in case he discovers that the employee performed a prohibited activity during taking vacation.

Very controversial is the right to get repaid the money paid for the vacation and currently count off the time of vacation. Formerly it was possible to use both sanctions. After a breaking-through verdict of Federal Court of Germany for labour relations it was determined that it is not allowed for the employer to get repaid the money paid for the vacation and it is also not allowed to count off the time of vacation even through performing the prohibited activity.

### **Other duties of the employee during the vacation**

There are also some other duties of the employees, such as it is prohibited for them to run risks that could cause the disability after the end of vacation, because that could be the cause of employers loss. The employee has also in reasonable cases the right to know the place of staying of the employee.

### **Conclusion**

It is possible to say that the legal regulations of performing gainful activities during the vacation in Germany are very sophisticated and they are one of the ways how to arrange that the vacation will be taken really for the case of restoration and regeneration. The rights of employers are defined quite wide and so it could be thought that the employees wouldn't break the prohibition so often. The questionable decision of the court should be assessed rather skeptic because if there is a competence to punish in a concrete way gave by the law it shouldn't be narrowed by the court. It is necessary to perceive that the employee's relaxation is not only in his interest but also in his employer's interest because it is desirable that the worker gets really recuperated so that his body and mind will recover during the vacation so that the employer doesn't have to be worried about his employee's health and the employer's possible loss.

**Reviewer:** MILAN GALVAS

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# THE PROBATION AFTER THE NOVEL OF THE LABOUR CODE

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ANDREA HRDLIČKOVÁ

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PEF MZLU V BRNĚ

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## Key words

The probation, amendment, labour law kodex, duration of the probation, dissolution in the probation

The article is dealing with one of the institutes of the labour law – the probation. At first the meaning of probation is being specified, afterwards the several conditions for valid arrangement and duration of probation are being determined. While defining the probation and its conditions it is considered the new code number 262/2006 digest, labour law codex. This kodex has been already changed by a big technical amendment with the number 326 / 2007 digest, which brought a lot of changes into this code and those changes in the area of the probation will be referenced.

Finding the definition of the probation, the best is to try to define the purpose of this instrument of the labour law. The answer could be found in the Supreme Court of the Czech Republic decision of the 29.1.2004 No. 21 Cdo 1807 /2003 where it is: The probation is an instrument of the labour law of which purpose is that the employer could review whether the employee fulfils all the necessary qualifications for the work and also the employee could consider whether to stay in the work or leave it because it is not fulfilling his expectations.

The labour code of law sets the probation length, obligatory form and the mode of termination of the contract during probation. The law limitations will be discussed later in this article.

The maximum length of probations is three months. The probations set in contract can not be later extended.

The probations set in contract can not be later extended even if both sides agree. In the previous labour code of law (valid until 31.12.2007) the probation starts right after establishing employment as it is referencing to the civil code of law. The probation is defined in the days, so it starts the day after event which is crucial for its beginning. If this day would be a bank holiday, then it could cause a probation length more than three months. In the technical amending act, the probation can be negotiated the latest the day of the start of the work.

*The probation can be negotiated the latest the day of the start of the work, or the day of the appointment as a chief staff. The probation can not be negotiated if the employment already exists.*

*The probation must be written down, else it is not valid.*

*This condition means that if the employee and employer establish the employment orally, the employee starts the work and the contract is written down afterward, there is not allowed to set the probation in this contract as the employment already started.*

*When there are circumstances which cause the employee can not attend work, the probation length is elongated.*

*In the past the sick leave was counted as a probation for 10 working days, nowadays the probation is prolonged of the duration of the sick leave. This is because the employer and employee can then decide whether the work contract is profitable for both sides.*

*Both the employer and the employee can terminate the employment during the probation with any reason. Nevertheless the employer can not terminate the employment during the first 14 days of the sick leave of the employee. The letter of advice of the termination of the employment should be delivered not less than three days before the termination of the employment.*

It is usual that the letter of the termination should be delivered three days before the termination, nevertheless it is not necessary. There is only one exemption and that is when there is any limit agreed in the contract.

There is no necessity to state the day of the termination of the employment in the letter of termination. In that case, the employment terminates the day of the delivery of the letter of termination..

The probation institute has its place in the Czech labour law. The question is whether it would be useful that the law maker forbid the possibility of several continuous probation periods in several periodic contracts.

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## Key words

Management, human resource management, disposal authority/power, internal rules, working regulation

The labour law can also be looked at as a group of norms which, when applied, help manage, define tools for management and set limits for management at the same time. The activities of employer in work process can be perceived as a process of co-ordination of activities of group of employees, carried out by an individual or group of individuals for the purpose of achieving certain results, which cannot be achieved by individual procedure. With this objective the employers use different tools to reach the determined goals. When using tools for management of work process the employers are bound by limits set by labour code.

Each individual employer chooses for management and organisation of business activities and for arrangement of relations with employees certain management system whose tool represents certain written or unwritten rules which regulate running and organisation of business. From labour law point of view by this activity the employer carries out the so-called disposal authority.

The term disposal authority is not explicitly mentioned by labour code or other labour law norm. It is a term used by legal theory and literature. The existence of disposal authority is a content condition for possibilities of factual management of both the business and human resources in particular.

The disposal authority arises together with the constitution of employment. The disposal authority of the employer is itself the subject matter of the legal relation, which is an individual labour-law relation. It is not until the constitution of disposal authority that the employer has the possibility to manage employees and results of his/her work, contributing to overall results of the business.

The process of concluding employment is in a way fundamental tool for human resources management. By selection of suitable candidate the employer builds work teams, composes personal substrate of the enterprise, employees who will be subordinate to actual disposal authority of employer.

The employment is most frequently established by employment contract. The employment contract represents by its substance a second management tool. Considering the range of disposal authority the most important item of the employment contract out of the obligatory ones will be the obligation to stipulate type of work, place of work. The employment contract can, in addition to type and place of work and date of commencement, stipulate also other conditions in which the parties are interested, overly extensive arrangement is not appropriate.

Considering diversity of activities of employers and their size, the labour-law norm cannot cover all situations which are to be regulated in individual cases, often quite flexibly. This cannot be achieved neither by employment contract. The tool, which is established for this purpose by labour code, is mandatory instruction, internal rule and type of internal rule, working regulation.

Mandatory instruction can be of different legal character and different forms. It can represent a legal act or expression of will which has the character of legal act. In this second case we can talk about other expression of will or about organisational measure. Mandatory instruction may be written or oral. In case of written form, these will be typically represented by internal rules of employer. Verbal mandatory instruction is most often issued for individuals or smaller group of employees, usually on an ad hoc basis. Written form of mandatory instruction as a unilateral legal act is internal rule. More precisely, these rules are labelled internal rule, working regulation or other rules and instruction not specified by name.

The most common internal rule will be working regulation (particularly with regard to tradition set by Act no. 65/1965 Coll.) which regulates fundamental conditions, rules and relations at work place and rules of organisation which set hierarchy of employees, usually together with definition of authority of individual positions. Another written mandatory instruction is internal rule. Other internal rules can be represented by internal wage rule, organization manual, rate of working consumption. Depending on type of activity of employer there can be also less common rules, e.g. dress code. There have been appearing quality norms recently, most frequently ISO 900X.

By above-mentioned tools it is possible to more or less in detail set up mutual rights and obligations of individual labour relation parties. The quality of such arrangement evidently contributes both to quality of objectives whose achievement gave rise to labour-law relation and quality of the relation itself.

The above-mentioned can, in principle without exception, be applied to both the abolished norm, Act no. 65/1965 Coll., and to the new code, Act no. 262/2006 Coll. The new norm was to bring a brand new concept of labour law and as a result the rigidity of old code should have been loosened together with more widely interpreted possibility of contractual freedom and therefore possibility of more flexible management of working process. However, it cannot be noted that the objective was achieved by the new code.

**Reviewer:** MILAN GALVAS

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# PROHIBITION OF DISCRIMINATION BASED ON DISABILITY IN LABOUR RELATIONS

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## **Key words**

Persons with disabilities, prohibition of discrimination based on disability, principle of non-discrimination, equal treatment, direct discrimination, indirect discrimination, harassment, instruction to discrimination, reasonable accommodation, disproportionate burden

## **The European Community Law**

The European Community law recognized a disability based discrimination in the Amsterdam Treaty amending the EC Treaty. Article 13 of the EC Treaty states that without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The article 13 of the EC Treaty can not be considered as a general base of prohibition of discrimination. It does not have direct effect, contrary to nationality based discrimination provided for in article 12 that states that the discrimination based on nationality shall be prohibited. The article 13 is only a legal base for the adaptation of a secondary legislation concerning discrimination on the abovementioned grounds.

The disability based discrimination is further elaborated in Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation (called the Framework Directive). This Directive lays down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation. The principle of equal treatment means the existence of no direct or indirect discrimination. The Framework Directive defines the direct discrimination as a situation when one person is treated less favourably than another is, has been, or would be treated in a comparable situation. The indirect discrimination on the grounds of disability means a situation when an apparently neutral provision, criterion or practice would put persons having a particular disability at a disadvantage compared with other persons. There are two exceptions: 1. that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or. 2. as regards the persons with a particular disability, the employer or any person or organization to whom this Directive applies is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

The Framework Directive also considers harassment and an instruction to discrimination as forms of discrimination. Relating to persons with disabilities, harassment may be defined as unwanted conduct relating a disability that takes place with purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. The concept of harassment may be defined in accordance with the national laws and practice of the Member States. The personal scope of

application of the Framework Directive includes persons in both the public and private sector including public bodies. The material scope of application includes: conditions for access to employment, to self employment or occupation, access to all types and all levels of vocational guidance, vocational training, advanced vocational training and retraining, employment and working conditions, including dismissals and pay, membership of, and involvement in, an organization of workers and employers.

For the persons with disabilities the reasonable accommodation is essential to guarantee the compliance with the principle of equal treatment. The Framework Directive states the obligation to an employer to take appropriate measures, where needed in particular case, to enable a person with a disability to have access to, participate in, or advance in employment or to undergo training, unless such measures would impose disproportionate burden on the employer. This burden is not disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned. However, not taking such measures shall not be considered as discrimination.

### **The Czech Legal Order**

The Czech legislation provides for the base for equal treatment at constitutional level, more precisely in article 3 paragraph 1 of the Charter of Fundamental Rights and Freedoms. According to this provision the fundamental rights and freedoms are guaranteed to everybody irrespective of sex, race, colour of skin, language, faith, religion, political or other conviction, ethnic or social origin, membership in a national or ethnic minority, property, birth or other status. The Charter does not mention a disability or health as a ground of discrimination. However, the enumeration of the grounds of discrimination is open-ended. Such a general formulation of prohibition of discrimination should be specified in laws.

For the area of labour relations the prohibition of discrimination is elaborated in an Employment Act (435/2004 Coll., as amended). This act applies only on relations existing for the purpose of securing the right to employment. The relations between employers and employees are regulated by the Labour Code (Act 262/2006 Coll., as amended) that entered into force on 1 January 2007. This Code includes the prohibition of discrimination among the basic principles of labour relations and contains special chapter relating to equal treatment and prohibition of discrimination but these provisions are not sufficient. The Labour Code does not provide for the grounds of discrimination, does not define the essential terms such as direct or indirect discrimination, harassment, sexual harassment or instruction to discrimination, and does not state remedial measures relating to protection against discrimination in labour relations. These questions shall be governed by special Act. However, such special act has not been valid yet. This situation is a result of a difficult legislative process connected with the approval of the so called "New Labour Code". Its proposal was discussed at the same time as a proposal of so called "Antidiscrimination Act". The Labour Code was approved but the Antidiscrimination Act was refused. This year a new proposal of Antidiscrimination Act was approved by the Chamber of Deputies and the Senate but the President put a veto on it.

**Reviewer:** ZDEŇKA GREGOROVÁ

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# ACTUAL DEVELOPMENTS OF EU LABOUR LAW: PROHIBITION OF DISCRIMINATION IN LABOUR RELATIONS

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## Key words

Prohibition of discrimination, anti-discriminatory policy, Directives of the European Parliament and Council and Commission, European Union, labour law, changes introduced by Directive 2006/54/EC, enforcement of law

The prohibition of discrimination in democratic and advanced countries including the legal territory of EU member states represents one of the fundamental pillars of their modern law and order. Expeditious legal institutions regulating social relationships and eliminating all discriminatory tendencies indicate the level of democratic development within the society.

Anti-discriminatory policy in EU consists of numerous legal documents adopted by EU bodies. In this respect, the Directives of the European Parliament, Council and Commission impose specific obligations on each of the member states and they are the sources of the secondary Community law. Bearing supranational character, directives form a part of the first EU pillar adjustment – the policy of EU internal market. The EU primary law also deals with application of anti-discriminatory principle /Articles 13 and 141 of the Treaty establishing the European Community/.

The analysis of the prohibition of discrimination in labour law and social relationships led us to the conclusion that its inner structure is multi-spectral and addressed to different social and legal relationships. Decoding them is possible in the secondary law where various EU directives adjust the problem of access to employment, working conditions, employment contract termination, dignity protection, sexual harassment, position of men and women in social security schemes etc. In the course of time EU bodies adopted several directives adjusting respective issues. The most important are: Commission Directive 75/117/EEC on the approximation of Member States legislation in implementation of the principle of equal pay for men and women; Directive 76/207/EEC on the implementation of the principle of equal opportunities in access to employment, vocational training and promotion, and in working conditions; Directive 86/378/EEC on the implementation of the principle of equal treatment of men and women in occupational social security schemes; Directive 97/80/EC on the burden of proof in case of discrimination on ground of gender; Directive 2000/43/EC and Directive 2000/78/EC prohibiting direct or indirect discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation; Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation etc.

The anti-discriminatory policy evolution is relatively dynamic either generally speaking or with a special focus on labour law relationships. Nowadays is crucial Directive 2006/54/EC that must be implemented to national laws of the Member States up to 15 August 2008 at the latest. This Directive will enter into force on 15 August 2009 as a substitution of Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC. It is to point out that Directive 2006/54/EC reinforces and makes more clear the whole anti-discriminatory policy and will enable the EU citizens better understanding. This Directive will adjust the gender equality in employment, Directive

2004/113/EC will guarantee the access to and supply of goods and services, Directives 79/7/EEC, 86/613/EEC, 92/85/EEC and 96/34/EC in wording of the Directive 97/75/EC implementing of the principle of equal treatment in occupational social security schemes and protection and reinforcement of maternity and parentage.

The most important changes introduced by Directive 2006/54/EC are: definition of equal pay will not, in some cases, /in accordance with EU Court of Justice judiciary/ refer only to situation where man and woman have the same employer; the principle of equal treatment will more clearly refer to public servants; the principle of pregnant women and mothers protection and also protection of fathers after paternal leave is broader /refers also to the rightful claim for the same position and working conditions/; definitions introduced by Directive 2002/73/EC are applicable on all spheres regulated by Directive 2006/54/EC; the rules on the burden of proof will be on the respondent and will comprise also administrative and law procedures /except of case when competent authority itself is obliged to provide the evidence and examine the whole matter/; other.

Several expert studies assert the Romanians and former USSR citizens as the most imperiled group in the EU after the enlargement in 2004. They are regular target of racial attacks, xenophobia and discrimination mainly in labour law and civil law matters. Annual reports of the European Monitoring Centre on racism and xenophobia also point to discriminatory tendencies with an impact on labour law and social environment in European society. European Parliament and Council adopted Decision No 771/2006 on the European Year of Equal Opportunities for All /2007/ - on the path towards the equitable society.

In spite of indisputable progress in introducing the principle of equality and active fighting against discrimination both phenomena stand out in the society. Council Resolution of December 2007 certified importance of the general awareness, law enforcement, mutual co-operation of Member States, intensive implementation of the European Pact on Gender Equality /2006/ and the Community Plan of Equality Between Men and Women for the 2006 – 2010 period though the equality is one of the EU core tasks for years. Slovak Republic as the EU member state from 2004 explicitly declares in its primary law the equality between men and women as one of the key assignments. National legislation was enhanced by transposition of several anti-discriminatory directives and by adoption of the anti-discriminatory act. Thus the principle of equal treatment of men and women was reinforced on the labour market and in labour law relationships. The anti-discriminatory policy in labour law legislation is very important though the law enforcement is often insufficient and complicated. We identify several reasons of this face of affairs: ambiguous interpretation of some basic concepts /direct and indirect discrimination, equal treatment, equal pay for equal work/; relatively low ability of judges to implement new legislation; insufficient knowledge of new legislation; other.

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**Full version of this contribution can be found in the *Conference proceedings* on pp. 775 – 787.**

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# DEPENDENT WORK – PILLAR OR BURDEN?

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## Key words

Dependent work, economically dependent worker, employer, employee, work, legal definition, self-employed person

In the year 2001 the legislator adopted a new Labour Code no. 311/2001 Coll. As a basic notion which defines the work performed by employee for the other party – employer based on employment contract, the phrase “dependent work” has been designated. The notion “dependent work” has not been defined in the Labour Code in the form of a legal definition. As a consequence, there have been situations when a number of former employees tried to contract their performance of the work under the contract form other than employment contract. The identified risk has been based on a lowering of the protection and occupational health and safety of these workers.

The solution of how to prevent this impact has been proposed and adopted in amendment no. 348/2007 Coll. The debate finally resulted in adoption of the legal definition of the notion “dependent work” in the section 1 paragraph 2 which has specified that dependent work within the relation of the employer’s superiority and his employee’s subordination means exclusively a performance of work by an employee for his employer, according to the employer’s instructions, according to the instructions given by the employer’s name, for a wage or remuneration, within working hours, at the employer’s costs, by his production tools and at the employer’s liability and it shall be a performance of work, which mainly consists of repeating designed activities.

The goal of this paper is to consider theoretical aspects of the main notion „dependence“ contrasted with the notion „independence“, to analyse interactions of these two notions critically, in regard to the needs and requirements of the Labour law in the 21st century, and to propose how to adapt the notion „dependent work“ to the results of new labour market conditions.

It is assumed that although the notions „dependence“ and „independence“ rest on the same theoretical level, the legislator does not follow this „equality“ and elevates the notion „dependent work“ as a key concept in the Labour Code by using the notion „independence“ only as a part of the definition of „živnosť“ (trade) in the Trade code no. 455/1991 Coll. or „podnikanie“ (business or entrepreneurial activity) in the Commercial Code no. 513/1991 Coll.

In addition to this, the labour market changed at the end of the 20th and at the beginning of the 21st century it also developed a theoretical gap between these two notions. In the following paper, this will be a subject to a kind of criticism. Economically dependent workers are basically excluded from the law governing work definitions.

In the paper, theoretical and practical models are the goal of the comparison. In the theoretical model, „dependent work“ is characterised by absolute dependence related to the definition of „business“ which is determined by absolute independence. The practical situation at the labour market of the 21st century relativises these two notions.

The main theoretical problem as the objective of my analysis is the absence of homogeneity in the part of the notion „dependence“. The critical analysis unveils that if in a theory the notion „dependence“ has two elements (economical and personal), the legislator will not accept that.

In the second part of the paper, besides the basic questions that the legislator has been bound to ask and answer, I also focus on the questions and requirements that arise from the „rules creations“. Three basic requirements (proportionality, internal and external consistency of a new rule) are critically examined in a connection with results from the legislator. The question of the proportionality has been analysed in regard to the legal and other alternative proposal forms of the problem concerning the so called bogus employment. The proposals have been divided into economical and legal.

The question of consistency has been resolved by a comparison of the legal definition of dependent work (section 1 paragraph 2 of the Labour Code no. 311/2001 Coll.) with the legal definition of business (section 2 paragraph 1 of the Commercial Code no. 513/1991 Coll.) and the definition of the notion „trade“ (section 2 of the Trade Code no. 455/1991 Coll.). Conclusion of the analysis points out that there is no significant collision between elements of the definitions and therefore, there is not any theoretical collision of the provisions between the status of employee and the status of employer.

Finally, it needs to be said that the problem of dependent work and its alternatives is a very complex one to be resolved within ten pages of a text. Though, the undeniable fact is that new working environment calls for new philosophical approaches towards these concepts from legal standpoints and also from those of other fields, such as economy and sociology.

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# NON-COMPETITION CLAUSE AND MONETARY COMPENSATION

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## Key words

Restraint of trade clause, covenant not to compete, non-competition clause, contract of employment, competitive relationship, financial compensation

The issue of prohibition of competition in the field of employment relationship is regulated by the Labour Code num 262/2006 that came into force on January 2007. Non-competition clauses are regulated for all employees by Section 310. According to that Section, in the case of conclusion of agreement under which an employee undertakes (promises), after the termination of his employment for a certain period but for no longer then one year, to refrain from performance of gainful activity which would be identical with his employer's business activity or which would be of a competitive nature to the employer's business activity. The employer may conclude with his employee a non-competition clause only if this can be justly required from the employee with regard to the nature or information, knowledge, operational and technical know-how which the employee has acquired during his employment at the employers undertaking and the utilization of which in the competitive activity could significantly encumber the employer's activity.

If respecting the non-competition clause prevents the employee from gaining earnings comparable to his previous wage, the employer must pay him a monthly compensation in money during the whole period of respecting the prohibition (subsection 1<sup>st</sup> of the Section 310 of the Labour Code). Monetary compensation shall be fixed in the employment contract or in separate special agreement. It shall amount to at least average employer's wage during the past three months prior to the termination of the employment contract. If the monetary compensation is not agreed on in employment contract, then the non-competition clause is not binding. Under the Labour Code is mandatory to sign the agreement in written form. If this formality is not observed the clause is null and void. The monetary compensation shall be payable backwards on a monthly basic unless the parties have agreed otherwise.

The usage of the term "monetary compensation" causes application difficulties because that expression is not defined in the Labour law or in another branch of the Czech law. We got to solve problem what kind of income to the employee does monetary compensation represent. We could state that it has close relation to the institute of wage because it has the same functions that we ascribe to the wages in the labour contract, mainly compensatory, regulation and social function as they are defined in the theory of Czech employment law. On the other hand we realize that monetary compensation does not consist the most important sign of wage, it is not pay for work already done.

Compensatory wage represents another close Labour law matter. It is paid by employer to employee in the situation set in the statute while employee does not really work for employer. Accordingly monetary compensation is paid in order to exclude using of working skills and knowledge acquired about employer's business by employee. With having respect to all specific details we could define monetary compensation as an income paid by former employer to the former employee arising from dependent activity. Ambiguity of wording "monetary compensation" should be dispatched because of need to apply discussed issue within

branches of Tax law, Social insurance and general health insurance law and in a branch of enforcement of a decision according to Civil Procedure Code.

Monetary compensation shall be subject of the individual income tax. According to the section 3 subsection 1a of Income Tax Act the individual income tax shall be collected from the income from dependent activity. The Section 6 defines income from dependent activity also as income following in connection with recent, future or former execution of dependent activity regardless of whether they follow from the payer for whom the taxpayer executes the dependent activity or from the payer for whom the taxpayer does not execute the dependent activity. Monetary compensation is also subject of general health insurance contribution. According to the 48/1997 Health Insurance Act person who has the income from dependent activity stated in the Income Tax Act is obliged to pay contribution to the system of general health insurance. Differently the former employee who has income in form of the monetary compensation does not have to pay social security insurance contributions and state employment policy contributions.

The last part of the article takes a look at the ways of enforcement of decision which could be used at the matter of monetary compensation in non-competition contract. We solve the question if the court should order deductions from another revenues or assignment of other money receivables while applying property of obliged person that is represented by monetary compensation paid him by former employer. According to the wording of Section 299 of Civil Procedure Code non-competition clause monetary compensation shall not be considered another revenues. The only way how to apply that property of former employee is an enforcement of the decision by assignment of a money receivable according Section 312 of Civil Procedure Code. The former employee gaining monetary compensation that has close relation to the wages is discriminated in comparison with other obliged persons that gain earnings considered another revenues. There is no basic sum that must not be deducted from the monthly monetary compensation of the obliged person while applying Section 312.

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# BILATERAL ECONOMIC RELATIONS BETWEEN KAZAKHSTAN AND CZECH REPUBLIC

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## Key words

Bilateral economic relations, co-operation, Kazakhstan, Czech Republic, perspective trends

In 1993 after establishment of diplomatic relations, economic ties between Kazakhstan and Czech Republic were not so dynamic, but after the year 2000 interest of Czech firms and entrepreneurs about setting up business in Kazakhstan grew up very quickly.

In recent years (from 2002 to 2006) the volume of bilateral trade has continued its growth. If in 2002 the total turnover amounted to \$76,833 mln., by the end of 2006 it projected to be more than \$400,963 mln., according to Czech statistic data. Although, both Kazakh and Czech statistical authorities have differences in figures, they admit tangible growth in bilateral trade development between two countries. There are more than 70 Kazakh-Czech joint ventures operating in Kazakhstan and 16 Czech companies have their representatives in Kazakhstan.<sup>1</sup>

Kazakhstan's main export commodities to the Czech Republic are: oil, petroleum products, minerals, metals, cotton, radioactive materials, chemical products etc. The main Czech export commodities to Kazakhstan are: equipment, heavy industry machinery, pharmaceuticals, agricultural products, and supplies Kazakhstan companies with equipment and technology (manufacturing lines, electric equipment, etc.) as well.

The areas of potential and perspective Kazakhstan-Czech cooperation especially for Czech investment activity in Kazakhstan are: energy, tourism, food, agricultural sector, textile, and construction, transport projects, financial sector, and manufacturing industry, technological sector, co-operation perspectives in participation in Kazakh state projects such as projects directed for solving ecological problems (sewage treatment plant, radioactive waste treatment, industrial wastewater treatment etc.).

## The main perspective trends for Czech investors are:

Machinery manufacturing industry – delivery of technical equipment for metallurgical area, chemical industry, oil industry, creation of joint mechanical engineering industry is concerned as perspective projects as well;

Oil and gas branch – delivery of equipments for oil and gas branch, participation of Czech investors in assimilation of oil and gas deposits;

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<sup>1</sup> [www.businessinfo.cz](http://www.businessinfo.cz).



Agricultural area – delivery of technical equipment for Kazakhstan food industry, creation of small canneries, development of SMEs in agricultural area;

Light industry – provision with textiles, development of joint projects in the given area;

Heavy industry – cooperation in metallurgical are;

Infrastructure – participation of Czech companies in reconstruction of city infrastructure, and working out of Kazakhstan transport system reconstruction;

Financial market – financial products (loan, etc.);

Pharmaceuticals – delivery of Czech medicines and scientific cooperation on pharmacy sector;

Innovation – participation in processing of new technology products;

Ecology – Czech state and private research centres and educational institutions could share supplies of technology for water pollution control; technology for environment.

Moreover, Czech factories may supply Kazakhstan with such consumer goods as vitreous and pottery products, house wavers, jewellery (garnet ware), cosmetic articles (Dermacol), food products (mineral waters as Mattoni), leather shoes (Bata) and furniture.

The one of perspectives must be opening Kazakh-Czech Chamber of Commerce with branches in Almaty and Prague, to help and to facilitate the Kazakhstan and Czech business enterprises, thus promoting and expanding partnership between countries.

Authors' next motive concerning future of Kazakh-Czech economic co-operation growth is activation of economic departments of Kazakhstan and Czech Embassies for granting assistance and disclosure of information for potential entrepreneurs, whose aim is doing business within the framework of partnership state. That is the reason of establishing close contacts with Kazakh and Czech diplomatic authorities.

The main problems in Kazakh-Czech bilateral co-operation take place in juridical area, for example, existing official agreements does not work completely, and matters sometimes depend on ratification procedure. There are more than 200 students from Kazakhstan in Czech Republic, and the number of potential students grows every year, but up to present between Kazakhstan and Czech Republic agreement on bilateral education remains unsigned, signing of the agreement may solve problems such as recognition of the diploma received in one of the countries of the agreement.

The present status of bilateral economic cooperation between Kazakhstan and Czech Republic, still does not exploit all existing potential of both countries, so for new perspectives Kazakhstan-Czech economic relations need only to find right way, because both sides are interested in long-term contacts.

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# MEANING OF INTEGRATED ECONOMICS IN THE EDUCATIONAL PROCESS

THEODOR BERAN

ČVUT V PRAZE, FAKULTA STROJNÍ, ÚSTAV ŘÍZENÍ A EKONOMIKY PODNIKU

## Key words

Accounting, cost accountingmanagement, internal management, economic profit centres, microeconomics, managerial economics , macroeconomics, costing, controlling

This article explains importance of specific education conception economics in other branches, juridical spheres high schools. Way out are practical piece of knowledge from education on CVUT in Prague. Specialities, which would education in law directions had be cursive, from which would had go out and near which again finish. Special emphasis is rapid - fire on different sensation two level drive, then drive intradepartmental and drive company entire. Further is mentioned demonstration hypothesis experimental intentionthat the leads to integrated conception. Author explains the basic dimension integration exceed company and forms several level – level intradepartmental, business, mezzoeconomics and macroeconomics and whole is round off philosophically and ethics economics.

Drive intradepartmental is specific form drive and differs from the drive company entire those specials:Intradepartmental drive presents drive partial region business economy. Consequence those specialities displaies in necessity create subsystems intradepartmental drive.Existence intradepartmental formations is basic presumption inner drive. Intradepartmental shapes it is impossible create soever. Major factor along of the process production intradepartmental formations – economic ganglions is criterion responsibility. Intradepartmental shapes must bear liability for region personal activities, work her development intra - plant entire. Activity these formations is then evaluate. Create responsibility circuits are reserved system intradepartmental prices.Intradepartmental drive is typical short - term character controlled period. Characteristic time backdrop used to be month and in some cases week, day, even also inning.d)Technical, organizational and economic conditions single intradepartmental formations determinative need product differentiation. It means that the what is he intradepartmental drive more closely personal production of the process, all the more respects his natural character, concrete conditions and predestinates avenues of approach personal inner drive.Drive intradepartmental has very concrete character , because driving activities are definite by transferring control action on immediate pursuance washing. This reality has of principle falls:

Inner drive must necessarily respect real technical, economics also organizational possibilities intradepartmental formations – economic ganglions. Heterogeneous methods and tool do also innovation ad hoc, therefore must be real. In light of specific characteristics intradepartmental drive is most important detailed analysis his two pages – first page coming - out from content controlled suits and alternative characterizes way assertion impositions and decision generally. Two pages intradepartmental drive predestinate using methods and waies drive.Natural page drive like drive bent on natural terms, is developed bythat the intradepartmental drive is very concrete, dezagregovane, bent on partial production or control action.Value page drive collects on value relations, whose tool are then value category, costs,yields,awards.

Meaning those pages inner drive it is possible spatřovat in higher step aggregation, synthesizing formulation levels of activities intradepartmental formations. Typical instance is economic result intradepartmental formations. Value page drive makes it possible to affect especially qualitative pages activities intradepartmental formations (e.g. region quality control). Next positron is infliction of influence given to intradepartmental formation on process of reproduction zigzag on the premises, especially through intradepartmental prices and their textures. Value category happen tool verification and analysis economy, in terms of direct to individuals and groups this reality forms motivational aspect inner drive. Imposition drive on all steps company is above all co-ordination. In the context is concerned co-ordination of both above-mentioned pages. Is concerned their connection. Way out for integration of both pages inner drive shows continual care of directive base. Technically specification are integral factor there sense that the nesting join how natural page production of the process, so also page value. This reality may not be will never pretermittig heir! In conditions practice, where isn't directive base devoted sufficient attention, where's appearance to concrete conditions given to company too small proportion technically just norms, where aren't mutually interconnecteds and no tie together upon yourself individual sorts calculation, there used to be natural and value page production of the process.

All activity company watch in smallest organizational period that the have homogeneous characteristic character. Is then necessary start detailed analysis conceive I-action ganglion, let us say economic ganglion and articulate organization according to function. Purposely we're introduced concrete principle, so that derive important aspect, concerning integrating managerial book-keeping to the courses, educational plans and so on. Is evident connection knowledges management, let us say with perfect knowledge filling management like of the process. Therefore careful and team selection fit educational material is important. Author assume that the we have to consider reasonable peace parol and quantitative conception. Parol interpretation forms superstructure, no basic system of instruments! Managerial book-keeping has relatively special position in schools technical character, but presentation one from many instances: If inclose for example operating division, we have to respect manufacturing process and define product so, so that separately intercepted costs incumbent on on achievements, which must be measurable and ratable. According to authors hypothesized that opinion is for managerial look-then look in context, very favourable technological rear, let us say technical – technical economic profile user, manager. Meanwhile we're short introduced aspect organizational. Further information only prove that high cross-disciplinary search character managerial accounting.

**Reviewer:** KAREL VLÁŠEK

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# FACTORS AFFECTING DEMAND FOR REGULAR BUS TRANSPORT

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## Key words

Personal transport; regular bus transport; railway transport; individual motoring; transport costs

Individual motoring belongs to the biggest competitor for the public personal transport provided by means of bus, railway or city public transport. This is the case not only in Sloval Republic conditions but also it is a serious problem of developed economies of European Union.

## Current status in personal transport in SR

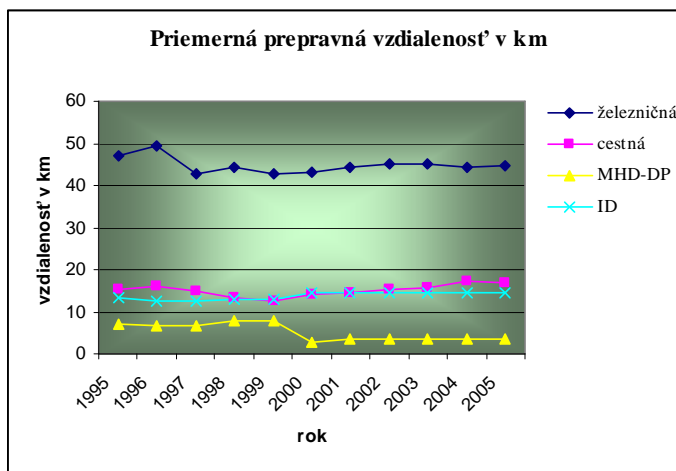
In the Table No. 1 we compare a public transport with an individual motorism. We can see that from the amount of transported persons perspective the individual motorism predominates in the amount of transported persons over the public personal transport and within the public personal transport the bus transport predominates over the railway transport in satisfying population transport needs.

Rok	Železničná verejná	Cestná verejná doprava	MHD-DP	Individuálny motorizmus
1995	89 471	722 510	515 593	1 333 334
1996	76 015	698 256	543 246	1 415 621
1997	71 489	667 427	527 662	1 469 116
1998	70 008	656 230	509 862	1 491 078
1999	69 431	621 567	485 472	1 653 820
2000	66 806	604 249	404 539	1 664 342

Table	2001	63 473	566 445	373 269	1 673 019	No. 1
	2002	59 430	536 613	370 018	1 735 560	
	2003	51 274	493 706	394 465	1 742 915	
	2004	50 325	461 772	383 118	1 750 171	
	2005	50 388	435 673	384 284	1 769 147	

Transport of persons by the railway transport, the public road transport and the individual motorism in thousands persons

The longest transportation distance is provided by the railway transport. The road public transport and individual motorism transport approximately at the same average transportation distance.



Graph No.1 An average transport distance of personal transport in km in SR

### Factors affecting demand for regular bus transport

The important factor affecting demand for the public personal transport is the price.

However passengers react to the change of the price, mainly to its increase, by replacing public personal transport with individual motorism.

In the Table No. 4 we state comparison of the bus transport fare and the cost of using personal car occupied by more than one passenger. This comparison is simplified as we take into consideration only fuel cost of a personal car. Taking this model into consideration we came to a conclusion that the transport by a personal car begins to be more advantageous when two or more passengers are using it.

In the Table No. 5 it is stated the comparison of regular bus transport fare and using of a personal car occupied by various number of passengers. If we take into consideration fuel cost and also the other cost expressed by basic compensation of 6,2 SK/km then we came to a conclusion that regular bus transport is more effective.

Regular bus transport and individual motorism transport approximately at the same average transport distance (Graph No. 1). Travelling public doing decision which means of transport to use takes into consideration the comparison of the cost of fuel consumption and the amount of transported passengers. This way they came to a mistaken conclusion that using of personal car is more effective.

**Reviewer:** ŠTEFAN BOŠJAK

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# INNOVATION MANAGEMENT

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## Key words

Competition, innovation, company, account, management, market environment, segmentation, manager innovations, product innovations, purposeful human activity

People live in space and in time. Time is fourth dimension that enables human orientation, events reception, their posteriority, possibility to reflect on such categories as history – presence – future, cause – consequence, old – new and so on. Simply, time is allied with changes.

Naturally, human likes to manage changes. He frequently stands in front of searching problem, which changes he can manage and which not. Managers have to know, how to achieve desired changes, they have to manage processes that are used to achieve required changes. Request, learn to know and effectively manage corporate processes, becomes urgent.

By looking into answer to question: “How it is so?”, knowledge about development of companies in last century can help. Also knowledge of human’s necessities; causes of his effort to change things into better results can help.

In literature, many definitions of term “innovation” are available. This is the proof of people’s necessity to name phenomenon, that conditions human development. Existing definitions of term “innovation” are always tinged by subjective author’s sight on a problem of generation of something new.

*“Innovation is practical delegation of ideas into new products (manufactures and services), processes, systems and social relations”<sup>1</sup>.*

Contemporary understanding of term “innovation” emphasizes its:

- Connection of way of company life with thinking and behavior of people
- Influence to every element of reproductive process
- Influence and also dependence on prominent constituents of system environment of company, that create and offer innovation on trade

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<sup>1</sup> TUREKOVÁ H., MIČIETA B.: Inovačný manažment – východiská, overené postupy, odporúčania

Mostly, innovations are divided into product innovations or process (technological) innovations, or its combinations.

This segmentation displaces services into background. Nowadays services are as important as products that are used for satiation of wants. That is the reason, why it is useful to present segmentation that will highlight services and products in the same way. Product can be characterized as the result of purposeful human activity. Company managers determinate not only what to offer to customer, but also how to achieve required outputs. In this sense, innovations can be divided into product and manager innovations, whereby expressive differences of these groups are in their focus.

Our papers are oriented to analysis of term "innovation", its segmentation and importance of this problem in companies. Second part of papers is dedicated to knowledge about machine firm KPK Ltd. Martin. Not only the company development, but also historical and nowadays approach to innovations are elaborated in this part of our papers as a practical application of innovation theory.

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## Key words

Road infrastructure, financial resources, EU funds, Public-Private Partnership

## 1. The characteristics of the road infrastructure

The road infrastructure is the significant factor which affects the economic level of country and region. Road network constitutes the highways, limited-access roads, 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> class roads, local communications and objective communications and all equipment, buildings, objects and works, which occur on it.

## 2. State of road infrastructure in SR

The structure of road network in SR in 2006 is displayed in the chart No. 1.

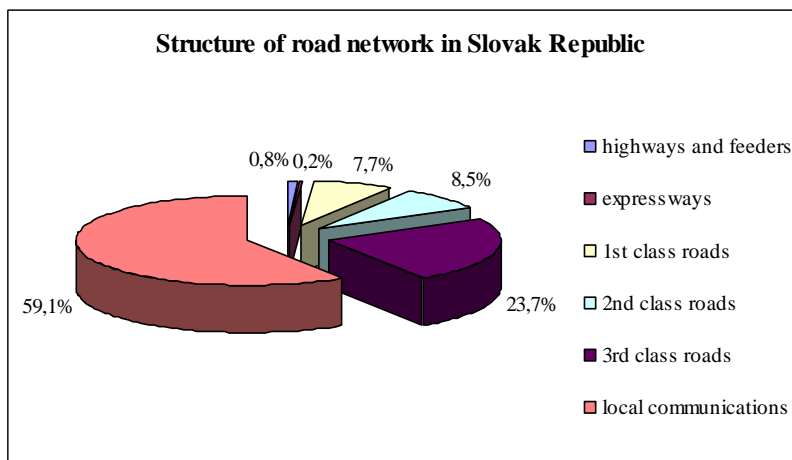


Chart 1: Structure of road network in Slovak Republic (%)

The chart 1 shows, that the local communications represent almost 3/5 of the total length of road communications in the SR. The 3<sup>rd</sup> class roads symbol nearly 1/4 of the road network. Roads of 1<sup>st</sup> and 2<sup>nd</sup>

classes constitute 7 %, resp. 8.5 % from the total road network. Highways and expressways together create only 1 % of the total length of land communications.

The most length of highways is in the region of Bratislava. In the region of Banska Bystrica and Nitra is no highway. The most density of the road network in km/km<sup>2</sup> is in the region of Trnava. The length of the local communications is 25942 km.

### 3. The road infrastructure financing

The volume of expenses to the road in the years 1999-2005 introduce the Table No. 2.

Year	2000	2001	2002	2003	2004	2005	2006
Investment	9 680,0	8 718,3	10 209,7	8 723,9	9 610,6	13 894,8	14 439,0
Maintenance	2 838,0	2 938,0	2 943,3	2 987,3	3 447,0	3 869,0	4 352,6
Total	12 518,0	11 656,3	13 153,0	11 711,2	12 194,1	17 763,8	18 791,6

Table 2: Total expenditure to the road infrastructure in SR, current prices (mil. Sk)

The volume of resources to the road infrastructure accrues in 2006 in comparison with the year 2000 at upwards of 50 %. Proportion of capital expenditures on total expenses is %.

The way infrastructure is funding especially from the state budget, charges of using road network, loans, from EU funds resources. The toll payment and the public-private partnership make ready. Looking for new resources and their effective exploitation are necessary.

As administration of the separate element (level) of road infrastructure is decentralized in SR, is necessary to study the finance options of road infrastructure separate on every level.

#### 3.1 Financing of highways and expressways construction

National Motorway Company manages the highways, expressways and a part of the 1<sup>st</sup> class roads – total 571,606 km.

National Motorway Company is financing from several sources. Beyond resources from the state budget it turns the sources from the EU funds, loans and from the highways sticker sale. The income from the toll system will be the next source of the Company. Besides it the construction of highways in co-operation with private sector (public-private partnership) is planned.

#### 3.2 The construction and reconstruction of 1<sup>st</sup> class roads

1<sup>st</sup> class roads are in ownership and keep of the state, bunk the operation of management guards The Directorate of Motorways - total 3071,233 km.

The finances from the state budget and from EU funds are exploiting on construction and reconstruction of 1<sup>st</sup> class roads.

### **3.3 The construction and reconstruction of 2<sup>nd</sup> and 3<sup>rd</sup> class roads**

The 2<sup>nd</sup> and 3<sup>rd</sup> class roads are at ownership and administration of autonomous regions (high regional unit), on territory of Bratislava and Košice they are at ownership and administration of town.

The sources of financing 2<sup>nd</sup> and 3<sup>rd</sup> class roads are mainly the resources from the budget of autonomous region, receipts from motor vehicle taxation, loans (EIB and commercial banks), public-private partnership and resources from EU funds.

### **3.4 The construction and reconstruction of local communications**

The administration and financing of local communications guard towns and communities.

Communities and towns exploit on financing of construction and repairs of local communications resources from its budget on basis approval receipts and expenses. The municipalities can get subsidy from the Ministry of Construction and Regional development of SR. Besides they can exploit the bank loans and finances from EU funds.

## **Conclusion**

Quality and branched road infrastructure is thinking as one of bearing pillar for economic growth achieving, raise of competitiveness and prosperity of community and regions.

The main problem in this area apart from missing highways and expressways in some regions of SR is mainly the long-time and wanting technical and qualitative status of the 1<sup>st</sup> class roads, regional and local communications.

Nowadays the construction, reconstruction and maintenance of roads and local communications is financing especially from the resources of the state budget, budget of autonomous regions, towns and communities, from payments of the road network, loans and sources from European Union funds. The toll system and the Public-Private Partnership are preparing.

It is necessary to look for further sources as well as designate the effective model of exploiting the available sources. Stability and sufficient financing is namely the main assumption of next effective development of road network.

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# EFFECTIVE AND EFFICIENT UNBUNDLING OF TRANSMISSION SYSTEM OPERATORS (TSO)

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FLORIAN MARGAN

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VYSOKÁ ŠKOLA EKONOMICKÁ V PRAZE, FAKULTA MEZINÁRODNÍCH VZTAHŮ

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## Key words

Depending on the outcome of the EU Council and EU Parliament deliberations, the new proposed legislative package presented by the European Commission on 19/09/2007 might have far reaching consequences on both the internal and the external dimensions of the energy and natural gas markets. Is necessary to give supports the Commission's aim to achieve a fully functioning internal market. This requires a lot of questions just like, effective application of the current legislation (particularly I am concerned with the topic of unbundling in v EU), non discriminatory access and system operation, stable regulatory framework conducive to support investment needs for Europe's supplies etc. I like to show shortly, where we are now in EU?

Proposal for a Directive of the Council emending Directive 2003/54/EC concerning common rules for the internal market in electricity and repealing Directive 96/92/EC. The European Commission has 19.9.2007 published a third liberalization package of energy regulations. It represents a proposal for an amendment of the Regulation on common rules for the internal market in electricity, Directive on conditions for access to the network for cross-border electricity trade and proposal of a new Directive on constitution of a European Agency for Cooperation of Energy Regulatory Offices.

I supports adoption of the package and hopes that it will be primarily the endeavour to improve the interconnection among member states that will contribute to the completion of a single European energy market without any pointless barriers. The proposal of the third liberalization package of the EU contains mainly a proposal of a Directive which will amend Directive 2003/54/ES on common rules for the internal market in electricity. The proposal imposes an obligation on member states to ensure implementation of ownership unbundling at the level of transmission system operators, or establishment of an independent system operator within one year following the transposition of the Directive into their national law.

I see the coordination of the activities of national regulatory offices as the best means to integrate their decision-making practices. However, it believes that powers of the new organ need to be exactly and exhaustively determined in the final version of the new Regulation. The third amended regulation is the Resolution No 1228/2003 on Conditions for Access to the Network for Cross-border Electricity Trade. The proposal of the Regulation states that transmission system operators should cooperate within Europe through the European Transmission System Operator as an organ accountable to the European Commission. Within the European network, a ten-year investment plan for the whole EU will be adopted and, along with that, an obligation to cooperate at regional level will be imposed on transmission system operators.

Any future legislation should aim at a well functioning internal market and at preserving the ability of energy companies to become globally competitive, to invest and to determine their portfolios and their long term strategies. In this respect, I see it is necessary the need for EU external policy to support dialogue and

partnership under a general umbrella of reciprocity with producing countries as a way to strengthen European security of supply.

A pragmatic approach is expected by the European Commission concerning the most discussed issues of the degree of ownership separation of production/supplies from transmission activities, which will enable the member countries to choose between full ownership separation, already existing in a number of member countries today, and a new option based on the function of an independent system operation (ISO), which will, of course, be more demanding from the regulatory point of view and will include in the national and community level a further regulatory link permitted to ensure competitive pricing and equal access to energy networks.

Depending on the outcome of the EU Council and EU Parliament deliberations, the new proposed legislative package presented by the European Commission on 19/09/2007 might have far reaching consequences on both the internal and the external dimensions of the energy and natural gas markets. Is necessary to give supports the Commission's aim to achieve a fully functioning internal market. This requires: effective application of the current legislation, non discriminatory access and system operation, stable regulatory framework conducive to support investment needs for Europe's supplies, improved regulatory process, improved TSO co-operation, the lack of legal unbundling and insufficient managerial separation of transmission and distribution system operators to ensure their independence. Insufficient legal unbundling of TSO/DSO to guaranty independence. On the question on unbundling is necessary stressed the following: any solution must be implemented coherently and must be proportioned, ISO is a possible alternative to be studied, other feasible solutions may exist and better, well targeted regulation should be sought.

Proposal for a directive of the European Parliament and of the council amending Directive 2003/54/ec concerning common rules for the internal market in electricity - how to resolve the dispute between member states in order the package is adopted in 2008. Some of Member states EU give support the efforts of the European Commission regarding the creation of a functioning single market with electricity. It simultaneously considers as a fundamental prerequisite for the functioning of the market, besides the sufficient production capacities, also the sufficient and accessible pan-European transmission capacities. Therefore, these states promote harmonisation of the regulation procedures and regional coordination of the transmission systems. With regard to these aims, some of Member states EU support the objectives and intentions of the European Commission in the area of cross border trade with electricity with a view to create a single market at least at regional level. The cooperation at regional level is fundamental . Nevertheless, some of Member states EU are not sure whether the appropriate instruments were chosen to achieve this goal.

The agreement regarding unbundling on the territory of EU will be not easy and the discussion will last for just a longer time. I have shortly focused on two different points of view about solving this problem of unbundling, namely by a group of EU states which doesn't directly support separating from vertical corporations and another group of EU states in the second part of this essay which support separating. In my opinion it is necessary to reconsider the definition and designation of roles and tasks notably of transmission system (TSO). Vertically integrated dominant energy companies are designated as the major disrupters of the market environment impeding market access to competitors. Therefore proposals for either forced separation or so called independent system operator (ISO) have been raised. Alternative Proposal of 8 EU countries for ownership unbundling and independent ISO operator – so called Effective and Efficient Unbundling – (EEU). In principle, the EEU defines making the current system more rigorous by introducing duty to elaborate so called compliance program for each TSO (a kind of TSO functioning Codex) and regulators' supervision over its performance. Though the Commission formally welcomed this proposal and promised discussion over it, its current position towards this proposal is negative. Probably ISO regarding gas unbundling is not a real alternative from reason: has never been implemented in gas industry, leads to a loss of all competencies (for example technical,...), creates problems of repARATION of responsibilities, industrial and financial risks.

**Reviewer:** JAROSLAV JAKŠ

**Full version of this contribution can be found in the *Conference proceedings* on pp. 864 – 879.**

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## Key words

European Commission, financial markets, Financial Sector Assessment Program, Green paper, White paper

The EU institutions cooperation at generating of single legislative rules generates the legislative base of financial markets integration. European Commission has in the integration of financial markets incommutable role. To the first steps to achievement of simple financial market of European Union (EU) belongs Financial Sector Assessment Program (FSAP) that was published of European Commission and was approved in 2000 by European Council.

## 1. Institution of European Union

In compliance with the Treaty of Maastricht (Treaty on European Union), which came into force in 1993 exist these main institution of European Union, namely: European Council, European Parliament, Council of the European Union, European Commission, Court of Justice and Court of Auditors. This individual institutions have his specifically powers.

## 2. Legislative procedures

In contrast to the national systems, in which the will of the nation is expressed in Parliament, the European Union accords a major legislative role to the representatives of the Member States meeting in the Council.

The decision-making procedures comprise the consultation procedure, the cooperation procedure, the co-decision procedure and the assent procedure.

## 3. First steps to achievement of simple financial market of European Union

To the first steps to achievement of simple financial market of European Union belong Financial Sector Assessment Program (FSAP) that program was prepared by the Staff of the International Monetary Fund and the World Bank. The FSAP, launched in 1999, was largely completed by its 2004 deadline, with 39 of the 42 measures adopted

The central philosophy of FSAP is: financial industry's performance has improved; higher liquidity; increased competition; sound profitability; stronger financial stability.

### **3.1.Green paper of European Commission on Financial Services Policy (2005 – 2010)**

This paper presents the preliminary views of the Commission for its financial services policy priorities for the next five years. It takes into account many convergent opinions expressed in the 2-year consultation process that started with the work of four expert groups, followed by wide public consultation.

### **3.2.White paper of European Commission on Financial Services Policy (2005 – 2010)**

This paper presents the European Commission financial services policy priorities up to 2010. The consultation on the Green Paper has shown broad support for these political priorities.

In this paper is part of “Dynamic consolidation of financial services”. Financial markets are pivotal for the functioning of modern economies. The more they are integrated, the more efficient the allocation of economic resources and long run economic performance will be.

**Reviewer:** JANA PŘÍVRATSKÁ

**Full version of this contribution can be found in the *Conference proceedings* on pp. 880 – 889.**

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# INDEMNITY POLICY AND PROCEDURES DURING BSE OUTBREAK IN THE CZECH REPUBLIC IN 2001 - 2007

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## Key words

Financial compensation, bovine spongiform encephalopathy, BSE, cattle, infectious diseases, costs, financial law

For nearly two decades the European beef demand has been affected by bovine spongiform encephalopathy (BSE) because of its potential danger to human health. BSE is an infectious disease caused by prions and was first detected in Great Britain in 1985/1986.

The regular examination of animals in the Czech Republic came into effect on 1 February 2001 and, by 30 November 2007, a total of 1,194,743 cattle were examined, of which 27 animals tested positive. Two outbreaks of bovine spongiform encephalopathy in 2007 confirms that, in the Czech Republic, the disease incidence has a decreasing trend, which is in agreement with the situation in other EU countries. As a result of 27 positive BSE findings, a total of 3,997 cows were killed and their carcasses were destroyed.

In accordance with the EU's Common Agricultural Policy and farming promotion, the EU provides financial compensations to farmers who have suffered losses due to BSE. Their allocation is regulated by "Act No. 166/1999 on Veterinary Care and on Amendment of Certain Related Acts" (Veterinary Act), with particulars given in Title IX "Compensation of Costs and Losses Incurred in Connection with Dangerous Contagious Diseases". This defines reimbursements to farmers whose cattle herds have been affected by the transmissible diseases specified in Annexes 3 and 4 to this Act. For 62 specified dangerous transmissible diseases, it outlines indemnity strategies and general itemisation of the compensation. The Czech legislation is in full agreement with the Regulation (EC) No 999/2001 of the European Parliament and of the Council, of 22 May 2001, laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies, as amendment.

Article 67, paragraph (1) of the Veterinary Act states that the farmer will obtain a compensation of the costs and losses suffered due to emergency veterinary measures imposed in order to eradicate and prevent the spread of any of the dangerous contagious diseases listed in Annexes 3 and 4 to this Act, on condition that these measures at least include the quarantine of animals on the holding and ban on their transfer from the time of a suspicion to the time of a confirmation of the disease occurrence.

The general principles of compensation for the costs and losses defined above are specified in paragraph (2) as follows:

- a) Costs of killing or emergency slaughter of diseased and suspected animals and safe disposal of their carcasses. Where appropriate, compensation is also provided for safe disposal of their products. In agreement with this, the farmer was compensated for all costs associated with having the BSE positive animal

and its whole cohort killed and disposed of in a rendering plant and for all related costs such as examination of the animals, their transport to the rendering plant, etc.

- b) Costs of the animal killed or slaughtered in emergency. For BSE this involved compensation for the value of all animals killed in the cohort identified on the basis of an expert's report. The compensation was provided according to Article 68, paragraph (2) and was based on the price of a healthy bovine animal of the appropriate category that was common in that place at the time of losses incurred.

- d) Cleaning, disinfection, disinsection and deratisation of the holdings and of the equipment on the holdings.

- e) Losses evidently caused by the impossibility to obtain products from the animals involved in the period of implementation of Emergency Veterinary Measures. For milking cows lost in relation to BSE, compensations were provided for the potential highest milk yield according to the "Milk Yield Assessment".

To reduce the economic impact of BSE on farmers, legal means have been established to reimburse farmers for the losses both direct and related. The latter involve costs of examination for BSE, transport of animals to a rendering plant, their killing and safe disposal of their carcasses, and cleaning and disinfection of the holding and its equipment, though this procedure is questionable because BSE is not a truly contagious disease. In addition, the farmer is reimbursed for losses due to non-materialised production. However, all these compensations cannot completely cover the costs incurred in relation to BSE.

In the first place, producer-consumer relations, usually taking long time to establish, are destroyed and return on the market is difficult; then, large costs are necessary to build up the herd again. These costs are difficult to calculate and their compensation cannot be claimed because they are not treated by legislation. A BSE incident is also associated with several adverse consequences, such as a loss of job in an agricultural enterprise, which can have a deep impact on rural populations. The ensuing problems in the broadest sense of the word can partly be eased by commercial insurance policy. The past experience showed that most of the farmers were insured. Any payment of insurance benefit has no effect on the amount of cost compensation based on the Veterinary Act. Since a farmer-insurance company relationship is a business one, it was not possible to find out information on benefit payments.

Table shows compensation for all costs spent in relation to BSE between 2001 and 2007. A total of 27 animals tested BSE-positive and, consequently, 3,997 animals coming from 138 herds were killed due to constitution of cohorts. The total of compensations in this period reached CZK 197,057 thousand. The average occurrence was 3.86 BSE-positive animals per year and the average costs per animal were CZK 7.3 million.

Table: Total Costs (in CZK thousand) associated with 27 BSE cases in the period from 2001 to 2007

Period	No. of herds defined by cohort size	No. of animals killed	Value of animals	Killing	Carcass disposal	Examination for BSE	Related costs*	Non-materialised production	Observance of emergency veterinary measures	Total
2001 to 2007	A. 109	219	10350,8	232,9	1076,5	161,3	103,3	133,8	0,7	12059,1
	B. 14	608	21118,4	314,9	1806,1	672,5	308,6	899,1	109,0	25738,9
	C. 15	3170	132572,5	1297,8	8671,7	3531,6	729,5	11681,0	413,6	159259,1
	Total 138	3997	164041,7	1845,6	11554,3	4365,4	1141,4	12713,9	523,3	197057,1

A, 1-10 animals in a cohort; B, 11 -100 animals; C, > 100 animals in a cohort. \*Costs related to killing and safe disposal of carcasses and farm decontamination.

Of these, 83.3 % (CZK 164.0 million) were compensations for the value of killed animals, 9.7 % (CZK 18.9 million) for the related costs, i.e., killing, safe disposal of carcasses and examination for BSE, and 6.9 % (CZK 13.6 million) for the losses due to non-materialised production.

To ease the negative economic impacts of BSE, the EU provides financial support for all member states. For instance, in 2005 the Czech Republic received € 1,640 thousand for active monitoring and € 2,500 thousand for eradication.

**Reviewer:** JAROSLAV ZLÁMAL

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# EXPLOITATION OF IP VALUE GROWTH POTENTIAL IN TERMS OF SME'S INTERNAL ENVIRONMENT

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## Key words

SME'S, Tacit Knowledge, Economic Niveau, Net Income Capitalization, Internal Environment

An effective management of knowledge is necessary for the right investment decisions at the age of knowledge economy nowadays. A considerable distinction of shares of objectified intellectual property in a property portfolio of enterprises has happened during the last few decades. Primarily, the aim of this paper is to analyze knowledge management within an internal environment of small and medium sized enterprise. Further we consider assumption suitable for qualifying and quantifying value of intellectual property which is capable for yield potential capitalization. Intellectual property is distinctive mover of competitive advantage on the present. The last stage of our research work is a draft of a new analytical tool suitable for intellectual property valuation and analysis of long term time series. This equation is suitable for analysis of historical and present data. Accordingly it can be applied for predict future time period and this type of coefficient is feasible for volatility analysis of intellectual property value changes.

Firstly we carried out an extensive literature searching focused on subject of knowledge management definition. There are exists many ways for recognition. In other words we deal with materialising of knowledge into formal structure. Knowledge should be apprehended as a part of transformation knowledge chain from general data to knowledge (see f.i. Truneček, Vágner). Knowledge management is dynamic modern branch of management with several discrepancies in technology and heterogeneous conception. Fundamental dichotomy is based on divergent interpretation of knowledge concept. Results of our observations are progress concept grounded on rudimental application approaches. These approaches are differentiated above all particular methods and according to the detailed event and also techniques.

## Knowledge Management Niveau

We extract author's concept of knowledge management in accordance with particular niveau. The top niveau called philosophic niveau shows us the first purpose, intention. This is the ideological cornerstone of knowledge management. On account of the first mover there is pushed the choice of rudimental possible approaches toward application procedure determining. This is the part of theories and gnoseological thoughts. The second niveau, called methodical or systematic niveau, already we are able to select sortable methodical device. Hereinafter all along the finished of this part of progress we are able to approach into the last part, technique niveau. In this level, partial techniques, computations and management activities are applied on the specific entities and subjects of management.

## **Broadly IP Conception**

Knowledge management is known on several names. According to particular paradigm of various schools of economics and management are used unstructured titles for this subject. We can meet with subject of knowledge management named in accordance with accounting regulations and guidelines, tax laws, industrial property laws and valuation rules and guidelines. Other view providing economics and valuation theory. The broad concept of intellectual property is accepted ourselves. Indications are not semantic equal, but are based on exploitation and expression of some sort of knowledge. Kisslingerova, Novy (2005) pointed out commonly used terms for intellectual property such as for instance intangible assets, intangibles, intellectual property, intellectual capital, intellectual ownership, and industrial property, copyright et sequentia.

## **New Analytical Tools**

Our topical concept for long run horizontal and vertical technical analysis is in preference determined for effective management of underlying properties. Our draft appears from German point of views on particular matters – Net Income Capitalization rather than Discounted Cash Flow methods and techniques.

**Reviewer:** IVA ŽIVĚLOVÁ

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# CZECH AGRICULTURE WITHIN EU INTEGRATION

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## Key words

Czech agriculture, EU, agricultural politics, EU budget

Czech agriculture is a one part of traditional Czech economics. After May 2004 (the Czech Republic entered to EU), we had to change our agricultural politic. Many of Czech agricultural enterprisers assess the agricultural politics EU very negative. This article deals with the Czech agriculture from the view EU integration. The aim of this article is to know the situation in the Czech agriculture before joining Czech Republic to the EU and current situation. The sense of this article is to state, if the protests of our farmers are substantiated. The article should show the future the Czech agriculture in EU and the opportunity to better offer of Czech agricultural products.

## Czech agriculture

At first, we have aimed about the specific of Czech farmers. About only 5 % companies of all Czech companies are farmer. There were more establishing subjects than leaving subjects before 2004. The rate changed after 2004, but the change is not dramatic. There are 0.14 % agricultural subjects insolvent. The rate is the same as the whole economics. The result is no significant change after entering the Czech Republic to EU.

The second part deals with agricultural production in the Czech Republic. There are shown that the quantity of potatoes, sugar beet and corn fell. Opposite, the rape increased. Quantity of crop was decrease after May 2004. The similar situation is at the livestock production. The quantity of cows, pigs and chickens decreased. Only number of sheep increased. The production of agricultural sector in current prices has been down since 2004. There is very different inflation at agricultural products in period 2003 – 2006. Deflation was in years 2003 (2.9 %) and 2005 (9.4 %). Inflation was in years 2004 (8.1 %) and 2006 (1.1 %). The production of agricultural products was at the similar level in the constant prices. The profit of farmers is increased. This supposition confirmed Petr Gandalovič, Czech Minister of Agriculture.

The third part of this article describes productivity in the Czech agriculture. Productivity was increased in the followed period. We can see that the most grow was in 2004. The livestock production was the great productivity as the plant production till 2004. Since 2004, productivity in livestock production has been the same as in plant production and it has been smaller than in 2004. Growth of productivity in agriculture can be compare with the all of employment in the agricultural sector and with whole of production. The number of employee has been lower till 1993. Less than one half of employees in 1993 work in agricultural sector nowadays. Agriculture belongs to sector with the lower earns, so it is one of a lot of reason of this situation. Along to Czech statistical office, the average earn in agriculture was 10 000 – 12 000 Czech crowns in 2005. The average earn in the other sector was about 20 000 Czech crowns.

## **EU agriculture**

The next part of this article is analysis of the EU agriculture. At first, there is shown a rate of Czech agricultural subjects on the production of whole EU. The situation for Czech farmers is not positive. Czech Republic had only 1.1 % of EU production in 2005. Leaders in production are France, Italy, Spain and Germany. The four states have about 60 % of EU agricultural production. Czech Republic has very difficult position in parley about EU agricultural politics.

The same situation is at self-supporting of selected agricultural products. EU has much more products than the people in EU are able to consume. The question is, where with over-supply? Only, the production of beef is lower than 100 %. The task is the high competition in this production. After this analysis, the Czech farmer could expect more restrictions in production in the future.

The last part discuss EU budget and the rate of this budget related to agriculture politics. The rate of financial resources from EU budget to agriculture is declined (about 50 %). Czech farmers could get only 50 % subsidies which get the farmers from the old EU-state. It is overall 77 % with the subsidies from the Czech state budget. Czech farmers have difficult position to in competition with the farmer from old EU states.

## **Discussion**

Czech farmer have only two chances to compete with other farmer from EU. The first is to choose the differentiation strategy and to produce special products. The second is to be better in marketing, e.g. to extend the offer of customer services. The offer of customer services is in the Czech agricultural sector very random.

**Reviewer:** JIŘÍ BLAŽEK

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## Key words

Generally Accepted Accounting Principles (US GAAP), Accounting regulation harmonization, International Financial Reporting Standards (IFRS), Reporting

Regulation and harmonization are very often discussed. We can find number of definitions and contexts of the terms. The article is engaged in problems of accounting regulation harmonization. Namely, the paper mentions and analyzes possible ways of accounting regulation in the world, gives reasons of regulation harmonization, engages in situation in the Czech Republic and attentions to difficulties of accounting and reporting rules implementation.

## Ways to regulation

Harmonization (i. e. eradicating the differences between particular methods of regulations) has a different territorial scope, eradicates the capital movement barriers and steers for globalization. Financial statements are often only information source about a company. The main reason of harmonization is comparability analysis security for investors and other users. We can achieve the accounting regulation harmonization by:

- Legal regulations,
- Standards,
- Previous ways combination.

## Legal regulations

Legal regulations are based on the Roman law. They have a form of the statutes that are enforced by law and contains penal clause. They are generally submitted by executive and approved by legislative authorities. The regulations content is not usually affected by professional associations. Their contingent updating is time-consuming. Subject of accounting regulation is not only accounting, but book closing also. The strict form of regulation can leads to consolidation (e. g. setting of a chart of account). There is a problem, that the legal regulations are created by a small group of people, who does not have relevant working knowledge and experience in the given field. In addition these people will not take control of abidance of the rules. On this account, the quite a number of the legal regulations is clear of effect.

## Standards

Standards are built up on common law and drew from the experience of providers and users of information. Setting process, content and update of standards are leaded by agents of professional associations. The



standards are consentingly observed. In the case of the standards at first sight it may seem that the absence of penal clauses declines the useful effect of the standards and makes difficult for their enforcement. But contrary is the case.

### **Combination of legal regulation and standard**

Final possibility of regulation is combination of legal regulation and standard. The way combines advantages both of the access.

### **Regulation of Accounting in the World**

There exists more than one accounting system in the world. We will be engaged in American Standards (US GAAP), International Financial Reporting Standards (IFRS) and Czech Accounting Standards (ČÚS).

#### **United States of America**

The United States of America, Generally accepted accounting principles are accounting rules used to prepare, present and report financial statements for a wide variety of entities, including publicly-traded and privately-held companies, non-profit organizations and government. Generally accepted accounting principles, commonly abbreviated as US GAAP, includes local applicable Accounting Framework, related accounting law, rules and Accounting Standard. US GAAP is not written in law.

#### **International Financial Reporting Standards**

International Financial Reporting Standards (IFRS), formerly International Accounting Standards (IAS),<sup>1</sup> are a set of international accounting directives. The standards and interpretations are adopted by the International Accounting Standards Board (IASB), formerly International Accounting Standards Committee (IASC).

The qualitative characteristics of financial statements are understandability, relevance, reliability and comparability. IAS accentuate on fair value.<sup>2</sup> Financial reporting should provide information that is useful to present to potential investors and creditors and other users in making rational investment, credit and other financial decision. The most important information is field of economic resources, the claims to these resources and the change in them.

#### **European Union**

All listed EU companies (including banks and insurance companies) have been required to use IFRS since 2005. In order to be IFRS approved for use in the EU, standards must be endorsed by the Accounting Regulatory

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<sup>1</sup> IAS were issued between 1973 and 2001 by the board of the International Accounting Standards Committee.

<sup>2</sup> Fair value is the amount for which an asset could be exchanged, or a liability settled, between knowledgeable, willing parties in an arm's length transaction.

Committee (ARC), which includes representatives of member state governments and is advised by a group of accounting experts known as the European Financial Reporting Advisory Group.

## **Implementation of International Financial Reporting Standards**

### **Reasons of International Financial Reporting Standards in European Union**

The EU directives had been amended, modified and changed many times. They were frequently out-of-date and rigid. The European Union was not able to secure the harmonization of Accounting Systems of their member countries. Because of it, the European Union implemented the International Financial Reporting Standards.

### **Integration of International Financial Reporting Standards to Czech legislation**

After the Czech Republic becomes a member of the European Union, International Financial Reporting Standards are valid for all accounting subjects, which are issuers of a security registered in the regulated securities market.

### **Harmonization of IFRS and US GAAP**

The US GAAP provisions differ somewhat from IFRS, though efforts are underway to reconcile differences in principles so that financial statements created under international standards will be considered acceptable within the United States, and US GAAP financial statements will be acceptable internationally.

## **Conclusion**

We can achieve harmonization of accounting regulation by legal regulations, standards or the previous two ways combination. Practice has shown that enforcement of the standards is more effective than in case of the legal regulations.

We know a number of Accounting Systems: American Standards, International Financial Reporting Standards, Czech Accounting Standards and so on. On the part of the United States of America there is pressure in recent years on converging US GAAP and IFRS. The main reason is to ease an entry of foreign investors to the financial market.

Czech legal regulations are changed to correspond to National standards and International Financial Reporting Standards, International Standards of Auditing and to conform to fourth, seventh and eighth EU directives. Unfortunately, till this time there are not solved the basic problem areas (e. g. leasing, evaluation and so on). Harmonization of accounting regulations is due to ensure a comparability analysis and transparency of final accounts.

**Reviewer:** JUDIT FAZEKAS

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# NEW COURSES OF THE COMMON AGRICULTURAL POLICY (CAP)

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## Key words

Common Agricultural Policy (CAP), agricultural subsidies, direct payments, reforms of CAP, decoupling, cross-compliance

## Origin and History of the Common Agricultural Policy

The Common Agricultural Policy has been the basic pillar of the European integration already from the beginning of the European Economic Community (EEC). Already in the Treaty of Rome about establishment of the EEC there are included general targets of the Common Agricultural Policy and are also outlined the instruments, by which the existing targets are to be reached.

„Article 33

*1 The objectives of the common agricultural policy shall be:*

- a. to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;*
- b. thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;*
- c. to stabilise markets*
- d. to assure the availability of supplies*
- e. to ensure that supplies reach consumers at reasonable prices*

Article 34

*...In order to attain the objectives set out in Article 33, a common organisation of agricultural markets shall be established....*

*...In order to enable the common organisation referred to in paragraph 1 to attain its objectives, one or more agricultural guidance and guarantee funds may be set up....“ [1]*

## The Critical Reforms of the CAP

The efforts to improve the Common Agricultural Policy and to upgrade its targets proceeded already from the very beginning. The first attempt at the reform is from the end of the sixties of the 20th century. It concerned

the Mansholt's plan, but it failed. The reform from the year 1992 focused on decrease of support prices on cereals, beef and milk, the support of early retirements, the support of alternative incomes at countryside and so on. The reform from the year 2003 was adopted at EU summit on the 26th June 2003. Generally it focused especially on the support of the quality against previous quantity approach and in particular in the area of the environment, the consumers' health and the living conditions of animals.

**The Contemporary Courses of the Common Agricultural Policy**

Along with the analysis of the recent courses of the CAP I keep to the Communication from the Commission on Simplification and Better Regulation for the Common Agricultural Policy published in Brussels on the 19th October 2005 (COM(2005) 509 final version) and to the Council Regulation (EC) n° 1234/2007 of October 22nd 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) and from the so-called 'Health Check' of the CAP plan by the European Commission for streamlining and further modernising the European Union's Common Agricultural Policy. The target of the simplification is the increasing of the transparency and the comprehensibility of regulations, liberalization of their demands and cost reduction for companies. The main task of the 'Health Check' of the CAP is then more thorough review of regulations and supports within the frame of CAP and their adaptation for new tasks and opportunities in the EU formed by already 27 member states. With the Council Regulation (EC) n° 1234/2007 was created the integrated set of harmonised rules for all common market organizations.

**The Common Agricultural Policy of EU and its relation to the CR**

For the subsidies system in the CR after its integration to the EU in 2004 is the Common Agricultural Policy and its documents the fundamental. In order to understand its influence I show for the visualisation purpose the structure of subsidies to agriculture in the CR in the following scheme.

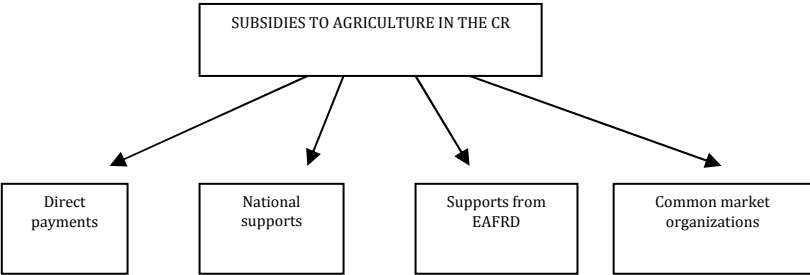


Fig. 1 The scheme of subsidies to agriculture in the CR

Source: Own elaboration

Impacts by reforms from 2003 are already largely implemented into the structure of subsidies policy on agriculture in the Czech Republic. Already since 2004 the single payment by area SAPS was introduced and with the new programming period 2007-2013 was strengthened also the target of development of the countryside by Rural Development policy. Cross-compliance will be claimable right from 2009. During last six months it is

possible to observe also the influence of the newest courses of the CAP, namely the simplification through adoption of single application for payment.

Citation:

[1] THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY (on line). 2008. [cit. 25.4.2008]. Available at:  
< [http://eur-lex.europa.eu/cs/treaties/dat/12002E/htm/C\\_2002325EN.003301.html](http://eur-lex.europa.eu/cs/treaties/dat/12002E/htm/C_2002325EN.003301.html) >

**Reviewer:** MIROSLAV NEJEZCHLEBA

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## LEGAL HISTORY SECTION

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# PROBATION WITHIN THE PROCESS IN THE MINING COURT ACCORDING TO IUS REGALE MONTANORUM

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LABEM

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## Key words

Ius Regale Montanorum – Gozzio of Orvieto – mining law – medieval law – process law – Kutná Hora – mining court – probation – 14. century – Václav II. – mining – proofs

## The Mining act

The Mining act of bohemian king Václav II. – Ius Regale Montanorum was created by italian professor of law Gozzio of Orvieto somewhere between years 1300 and 1305. The reason for this issue was the fast development of silver mining in Kutná Hora and its region. The Privilege of Jihlava – the only one law at the time containing any rules for mining had not enough legal instruments to regulate all relations typical for mining.

Ius Regale Montanorum is after the fashion of the Institutiones of Byzantine emperor Justinian divided into four books. First three of them regulate the material law, concretely the first book is devoted to position of different persons being party to the mining control, i.e. the judge, the members of the jury, etc.; second and third book bring rules for opening new mines, renting fields to new miners, and contents some also „labour law”, e.g. minimal earnings for workers.

Finally the fourth book regulates the same way as Justiniani Institutiones the process in the mining court. The court in case of the regular proceedings consists of the judge and jurymen. In the case of irregular proceedings arbitrates the judge himself.

## The probation

The regulation of proving is the subject of chapters XI. to XVII. It is mostly received from the Roman law sources, especially Institutiones. Probation itself is fixed part of the proceeding, all evidences are given in the court in the presence of both parties. There are only two exemptions of this rule – the *secret testation* recommended in greater causes to prevent the fear of witnesses and the proof by the *testation writing* acquired before the start of trial. The burden of proof belongs in principle to the accuser. Although the Mining act allows to the defendant prove some facts, that can negate accuser's statements. It's also forbidden to make proofs, that have no relationship to the trial and make it longer.

Concretely regulates Ius Regale Montanorum four groups of proofs – the witnesses, the documents, the legal presumption and the adjuration.

## **The witnesses**

First and most important proof is the testimony of witnesses. Contrary of the other law sources from the same time, witnesses in the mining court speak only about things, they have seen or heard, but they do no more swear about their conviction of verity of party's statements.

Chapter XII. of the fourth book nominates whole groups of witnesses, who cannot give testimony. In this part of the Mining act is very easy to demonstrate the influence of Roman law source over the text of *Ius Regale Montanorum*. If you see the list of exempted trial witnesses in the Mining act and the list of exempted testamentary witnesses in the *Institutiones*, it's almost the same list.

There are exempted servants, women, children, madmen, people with bad reputation, poor, suspicious people and people of other than catholic religion. According to the Roman preimage, the Mining act prohibits within the testimony of servants also the testimony of slaves.

Also the absolute prohibition of testimony given by women brings some questions. For example the wife of a mining control representative, however she could not give testimony, could accept the report on discovery of new lode and probably also witness it in the court.

By children regulates Mining act the age of getting adult. The age is fourteen years for boys and twelve years for girls. This regulation respects *Institutiones* too. Now we can ask, why it is necessary to know the age of getting adult by girls, when adult women so as the girl are not able to witness. Also for the children of a mining control representative obtains the same exemption as for his wife.

For the other witness groups there are not many special rules, only the position of poor on as a witness is regulated not unambiguously. In the beginning of XII. chapter are all poor people absolutely interdicted from giving testimony. But, according to §10 shall be excepted only suspicious poor people and the testimony given by honest poor shall be believed. Even to these poor, who cannot for their social situation come to the court, shall be sent reliable people to get their testimony.

## **The documents**

Second group of proofs known by the Mining act comprise the documents. *Ius Regale Montanorum* differentiates two main types of documents – municipal protocol and privilege. Municipal protocol is writing wrote up to certify any fact, subscribed by two approvers and sealed. *Privilegium* is a writing confirming to any person or any place definite amount of privileges.

## **The legal presumptions**

To make the trial faster in some certain cases, constructs Mining act two legal presumption. First of them agrees to a worker, who worked for any time for somebody, did not get his salary and accuses his employer. The second presumption agrees to poor one, who accuses rich defendant. In such cases is enough for deciding to ascertain the presence of conditions allowing using any of these presumptions. Presence of these conditions can be proved by adjuration of the accusing party.

## **The adjury**

If there are no proofs (no witnesses, no documents, no conditions for using presumption), the party can certify its statements by swearing. The adjuration is the most powerful proof and the party can choose between



swearing and fulfilling requirements of the other party. Rejecting the adjuration results failure in the trial. There is no punishment for perjury, because adjuration is sacred act and only God is allowed to punish false oath.

In the fourth book of the Mining act we can find quite modern rules to lead the trial. Most of these rules come from Roman law sources and are combined with the typical medieval law elements.

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**Full version of this contribution can be found in the *Conference proceedings* on pp. 943 – 953.**

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# THE PREPARATION OF CZECHOSLOVAK CONSTITUTIONAL NATIONAL ASSEMBLY ELECTION IN THE CONTEXT OF THE CZECH AND SLOVAK NATIONAL RELATIONSHIP

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## Key words

Constitutional National Assembly, constitutional act of the Constitutional National Assembly, election, act of the election the Constitutional National Assembly, act of the modification permanent electoral indexes, law nr. 28/1946 Sb., constitutional law nr. 65/1946 Sb., law nr. 67/1946 Sb., 1946

The preparation of Constitutional National Assembly election was the main task of Temporary Legislature, which exerted in Czechoslovakia from 28th of October 1945 to 16h of May 1946. On 21st of February the Temporary National Assembly accepted the code nr. 28/1946 Sb. About the adjustment of permanent electoral list, which existence was necessary presumption of Constitutional Assembly election realisation. On the field of Temporary National Asseblly occured to introduction of constitutional law about Contitutional Assembly warp and introduction of warp about the Constitutional Assembly vote law on 10th of April 1946. These warps were with slight changes proposed by contitutionally-legal comittee approved by Temporary National Assembly the next day, so on 11th April 1946. The changes mainly referend to a warp of Constitutional Assembly vote law (division of mandates, limitation of ineligibility range or intejection of conservation of present position of Slovak National Council).

The constitutional law warp about Constitutional National Assembly was twitted, that it prefers Slovakia, which is in final result favourited. Furthermore some of (mainly Czech ones) the politicians thought, that preffering of Slovak nation peculiarity lead to growing of political and legal barriers. These barriers trampled proclaimed unity of republic. From communistic camp appeared also opposite voices, that pleaded slovkian postures and called for neccessarity of czech notification of Slovak national council and pacification with its existence as a independent political representative of Slovak peculiar nation.

The Democratical party warned on probably the most relevant lack of Constitutional National Asseblly election law warp, which was in poor legislative treatment of situation resulting from „regional“ system of political parties in republic. In consequence of this model assertion developed in Czech countries their activity diverse political parties than in Slovakia, which resulted in complication in case, that Slováká, that stay in Czech countries for a long time and thinking about voting a Slovak political party and did not want or were not able to vote in place, where they were registrated in permanent voter's lists (it means in the place of their domicile in Slovakia, or in the place in Slovakia, which was stated in voter's pass, where they had to do a long journey from Czech countries). Similar problem arised also in case of Czech, that restrained in Slovakia from various reasons for a long time.

The law nr. 28/1946 Sb. about adjustment of permanent voter's lists and the warp of Constitutional National Assembly vote (and this not even in approved form of law nr. 67/1946 Sb.) did not concise a higher mentioned problem of Slovaks staying in Czech countries and Czechs staying in Slovakia. The blame can not be layed only

on poor legislative adjustment – this itself was suitable, but only if there was nation-wide political system of political parties in Czechoslovakia. Substandard and pernicious regional model sowed many problems and in its essence depreciated and notably disturbed notoriously proclaimed thesis of Czechoslovak unity.

Passing of Constitutional National Assembly vote law passed on second attempt, group of deputies tried to enforce an amendatory proposal, that it should be let out a debatable institute of „empty ballots“ from the law’s warp. It was very long and live discussion about facilitation of dropping in a poll an empty ballot on the deck of Temporary National Assembly, there was a dominant opinion, which prevailed at the end, that a citizen should have a right to express a dissent with all the political parties by dropping in an empty ballot.

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# SOURCES OF THE ISLAMIC LAW

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## Key words

Source, law, Islam, Shari‘a, Qur‘án, Sunna, Qijás, ‘ijmá, istihsán, istisláh, maslaha, ‘urf

The study deals with the sources of the Islamic law. The primary sources of the law are the Qur‘án, the *Sunna*, *Qijás* and ‘*ijmá* and secondary sources of the law are *istihsán*, *istisláh – maslaha* and ‘*urf*.

## Primary sources – The Qur‘án, the Sunna, ijmá and qijás

The first source of the Islamic law - Sharia is the **Qur‘án**. Qur‘án literally means „reading“ or „recitation“ and may be defined as the book containing the speech of God revealed to the Prophet Muhammad in Arabic and transmitted to us by continuous testimony. Qur‘án is the principal source of the Shariah and lays down general guidelines on almost every major topic of the Islamic law. There are 114 súras („chapters“) and áyát (verse) of unequal length in the Qur‘án. The áját on various topics appear in unexpected places, and no particular order can be ascertained in the sequence of its text. In the Qur‘án are close to 80 or 60 legal áját. This legal contents of the Qur‘án constitute the basis of what is known as *fiqh al- Qur‘án*.

Literally, **Sunna** means a clear path or a beaten track but it has also been used to imply normative practice, or an established course of conduct. To the scholar, *Sunna* refers to all that is narrated from the Prophet, his acts, his sayings and whatever he has tacitly approved. *Sunna* refers to a source of the Sharia and a legal proof next to the Qur‘án. *Sunna* has been classified in various ways, depending, of course, on the purpose of classification and the perspective of the investigator. The *Sunna* may be divided into two types: non-legal and legal *Sunna*. Non-legal *Sunna* do not constitute legal norms. As *Sunna* is the second source of the Sharia next to the Qur‘án, the scholar is bound to observe an order of priority between the Qur‘án and *Sunna*. Hence in his search for a solution to a particular problem, the jurist must resort to the *Sunna* only when he fails to find any guidance in the Qur‘án. Should there be a clear text in the Qur‘án, it must be followed and be given priority over any ruling of the *Sunna* which may happen to be in conflict with Qur‘án.

‘**Ijmá** is the next source of Islamic law and means universal consensus of the scholars of the Muslim community of any period following the demise of the Prophet on any matter. ‘*Ijmá* enhances the authority of rules which are of speculative origin. Speculative rules do not carry a binding force, but once an ‘*ijmá* is held in their favour, they become definite and binding. Once an ‘*ijmá* is established it tends to become an authority in its own right. It then becomes common practice to quote the law without a reference to the relevance sources. This is one of the reasons which induced the jurist to recognise ‘*ijmá* as the third source of the Sharia.

**Qiyás** means measuring or ascertaining the length, weight, or quality of something. *Qiyás* also means comparison, with a view to suggesting equality or close similarity between two things, one of which is taken as the criterion for evaluating the other. Technically, *qiyás* is the extension of a Sharia value from an original case to a new case, because the latter has the same effective cause as the former. The original case is regulated by

a given text, an *qiyás* seeks to extend the same textual ruling to the new case. A recourse to analogy is only warranted if the solution of a new case cannot be found in the Qur'án, the *Sunna* or definite *‘ijmá*.

### **Secondary sources – istihsán, istisláh-maslaha and urf**

**Istihsán** means “to approve, or to deem something preferable”. In its juristic sense it is a method of exercising personal opinion in order to avoid any rigidity and unfairness that might result from the literal enforcement of the existing law. The jurists are not in agreement on precise definition for *istihsán*. “Juristic preference” is a fitting description of *istihsán*, as it involves setting aside an established analogy in favour of an alternative ruling which serves the ideals of justice and public interest in a better way. *Istihsán* as a source of Islamic law is controversial over the validity, some scholars reject this principle. Some scholars say that *istihsán* is included in *qiyás* and some say it is a variety of *qiyás*.

**Maslaha** means “benefit” or “(public) interest” and it refers to unrestricted public interest in the sense of it not having been regulated by the Law giver insofar as no textual authority can be found on its validity or otherwise. It is synonymous with *istisláh*. The majority of scholars maintain that *istisláh* is a proper ground for legislation. When the interest is identified and the scholar does not find an explicit ruling, he must act in its pursuit by taking the necessary steps to secure it. Also *maslaha* (plural *masálih*) is divided into many types (essential, complementary etc.). Essential *masálih* consist of the five essential values, namely religion, life, intellect, lineage and property. Also *maslaha* or *istisláh* is not unproblematic source of the law. Some take a view *maslaha* doesn't constitute a valid ground for legislation, and do not accept *istisláh* as an independent proof.

**‘Urf** means “that which is known”. In its primary sense, it is the known as opposed to unknown, the familiar and customary as opposed to the unfamiliar and strange. *‘Urf* is defined as “recurring practices which are acceptable to people of sound nature”. Hence recurring practices among some people in which there is no benefit or which partake in prejudice and corruption are excluded from the definition *‘urf*. Custom which does not contravene the principles of Sharia is valid and authoritative.

The above sources of Islamic law are not unproblematic. There are polemics over the common validity of some of them and over the conditions of validity which must be fulfilled. The paper deals also with these polemics and shows the gaps of scholars and four *sunna* schools of law.

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# FORMAL CONTINUITY OF AMERICAN (COLONIAL) LAW AND ENGLISH LAW

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## Key words

Common law, statutory law, continuity, colonies, law, charts, parliament, colonial assemblies, constitution, development

The entry deals with problems of formal continuity of early American (colonial) law and English law.

In the first part of the entry are generally analysed the mere material conditions for transmission of English Common law to the specific social environment developing in the early stages of American colonial history, its gradual transformation and influence over transfer of English law patterns to the colonial world. The entry here deals with the fact, that the Common law perceived from the point of view possessed by early colonists presented only relatively distant normative system whose content or conceptual background could not have been known to the colonists in any authentic way and certainly in their minds must have presented only a remote and sometime even hostile phenomenon. Therefore any matching transmission of the English law to the new conditions, which as it must be pointed out by no means corresponded with conditions which the English law anticipated, was out of question.

The growth of early American law was much less an exact duplication of a definite model, than crude and uncomplex imitation of inaccurately remembered things.

Colonists didn't started to turn their attention to what was the Common law of England before plantations itself went through a long social and economical development and of course not before social and economical relations (and especially cultural level) in the colonies itself started to seek more advanced system of normative regulation. In this new conditions the Common law begun to constitute an integral component of colonists requirements toward local and imperial, eventually proprietary power.

Further on the entry analyses fundamental sources of normative inspiration of the colonial law, as especially role of local customs well known to the colonists and above all normative provisions of an Old Testament is mentioned and emphasized.

Here too the gradual transition to use of Common law as one of dominant sources of inspiration for the growth of the colonial law is subsequently described.

In the next part, the entry analyses basic formal scope of continuity of colonial and English law formed namely by colonial charters, which presented a fundamental (but also only fragmental) framework of the colonial law (and basic definition of relations between colonial and English law) and by particular reception statutes passed by colonial assemblies, which in one way or in another declared transposition of certain parts of the English law to the colonial legal system. In the context of this reflection there are analysed particular formal delimitations of the mutual relationship between colonial and English legislative, measure of autonomy of colonial law, its

vaguely fixed limits and last but not least also mechanisms serving to the reservation of development of the colonial law in relative agreement with the English law, eventually with the interests of English imperial policy.

In this way determine frame of formal continuity between colonial and English law is afterwards assessed as a mere delimitation of fundamental principles of its mutual relationship rather than as a directly applicable provision, which would enable us to accurate and precise identification of norms of the English law which formed an indevidable part of colonial legal system or if you like of how verifiably is determine an extent of autonomous colonial legislature.

The entry further analyses particular directions of colonial legislation. Special focus is here put on the way of adoption or adjustment of particular parts of Common law and Statutory law to the specific conditions of American colonies. Special focus is afterwards dedicated also to the development of some discontinuous elements in American law.

The next part of the entry analyses position of colonies within English empire. Emphasis is here put on the question of applicability of the English unwritten constitution within particular colonies, if you like search for answers on question, whether and if in what extent, it is possible to consider rights and liberties implicated in this constitution as directly applicable on colonial territory. This question is at the same time regarded from the point of view possessed by formal law, as well as in light of aspects of practical possibilities of portability of particular parts of this constitution to the colonial environment. On this place is subsequently step by step demonstrated rising antagonism in perception of the relationship of English unwritten constitution to the colonies, emerging especially in course of 18<sup>th</sup> century between colonies and English imperial government.

Following lines then describes factual influence of English unwritten constitution in formation of colonial law and especially attitudes of the colonies toward enforcement of imperial government. The unwritten English constitution is here presented as integral part of requirements of the colonists asking for rights guaranteed to them by colonial charters, as well as important inspiration for colonial legislation.

Final part of the entry then demonstrates problems of institutional relationship between colonies and the English empire. Special attention is here devoted to the indistinct delimitation of position of the English parliament toward colonies and especially to the long-term absence of actually usable delimitation of competence between colonial assemblies and parliament.

In the final summary the author claims, that the mutual relation between English and colonial law is in fact impossible to sum up by simple delimitation of formal continuity. This relation is necessary to perceive in its dynamic and variability. The English law without doubts presented one of the most important starting points of the development of the colonial law, its role however wasn't limited to this extent. In the same time English law went along gradual development of colonial law, supported it and intervened to it practically throughout two centuries.

None of the attempts of formal delimitation of mutual relation between American and English law brought solution, which would constitute unambiguous answer on naturally emerging questions. In the same way we have to conclude that objective answer to the question of the range of rights which colonists, in light of the English unwritten constitution disposed is practically impossible. This relation has never been formally solved, particular findings made on one or second coast of the Atlantic ocean were always subjected to actual doctrine or simply presented display of interpretative opportunism. These problems finally were one of main reasons of crisis, which in the end, led to the war of independence.

**Reviewer:** EDUARD VLČEK

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# USUCAPTION IN THE ROMAN LAW AND IN THE CZECHOSLOVAK CIVIL CODE FROM 1950

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## Key words

Usucaption, Roman law, Civil Code, XII Tables, classical Roman jurisprudence, *usucapio*, Institutions

Usucaption, lat. ***usucapio***, as one of the ways of acquiring civil ownership has its roots in the XII. Tables and despite a different social and ideological situation during the second half of the 20<sup>th</sup> century it is included into the unified civil code, which was adopted by the National Assembly of the Czechoslovak republic on October 25, 1950. On the other hand, it is clear that through the long period the institute of usucaption has undergone many changes and considerable development took place.

## XII TABLES

According to Diósdi, Klein and Kaser are surely right in suggesting that *usus auctoritas*, the antecedent of *usucapio*, was originally a provision bearing upon the law of evidence. The actual and continuous use of the thing discharged the possessor from having to prove his title. In such a way *usus auctoritas* at the same time performed the function of the later *usucapio*. The original idea, however, did not yet stress the acquisition of ownership, but the discharge from producing evidence. *Usus auctoritas* was generally available to everybody who could claim an *usus* of one or two years. The requirements of *bona fides* and *iustus titulus* did not yet exist in early law.

## PRECLASSICAL ROMAN LAW

*Usus auctoritas* was a subject to a far reaching transformation in preclassical law. This is most strikingly manifested by the alteration of its name. Thenceforth it was called *usucapio*. Roman *usucapio* has quite close links with the transfer of ownership. We have to bear in mind that the consolidation of the informal acquisition, i.e. the transfer of a *res Mancipi* by *traditio*, was an important function of *usucapio*. Preclassical law not only created the classical notion of *usucapio*, but at the institution itself was considerably transformed by the introduction of several requirements – i.e. *bona fides* and *iustus titulus*, as well as the prohibition of *usucapio* on *res furtiva*, which meant a limitation of *usucapio*. So the field of application of *usucapio* became considerably narrower.

## CLASSICAL ROMAN JURISPRUDENCE

*Usucapio* was by the classical Roman jurisprudence defined as an acquisition of ownership of a thing belonging to another through possession of it (*possessio*) for a period fixed by law. Further requirements of *usucapio*



under *ius civile* were (a) *bona fides* (good faith), i.e. the possessor's honest belief that he acquired the thing from the owner (while, in fact, he acquired it from a non-owner), and through a transaction which legally was suitable for the transfer of ownership (while, in fact, it was not). Good faith was required on the part of possessor only at the beginning of his possession; (b) a just cause (*iustus titulus*), i.e. an act of liberality (*donatio*) of the owner or an agreement with him (a purchase) which would justify the acquisition of ownership if there were not a defect in the transaction itself (*traditio* of *res Mancipi* instead of *mancipatio*) or in the person of the transferor (a non-owner). An erroneous belief of the usucaptor that there was a just case did not suffice for *usucapio*. Possession of the usucaptor had to be continuous and uninterrupted. *Usucapio* was accessible only to Roman citizens and on things on which Quiritary ownership was admissible.

We have learned much about this institute from Gaius who devotes much space to it in his Institutes (Gai. 2, 41 – 59). Moreover, due to a casuistic approach of Roman lawyers there were several “types” of *usucapio* defined, such as *usucapio ex Rutiliana constitutione*, *usucapio libertatis*, *usucapio pro derelicto*, *usucapio pro donato*, *usucapio pro dote*, *usucapio pro emptore*, *usucapio pro herede*, *usucapio pro legato*, *usucapio pro soluto*, *usucapio pro suo*, *usucapio servitutis*.

## JUSTINIAN'S CODIFICATION

Since one of Justinian's main concerns was to preserve as much as possible from the wisdom and knowledge of classical period the regulations of *usucapio* are almost the same. He made only slight changes as to the time of possession – he changed a 1-year period for movables to a 3-year period and a 2-year period for immovables to a 10-year one *inter praesentes* and a 20-year one *inter absentes*. He has also allowed the possession of a *bona fide* possessor to be counted in the time period of his successor.

## CZECHOSLOVAK CIVIL CODE FROM 1950

Even though the Czechoslovak Civil Code from year 1950 was formulated under different socio-ideological conditions than the Roman definitions were, it still keeps in line with the ancient Roman legal culture and definitions. This is partly due to the fact that legal systems here were influenced by the Roman law either through Hungarian customary law, which was based partly on Roman law as interpreted in the Middle Ages, or through Austrian civil law, which was vastly founded on Roman law. Partly it's because the definitions of ancient Roman lawyers were still proving to be useful and valid. So the main differences are in the way this institute was formulated – since the language of modern civil code was much more abstract than the casuistic approach of ancient lawyers. Thus there are 4 brief paragraphs defining usucaption in the Czechoslovak Civil Code instead of hundreds of case studies of tens lawyers from ancient Roman Empire.

**Reviewer:** Jiří L. Bílý

**Full version of this contribution can be found in the *Conference proceedings* on pp. 987 – 997.**

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# CONTINUITY AND DISCONTINUITY IN CONCEPT OF LEGAL RESPONSIBILITY

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## Key words

Legal liability, responsibility, censor, morality, regimen morum, philosophy of science

The essay entitled 'Continuity and Discontinuity in Concept of Legal Responsibility' analyses the similarities between the modern legal concept of responsibility and the antique censorial moral correction mechanisms. At the beginning some basic theoretical questions, like the aims and the traps of this comparison and the general problem of comparableness, are also being addressed. According to the author the emerging doubts (the chronological gap between the phenomena and the miscellaneous primer sources) are to be combated by a strict functional approach.

Distinguished from the mainstream literature the idea of the prevention is considered to be the main motivation force behind the censorial activity. The almost inexhaustible considerations of the modern legal responsibility will be presented as an inevitable process of the scientific research. From this point of view of the modern scientific theory-making is derived one of the main these of the essay: the eroded concept of legal liability should be replaced by a new paradigm, which is historically and semantically not overshadowed by the theory of the subjective culpability.

Following that, the *regimen morum* will be fittingly placed into the elements of the modern system: the breach of the previous obligation, the imputability, the question-answer scheme, the concurrence of the alternative liabilities, the sanctions. These are all similarities of both systems, which, on the ground of the prevention, are shuttling between the private and public interests stabilised by judicial corrective mechanisms.

In conclusion, the different tools of correction used by a society could not be handled separately. The actual interaction of law and moral may differ from time to time and may distinguish seemingly similar institutions from each other. This phenomenon is called by the author, 'system relativity'.

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**Full version of this contribution can be found in the *Conference proceedings* on pp. 998 – 1008.**

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# RELATIONSHIP OF EUROPEAN IUS COMMUNE AND NATIONAL LEGAL SYSTEMS IN FORESEEABLE FUTURE

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## Key words

ius commune, roman law, canon law, local customs, international law, European legal system, unified legal system, pluralism, national, supranational level

## 1. Introduction

I would like to set up a kind of framework. Firstly we have to go back to the history, to see what ius commune is and how did it develop through the past until these days. In the second part I would like to show you on the example of my country the recent situation and relationship between the legal system of Slovak Republic and the ius commune as we know it today. And finally on ground stones I am going to think about the possible and at the same time inevitable development of this relationship in the foreseeable future.

## 2. „Ius commune“ in History

When talking about Ius Commune we can start with the Ancient Roman Empire. In regards to the process of establishing a common culture and legal system in the Roman empire we can speak about combining the cultural aspects of all nations and peoples of the Roman empire conquered by the Roman legions.

Within the roman legal system itself we can differentiate between ius civile and ius gentium, which was the part of Roman law which influenced the most of the population of the Roman empire and may be it is the part which really could be defined as ius commune at that times. In the theory of law ius commune is now often understood as the communitarian law of European Union.

So then might the question arise if the international law can be also described as ius commune or is it the European law which is the closest „successor“ of ius commune. But for the purpose of European legal history, and for the purpose of this paper let us just presume that the ius commune we are talking about is or are the legal systems of Europe.

The Roman law at that time was very much influenced by Canon law. Usually the Canon law and Roman law were thought at universities. The Canon law was used for matters of the Church and the Roman law for the use of non ecclesiastical matters.

From these different angles of view we may summarize that ius commune is the law which is the unified or commonly used law in one country, mostly formed and thought at universities, the written law. On the other hand in every place there has been of course also the particular law, customs or statutes, so called the ius proprio - customary law.

### 3. „Ius commune“ in Presence

Each state has made different changes in his own legal system in order to keep it closer to the European ius commune. I would like to develop this idea on the example of relationship between the legal system of my country and European norms.

After looking at the constitution of Slovak Republic we can close up with some remarks. The constitution recognizes the international treaties as the main source of the international law and assures their direct application. With the article 7(2) the main premise is set in integrating the European law into the legal system of Slovak Republic. The constitution inclines to the monist theory but does not declare this principle in the text itself. Acknowledging the importance to the acts of European Union in the Constitution by giving them priority before national legal norms in the Article 7(2) which is a clear step towards creating common European ius commune.

### 4. Foreseeable future of the ius commune

On my opinion national law is coming closer to ius commune by integrating international and European rules into national legal systems. As Kelsen is saying the state is the model for the future development of the international legal order which means only that the international legal order tends to become centralized.

Throughout the past we have seen how law in different times and places has been united and later on became integrated to the national legal system. Nowadays we can see the integration of international treaties and European laws, or directives into different national systems. On my opinion the development of an European system of law – an European ius commune cannot be stopped any more. Regarding this obvious signals of the past and present development we can say that there is not only a strong tradition of one unified legal system. But it is may be predictable at this time that the process will not stop at this point but will be developed further.

If you take a closer look at specially the directives of European Union<sup>1</sup>, you will see that this process already started. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. <sup>2</sup> Whether there occurs a conflict there is also the European Court of Justice that decides how this or that concrete case has to be solved.

In my conclusion I will use and support the idea of Peter Fitzpatrick in *New Europe and Old Stories*. He accepts the idea that legal pluralism infuses the EU legal order, and that it (legal pluralism) cannot alter the modernist orientation of EU law within which pluralism is a way leading to unification<sup>3</sup> hence to the only one legal system, the European ius commune.

**Reviewer:** MAREK ŠMID

**Full version of this contribution can be found in the *Conference proceedings* on pp. 1009 – 1018.**

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<sup>1</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) OFFICIAL JOURNAL L 294 , 10/11/2001 P. 0001 - 0021

<sup>2</sup> The Treaty Establishing a Constitution for Europe (CIG 87/2/04)

<sup>3</sup> Peter Fitzpatrick and James Henry Bergeron Aldershot, Brookfield USA, Singapore, Sydney: Ashgate Dartmouth, 1999

# DEFINITION BY THE OPPOSITE IN ROMAN LAW – CAPITIS DEMINUTIO ET STATUS LIBERTATIS, CIVITATIS ET FAMILIAE

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## Key words

Status libertatis, civitatis et familiae (status of liberty, membership of the city and of the family), capitis deminutio maxima, media et minima, caput (legal capacity), ingenui (lawful (free) man), persona sui iuris (person of its right), persona alieni iuris (person under the competence of someone else), servitutes (slavery), libertatis (liberty)

Definition or argumentation by the opposite – a *contrario* – is a common method of the interpretation of legal documents. The basis of this method is a process of negation when for example one group is defined by listing the attributes of another group; these are opposite conditions or attributes. In the current law system, this method of interpretation or argumentation is used very often, for example it is everything except ... and so on. This method was used as well by the ancient roman experts of law. They often defined only some legal institutes and especially those which were controversial. Ulpianus explained *ius naturale* in this way: “*ius naturale is what the nature granted to all beings. This right is not reserved only to a man, but to all the animals ... ius gentium is the right which is applied by the nations*”. On the other hand, Ulpianus did not consider useful (necessary) to explain *ius civile*, because for him, it was evident<sup>1</sup>. From this Hattenhauer’s citation we can draw conclusions that ancient experts of law defined mainly the controversial and unclear provisions that required some explanation. The most frequent provisions were generally overlooked because it was not considered necessary to explain these institutes, that we can call today *notories*, in details.

That is why today wonderful passages are conserved from which we can learn everything about the situation of slaves and persons *alieni iuris*. At the same time we are directly referred by roman lawyers to the understanding of the situation of *sui iuris* and free persons only if we understand the situation of slaves and *alieni iuris* persons.

*Capitis deminutio* is therefore the law status, it is a status that every roman citizen can enter into following some specific real or legal facts, for example the real fact is war captivity and the legal fact is the adoption, *coemptio* which represent the end of membership of one family and belonging to the new family. There are other things related to this kind of “change”, for example the exercise of familial rituals, when the woman entering the new family by marriage (whereby leaving her previous family) accepts also religious rituals of the new family – so-called *sacra privata/familia* (for example the worship of family’s *Lars* and *Penats*).

*Capitis deminutio* of whichever level is very practical law provision that changes the legal status of a person in relation to the change of fact. It is necessary to realize that what made an ancient man into a man was a

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<sup>1</sup> Hattenhauer, H., *European legal history*, Praha 1998, C.H.Beck, p. 81

summary of his political rights and these rights could be exercised only in the society called the city of Rome. The political rights were ranked according to the membership to the particular class, but this status of individual was not absolute and definitive (this situation could change also for example during the census by the change of property relations). That is why this status could change whenever during the life and it could be as well restored to the original status (in terms of caput) – ius postlimini.

The statuses of the free roman citizens themselves - status civitatis, libertatis and familiae - are defined by the opposite. It is clear that for roman citizens and layers it was evident who was free and full-fledged citizen – therefore a Roman and that is why the systematic of Roman law defined their position by the easiest way possible. They described in detail who is not the Roman – therefore, who is not free – and on this basis, everybody who does not fulfil the provisions about slaves or persons alieni iuris is free and consequently, the person sui iuris.

In my opinion one of the greatest Roman law definitions included in Digests is the following: Dig. 1.5.4 pr. Florus 9 inst. Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur<sup>2</sup> → The liberty is a natural possibility to do as one pleases to everyone, but only in the case that nor power nor law hinders it. Not only it is important that what is the liberty is defined, but also a contrario that “lack of freedom” is the situation when one does not do as he pleases, but as someone else does. Here I see a clear difference in somebody who is free and somebody who is not and has a different legal status (slave, discharged, but also a person alieni iuris). This is in addition very evident in the situation of property. Who is under somebody else’s power acquires all the property for his “master” - an owner of competence over him (of course except peculium). On the other hand the status of liberty and exercise of competence is also aggravated; chiefly by obligation to provide security for actions of persons that are in free man’s power – potestas.

**Reviewer:** RENATA VESELÁ

**Full version of this contribution can be found in the *Conference proceedings* on pp. 1019 – 1035.**

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<sup>2</sup> Dig. 1.5.4pr. Florus – Latin text took from [www.thelatinlibrary.com](http://www.thelatinlibrary.com)

## Key words

Historical interpretation, interpretation of law, European Court of Justice, legal history, history

Historical interpretation of law is considered by the legal theory to concentrate on analysis of documents connected to the process of creating a relevant legal text. This too narrow understanding is sometimes complemented by an opinion saying the historical interpretation is based on making the sense of legal norm clear taking into consideration the goal followed by its promulgation and reflecting upon social conditions under which the act came into force. This approach combines teleological and historical interpretation. Best description of historical interpretation would probably be the one according to which legal norm is being created in a specific situation given by many different factors of social and historical development, influencing the content of the norm. Comparative method comparing the prior and later legal regulation has its place here as well. However, neither this definition is perfect.

In the (Czecho-)Slovak judicial practice, historical argumentation is used by judiciary as:

- negative historic experience serving as an argument for the importance of current regulation,
- making the origin of a legal institution clear in the context of universal (world) legal history,
- historical context of Slovak legal regulation setting the legal norm into the historic context of its creation,
- denying or putting in question a historical legal institution or legal interpretation under new conditions,
- using historical law in practice,
- simple declaration of historical development and formal declaration of using historical interpretation without further elaboration.

As historical interpretation in a broad sense one can understand all the abovementioned ways of using history (historical argumentation) with the exception of simple usage of past (historical) law and of simple declaration of historical development.

Using the method of searching in electronical database of European Court of Justice decisions by key word „historical“ or by the root of the word – „hisor“ one may come across a number of decisions, opinions or other materials connected to the ECJ practice, where historical argumentation is used.

**Historical context of legal regulation setting a legal norm into the historical context of its creation** is represented for instance by the Judgment of the Court (Grand Chamber) from October 23, 2007 in Case C-112/05, where the Commission of the European Communities was an applicant and Federal Republic of Germany a defendant. This decision deals in detail with the history of passing so called Volkswagen Law.

**Denying or putting in question a historical legal institution or legal interpretation under new conditions** can be found in the Opinion of Advocate General Kokott delivered on September 7, 2006, in Case C-284/04 T-

Mobile Austria GmbH and Others v. Republic of Austria where evolutive interpretation was sought by the T-Mobile Austria arguing that in the new conditions the legislator would have intended and decreed otherwise.

Simple declaration of historical development and formal declaration of using historical interpretation without further elaboration is to be found in the Judgment of the Third Chamber from October 11, 2007 in Case C-460/06 Nadine Paquay v. Société d'architectes Hoet + Minne SPRL, where the historical argumentation of national court is mentioned without further elaborations on the level of European Court of Justice.

**Declaration of missing historical argumentation** was pronounced for example in the Opinion of Advocate General Sharpston from March 8, 2007 in Case C-434/05 Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v. Staatssecretaris van Financiën where because of lack of any materials on the new provision no historical interpretation could have been made.

**Making the origin of a legal institution clear in the context of universal legal history** was probably the goal of a short overview on the development of insolvency and bankruptcy offered in the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-1/04 Susanne Staubitz-Schreiber.

To conclude, from the abovementioned number of ways of using historical argumentation in the practice of Slovak and Czechoslovak courts one can find only some in the practice of European Court of Justice. These are:

- Historical context of legal regulation setting a legal norm into the historical context of its creation
- Denying or putting in question a historical legal institution or legal interpretation under new conditions
- Simple declaration of historical development and formal declaration of using historical interpretation without further elaboration
- Making the origin of a legal institution clear in the context of universal legal history

Past (historical law) is not being applied, just like the negative historical experience to stress the necessity of a certain institute. On the other hand, one may find another type of historical argumentation – declaration of missing historical argumentation. These differences are most probably to be explained by the negative experience of post-communist countries of Central Europe on one hand and by the relative modernity of European law without any obvious tight bonds with the previous historical regulations on national levels.

In general, the attitude of European Court of Justice towards the historical interpretation is rather negative, prioritizing literal or grammatical interpretation. Research in the circumstances of approval of certain legal regulation is allowed only in case of legal norm explicitly addressing certain materials, deliberations or minutes from the process of preparatory works. This is the viewpoint of the ECJ for instance in Case C-292/89 Antonissen [1991] ECR I-745, paragraph 18, according to which one can not invoke statements pronounced in the deliberations of Council unless the provision of the norm does not invoke these deliberations or declarations.

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# THEORETIC LEGAL REFLEXIES OF THE FORMATION OF ECONOMICS LAW

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## Key words

Economic law, economy-law relations, socialist organizations, acts of economic control, socialist economy, Economic Code, economic system

Special regulations had been needed in the most of economic questions in the realm of the legal adjustment of economic relations since 1950. Extensive authorization for releasing of the implementary regulations led to the expansion of the chaotic system of legislation and later to the idea and doctrine of the Economics Law. The core of the doctrine of Economics Law was the thesis that in socialism were brewed up qualitatively absolutely new relations with specific features and they were set apart into specific category. The Economics Law couldn't be subordinated to either The Administrative Law or to The Civil Law. The reason for that should have been that relations in the Economics Law were administrated by the two-ply system of the legal adjustment they comprised doubled different and the same time inseparable constituents. There were vertical and horizontal relations. Horizontal relations among equal organizations were born on the bases of the agreements and contracts as the common or ordinary relationships but their changes, termination and also their content were influenced by vertical interferences of controlling organs called Acts of Economics Governance. It was possible to set up, change and cancel obligational relations, to determinate the content and the issue of those relations by the Acts of Economics Governance. The property relations among socialistic organizations were assumed to be completely different to the relations among citizens because they were implemented under the state plan.

The legislation in the Economics Law tried to frame comprehensive legal regulation which would have included not only the contractual system but also the system of controlling and planning. It was then when the dispute over the being the Economics Law as an independent legal section. The administrative interference of The Central Committee of the Czechoslovak Communist Party (eventually untimely ended the entire discussion. The resolution of the Central Committee of Czechoslovak Communist Party determined that the adjustment of the Civil Code was needed to aim to quotidian relations of citizens. Further, it was decided that the adjustment of the relations among the socialistic organizations didn't belong to the Civil Code. The relations in the foreign trade were adjusted in isolation. The resolution of the Central Committee of Czechoslovak Communist Party denoted the effort to solve the basic scientific problems politically.

While preparing new codes the old ones weren't examined why they hadn't been convenient. The further discussion to this point was reduced to the silence after the political decision of the codification of the civil relations and the preparatory work on the codification of Civil Code, Code of the Economic Law and Foreign trade Code had started. The structure of the commission was restricted to devotees of the accepted concept. The commissions were created only by those who had had no objections. The creating work had run with elimination of any opposition and the results of the work which had been done within two years plans were known as the three codes:

The Civil Code – law No 40/1964 Zb, Code of the Economic Law – law No 109/1964 Zb. and The Foreign Trade Code – law No 101/1963 Zb.

All the three codes adjusted private-law relations and neither of them was taken as general. Their self-reliance was so conspicuous that some regulations were repeated or overlapped. Each of these codes was applied for a certain sphere of relations independently. The border between the legal amendment of the civil law and the economic law was very sharp and on principle inviolable. Production sphere adjusted by the Code of the Economic Law was legally separated from the consumer's sphere, which was adjusted by the Civil Code.

The codifications from the years 1963-65 should have contributed mainly to simplification of the rule of law. It had been reached but only in the task of the number of the legal regulations. The Code of the Economic Law itself had banned 101 laws, executive orders, ordinances and the basic terms of delivery. In certain respects the codifications complicated the rule of law in a manner that some of the law institutions which had been adjusted before only by the one legal regulation were then adjusted in more legal regulations. The disintegration of the rule of law was visible in the constituent legal institutions which were without any special reasons differently adjusted in separate codes. The nonintegrated adjustment was very difficult to understand even for lawyers. The adjustment of The Code of the Economic Law was a product of its time but it contained some rational items as e.g. a lot of advantages had the adjustment of the close-door and quick arbitration court.

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# ACTIO EXERCITORIA ET INSTITORIA OR DIRECT REPRESENTATION IN ROMAN COMMERCIAL LAW

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## Key words

Actio exercitoria, actio institoria, adjective actions, praepositio, direct representation, liability in solidum

The aim of this contribution is to clarify and explain the institutes of *actio exercitoria* and *actio institoria*, which belong to the group of so called adjective actions (*actiones adiecticiae qualitatis*). Although these actions are interesting from many points of view, textbooks and brochures on Roman law devote to them a maximum of two pages. These are interesting not only dogmatically, because they are in fact an exception to the *obligatio est vinculum iuris* rule, i.e. that the obligation is purely personal relation and as a principle cannot be effective towards third persons concerned on the contractual relationship. Furthermore, the introduction of adjective actions by the praetor has affected theoretically-legally political postulate, that a slave is res, not a person, able to act and enter into contracts on the basis of his own will. Thirdly, the existence of adjective actions clearly demonstrates that social and economic evolution of antique Rome, based exclusively on a slave society, was reflected also in social differentiation of bond persons, i.e. *alieno iuri subiectae*.

On the basis of exegesis of the texts of Digesta and Gaius Institutions, as the case may be on the basis of interpretation of particular parts thereof on *actiones exercitoria et institoria*, one may reach an opinion that although Roman lawyers did not know an institute of direct representation; it can be said that *actio exercitoria* and *actio institoria* constitute, from the present view, a typical legal institute of direct representation in Roman law.

Both actions were accepted by the praetor as a consequence of development of commercial relations and trade as such, perhaps in 2<sup>nd</sup> century BC. First of these actions has its basis in a circumstance, where a ship-owner (exercitor) authorizes his agent (magister navis) to command his ship, while the agent may be both, a free person, filius familias, or a slave. The situation is analogical as regards actio institoria, when an owner of a trade or craftsman enterprise authorizes a person alieno iuris, i.e. so called institor, to manage his enterprise.

The basis of the power-holder's (*dominus*) liability is an authorization, so called praepositio, that sets the limits of this liability. Exercitor is thus liable only for acts within the authorization. In the case law of Roman lawyers there are instances, where the dominus negotii's liability is extended to cover those acts, which are not so narrowly covered by praepositio. Based on this, the opinion that the praepositio is the only source and extent of the liability of the power-holder can be denied – as follows from the traditional doctrine. The overall extent and content of praepositio is not determined a priori and thus is not dependent exclusively on the will of the power-holder, but it can be created in the course of negotiations.

The IV. chapter of this contribution compares exercitorial/institorial authorization to an authorization within a contract of mandate, where as regards a mandate the will of a client, which determines the contents of the authorization, is decisive. The authorization shall be detailed, because it shapes the limits of the mandatary's powers, and at the same time as regards a client represents the scope and limits of his liability towards third

persons. In case of *praepositio institoria* or *exercitoria* the will of the power-holder is just an initial act of authorization and only one of the limitations to the execution of the commercial activities. This primary will can be modified by particular circumstances arising out of acts of the authorized party (slave). Consequently it can be said that the amplitude of authorizations in case of *praepositio exercitoria* or *institoria* is bigger than in case of contract of mandate (*mandatum*). At the end of this contribution the liability and suability of the power-holder (*dominus*) is analyzed.

At the conclusion, one can observe that through the adjective actions, including *actio exercitoria* and *actio institoria*, the praetor actively intervened to the evolution of commercial relations in antique Rome and endeavoured to regulate contractual relations, which upon authorization (*praepositio*) of the power-holder (*dominus, paterfamilias*) were entered into on his behalf by *alieno iuri subiectae*. Dominus was liable for these obligations *in solidum*.

**Reviewer:** MICHAELA ŽIDLICKÁ

**Full version of this contribution can be found in the *Conference proceedings* on pp. 1055 – 1065.**

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# CRIMINAL JUSTICE SYSTEM IN CZECHOSLOVAK SOCIALIST REPUBLIC IN THE 1960' OF THE 20TH CENTURY

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## Key words

Criminal justice system – local people's courts – torts

The main purpose of expertising the criminal justice system in CSR was the aim to outline the situation in this area in the beginning of the 1960' of the 20th century. After adoption of the proposition concerning the qualitative changes which were awaited by the society ( e.g. the victory of socialism, changing up to communism and to the nation wide state, changes in economics, in the population structure, paradigm of an individual as a part of the society- as the socialistic nationalist), in december 1960 the Central Committee of the Communist Party prescribed the importance of participation of the population in court decisions as their primary task. The socialistic criminal justice law was supposed to have a significant role in this. The basic scope of justice was qualified in the the act No.100/1960 the Constitution of CSR, which affirmed the triumph of socialism in the state and assigned the preparation for the changeover to communism. The method how this participation of the public against counteracting of the socialistic laws should be done, was besides others, also transferring of the matters, which were before in the jurisdiction of state authorities, upon social organisations, mostly on the Revolutionary Labour Movement and the local people's courts. Consequently, the educational effect of the imposed sentences and anewing of penalisation of crimes should be have been intensified. Considerable part in this should be done by the local people's courts, which were included to the system of the administration authorities as the lowest body of czechoslovak justice system. In the tenor of the affirmed principle of people's courts, local people's courts were supposed to decide less serious criminal matters, that were transferred by the prosecuting attorney or by the court. Considering the enactions of these courts by the national committees and factories settling of less serious crimes the courts should decide about the "misdeamants", who were known by the judges and the public personally. This familiarity with their personal and employment situation should supply fair decisions, which would be „ sensitizely“ accepted by the offenders. Local people's courts could only imposed the educational sanctions. The purpose was to intensify the educational effect by acting and controlling the offenders by the whole team of workers. In spite of the effort of the representatives of the public power to make this methods more popular, many imperfections appeared in the local people's courts actions. The reason for these imperfections was not only caused by absence of this type of courts in this country but also because of inadequate human resources and lack of interest by the public for the proceedings held by these courts. We have to stress that there was no public faith to these courts, what was caused by insufficient education ( there was no act stating that the judge of this court must have graduated the law university), and obviously by the lack of independence in the proceedings. The problems of the local people's courts mentioned above, insufficiency of imposed actions ( which were educational) and partial change of the official characteristics about the level of the socialistic society, these courts were sequentially ceasing although they formally existed until 1969. Local people's courts were reversed by the act No. 150/1969 concerning the torts. Since then the less serious torts were inflicted more strictly.

As I had the opportunity to research the literature, articles in magazines and other were very helpful materials, to work up this special area, I can conclude, that not the theory but only experiences could help us to understand the possibilities of usage and ideologic fundamental of the institute of local people's courts.

**Reviewer:** JOZEF BENA

**Full version of this contribution can be found in the *Conference proceedings* on pp. 1066 – 1076.**

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# DEVELOPMENT AND IMPORTANCE OF AN INSTITUTE OF OMBUDSMAN FOR CHILDREN

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## Key words

Ombudsman for children, ombudsman, children's rights, right's protection

It has been more than 18 years since the Convention on the Rights of the Child entered into force. This document declares the idea that children are fully entitled with rights as other human beings and full-value members of society. My article covers the topic of an institute of ombudsman for children which is one of possible ways how to protect those rights.

"Ombudsman" is a Scandinavian term which has been adopted into other languages. We shall not be surprised that the first ombudsman for children was established in Scandinavian country too. It was the Norwegian Parliament that recognised the fact that advocacy for children is necessary for the first time, in September 1981.

The first Norwegian Ombudsman took his office in 1962, Ombudsman for Consumer Affairs in 1972 and Ombudsman for Equal Status of Men and Women in 1979. Existing welfare system, the lack of maternal and child health divisions and other standard offices focused on children's interests and comprehensive family social support system – those were the conditions that made the Norwegian Parliament to adopt new model as the first country in the world. The legislation providing the purpose of the Ombudsman for children stated that the Ombudsman was to "promote the interests of children vis-à-vis public and private authorities and follow up the development of conditions under which children grow up" with the only prohibition - individual conflicts within the family cases which had been brought to the court.

Objections against the proposal can be summarised under four main headings:

- the Ombudsman might undermine the authority of parents
- other authorities might renege on their own responsibilities in relation to children
- the Ombudsman would be too expensive
- the office could be bureaucratic

Nevertheless the Parliament decided to legally establish the authority that would give a voice to children. With the total staff of four people (one staff member per million Norwegians and 250,000 children) and annual budget of \$US 300,000 the office was able to show how important it's functioning is. The recognition of the usefulness, the professional status and the popular standing in the eyes of public increased. While it handled

approximately 2,500 complaints annually during the first 8 years, the number was 20,000 in 1999. 75 per cent of Norwegian 7-years-olds knew about the Ombudsman and by the age of 14 this percentage increased to over 90 per cent. The conclusion was that only 2 per cent of the sampled population wanted the Office to be abolished.

All the positive effects of the establishment of the office of Ombudsman for Children in Norway were proved also by the fact that this functioning model was transformed into many legal orders all over the world. We can divide these international developments into three groups:

- ombudsmen for children modified to suit the situation in a different country but having the common characteristic of being established by public initiative and having an official relationship to government (Costa Rica, New Zealand, Germany, Austria, ...)
- responsibilities similar to the Norwegian model but being established by private initiative, without official standing (Sweden, Great Britain, Belgium)
- other ways which have little or no similarities with the structural model

Positive experience from all these countries served as inspiration for proposals that has already been made on the international level, for example Ombudsman for Children in War Zones or within the UN or EU.

Concept of new ombudsman-type institution is discussed in Czech Republic nowadays. The situation of children's rights protection is permanently criticised by Committee on the Rights of the Child and by number of non-governmental organisations. In their opinion our system of protection is divided into competencies of four ministries so can hardly be coordinated and complex. They find it helpful to constitute new institution which would have the rights of children as the main area of its interest. Existing Ombudsman offers instruments that can work in cases of children's rights violation but the office doesn't employ a single specialist on this area. The other difficulty is that the office covers quite large area of problems and doesn't have enough space to work here effectively.

Opponents object the uselessness of constituting an institution with exactly the same competencies as Ombudsman we already have. This way would be too bureaucratic and expensive. They find it more effective to create a special section in an existing office.

This discussion show us how complicated the area of children's rights is. Notes that were made about the situation in Norway show us that the ombudsman for children is one way of their protection and that it's a working way. The best solution is hard to find. In any case it shall make efforts to solve the problem in details and from all its aspects.

**Reviewer:** TATIANA MACHALOVÁ

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# HISTORICAL AND LEGAL ASPECTS OF INDIVIDUAL LEGAL REGULATIONS ABOUT CRIMINAL PROCEEDING AGAINST YOUTHFUL DELIQUENT

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## Key words

Criminal procedure, youthful offenders, Legal article VII from 1913, Act 48 from 1931

In the present do not exist in our place particular legal regulation of criminal proceeding against youthful offenders. Per my opinion in the period when records increase criminality of youthful is absence of some legal regulation fault. For creating effective legal regulations of criminal proceedings against the youthful are required two realia. Will - power of legislators modify this area and qualification to form the legal regulation, which would have been effectively applied. Just in this regard I preoccupied by idea of comparisons criminal proceedings against youthful in the historical cross – section. I have been tried to describe the process of criminal proceeding according to independent legal regulations from 1913 and 1931 because I think that even in the history existed institutes, those application in the present would has been contribution. In my opinion is important to know the development criminal proceeding. A great number of institutes has been established before, only in the present are forgotten. History also is able to give response to several issues for us. Is able to show, what is effectively and what on the contrary is out of order. So we can to evade introductions of something, what is in the practice non - certify. And on the second part we can to take an example from good and functional regulation from in the present invalid laws. Expert in each terms are suppose that the purpose of criminal proceeding is to raise and no only to punish. Sometimes was this opinion only declared but sometimes has been this purpose observed in spirit of law, and in the application. In my article I angled for approach legal regulations about criminal activity of adolescent and on comparison chosen problems of criminal procedure too. Of course indefensus adolescent in the spirit that theirs acts are needed to overlook. In any case it is needed forcefully step in the cases of serious offence. However I perform an opinion that in many cases they can't or they don't know use all their rights in the criminal proceeding. Reform of criminal judicial system over youthful had been formally completed in the year 1913 when was publicized special legal article number VII about tribunal for young, which adapted criminal proceedings against youthful delinquent. Just then this special legal article had been established, criminal proceeding against adolescent had been more effective. Contribution of this legal modification is primarily in realia that in the year 1913 was found affluence will - power to complete reform of criminal law. Providing, that the some area of criminal procedure in this legal article had been not regulated or had been regulated only partly, then subsidiary had been applied general regulation in Code of criminal procedure. In practice it meant, that the judges always had to use these regulations in reflections and had to apply them. By the legal article number VII from 1913 were found not only special modification of criminal proceeding against youthful but also special judicial system, which dealt issues about youthful offenders. About anyone young, which has been suspected from committing of criminal offense, has been advisable made announcement in court young. Courthouse then notified prosecutor and had been done to immediate remedy until the prosecutor filed an action. Investigation had been led by judge for young. Judge had to first place ascertain of young's identity and specified his age. Had to provide all facts

needed for final knowledge figures of offender, levels mental and moral progress and life ratios. After determined mentioned facts and interrogated of youthful, came up courthouse to impose possible protective remedy. Against decision of the court had been possible to appeal, however not dilatory effect did. Youthful has been criminally liable from years of 12.

Philosophy and primary idea of Act number 48 from 1931 about criminal judicature above young is education of youthful offender of crime. Act is built on idea that only punishment for offender is not suffice and is uninvited.

Asserts an idea, that the sentencing of offender just does not remove reasons of criminality and using penalty, how type of recompense in committed act, do not remove reason of unlawful activity of youthful and even can to be a reason for recidivism in the future.

Advanced range of criminal liability from 12 on 14 years and started to discriminate between under age and youthful. Besides accomplishments criterions age limit had been ultimate for consideration about criminal liability specific intellectual forwardness. Youthful wasn't criminally liable, if could not for considerable backwardness at the time of recognized act's illegality or controlled their activity and defined after - effects. Courthouse had been allowed drop away from the punishment, if youthful committed act from justifiable non-acquaintance enactment. Just pardonable non-acquaintance of law as one of conditions for stifle a prosecution punishment evoked after passed the act wave polemics. Be talking by over specialty of act from 1931, which non - founded in the modification from 1913 or later accepted regulations.

Is not desirable that society only punishes, but also raise. There are marked pursuit to prefer educational principle and to pursuit of reeducation youthful ante the criminalization and punishing of youthful delinquent. By this act had been Czechoslovakia assigned between countries, which perceived urgency and importance of modifications criminal proceeding against juvenescent and therefore came up to the creation of special legal modifications in this area. So had been underlined sense of criminal proceed against youthful.

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# THE LEGAL STATUS OF THE SLAVE IN ANCIENT GREECE

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## Key words

Slave, slavery, dischargee, submission, asylum, slaver, captive, perioics, helots, metics, public slave, private slave, Athens, Sparta

## The legal status of the slave in ancient Greece

This paper deals with a problem of describing the legal status of slave in ancient Greece. As the Roman empire is, beside Greece, considered to be the most important ancient state and just this state is well known partly through its wholesale exploitation of the slavish work and partly due to the cruelty which was so typical for the Roman slavers, this article is entirely focused on the confrontation of the legal status of the slave in these two ancient states. This is why even the basic information about specifics of the roman slavery are stated in this treatise.

It seems to be logical that in many aspects of this matter we can find parallels in both mentioned states. In both cases the slave isn't regarded as a subject but as an object of the legal relations. This is really substantial because it predestinates most of other consequences. The slave can't conclude the legal relations, on the contrary the relations are routinely concluded in such a way that the slave himself is their object. Then the slave is an object of the purchase, of rent, even of a deposit etc.

It is also unmistakable that if the slave is thought of as an object, actually as a „thing“, then the slaver's handling with the slave as well as the living conditions of slaves correspond to this fact. Both in Greece and Rome it was possible for the slave to enjoy relatively good social status (depending on his abilities). However, he remained under almost absolute command of the slaver. The striking exposure of this was the Roman *ius vitae necisque*, it means the master's claim on slave's life and death. According to this right the master was allowed to maltreat, torture, sexually abuse and even kill his slave, with impunity. The master was not punishable for this act: the slave is simply a part of his property just like any other „thing“.

It is obvious, from the confrontation of Greek and Roman slavery, that both the origins of slavery as well as the forms of enslavement are very similar (in both cases also the overdraft slavery is documented). From both states are known the situations when the slave, which is intolerably tortured or hacked by his master, can turn away into the temple and enjoy the right of asylum.

## Differences between Greek and Roman slavery

Indeed just in the field of the guttural law we can trace up the most important difference between Greek and Roman form of slavery. In the most developed Greek city state, in Athens, the nonpunishable killing of the slave which we mentioned above, didn't exist at all – in contrast to the legal situation in other Greek city states, where much like in the Roman empire the slave is perceived as a part of the master's property.

One of the most considerable ancient philosophers Aristotelés is known for his opinion, that the slavery is a natural part of common life: some of us are born as citizens and some others as slaves. Nevertheless in Athens, in contrast to Rome and evidently thanks to their advanced humane thinking, they realized, that the slave isn't just an instrument, which should serve to his master but the slave is a human being, too.

Even though the master was allowed to castigate his slave and in general to treat him only by his private decision, yet there existed a noted legal regulation in Athens, which made it impossible to kill the slave with impunity. In contrast to the situation in Rome, the Greek owner of the slave was called before the judge in case of killing some of his slaves. Anyway he didn't have to answer for the murder, this would happen only in case of killing a free citizen. The slave was qualitatively different from the free citizen: the master was liable for his death as if he killed him inadvertently. Thanks to this he naturally got a lower punishment.

It is necessary to introduce another speciality of the Greek city states. Particular groups of insiders had by some reason the similar position as the classical slave. This category includes perioics, metics, as well as some other insiders. A specific position is partly occupied by the public slaves - because they have a little bit different position than the private slaves, partly also by the helots.

### **Slavery in Athens and Sparta**

There were two best known city states in ancient Greece: Athens and Sparta. Both states were politically and economically very strong, however they presented different conception at the very same time. Their dissimilarity is shown also in the point of view regarding the slavery. The economy in Athens was as well as in Sparta built on slaves work, but the Athens citizens treated slaves much better. The cruelty of Athens slavers didn't reach such a level as it occurred in Sparta.

Sparta was very famous for its rigid discipline and importance of the army. It presented an antipole, compared with Athens. There was a large number of slaves in Sparta and therefore there existed huge fear for the slaves rebellions (nevertheless in Greece the rebellion never reached a great importance – the slaves came from various regions and did not understand each other). Therefore the Spartan strongest slaves were killed constantly (so-called *krypteia*).

It is necessary to mention a particular category of resident population in context of Spartan slavery, namely the helots. According to some authors helot had the same position as slave. However, this opinion seems to be dramatically simplifying: helots distinguished from slaves in couple of ways. Some authors comprehend helot as a connection link between the slave and medieval serf, others identify them with slaves. This conception is perhaps more logical but the proper definition of the helot's position is rather difficult – helot stands somewhere between the private and public slave.

The question of the ancient Greece slavery is actually interesting field of scientific activity: whether watching certain differences compared with some other ancient states (first of all with Rome, as a classical slaver's system) or in the matter of some specific groups of the population, which differs from each other by their legal position or factual living conditions. Right on this aspect it is possible to realize to what extent varied mixture the ancient Greek society was. One of these groups of insiders were helots. Helots obviously represent a connection between the ancient and the medieval world because they resemble the medieval serf.

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# INCIDENT IN TIENTSIN – A PIECE OF THE „DOPPELMONARCHIE” IN CHINA 1917

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## Key words

Tientsin, China, Austro-Hungarian Empire, conceded territories in 1917, the “Doppelmonarchie” in China, Hungarian State Archive, Emmanuel Skalitzyk

It is clear that the Austro – Hungarian Empire was not a typical colonialist power, nevertheless it held a “mini-colony” in China: after the boxer-revolt the Empire became a conceded-territory possessor at the bank of Peiho river in 1901.

Despite the fact, that some economic groups were trying to accelerate the out-building of Chinese relationships and in the 1860-70 an official expedition was sent to the Far East, the outcome of these efforts was minimal: only three bilateral contracts between the Empire and in that time sovereign states were closed. Theoretically this made possible the evolution of trade and diplomatic connections, but except the establishing of the Austro – Hungarian Consulate, no other visible gains were achieved.

The Boxer revolt in 1900 together with the united policy of the European powers in China enabled new possibilities for the Austro-Hungarian Empire too. Because the Empire represented itself with military units in the “expedition” led by von Waldersee, it was possible to acquire – according to the historical records – a quite plain domain near the Italian territory.

After the outbreak of the World War the status of the conceded territory became more and more unhandy. The open harbors, conceded territories existed as “European islands” and simultaneously also as neutral territories until 1917. Of course, this fact did not eliminated the political efforts towards destabilizing the local position of the colonies. This was the case of the Tientsin-territory also. According to the historical records a company of British, French and Japanese escaped war prisoners, sailors and local adventurers tried to get possession over steamships Lloyd anchoring in Shanghai as well as weaken the Empires regional status in Tientsin.

So there were some processes of colonization, which remained unfinished – among others caused with the Chineses declaration of war. but one thing is sure: after the declaration of war, in 1917 the consulates personnel left and the Chinese territories of the Empire were lost for ever.

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# LEGAL REGULATION OF PROTECTION OF HUMAN LIFE IN HISTORY OF INDEPENDENT CZECHOSLOVAKIA

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## Key words

Human rights, human life, legal protection of human life, intentional abortion, euthanasia, death penalty

## 1. Introduction

Human life is for every man one of the most considerable value and of course that value has to be protected in the interest of individual even in the interest of public. Right to life and his protection is one of fundamental human rihgts. But in context of protection there are a few controversial moments, therefore the protection is not absolute. These controversial moments are in context of providing intentional abortions, or euthanasia, but also death penalty as sanction for serious crimes. Human rights have its place in system of law of every democratic state nearly for a few centurries. But the protection of human life especially in connection with mentioned controversial topics has changed during the time and sometimes is still changing. And that facticity is influenced by many aspects like social meaning, religion influence, or also political system.

Attitude to human life and its protection has long historical development. Until in present times we can say, that human life has in our society so high value, that it is protected by constitution even by laws. If we look into the history, we can say, that in our past there were many moments of defy the human life. It has to be said that there were long historical development in attitude to legal protection of human life even in connection with controversial moments previously mentioned.

In this paper a will deal with right to life as one of the fundamental human right. As it was mentioned, it is connected with a number of controversial moments, witch causes social disagreements. Even in this time there are many discussions about right to life before birth (in asociation with intentional abortion or research on embryonal stem cell) or in case of euthanasia or death penalty as capital punishment. In my paper there will be mentioned legal regulation of right to life in times of independent Czechoslovakia, since the moment of its establishment in 1918 until the present valid legal regulation of right to life. It will be mentioned there, so that the reader has the whole imagination about historical development of that problem.

Next I would like to mention in this paper the legal regulation of controversial aspects of right to life. There is no doubt that there are big disputes in society connected with right to life before birth, or right to life of sick person who suffers because of his illness, and also we can say that there is not leading opinion about the legal protection of life in that situationes. We can see it in historical development of legal regulation of intentional abortions, even of capital punishment which was forgiden in Czech republic in 1993, or also we can see it in legislative attempts to change criminal law which punish realising of euthanasia.

## **2. General protection of human life**

In our system of law we can find rules which protect human life on constitutional level. In Bill of fundamental human rights and freedoms in article 6 there are proclaimed that every body has right to life and human life is worthwhile of protection even before birth. It is undoubtable that it is touching the problem of intentional abortion. Also providing of death sentence is absolutely forbidden in this article. In general human life has been protected on constitutional level during the whole history of independent Czechoslovakia, but the protection has had different expressions and also different realisations. The main changes we can note after the Velvet revolution because after that our state began democratic development and also fundamental human rights and freedoms found their place in our system of law.

But it is not all in association with protection of human life. On legal level we can find another rules touching that problem and these are especially in criminal law. During the whole considered history till the present times there are still regulations of murder, assisted suicide, slaughter and other crimes which are attacking human life even these crimes have during the time different specifications. And in these days another legal regulation criminal law is going to be passed. The only exceptions of protection of human life are situations of exigency and necessary defence, because in these situations it is possible not to be punished if someone will die.

## **3. Legal regulation of human life in controversial moments**

In society there is controversial discussion touching the problem of protection of life before birth. In context of that the main question is where does human life began. There is opinion that human life begins from conception, on the other side there is opinion that human life begins in very latest part of pregnancy or even in the moment of birth. Therefore we can find in legal regulation of that problem quite big differences. At first half of twentieth century intentional abortion was allowed only in special cases, for example if the woman could die because of pregnancy. In 1957 there were big change in legislation of intentional abortion. In that year new legislation was passed and therefore abortions were allowed for much more possible reasons. During the time the legislation have changed but nowadays it is still liberal legal regulation and intentional abortion can be provided even if the woman ask.

Another controversial topic is question of euthanasia. In history of Czechoslovakia there were two attempt to change criminal legislation, one in 1926 and the second in 1937, but both attempts failed. In proposed legislation there should have been contained new crime reflecting providing euthanasia and presumed sanctions should have been much more lower. Another recodification which was reflecting the problem of euthanasia was propose of new criminal law in 2006, which also failed to pass.

Right to life is quite wide problem, which we can consider from different point of view. For example we can offer summary of legal regulation of right to life even of his controversial aspects. But also historical point of view is very important.

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# A FAILURE OF THE MILITARY ASSISTANCE IN OSLAVANY IN DECEMBER 1920

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## Key words

Military assistance, the December general strike, 1920, Oslavany, comunists, army, gendarmerie, weapons

A term "the military assistance" had been applied for situations when the army was employed to fulfill tasks that fall within cognizance of the state bodies, however, these ones were not in a position to master the situation themselves. The army had not to substitute for these state bodies but only to enforce their operations. In most cases, the army was utilized during natural disasters and often also to maintain security i.e. during demonstrations, strikes, etc. The intervention of the army was not always successful.

During the autumn 1920, a quarrel culminated in the Social - Democratic Party between its right wing and the left wing that was inspired by communism. The conflict came to a head at the moment when communists seized (occupied) the building of Lidovy dum in Prague – the headquarters of the Social - Democratic Party. Security forces were called for an intervention to restore order. Their intervention provoked a sharp reaction from the side of workpeople that have a liking for the left wing. On December 10, the general strike occurred in many places. However, the strike was interrupted and it should continue on December 13, 1920.

The center of protests in Moravia were Rosicko-Oslavany coal fields. These coal fields supplied with coal most of factories in Brno and there was also a power station that provided Brno with electricity. Early morning on December 13th, the military assistance (one battalion of 10th infantry regiment under command of major Zazvorka) was dispatched there with the task to secure running of the power station. However, the strikers had managed to disarm several military brigades (patrolling at the post, at the train station) during the day and then they made an attack on the power station with captured arms. Even here, the soldiers gave up without a single shot. Other military brigade that arrived by train to help the soldiers there was also disarmed. It happened sooner than arriving soldiers got off the train. About 25 000 cartridges, 305 guns and 4 machine guns were seized from the soldiers.

Further arms were taken from neighbouring peasants (farmers) partly voluntarily, partly by force. However, the peasants (farmers) themselves did not join the strike. After all, the fact that the strikers captured arms was more likely a taking advantage of an opportunity than a planned step. They were not able to utilize the given situation at all. No closer contact was established with soldiers to get them on strikers' side. Workers from other parts of the coal fields that came to help strikers, were only limited. The strikers did not know themselves how to cope with such situation. The evidence of it had been shown by the fact that they took hostage the disarmed gendarmerie but the soldiers were allowed to leave.

These circumstances drove the political and state administration with the municipal military headquarters for Morava in Brno to dispatch new military troops. This time, three infantry battalions supported by light artillery battery and other forces commanded by lieutenant colonel Hynek Sponner. As a demonstration of power, three aircrafts were also sent out from Olomouc.



At the moment, the striking workers opened fire at these troops, soldiers answered shooting unlike the previous day. The workers did not take this possibility into account and they started to go back en masse. The soldiers restored order in Oslavany and a function of the power station above all. The situation continued to be stretched but due to the garrison dislocated there for a longer period, no more problems had arose yet.

The whole event was followed naturally by a judicial prosecution not only for the strikers (several hundreds were arrested) but also for the soldiers. The reason was the fact that they allowed to be unarmed nearly without a resistance. The fact that major Zazvorka was explicitly informed about the possibility of disarming the military assistance troops, could be supposed as an aggravated reality. Reasons for a failure of the assistance were also investigated because the successful troops had been originally supposed as less reliable and unsuccessful on the contrary as more reliable. The fact that Sponner had permitted to his soldiers to use arms was a presumable cause of a failure.

Since the beginning of the Republic, each using of arms by military assistance had been watched closely even from the side of politicians and a politization of such use often occurred although the use of arms was rightful.

The soldiers were exposed to a considerable psychological stress and they were afraid of using arms. In this case, Sponner informed the soldiers that all their actions „are covered by the Minister of National Defence“ and it encouraged them. On the contrary, the strikers did not expect so vehement change of soldiers' attitude and they were stunned. That is why the radical action of the troops was accomplished without losses of lives, there were only few injured people. The action of lieutenant colonel Sponner demonstrated that the military assistance could achieve success even over armed rivals.

However, the failure of the military assistance in Oslavany on December 13th, 1920 remained the most widely known non-success of the military assistance in the history of The First Czechoslovak Republic. A consequence of the assistance's failure in Oslavany could be found even in regulations that an appointment of the assistance later governed. The regulation from the year 1923 explicitly specified that soldiers have to be aware of the fact that being disarmed without a fight they could be prosecuted.

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# DISTRICT OF COLUMBIA V. HELLER – WILL IT BE “THE CULMINATION OF EVOLUTION” OF THE SECOND AMENDMENT’S INTERPRETATION DOCTRINES?

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## Key words

Right to Keep and Bear Arms – Incorporation Doctrine – Individual Right – Collective Right – Well Regulated Militia – Second Amendment – Fourteenth Amendment – Due Process Clause – Privileges or Immunities Clause.

*A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*

2<sup>nd</sup> Amendment to the American Constitution

The author of this article is focusing on interpretations of the Second Amendment to the American Constitution. Firstly, he aptly explains, which particular provisions and words of the Amendment in question create the most difficulties for interpretation. In this respect, he emphasizes the importance of carefully considering the incorporation doctrines that have an enormous relevance for the actual meaning of the Second Amendment’s rights. All three basic approaches to the incorporation theory are closely described in the article.

There are two major questions related to the “right to keep and bear arms”: (1) Should this particular right be understood as a right of every single individual, or does it apply only to a “well regulated militia”?; and (2) Does the Second Amendment keep only the federal government from infringing on guaranteed rights, or does it apply to the governments of all individual states too? The author of this article is presenting many different points of view for understanding the meaning of the “right to keep and bear arms”.

He demonstrates the evolution of interpreting the rights in question by looking at relevant judicial acts. The leading cases, such as: *United States v. Cruikshenk*, *Presser v. Illinois*, *United States v. Miller*, *United States v. Emerson*, and many others, are briefly described in the article and the author always pinpoints the most important connections among them. He clearly shows the slow, but continuous advancement in understanding the Second Amendment’s rights.

The recent case, *Parker v. District of Columbia*, is understood as a turning point to the mentioned interpretations of the “right to keep and bear arms”. The United States Court of Appeals for the District of Columbia was the first federal appeals court that ruled, that the “gun control law” in Washington D. C. had been infringing the “individual right to keep and bear arms”. The author of this article also points out some of the reactions and comments relevant to this judgment, which were done by famous American law professors and other specialists, including professors Chemerinsky, Tribe, Amar and others. The case, *Parker v. District of Columbia*, is now pending at the Supreme Court under the label *District of Columbia v. Heller*. The hearing started on March 18<sup>th</sup> and a final judgment is expected to be announced in Summer 2008.

The last chapter of the article deals with the theoretic and philosophic ideas and thoughts concerning whether the “right to keep and bear arms” can be understood as one of the natural human rights, or if it should be read only as an expression of social standards and norms.

Is the “right to bear arms” just a subgroup of the proprietary rights? Should it be understood as a social custom? Can we successfully limit this fundamental right? Do the “gun control laws” really have the expected results? Can the upcoming Supreme Court ruling answer all these questions? The author does not try to answer these questions, but by giving the reader many quotes and ideas of prominent law professors, he provides to the reader a magnificent survey of all kinds of approaches to that issue.

The final part deals with the most prominent American politicians and their different kinds of approaches to the “right to keep and bear arms”. Which presidential candidate is the most tolerant to the Second Amendment’s rights? Who can we expect to criticize the “gun control laws” and who will be supportive to these regulations?

The author also highlights the different viewpoints of some American and European politicians’ thoughts on the issue. Although there are supporters of the “right to keep and bear arms” in Europe too, and opponents of these rights in USA, the general approach of Europeans and Americans to armed citizens can be shown on couple of quotes, that can serve as an example:

*“That the People have a right to keep and bear Arms; that a well regulated Militia, composed of the Body of the People, trained to arms, is the proper, natural, and safe Defense of a free state.”*

George Mason, American Statesman, One of the “Fathers of the Bill of Rights”

*“We in Europe have a different culture than in the United States and we do not consider the freedom to buy weapons a human right.”*

Gisela Kallenbach, Member of the European Parliament

*“No free man shall ever be debarred the use of arms.”*

Thomas Jefferson, Principal Author of the Declaration of Independence, 3<sup>rd</sup> President

*“Europe does not want to follow the route of U.S., where it is too easy for guns to fall into the wrong hands.”*

Alexander Alvaro, Member of the European Parliament

Generally, the aim of this article is to provide a reader with relevant and objective information regarding the Second Amendment’s rights, and to describe possible **bedrocks, which might serve the Supreme Court when they decide whether or not an individual has the right to “keep and bear arms”**.

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**Full version of this contribution can be found in the *Conference proceedings* on pp. 1139 – 1151.**

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# COMPULSORY VASECTOMY IN THE NAZI THIRD EMPIRE – FELONY BASED ON LAW

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## Key words

Compulsory vasectomy – The Nazi Third Empire – Eugenics – Racial Hygiene – The Protection against Ancestors with an Inherited Defect Act

## Introductory

One of the most important cardinal parts of the Nazi ideology (1933 – 1945), was racial hygiene doctrine and population policy, which was promoting reproduction of so-called “pure-blooded” and “inheritably healthy” individuals. These following concepts such as compulsory vasectomy, obligatory isolation and euthanasia, will be always connected with this most terrible stage of German history.

## The Protection against Ancestors with an Inherited Defect Act

One of the first “racially hygiene” measures allowing the compulsory vasectomies was the enactment of The Protection against Ancestors with an Inherited Defect Act (*Gesetz zur Verhütung erbkranken Nachwuchses*) from 14<sup>th</sup> July, 1933 (RGBl. I. S. 529). Every vasectomy needed to be approved by the court. The decisive role has been given to the judiciary. It means the judicial power was in charge of application and enforcement of the abovementioned Act. This was successful strategy of Nazis. People had more confidence in “independent courts” than in administrative or partisan agencies. Judicial proceedings worked as the assurance that these implemented methods and practices had been according to law and legal principles of fairness. The Protection against Ancestors with an Inherited Defect Act distinguished between voluntary vasectomy (§ 2) and compulsory vasectomy (§ 12). The exercise of vasectomy was only possible when there had been a high degree of probability that the ancestors of involved individuals would be affected with an inherited disease.

There was a chance to place a judicial remedy against the sterilization order within two weeks to the High Court of Justice for Protection of Hereditary Health. There was only a limited count of individuals who were allowed to file an appeal against the judgment. The person who started the proceedings in the first place, the doctor and the potentially aggrieved party, too. The High Court of Justice took final decision on the appeal and there was no possibility of another remedy. The costs of proceedings were covered by the government and the insurance company of the patient covered the cost of vasectomy. The execution of the judgment had to be done within two weeks since it had been decided.

The vasectomy was allowed only after the High Court of Justice for Protection of Hereditary Health (*Erbgesundheitsgericht*) approval on that issue even when it was to be done on the request of person with an inherited defect. In the cases when this person was not capable to enter into legal acts or under 18, the authorized person for fulfilling the request was a next friend. Judicial proceeding was not open for public and judge was allowed to make all needed arrangements such as inquiries, interrogate professional witnesses, call

up the parties to the case and have them sterilized. The doctors had to give all evidence about their patients and there was no such thing as a medical secret in these cases. On the other hand, all persons who attended the proceedings or execution of decision were prohibited to talk about that. The breach of this rule was punished with money penalty or imprisonment for one year.

The proceeding was finished either by giving an order to carry out vasectomy or by dismissal of the request. Decision was determined by plurality. There was no way to talk about the principle of free evaluation of evidence or judicial independence. Officially, judge was not obligated to assign vasectomy but there was a huge pressure to do so. Undue influence toward judges was being made through the following methods and instruments: personal management, continuous education and schooling, leading the judicial power through executive branch by ordinances of Secretary of Justice, influence of commentary to the Protection against Ancestors with an Inherited Defect Act, publication of judges decisions in legal reviews and discussions about judges decision-making authority.

Within the first four year of the force of this described Act had been sterilized more than 50 000 people. The total number of “victims” of this Act overreached 360 000 people.

## **Conclusion**

Just a few months after the January 30<sup>th</sup> 1933, which was a beginning of Nazis’ government in Germany, there were attempts to start a new population policy. “Breeding” of the so called “pure-blooded” or of the alleged “hereditary healthy” people, was on the daily routine. By the aid of legal acts, and contribution of German doctors and judges, the Nazis were infringing the natural integrity of human beings by taking away from them the ability to reproduce. Germany was not the only state where compulsory vasectomy was going on. There were a lot of European countries where this practice was usual, same as in USA. The reason of vasectomy was usually everywhere the same. The hugest difference had arisen on the beginning of the World War II., when Nazis began with mass murders of the persons with inherited defects. There is no doubt that this practice was allowed also due to the willing assistance of lawyers who had helped with drawing of new statutes, and of judges who were bringing the new “law” into effect and applying it together with the policy of Nazis.

**Reviewer:** KAREL SCHELLE

**Full version of this contribution can be found in the *Conference proceedings* on pp. 1152 – 1162.**

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# PUBLIC HOLIDAYS IN THE CZECHOSLOVAK LEGAL ORDER(1918-1938)

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## Key words

Legal order of public holidays (Sundays, holidays), the Czechoslovak Republic (1918-1938)

The article consists of four parts: First chapter (*Assumed Legal Regulations*) is addressed to the question of legal continuity in the new established Czechoslovakia with the broken Austro-Hungarian Empire. The law Nr. 11/1918 of the Collection of Laws and Regulations, which tackled this question, meant for the Czech Countries at least the temporary adoption of the legal regulation of sanctification (celebration) of Sundays and holidays that were forced in the Habsburg Monarchy (respectively Cisleithania) and were rather successful. The legal regulation of this question was until 1918 solved especially by some edicts of 1771 issued by the pope Clement XIV and by the empress Maria Theresa (setting up the number of festivities), the Sabbatical and Festival Rest Act 1895, the Interdenominational Act 1868 and marginally also some other legal rules (for example the Civil Procedure Act 1895, the Code of Criminal Procedure 1873).

Because of some anti-Catholic affections in the Czech society that appeared soon after the 28th October 1918 (though more than 80% population was catholic!), in 1919 was introduced in the Czechoslovak parliament the quite radical draft law proposing cancellation almost all of the festivities, which were 18–19 and their replacement by only three days of public holiday and by 5–7 days of paid holiday. The essential thesis of this intention that would significantly disadvantaged employees and that was not passed at the end, describes the second chapter (*Attack on the Festivities*).

The third chapter (*The Czechoslovak Public Holiday Act 1925*) is concerned with the new Czechoslovak legal regulation of public holiday of 1925. This law regulation quite sensitively kept the most of fetes from before 1925 and further added category of red-letter-days (1st May, 5th and 6th July, 28th September and 28th October) significant in term of national, cultural and social aspects. The provisions of the Law about sabbatical and festival rest of 1895 had referred also to all of fetes and red-letter-days after 1925.

The fourth chapter (*Conclusion*) mirrors the short muse about the significance of the sabbatical and festival rest that the first Czechoslovak Republic was still aware of.

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**Full version of this contribution can be found in the *Conference proceedings* on pp. 1163 – 1170.**

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## CIVIL LAW SECTION

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# CHOSEN ASPECTS OF THE SOFTWARE PIRACY

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## Key words

The Software piracy, the Game theory, the Prisoner's Dilemma, cooperate, defect, the Nash equilibrium

Damages caused by the software piracy according to the anniversary globally study of the BSA and ADC reaches in the year 2006 39,576 millions USD. This means annual increase about 5,104 millions USD towards year 2005. The highest damages are caused by software piracy in the regions with its relatively low rate. These regions inter alia they have relatively good and extensive legal protection of software. Despite the amounts of these legal regulations the level of the software piracy is still too high and damages are still increased. Are these legal regulations ineffective? Why the users risk legal regresses and despite the threat of the punishment they still use illegal software. How the rate of the software piracy can be lowered to acceptable level and what role can be played by the law?

In research of the true and expected behavior of the individuals there is at the present more utilized the game theory. To research the behavior of the users and to find an answer why the users utilize illegal software I have decided to use a game theory. Thereafter I will try to define a task of the law as an instrument of the protection of the legal software. For my analysis I have decided to select a game called prisoner's dilemma. Standard Prisoner's Dilemma has always two players. In this game players have two possible options for their behavior. They can choose either to cooperate or to defect each other, so they following the same interest or they can watch their self interests. The game may be repeated only once, or it may have several rounds, so we talk about repeated game. In the standard scheme of Prisoner's Dilemma one of the players can get much more by the defect, than by the cooperation. However if the second player also defect they will lose both. In this situation the best solution for the players is to cooperate. The cooperation will assure profit for both of the players. This profit won't be so high as if one of the players preserved selfishly, but the profit is certain and nobody loses. Moreover the cooperation motivates the players to repeat the same game and to gain from this game. This state will form Nash equilibrium. The Nash equilibrium is the state where each player is assumed to know the equilibrium strategies of the other players, and no player has anything to gain by changing only his or her own strategy. In other words, to be a Nash equilibrium, each player must answer negative to the question: "Knowing the strategies of the other players, and treating the strategies of the other players as set in stone, can I benefit by changing my strategy?" How we can ensure a cooperation of the players and the equilibrium if the game is not repeated. In this case theory of games suggests an existence of the enforceable regulations of the game or an existence of the agreements, which performance can be enforced. Enforceability of the regulations of the games or the player's agreements expects the existence of specific authority, which is powered to punish the players. There exists a room for law as a tool of recovery of the existing rights and responsibilities resulted from the legal regulations or from the agreements.

If we apply the prisoner's dilemma on the case of the two software users, they will have two options. The first option is to use legal software the second one is to use a pirated copy. It seems that with the use of the pirated software the users can just obtain. However the unlicensed usage of the software can be profitable for the users only when the game is not repeated. By the unlicensed usage of the software does not originate a



damage to users, but this conduct leads to damage to the producers and distributors of the software. By the repetition of this game the damages caused to the software companies they increase rapidly and these financial resources may miss them by the development of the software. Ultimately these damages will lead to rise in price of the software and to the reduction of its qualities as well as the qualities of the services provided with the software. Finally these damages can lead to the bankruptcy of the software companies.

By the software this game is repeated in a large scale. We have worldwide over billion users of the software and thousands of the software products. By this extent of the players and growing damages, as well as costs of the software development it is only a question of time when the casualties produced by the software piracy will affect all users. At present regarding to the descending price of U.S. dollar, as well as the fact that the producers of the software find the ways how to reduce costs of the distribution the situation is not yet critical. From theory of games it is resulted, that by the repetition of this game the utilizing of the legal software should represent the Nash equilibrium. But we still have not reached the Nash Equilibrium. It is necessary to force the users achieve it sooner than wait for achieve the equilibrium by natural way.

But how this equilibrium achieve? It is necessary to realize that the bone of contention lies in our behavior. How we notice the environment around us, how we respect our environment, natural resources, as well as work of the other people. Today, when we stand before the global problems as it is global warming, food crisis or poverty we cannot continue in selfish behavior. The first we should revalue our behavior and to start to be responsible. Next step should be the increase of the education and to gain knowledge of the problem of software piracy. Concerning the law as a tool of protection of the software, there is no need to produce more legal rules. It is necessary to reinforce the application of the norms in force, because the enforcement of these norms is minimal. Moreover it is needed to create a special police units and forces to deal with the software piracy and provide them with a necessary equipment and jurisdiction. It should be improved international cooperation of the police and the judicial organs, because piracy is not a problem of one country but it is a global problem.

**Reviewer:** MILUKAŠ SABO

**Full version of this contribution can be found in the *Conference proceedings* on pp. 1172 – 1181.**

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# THE PUBLIC PROSECUTOR'S OFFICE IN THE CIVIL PROCEEDING IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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## Key words

Public prosecutor's office, civil proceeding, fair trial, equality of parts, practice of the courts, European Court of Human Rights

The theme of this contribution is The Public Prosecutor's Office in the Civil Proceeding in the Practice of the European Court of Human Rights. At first sight can somebody think that the institute of public prosecutor's participation in those proceedings is something marginal without a real sense. But this contribution shows us that these ideas are not right.

The base of the legal regulation of the public prosecutor's office's participation in those proceedings is the article 80 of The Constitution of The Czech Republic that sets that public prosecutor's office deals with the criminal cases, so does it in the non criminal cases. Another acts sets in which cases does the public prosecutor's office work.

Another important act is the Public Prosecutor's Office Act that sets that the public prosecutor's office is authorized to file a motion for opening civil proceedings or enter civil proceedings already opened only in cases stipulated by law. The Civil Procedure Code regulates the procedural status, powers and duties of the public prosecutor's office that has filed a motion for opening civil proceedings or entered such proceedings.

On the present is the public prosecutor's office able to enter 13 cases enumerated in the article 35 of The Civil Procedure Code, for example the cases of declaration of death, settlement proceedings or public sales. Another Act sets that the public prosecutor's office is able to file a motion for opening civil proceedings, typically the cases of affiliation proceedings, unlawfulness of strikes or dissolution of a company.

The public prosecutor's office is very important authority that is able to enter or initiate the civil proceeding, but the main condition of that process is the condition of reality of the public interest. Only the public interest may be the reason for intervention. The condition of the public interest is the protection from the misuse of the power of this authority.

The public prosecutor's office is the authority that deals with the civil proceeding in every moment of its running. It is also the subject that is able to misuse the basic principles of the civil procedure, mainly the principle of equality and the right to rightful proceeding. The important problems is also connected with the proceedings for discretionary remedies, because The Civil Procedure Code does not sets the right of the public prosecutor's office to file a motion for opening proceedings for discretionary remedies.

The public prosecutor's offices in the civil proceedings are the typical signs of the legal regulations of many European countries, both democratic and transforming. The participation of such untypical subject in the proceeding must come into conflict with the basic procedural principles, especially the right to a fair trial in accordance with the article 6 (1) of The Convention for the Protection of Human Rights and Freedoms.

The main aim of this contribution was to prove that the public prosecutor's office is very important authority that helps to protect the public interest. The history had showed us that the public prosecutor's office was the

institute that helped the ascendancy with the protection of their position in the society. So, it was the authority that was like the symbol of lack of freedom and against democracy. Today, we can see that the role of the public prosecutor's office has been changed. The public prosecutor's office is the guarantee of the fair trial and the guarantee of the public interest in the proceedings for merits that are mainly important for the society. This legal institute is typical for traditional democratic countries, the same way it is typical for countries that are running through the process of transformation. The Czech history shows us that the Czech public prosecutor's office has changed a lot, from the institute of the protector of the socialist legality to the institute of the protector of the democracy and public interest. Only the powerful and trustworthy public prosecutor's office is able to be effective.

"The powerful public prosecutor's office with the sufficient and effective competences represents the effectual instrument of external control in the scope of implementation of the control function of the state."

**Reviewer:** JARUŠKA STAVINHOVÁ

**Full version of this contribution can be found in the *Conference proceedings* on pp. 1182 – 1192.**

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# ALTERATIONS OF CONTRACTS IN PUBLIC PROCUREMENT

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## Key words

Public procurement, alteration of the contract, assignment of rights, acceptance of duties, cession of the contract, substantial alteration of the contract, unsubstantial alteration of the contract

## 1 Introduction

The paper deals with the alteration of contracts concluded in award procedures according to the Czech Public Contracts Act No. 137/2006 Coll. ("PCA"). Although these contracts have been made in specific public procurement procedures they are standard civil contracts governed by Civil Code or Commercial Code. However, when these contracts are amended or altered it has to be taken into consideration that they have been concluded in compliance with the PCA. Therefore, these amendments or alterations shall not contradict or circumvent the Act.

The aim of the paper is to establish to what rules these contracts are subject and whether their alterations are possible and, if yes, to what extend. The alterations are for the purpose of their examination divided into two basic categories:

- alterations of contracting parties and
- alterations of the subject-matter of the contract.

## 2 Alterations of contracting parties

The alterations of the contracting parties are not regulated nor by PCA (and EC Directives) nor by the Civil Code. The Civil Code contains only provisions dealing with the assignment of rights and acceptations of duties. The contracts made in the award procedures are synallagmatic contracts that are characterized by the pair of mutual rights and duties (the duty to provide supplies, services or works and respective right to obtain them; the duty to pay remuneration and respective right to get paid). However, the contracts cannot be simplified to this pair of obligations; they contain complex of other complementary rights and duties and the Czech law does not regulate the cession of the contract as a whole. Nevertheless, for the purpose of this paper the alterations of the contracting parties are examined in the simplified manner as the assignment of rights and acceptance of duties in the relation to eventual contradiction with the PCA. Above all, it is assessed whether any of the agreements of the parties or even unilateral consent of one of them required by the Civil Code cannot be considered as (at least de facto) conclusion of the new contract.

In case of the change of the contracting entity, the conclusion is that such a change can be allowed with the exception of the cases where the original and new contracting entity is subject to different procedural rules (i.e. the new contracting entity would be obliged to follow a more strict procedure than the original one).

In case of the change of the supplier, the situation is more complicated as the result of this operation would be the change of supplier whose selection was the main objective of the award procedure. The main problem is

that the new supplier would be chosen without any competitive procedure by the contracting entity or the original supplier. Moreover, the consent of the contracting entity that is required by the Civil Code for the acceptance of duties by the new supplier might be even considered as (de facto) new contract. Therefore the alteration of the supplier is not admissible (with exception of some specific cases, e.g. when this is a consequence of another fact as in case of mergers).

The possibility of alterations of the contracting parties in public procurement is at present decided before ECJ in the case C-454/06 Presstext Nachrichtenagentur GmbH. According to the opinion of the General advocate the alterations on the side of the supplier constitute a substantial change of the contract that is not admissible without new award procedures because such a modification may distort competition and give advantage to certain supplier (i.a. because such a supplier would not be selected in competition with other suppliers). The exception would be in case where the contract is transferred to a subsidiary company which the original supplier controls in the similar manner as its internal department (so called in-house (internal) transaction).

### **3 Alterations of subject-matter of contracts**

Similarly as in the case of alterations of the contracting parties, the modifications of the subject-matter of the contracts in public procurement are not (with some exceptions) regulated by PCA (and EC Directives) or Civil Code.

The alterations of the contracts in public procurement can be specifically divided into two subcategories:

- extension of the subject-matter of the contracts and
- other alternations.

The ground for the division is fact that the extension of the subject-matter of the contract is considered as the new public contract that has to be awarded according to the PCA. Some of the extensions are anticipated in the PCA and may be awarded in the negotiated procedure without publication of the contract notice directly to the original supplier. The other extensions have to be awarded in one of the standard competitive procedures.

Other modifications of the subject-matter of the contract are not specifically regulated but have to be, in conformity with ECJ rulings, judged whether they constitute a substantial or unsubstantial modification of the contract. Substantial changes are such changes that may distort competition or give advantage to a particular supplier and therefore are not allowed without a new award procedure.

The paper finally examines some model examples of modifications with the conclusion whether they should be regarded as substantial or not.

### **4 Conclusions**

The paper concludes that alterations of the contracts made in award procedures according to the PCA are to the limited extent admissible. However, the legal regulation is not unambiguous; especially the relation of the PCA to the § 39 of the Civil Code (void and null contracts) and to the competition law.

In relation to the alterations of the contracting parties, the situation is complicated by not quite clear regulation of the cession of the contract. But even the possibility of the alteration itself is not unambiguous and a specific legal regulation in the PCA might be considered. The same applies for the alterations of the subject-matter of the contracts where, according to ECJ rulings, the substantial and unsubstantial modifications have to be distinguished. However, before final decision it is necessary to wait for the ruling of

ECJ in the case C-454/06. Nevertheless, in our opinion the specific legal regulation of the alterations of the contracts is not suitable (because it would have to be too casuistic or too general which would not eliminate problems of interpretation) and we would recommend to leave the interpretation on the level of ECJ rulings and decisions of the Czech Competition Office.

**Reviewer:** KAREL MAREK

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# CONSUMER PROTECTION IN THE HUNGARIAN COMPETITION LAW

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## Key words

Hungarian competition law, Hungarian consumer law, Hungarian case law, transposition of EC directive

One of the significant elements of the economic competition is the battle to gain the consumers' confidence. In this "battlefield" consumers needed a special legal protection because their rights and interests were often violated by dishonest market behaviors in many different cases. To this end the state has established the frames of fair and free economic market. In Hungary the legal requirements being in force are in the Act LVII of 1996 with the title prohibition of unfair and restrictive market practices (furthermore: the Hungarian Competition Act). The aim of the regulation is to achieve a fair competition on the economic market with excluding behaviours having harmful effect on consumers' decision.

The Hungarian Competition Act dedicates an own chapter to the unfair manipulative activities, and in general it prohibits deceiving consumers in economic competition. The Hungarian Competition Act also gives examples of the typical unfair business activities. It should be remarked that this list is only setting some examples to make the application of law easier; the Hungarian Competition Authority has competence for intervention in other unfair manipulative situations as well.

We can find more articles protecting the interests of customers. For example the prohibition on abuse of a dominant position particularly, when it limits production, distribution or technical development to the disadvantage of the consumers. The Hungarian Competition Authority will only permit a concentration of certain undertakings if, inter alia, they have no harmful effect on the interests of the consumers.

In many cases consumers make their decisions on the basis of the information passes by advertisements. These commercial messages can also be suitable to deceive consumers' rights. Thus, consumers' interests need legal protection in this field as well. In Hungary the Act LVIII of 1997 (furthermore: Hungarian Advertising Act) contains the provisions concerning to the business advertising activity. The Hungarian Competition Authority also controls the application of the provisions on the comparative advertising and on the prohibition of misleading advertising declared by the Hungarian Advertising Act. In case of an infringement process, the Competition Council examines the reality of the facts stated in the advertisement. Sometimes even those ads containing accurate information can have a deceptive influence on consumers due to their pictorial appearance. The whole impression created by the advertisement is also taken into account during the process. The types of advertising are considered as well. Another relevant consideration is the fact that there are consumers who are well-informed and those who are not. In a lot of cases, the consumers can not repeat the details of the contract, although they concluded it personally. Other relevant aspects are for instance that it can not be expected from consumers to handle all excessive advertisements under protest and check their statements all the time. When the Competition Council judging a situation the aim of the advertisements also deserves attention: namely to inform generally potential customers about products and services in order to increase consumption. Consequently commercial messages are not suitable to cover all relevant information and facts.

In 2007 the Competition Council of the Hungarian Competition Authority conducted all together 158 processes. More than 50% of these cases were in connection with the deception of consumers. Most cases were in connection with misleading information about bank products and services. After the comparison, it can be concluded that most consumer-frauds occurred on the credit card market. The banks failed to give appropriate information about the use of credit cards, especially about the conditions of no-interest payments. At the end of the series of market cleaning investigation processes the Hungarian Competition Authority imposed fines that total 268 Million HUF (approximately more than 1 Million €) on 7 banks. In other cases, the reasons for conducting investigations against banks were incomplete guidance referring to the Standardized Deposit Interest Rates Index, promise of availing certain interest and credits.

The European Union is also dealing with the insurance of fair economic competition. In 2005 the European Council and European Parliament adopted a directive called the "Unfair Commercial Practices Directive". In the following year the 2006/114/EC directive was released. The reason was that previously the laws of the Member States of the European Union concerning to these issues showed differences which could generate barriers against the functioning of the internal market.

The Hungarian drafts according to the transposition of these directives are now among the items of legislative schedule of the spring session 2008 of the Parliament. The amendments will touch upon more Acts such as the Consumer Protection Act or Hungarian Competition Act. A unified Code will regulate the provisions and the restrictions on business advertising activities. A completely new Act related to the business-to consumer relationship is also among the drafts with the title "Act on Prohibition of Unfair Commercial Practices against Consumers".

It is doubtless that the current legal regulation needs changing in order to better serve the interests of consumers in the European Union. The reforms will concern to all participants of the economic market. It is still questionable whether the new system can redeem what is expected. One aspect will still remain: provisions on the protection of consumers in competition law will be declared in more Acts. It is worth deliberating with conformity of these acts to each other. Maybe it can not serve appropriately the interests of consumers if more Codes intend to protect them by "diffused" regulation. Time will probably give the solution, and it will also be emerged whether the business sector could get prepared to apply the new rules and meet the legal requirements.

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**Full version of this contribution can be found in the *Conference proceedings* on pp. 1206 – 1213.**

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# INTERNATIONAL CHILD ABDUCTION

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## Key words

International abduction of children, Convention on civil aspects of international child abduction, Council Regulation (EC) No 2201/2003, proceedings for the return of children, habitual residence

Today's world is globalized, people travel all over the world for tourism and for work. They stay abroad for long time and not only business relationships grow up. From the beginning of the 90<sup>th</sup> of the last century is visible huge growth of number of children borned from international relationships in the Czech Republic. This phenomenon brings increase of the incidence of international child abduction.

Why people kidnap a child? Almost every child kidnapper is his or her parent and an escape from problems to another country is a way how to solve problems in partnership. The child can often act as some kind of a weapon or a manner to extort the other parent.

When the relationship splits, partners can settle some agreement about future rights of custody of the child and rights of access or this question can be established by judicial or administrative authorities of a country. But sometimes parents do not wait and act their own way and wrongfully remove the child to another state different from the state of habitual residence of the child.

This contribution will put mind only on child abduction at EU territory. The Convention on civil aspects of international child abduction drawn up by the Haag Conference on Private International Law on 25. 10. 1980 is the main enactment, which regulates child abduction („the Haag Convention“).<sup>1</sup> In EU, we have to respect the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. The Haag Convention is applicable only on children younger than 16 years.

The Council Regulation has priority to Haag Convention in those question, which are both regulated by regulation and convention. The Council Regulation, however, supports application of Haag Convention as an important instrument of reparation of the illegal case.

Both enactments give supremacy to the voluntary return of the child or parent reconciliation. EU established special office of The European Parliament Mediator for International Parental Child Abduction.<sup>2</sup>

The most important term is „the international abduction“, which is defined in article 3 of Haag Convention and in the article 2 sub. 11 of Council Regulation. They both specify it as a wrongful removal or the retention of a child outside of the state of habitual residence. Simultaneously, the removal must be the breach of rights of custody and at the time of removal or retention those rights were actually exercised.

When there is not possible any agreement, the cause must be sued.<sup>3</sup> Contracting states of Haag Convention had to establish/ designate any Central Authority to discharge the duties which are imposed by the

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<sup>1</sup> More than 80 contracting states.

<sup>2</sup> The European Parliament mediator is from 2004 Mrs. Evelyn Gebhardt from Germany.

Convention upon such authorities.<sup>4</sup> One of these duties is to assist in securing the return of the child to the person ( institution or other body ) claiming that a child has been removed or retained in breach of custody rights.

In cases of international abduction jurisdiction of courts of the state of actual residence of the child. They have to act expeditiously in proceedings on the application, using the most expeditious procedures available in national law. The judgment should be issued no later than six weeks after the application is lodged.<sup>5</sup>

The court must order the return of the child forthwith when these conditions are accomplished: a child has been wrongfully removed or retained and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention. This rule has these exceptions:

1. although the period of one year has expired, the court can order the return of a child unless it is demonstrated that the child is now settled in its new environment.  
the person, institution or other body which opposes the child's return establishes that
2. the applying person, institution or other body was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention, or
3. there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation
4. the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views,
5. the return of the child in breach with the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.<sup>6</sup>

It is very important to realize, that the proceedings and the decision under Haag Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue. The court can order the return of the child or not ( in specific, duly justified cases<sup>7</sup> - as it has been described ) If the child has been wrongfully removed or retained and the return has not been ordered, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. That judgment should entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgement in the Member State to or in which the child has been removed or retained.

The mentioned regulation is also pointed out in art. 16 of the Haag Convention, which bars to decide on the merits of rights of custody to the judicial or administrative authorities of the Contracting State to which the child has been removed from the time of receiving notice of a wrongful removal until the decision under Haag Convention

Another very important term is the „habitual residence“ of a child. It is not defined anywhere, but the emphasis is put on acquire a certain grade of continuity of the residence.<sup>8</sup>

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<sup>3</sup> Haag Convention permit to sue at judicial or administrative authority, Council regulation only at court.

<sup>4</sup> The Central Authority in the Czech republic is Úřad pro mezinárodněprávní ochranu dětí, residence in Brno Benešova 22, CZ. ( Office for International Legal Protection of Children )

<sup>5</sup> See art. 11 sub. 3 last sentence of the Council Regulation.

<sup>6</sup> See art. 12, 13 a 20 of Haag Convention.

<sup>7</sup> See Council Regulation No 2201/2003, preamble sub. 17.

<sup>8</sup> You can find wide scale of practice of the courts at [www.incadat.com](http://www.incadat.com).

In the foregoing text introduced the proceedings by Haag Convention. The Council Regulation is a kind of „lex specialis“ to the Convention and it has some special provisions which modify it. The most considerable deflection is in art. 11 sub. 4 of the Council regulation, which says: „A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention ( see up No 3/ ) if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.“

The Council Regulation has another procedural conditions, which are not required by Haag Convention, e.g. art. 11 sub. 2, 5, 6, 7.

Presently, a new updating of Czech civil proceedings of international child abduction is in Parliament. It reacts to the requirement of mentioned international documents and practical problems.

The best interests of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, it includes upbringing of the child too. It is sad, that the only victim, who suffer the most, of the whole cycle of the abduction and returning, is the child.

**Reviewer:** ZDEŇKA KRÁLÍČKOVÁ

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# MANDATORY AND DIRECTORY PROVISIONS OF CIVIL CODE

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## Key words

Mandatory provisions, Directory provisions, Civil code, Commercial code, New Civil Code, Duality of norms, Principles of Civil law, Practice of the courts, Vicariously mandatory provision, Solution of other branches of law

The contribution concentrates mostly on the topic of differentiation between mandatory and directory provisions in current Czech Civil code. The situation is very complicated because the criterions according which these two kinds of provisions have been differentiated are very unclear and it doesn't support the basic principles of private law. The main purpose of this work is to bring some methods how they can be distinguished and after this the opinions and ideas pro futuro. It is very interesting and important too because new Czech Civil code has been preparing by prof. Eliáš from Faculty of Law in Plzeň and it will probably share very similar concept which is used now.

First chapters of contribution are very general and their purpose is to describe as much as possible general terms of the topic. By these information I mean mostly terms like mandatory and directory provisions and the differences between them. After this description are named all relevant principles which are connected somehow to the autonomy of will in private law and to the methods of interpretations of legal texts. For this part of work is very typical mix of well known information with new knowledge which are written there. By these knowledge (or facts) I mean f.e. distinction between provisions how they are known now (legal norms) and "provisions of lower level" with which is necessary to work for better recognition of mandatory provisions. It is very practical information, especially because in current legal statutes or codes are very long and very complicated provisions where is impossible to recognize nature of this norm.

Today is only one relevant provision for differentiation § 2/1 which is very general and everybody who works with it says that this provision is very unpredictable or at least against principle of legal certainty. I established four basic kinds of provisions in my work into which we can divide all provisions which are mandatory in current Civil code. These kinds are expressly determined provisions, vicariously mandatory provisions, temperamentally mixed provisions and purposely mandatory provisions. If it is not possible to sort the norm into one of these categories, it will be directory then. Very interesting is especially temperamentally mixed provisions because current scientific opinion is that this kind of provisions (like f.e. §51 of Civil code) are directory. Opinion presented in this contribution puts them into group of mandatory provisions and reasons for this are written there too clearly.

Very closely to the theoretical differentiation is differentiation by the courts ruling. The most relevant judgements of Supreme and Constitutional court are presented in this work like for instance judgement from March of Constitutional court of Czech republic, which decided about situation connected to the Labor code and differentiation of mandatory provisions there which were very complicate and they were changed into the form which is now in Civil code - Interesting are especially dissents of some judges of Constitutional court. According to them it has to be changed too because it is against legal certainty. The question connected to this

judgement is if it wasn't be changed too much because Constitutional court was afraid of situation after so important hit or if the reason was adequate measure of certainty of this provision.

Last part of my contribution is about contemplation de lege ferenda connected to the procedure of creation of new Civil code in Czech republic. Final version will be presented probably during summer of current year and the most relevant provision will be based on the express declaration of mandatory provisions or on the four general factors again among which are for instance public order or good manners. These two indicators of mandatory provisions are very similar to the current nature of statute and the question connected to them is if there isn't better solution?

From this question is very simply understandable my position to the problem of distinguishing of provisions which is presented in my contribution. At the end of the contribution is comparison between all possibilities how is this problem solved in the codes or statutes in Czech republic. No one is the Best but there is presented which solution has which advantages and disadvantages. At the end is presented personal opinion about solution which has been chosen for future in new Civil code.

Whole problem is very complex and very complicated because it is very difficult to recognize the nature of provision in current Civil code. It is necessary to work with all codes, legal branches and principles in them. In the end it is necessary to say that the solution which is chosen for current civil law is very general and probably very good for flexibility of law like a customization of Unfair competition and its very famous general clause against it. Unfortunately it isn't very clear which provisions can be changed and which can't be and it breaches the principle of legal certainty and principle of forethought. This is the reason why it is necessary to prepare some solution which will reflect current adjustment or to prepare modification of Civil code which will change the principle of recognition.

This article present one of solution how is possible to recognize nature of provisions. There are many different possibilities but I think that mine is very simple but not perfect. The question on which is necessary to ask now is: "Is it possible to find clear solution which will distinguish mandatory and directory provisions according to the current Civil code and civil law now?". If anybody asks me on this question, My answer to this question should be no. We can only find solution which will help us in some cases, sometimes even hard, but unfortunately it will not be probably valid or useable in all cases.

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## Key words

Expert - List of Experts - Appointment of Expert - Expert report - Interrogation of Expert

## Introduction

Expert evidence belongs to frequently utilized means of proof. It is exercised by courts in judicial practice provided that professional knowledge is necessary to review a certain fact. Although the nature and purpose of its usage as stated above are in legal orders of particular countries identical, different methods of its legal regulations are utilized to reach and ensure the purpose of this means of proof. In the article the author pays attention to the significance of the expert evidence, emphasizes and underlines the disparities of its regulation within the Slovak and German civil procedure and proceeding from the comparison of the both legal regulations seeks to lay down and present the starting points and potential solutions for the advancement of utilization of this means of proof.

## Expert

The Slovak legal regulation defines the expert as a natural person or legal entity entitled by the state to act according to the Act of Experts, Interpreters and Translators; is registered in the list of experts, interpreters and translators or is not registered in this list, but is appointed an expert. The German legal regulation does not define the expert but according to the German legal theory it is a person with special knowledge.

The court uses the activity of an expert in cases, when the evaluation of the relevant facts depends on special knowledge or experience. Whereas in Slovakia the judge is obliged to appoint an expert also in situation when he commands of the necessary knowledge, in Germany the legal theory allows the judge to evaluate these facts by his own when he provides with the needed knowledge or experience. The parties must be informed.

## List of Experts and Appointment of Expert

The activity, competence and the duties of the Slovak experts are regulated in a special Act No. 382/2004 Z.z. The experts are mostly experts registered in the official list of experts at the Ministry of Justice of the Slovak republic. The list is available on the internet, on the official website of the Ministry ([www.justice.gov.sk](http://www.justice.gov.sk)). Non registered experts can also be appointed the experts by the court only in case, that there is no other registered expert for the particular field or branch, or the registered expert is not available or is available under inadequate difficulties. They must agree with the appointment and give the promise in front of the court. If an expert's report was made by an expert who did not give the promise during the judicial procedure and the judgment depends on evaluation of the facts where the special knowledge is needed, it would mean a failure of

the procedure. This failure can cause a false judgment if the court took the testimony of the expert and the action of the expert (who did not give the promise) for an expert report.

Within the German judicial procedure the parties are allowed to choose an expert. The court is bound by their choice. The choice of the parties can be limited by the court only in case concerning the number of the experts. If the parties do not agree upon the expert, the expert is appointed by the court, which can ask the parties to bring proposals concerning the expert. By the choice made by the court the officially appointed experts must be preferred.

The legal base of the officially appointed experts is embedded in the § 36 Tradesman Act (Gewerbeordnung) and § 91 Craftsman Act (Handwerkordnung). The experts are appointed on their own request by an official body assigned by the government of the particular state or entitled by a particular Act. The government of particular state can entitle bodies to appoint experts. Those bodies are first of all Industrial and Commercial Chamber, Chamber of Architects, Chamber of Engineers, Chamber of Farmers, etc. Unlike to Slovakia, there is no official register of experts in Germany. If the parties do not choose any expert, the court asks the particular Chamber for the list of experts.

### **Expert report**

The written expert report is preferred in the legal regulations of both countries. However the reality is different. The Slovak civil procedure does not contain any statements concerning some directions for the judges while hearing the verbal report of the expert in the court. A very limited regulation offers the Act No. 382/2004 Z.z. according to which the protocol has to encompass data of the expert clause. The German legal regulation refers to statements concerning the witness interrogation.

According to the § 17 Act. No. 382/2004 Z.z. the written expert report is comprised of the label page, introduction, report, conclusion, annexes and expert clause. The Slovak experts has direct, vested instructions how to create a competent and qualified written expert report. On the other hand there is no legal regulation in Germany concerning instructions for the experts while creating a written report. An important help is offered by scientific publications published by more experienced experts.

### **Conclusion**

The importance and fundamental of the expert evidence is in both countries identical. Whereas the Slovak the Code of Civil procedure contains just a general regulation of expert evidence, the Act No. 382/2004 Z.z. regulates enough the conditions of the expert's activity, rights and duties. The official list of experts seems to be a great advantage for the judges by choosing the appropriate expert. In the German regulation the statements concerning the essentials of the written report are absent. This lack of regulation can cause a situation when the report must be completed by the instructions of the judge what may lead to dispensable dragging of the process. On the other side there are no statement concerning the interrogation of the expert at the Slovak court. The judges must improvise through the procedural decisions or apply the statements concerning the interrogation of the witness per analogiam.

Both of the regulation contains several advantages. By comparing the regulations and its consequences in the practise would be possible to improve both regulations, simplify and accelerate the process and reach faster the justice for the parties.

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# DIRECT AND INDIRECT PARENT-CHILD CONTACT

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## Key words

Direct contact, indirect contact, supervised contact, supported contact

Parent-child contact is a basic expedience for maintaining parent-child relationships in cases, when they don't share the same residence. In the legal theory and praxis, there should be distinct number of forms of contact and this paper offers general systematization and points on ideal usage of each separate form of contact.

There should be distinct line between forms of contact based on direct personal meeting and forms of contact which are not based on direct personal meeting. 'Direct contact' can be defined, as direct personal meeting between the child and its parent, during which the parent and the child usually communicate and they also interact. Obviously, direct contact is the key factor for development of the parent-child relations and for realization of parental responsibilities. Term 'indirect contact' can be used to describe contact which doesn't contain direct personal meeting (telephone calls, e-mail, etc.).

Contact scheme is basically shaped by three essential elements - parents, their child, and the best interest of the child. By reason that the parents are holders of the parental responsibilities, the child is the person possessed by his / her own rights and the best interests of the child principle is intrinsic for Czech system of law. The court is bound by law to make a decision about contact that it is in the best interests of the child.

There should be plenty of measures for differentiation of the direct contact forms. This paper works at first with duration and frequency of contact. According to these measures, there should be identified five different parent-child contact patterns: (i) 50/50 shared residence, (ii) standard contact, (iii) holiday-only contact, (iv) little or no contact (v) daytime-only contact. 50/50 shared residence by course of Czech law consists only of the cases, when the court awards parents by joint or alternating custody. Standard contact means contact between parent and child every odd or even weekend, one day during a week, two or three weeks during the summer holidays and several days in time of Christmas holidays, Easter holidays and Spring holidays. Contact in this amount can serve to preservation or development of parent-child relationships very well, thus it is the best in those cases when there are not conditions for joint or alternating custody, or for restriction or prohibition of contact. Holiday-only contact takes part in situations when the parent and child are divided by long distances, f.e. they live in different countries. Sometimes parents don't visit their child because of subjective or objective reasons, for instance, long distance, prevention of contact by resident parent, restriction or prohibition of contact and all these cases fall within little or no contact pattern. Daytime-only contact consists of child visitation without overnight stay.

Afterwards this article summarizes forms of direct contact in compliance with persons participating in contact. Principally the parent and child have contact in a certain time, on a certain place, and without any other person. The court sometimes makes order to provide a contact in presence of resident parent and it is usually executed in the child residence. Further, it is quite common that the third person participates in contact – it is in most of the cases a psychologist. A psychologist can play different roles from monitoring interaction and conversation between the parent and child (*supervised contact*) to helping establish parent-child relations (*supported contact*).

Indirect contact also has many different forms and usually it is a natural part of the contact in general. The communication via phone calls is one of the most commonly used contact form. During the last decade there is a fair progress in indirect contact field which is provided by a computer with appropriate software and hardware equipment and the Internet connection. Sometimes professionals talk about new generation of parent-child communication. The parent and child can use the Internet phone calls, chat, video calls, e-mail; they can play games and parent can help his / her child with homework etc. Regarding this, written mails are far less used. Indirect contact forms which do not involve communication mean obtaining information about the child's health, school report, or free time activities. Typically, the parent is informed via medical reports, photos, or videotapes.

Parent-child contact can be very effectual tool for preservation of mutual relationships. But there has to be used in a proper way all the possibilities offered by different forms of contact. Primarily, there are the parents and the court who are bounded to make right decision. However, court's solutions including some of the forms of indirect contact are applicable without cooperation of the parents rather problematically in practice, because of limited possibilities of execution of decision. It means that appropriate execution of decision about indirect contact still remains an unresolved question.

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# FINDING THE WAY TO DISPASSIONATENESS OF THE JUDGE IN THE CIVIL PROCEEDING

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## Key words

Independence and impartiality of a judge, judge exclusion institute, civil proceeding, right to a fairly trial

A judge exclusion institute in civil proceeding considerably guarantees the interpretation of right to unbiased process, while the equality of party to a proceeding is well-preserved. These principal attributes of the civil proceeding are in fact able to exist, only if a judge performs and acts independently and impartially, he is not connected in any way to parties to the concrete proceeding, to their lawyers, or to in hand case. The status of the judge must be inevitably and absolutely neutral. The concrete content of the bias is given by process rules.

The present-day's tendencies, which are primarily expressed in slightly wrapped perception of actual status of the judge in a society, have remolded a meaning much more than the utilization of this institute. The main use is concentrated rather to its misuse, formation of obstructions, delays in a proceeding with one possible attainable result - inefficiency and an increase of proceeding outlay. What is worse, is the fact that it is not only about the misuse from parties to the process, but it is possible to deal with it from the side of judges. It happens particularly from the reason, that in case of the smallest doubt which is pointed out by the judge himself, or by the party to a process, there is a demand to preserve preventive effects of the device.

All recently stated solutions arise, an impression of necessarily acute withdrawal of undesirable state of the institute misuse, with the application of a legal tool. This is presented by a norm-setting. In case of legal judge exclusion manipulation in civil proceeding according to the law regulation N° 99/1963 Statute-book Civil court order, in version of later regulations (thereinafter only C.c.o.). There is an indubitable fact, that some of the mentioned paragraphs have been changed 7 times since 2001 (e.g. regulation § 16 C.c.o.).

When looking at concrete changes in juridical adaptation, it is adequate to be like to accept them as a "test". A motivation to improve the acute state is so intensive, that inner logic is absent in certain steps while in some of the cases is missing also the presence of real justness of their modification. There is also a problem of absence of communication in some cases, at law creation, among specialized experts from theoretical circles and judges from first degree courts, meeting the widest agenda. They are the courts, maybe the closest to a subject, invoking the law protection from the point of view of solved spheres. The final result is than elaboration of the juridical adaptation leading to an evident opacity.

It is necessary to mention, that the judge exclusion institute must be, in juridical order, adapted towards the real fulfillment of its real aim. However, when looking at recommended modifications and modifications in preparation, it is possible to deduce, that some of the prepared paragraph versions, are in this case, on the boundaries of constitutional character. As if the delicacy of this question and the demanded need of personal attitude was forgotten.

We think that not only appropriate and effective juridical ground is sufficient in the given case. Significant is mainly the ability of extremely right interpretation of the lawful version, which consequently results into the

right application of concrete case. We think that it would be consistently illegal and neutral as far as arrangements of judge exclusions would be induced at place, where there haven't been fulfilled legitimate lawful conditions for process like this. This right interpretation is naturally necessarily connected with personality of the judge by himself.

Judge is the person, which disposes its own statute in a lawsuit. At the same time, he must fulfill assumptions for prosecution of the given profession. He has to have certain attitudes and pretension, moral principles as well as feeling of higher justice. The judge by himself should notice the existence of possible commitment following listed attributes first. Evaluates and judges the question of possible inner doubt about his own commitment, whereas it is one of the most resonant problems, while the exclusion of the judge in this case is not consistently judged either the decision about the final exclusion from the process cannot be always considered as right. The ability to differentiate between own inner feelings on one hand and facts, which can really stir doubts about the commitment, on the other hand. By a professional approach, he should act in such a way, that he wouldn't give the reason for self-perception in commitment. Particularly realize the delicacy of participants figuring in objective case.

An effort to fulfill the significance of civil process basic principles is admittedly significant dimension. To cover it towards accomplishing an intention and aim, in which it utters. However, we think that it is not possible to achieve advisable the subject, by exclusive elaboration of only one institute. The lawsuit is a summary of operations, a sequence of procedures, which exist together and they make up each other. They create a mutual coexistence and are coherent. It is analogous also in a case of judge (judges) exclusion institute. It would be a utopia to fight for constant elaboration and development, with an effort to achieve that the elimination of its misuse will be minimal, or even disappear. Neither the most precise juridical adaptation in this case, cannot avoid the abolishment of case by the appellate or invocation court, according to competent establishments of the Civil court order.

Once admitted right is here for a concrete subject, while there is a possibility to dispose and act according to its declaration. Individually, it is possible when the subject right is a tool and a basic guarantee of the higher constitutional character. However, it remains to learn how to use it there and in such a way that is inevitable and desirable.

**Reviewer:** SASKIA POLÁČKOVÁ

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# PRINCIPLES OF LAW

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## Key words

Law principle, positivism, ius naturae

The question of the law principles or law doctrine is a current question. Principle is the general sentence which serves the solution for additional explanation and proof. If we should proceed correctly, we have to give principle even a self-evident or proven reason. Principle thus... Is the leader law idea, origin of the law, source of law. In the case of ius naturale, is the origin of the law the human nature. In the case of positive law is the origin the will of popular sovereign- state. Nowadays is the meaning of these two words interchangeable. They are meant as synonyms. Principle means origin, basic, basic idea, basic universal law, from which we result by derivation other knowledges. Principles of law are the term generic theoretical principles creation and realization of the law.

By formulation of the content of law principles and determination their position in law, in legal order is to distinguish, which stream of law author prefers. Whether positivism or ius naturale. Law-positivism spread in 19th century several forms and contributed the consolidation and of the formal law-peace and liberal law age. From the beginning of the 20th century it is criticised for its formalism, although this is the one of the most widespread directions of law theory and practice. Positivism is known as the leader direction by the Czech law theory school as well. Followers of the ius naturale read law as substantiality confirmed law, which follows from the frame of life and human nature, which is in its merit constant. From the second World War is rating up the tendency of revival of the ius naturale way of thinking and argumentation.

Ronald Dworkin's work could be considered as the fundamental work. Dworkin defines the term of principle as a specific mark of the whole standard-set others, that mean different rules. (tady asi to od neplatí, že). Principle is the standard, which should be adhered to not because of its positive influence, in the utilitarian meaning, from the point of view of individuals or section, but because justice, fairness, morality requires it. For example no-one must not have bent from his injurious conduct. Principle determines reason, which leads to a specific way, no concrete solution is invoked. Every principle has its weight, if it comes to a conflict between them, the judge has to take account of the importance of both of them. Principles have the key-role in the court argumentation.

Also positivists realize the existence of principles. H.L.A.Hart, Robert Alexy, Ota Weinberger handled with these questions. All of them suppose existence of principles. Alexy criticises Dworkin's approach. Logical difference between the rule and the principle could be therefore set by in the time of conflict. If the solution is given by comparison of the two in collision standing regulations we talk about principles. Principles are for Alexy orders to optimize. If it comes to a collision of two principles, it is necessary to adjudicate and that so, that both applicable principles are to apply in maximum way. Alexy ranks to principles common wealth as well.

Weinberger puts principles into a set of law-rules. Principles could and should be express explicitly, educe from the set of valid law rules.

Constitutional court of the czech republic nowadays prefferes the conclutions followed from reflection of above mentioned positivisms. It supose principle-existence. Principle-origin is czech republic's constitution, declaration of basic rights,from which we can deduce the existence of principle. Through this roots of constitutional law soak through the principles into others law regulations which create legal order ( of course as well into the civil law). From the conception of principles, proporcionality principle follows, that it is a process, through which we achieve our drift ( larger sense), procedure we choose to achieve theoretical knowledge, eventually to class and codify into a scientific unit ( narrow sense). Is it a reduction of an idea to a method?

In the case of conflict between the regulation of so called simple law and constitution is the common court obliged to propound this to the constitutional court. It is obvious that common court can not argue in solution of any concrete civil law dispute by constitution against law regulation (regulation of common law), only constitutional court can . It is a procedural regulation, so it forbids any other procedure. We can only use the interpretation of the regulation of the so called common law by the constitutional conformal interpretation and not by the interpretation with the constitution not conformal. Now it comes the question, if only this way of interpretation gives the common law courts sufficient space for claiming the principles in its resolution.

From all above mentioned is clear, that beside the law in the form of the set of law (however continental or anglosass) the law philosophy has its place. This term was first used by a law-theoretican and historian G. Hugo in his textbook, which he named textbook of common law like philosophy of positive law ( to si najdi v originále). He wanted to poin out, that law- research has to go deeper. We can not consider only on ius naturale.this access, which treat both of the law-forms (positive, ius naturale)pari passu named Hugo law-philosophy.

Instead of the conclusion questions: do we stay by genesis of a new law-theoretical paradigma? Can we reach a better law systém by syntese of the best components from both of them, ment positivism and ius naturale-theory? Is here again this all-society need of positivism-conception in the form of unit european law? Does positivism have still his space?and last but not least is here the highly practice question of how to follow in the process of rule-making to the law-continuity in legal-order in time, in that it was interrupted? Is it possible, in the light of the fact, that last seventy years, this was not the question of the day, because as we know, it was interrupted in 1939? Is it not better to make a deeper reflection nowadays's stadiums and renault from it? Simple link-up leads to a deep revision in the consequence of the development of law-philosophy. This development allready begann.

**Reviewer:** JAN HURDÍK

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# A PREDATOR IN AMERICA'S MIDST: A LOOK AT PREDATORY LENDING AND THE CURRENT SUBPRIME MORTGAGE CRISIS

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## Key words

Predatory Lending, Discrimination-Foreclosure, Subprime Mortgage Market, Secondary Mortgage Market, Housing Boom, Recession, FHA Housing Stabilization and Homeowner Retention Act, The Neighbourhood Stabilization Act of 2008, The Subprime Borrower Protection Plan

The author of this article is focusing on the current subprime mortgage crisis and housing recession that has struck the United States of America. What could be the reasons behind the current recession? How could so many Americans now be finding themselves without a home and with looming debt? Who is responsible for this current crisis and how, if at all, can it be fixed so future generations will not have to go through the same problems?

The article begins with addressing what could be a major reason why, after a period of such economic and housing prosperity, the banks and lenders now find themselves losing money because of the many foreclosures and unpaid mortgages.

Firstly, the article explains one reason why so many Americans are now filing for bankruptcy and foreclosure: predatory lending. Predatory lending is the discriminatory practice of targeting certain groups of people, often low-income, minority and elderly persons, and teasing them into accepting a subprime mortgage with an adjustable mortgage rate. The result is that for the first few months the borrower is successful in making the payments, however, once interest rates inevitable rise, the borrower finds him self in the possession of being unable to make the payments. Finally, this results in the borrower having to default on this mortgage and the bank has to foreclose and auction the home off without even coming close to paying off the rest of the debt. As the author shows, predatory lending and discriminatory practices of this nature are not a new phenomenon. Long before the passage of the Civil Rights Act of 1968, and since the passage of the law, those in society seen as uneducated, lower-income and unable to understand the extent of their choices are often the targets of these types of lending practices.

The article examines some case studies that have been done, which point to the fact that in America a majority of these subprime loans have been peddled to most of America's less fortunate populations. Most of these borrowers were brought in with low or no interest rates in the beginning, and many of them were never read the fine print. Thus, after only a few months, piles of credit card debt, mortgage debt, and bills were too much for even the average American to handle.

Along with the effect of predatory lending, the author next analyzes why subprime mortgages are attractive to banks and mortgage lenders. The author examines what exactly a subprime mortgage is, and why using these types of mortgages can help the bank sell them on the secondary mortgage market in order to free up more money in order to allow the institution to lend even more money. Also, the author examines how a subprime mortgage can actually help a person, who ordinarily would be unable to get a mortgage because of financial

reasons, obtain a mortgage with the hopes of owning his or her own home. The author examines the risks that both the borrower and lender must take when deciding to give and to accept a subprime mortgage.

After defining predatory lending and the subprime mortgage market, the author then seeks to look at the current state of American economics with respect to the housing boom. The author chronicles the economic boom of the early 2000s up until the current recession, which began in 2005. The author looks at foreclosure statistics and how the idea, which seemed good only a few years before, has caused catastrophic consequences to not only homeowners, but to the banks and lending institutions as well. The author shows how the over abundance of subprime mortgages in the market led to an insurmountable amount of risky securities that never could have had much backing by the lending institution, the homeowner, and especially not by the secondary mortgage market investor.

The last part of the article analyzes three new proposals: 1) FHA Housing Stabilization and Homeowner Retention Act; 2) The Neighborhood Stabilization Act of 2008; 3) The Subprime Borrower Protection Plan. The author analyzes each plan, the first two have been proposed in Congress and a leading economist in the field has proposed the latter plan. The author explains the key points of each of the plan, what effect each plan is deemed to have on the current crisis, and the author then points out what weaknesses each plan may have.

In conclusion, the author makes it clear that the economy in America is bound to get worse before it can get better. The purpose of the article is to show that although homeownership, financial sector prosperity and economic wealth can make everyone involved feel lucky for a little while, by not looking into the future and realizing the potential consequences of the situation this will lead to all parties involved without much recourse. Although the author concedes that something must be done to help both the homeowners who have lost their homes and the banks and financial institutions that have lost most of its promised profits, the real question the author wants to pose is how does American now produce laws that are actually enforceable. The reality of the situation, the author seeks to point out, is that even though there are laws in place and there are new laws being proposed to combat the situation, this may not be the ultimate solution to the problem. The real problem is that without the government and the people truly calling for an enforcement of these laws, such as those that are already seeking to combat discriminatory techniques like predatory lending and the issuing of subprime mortgages to borrowers who have no real chance of keeping up with payments, America may be bound to repeat the very reasons why it finds itself in this current position in the first place.

**Reviewer:** MICHAEL SENG

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# DETERMINATION OF FLAT AND SUPERFICIES SOLO CEDIT PRINCIPLE

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## Key words

Flat, superficies solo cedit principl, real property, legal matter

The aim of this work is to show how the superficies solo cedit principle, known from the ancient Roman Law, inputs the current legal adoption of real estates, namely flats, in the Czech legal order.

We focus the history of that principle. We point out that even in Rome were flats. But not as legal matters. The principle caused that just land was taken as a legal matter. Other stuff was just a part of it and share the lines of the land property.

We see that the number of flats, called insulae in Rome, was quite high – over 23000, located in buildings sometimes even 7 floors high. In spite of the fact that mainly the members of idealistic law theory considered insulae as a legal matter (referencing to the conflict with the natural law (ius naturale) mentioned by the ancient lawyer Paulus), there is no mention in ancient law sources. It goes even against the logic of the Roman land law based on the superficies solo cedit principle.

As we know the mentioned principle acts strongly the de jure recognition of flat as a legal matter. We see the relation between the principle and flats as legal matters. In law orders where the principle is adopted there cannot be the flat accepted as a legal matter. But the reality is not monochrome and thus why there are usually exemptions in particular legal orders.

In addition we go through medieval Europe towards the 19th century where we see strong impact of Savigny's teaching on German legal order. He outlined that flat as a legal matter is a nonsense.

In Czech Republic the legal order was impressed by the former Austrian monarchy law. (e.g. the Allgemeines Bürgerliches Gesetzbuch (ABGB) – Civil law Code adopted in 1811; went to force in 1812). The ABGB was (in Austria still is) influenced by the Roman law reception and the principle was a part of Czech law. That's why there weren't flats recognized as legal matters.

The legal framework for recognition of flat as a legal matter was adopted after WWII by the adoption of the new Civil Code called also the Middle Code (1950). It abolished the principle. Mainly due to the fact that the principle stood in the way of collectivization of Czech country side.

The adoption of flat as legal matter arrived with the Flat Ownership Act in 1966. This was a specific norm. It was built on the monistic conception and only individuals were able to get the property of flat.

Difference came with the new Flat Ownership Act in 1994. This was built on dualistic conception and allowed also juristic person to be the owner. The ownership of flats is also possible due to fact of the Civil Code change – section 118 article 2 and section 125 appoint that flat is a possible legal matter.

The flat is not a legal matter generally but in a special statute regime. The essential mark of flat is its legal not an actual qualification. In the end of this work a regime of flat as a real property is mentioned.

**Reviewer:** IGOR KOTLÁN

Full version of this contribution can be found in the *Conference proceedings* on pp. 1302 – 1306.

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# THE RECOGNITION AND ENFORCEMENT OF JUDGEMENTS

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SASKIA POLÁČKOVÁ

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FAKULTA PRÁVA, ÚSTAV SÚKROMNÉHO PRÁVA, BRATISLAVSKÁ VYSOKÁ ŠKOLA PRÁVA,  
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## Key words

Regulation, recognition, enforcement, Brussels I., Brussels II. bis, The Code of International private Law and Process Law

The article is dealing with the application of Regulations Brussels I., Brussels II. bis and the Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations in Slovak republic, especially in case of recognition and enforcement of judgements.

The article is divided into several parts which deal with each and every regulation separately. This section is followed by the Slovak Law section, namely with the Code of International Private Law and Process Law, Civil Process Code and Family Law Code.

The chosen Regulations are all containing sections about the recognition and enforcement of judgements which area are maintenance obligations. The reason of choosing maintenance obligations is that this are one of the most frequent decisions and the subjects / minors should be the most protected group since they depend on the help of their parents.

## Regulations

The Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was one the first regulations that introduced the recognition and enforcement of judgements into EC.

The history of this regulations starts with the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 which was the precedent international law regulations that bounded only states which ratified the convention. For this reason the EC decided to accept the EC regulation that would bound all the states of EC. The same developement applied for the Brussels II. bis regulation and the Proposal as well.

The reasons that led EC to create the Brussels I. regulation were the protection of the internal market which is connected with the freedom of free movement of persons, to support judicial cooperation between Member States and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States<sup>1</sup>.

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<sup>1</sup> Preamble, p. 2, Brussels I.

The recognition and enforcement are defined in the Chapter III of Brussels I.. The main point is to unify the process of recognition and enforcement in Member States by prohibiting any special procedure. The only reasons for denying the recognition and enforcement in Member State are given in the enoumerating list.

#### **Aplication of EC Regulations in Slovak republic**

Since the entry of Slovak republic into the EU the judicial institutions are forced to apply Law of the EU. Eventhough the regulation as a legal instrument is directly exercisable in Member State, it needs to be „connected“ with the rest of the legal system. The connection in the Slovak Law is provided by The Code of the International Private Law and Process Law, The Civil Process Code and the Family Law Code.

The main part of the procedure of the recognition and enforcement are contained in the Code of the International Private Law and Process Law. The Code itself is from the year 1963, so naturally it would not contain the Regulation or Convention. The change came with the Act No. 589/2003 of Coll.. This new Law made the connection between the Regulations and the Slovak Law system.

According to the Code, the whole procedure will be made only on the formal niveau, meaning the court will only control the formal side of the foreign decision and not the substantial side of the decion, which is prohibited.

The parties of the procedure are already given by the decision that should be recognised. The duty of the entitled party, if it does not have the domicil in the Slovak republic, is to authorise a person that is Slovak citizen to collect the court writtings. The other duty of the entitled party is to deliver the proposal with all the documents that are enoumerated in the Code in order to make the foreign decision recognised and lately to enforce it.

Eventhough the main goal of the EU legislator was to simplify and unify the judicial cooperation between the Member States, I have to say that the way to make it „easy“ for the EU citizens is long and will need more of the „real“ simplification on the side of the Member States. But the given direction in the EU concerning internal market and the migration of persons will bring even bigger need of coordination between the Member States and the Member States and the EU.

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**Full version of this contribution can be found in the *Conference proceedings* on pp. 1307 – 1316.**

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# THE EXCURSION INTO SPANISH LEGAL REGULATION OF ADVOCACY

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## Key words

Spain, history, valid legal regulation, the organisation of advocacy, the conditions for providing legal services, the manners of exercise of legal counsel, the rights and liabilities of attorney-at-law, the disciplinary liability

## Introduction

The paper is devoted to the excursion into the legal regulation of advocacy in Spain. Czech and Spanish legal regulation of advocacy has common features but we can find dissimilarities, too. The main attempt of this work is describing and comparing Spanish advocacy with the Czech one.

## History

Spanish advocacy as well as Czech advocacy went through the rich history and its roots date back to the Middle Ages. The first important source of law in this scope is an act called “De avocatis” that was passed in 1247. During several centuries the Spanish advocacy became an independent and liberal profession. Nowadays the number of its members is increasing rapidly and the quality of provided legal services is improving.

## The concurrent legal regulation of Spanish advocacy

The concurrent status of advocacy is regulated in “Ley 2/1994 de febrero de Colegios Profesionales” and in “Estatuto General de la Abogacía Española” which is the fundamental legislation in Spanish advocacy. In Spain the advocacy is regarded as acknowledged and reputable profession.

## Organisation of Spanish advocacy

The self-administration in organisation of advocacy is common for both countries, but the internal organisation itself is rather different. In the Czech Republic there is only one bar association (“Czech Bar association”) but in Spain there are several bar associations. “Consejo General de la Abogacía Española” has the national competence and its registration office is in Madrid. It is the public entity with the legal identity. The executive authorities are the general assembly (“El pleno del Consejo General”), permanent committee (“La Comisión Permanente”) and president (“El Presidente”). In every province there is at least one local bar association. The membership for individual attorneys-at-law is obligatory. Each member has its own title, e.g. “ilustre”, “ilustrísimo señor”, “excelentísimo señor”, etc. and they have the right to wear a gown, insignias and other attributions of their function. The main functions of these authorities are similar but wider than the functions of the Czech Bar association. The paper is also concerned with particular local authorities in the comparison with the Czech organisation of advocacy.

### **The conditions for providing legal services and manners of exercising legal counsel**

The conditions for providing legal services are exactly the same as in the Czech Republic – lawful age, legal capacity, citizenship of a country, EU or EHS, academic title, being without criminal records, etc. Spanish attorney-at-law can exercise legal counsel not only individually but also in association and as an “employed attorney-at-law”. The speciality of Spanish legal regulation, that has not analogy in Czech Republic, is so-called multidisciplinary cooperation. It is an institute which enables attorneys-at-law to associate with other professionals in whatever legal form including a company. They can provide not only legal but also other special services by this way. The attorney-at-law who exercises legal counsel in association cannot exercise it individually at the same time.

### **The rights and liabilities**

Spanish as well as Czech advocacy has strong tradition of codified rules of the rights and liabilities of the members of this profession. The issue is regulated in an analogy of our ethics code, and that is “Código Deontológico de la Abogacía Española”. In this code the rights and liabilities are divided in the same way as in our country – attorney-at-law must follow them towards the legal profession, paralegals, client, court of law and other authorities. Spanish attorney-at-law has the right to all honours traditionally connected with advocacy. If he thinks these honours are broken he can make a complaint to a court of law. The attorney-at-law is also obliged to notify all cases of illegal and incompetent manner of legal counsel. In connection with trial the attorney-at-law is obliged to be attired in toga eventually barret without distinction excepting symbol of appropriate association. In a court room the attorneys-at-law sit in the middle at the same level as a tribunal. During a trial they represent Ministry of Justice and Spanish advocacy. In a court they even have their own designated places for discharging of office.

The paper also deals with the problem of publicity and advertising that was liberalised in 1998. The advertisement itself is allowed except of the explicitly prohibited forms. It must be reasonable and contains true and disinterested information. The matter of interest in Spanish advocacy is the competence of the president of particular association to make control in an office of any attorney-at-law. The main reason is to find out whether the rules and acts are observed.

### **Disciplinary liability of an attorney-at-law**

The attorneys-at-law are accountable for any disciplinary misconduct and they may be penalised in disciplinary proceeding. The disciplinary liability is inherent beside “Estatuto General de la Abogacía Española” also in “Reglamento de procedimiento disciplinario” – the analogy of our “Disciplinary order of Legal counsel.” “Estatuto General de la Abogacía Española” differentiates between grave, less grave and slight offences. According to the type of offence there are sanctions that are oral or written admonition, temporary prohibition of legal counsel and disbarment. The public admonition and financial penalties used in the Czech Republic are not known in Spain. The attorneys-at-law may appeal against verdict of the disciplinary proceeding to “Consejo General” or to the relevant administrative court. There is also the disciplinary competence of the administrative court and its sanction are written in personal profile of an attorney-at-law.

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# CONSEQUENCES OF REVISION OF THE EUROPEAN CONVENTION ON ADOPTION OF CHILDREN TO NOVEL OF CIVIL CODE

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## Key words

Civil code, private law, recodification, European Convention on Adoption of Children, revision

The aim of article, presented with name Consequences of Revision of the European Convention on Adoption of Children to novel of Civil Code on Conference of Young Lawyers –COFOLA 2008 organized by Faculty of Law of Masaryk's university in Brno, is to present the work of miniteam for family law on recodification of private law.

In the terms of recodifying activities in field of private law is the main aspiration to create a comprehensive private-law codex, which should, inter alia, includes the regulation of family law too, incl. the regulation of substitutional family care. Regarding to conceptual animadversions to regulation of adoptions entrusted the miniteam prof. Hrusakova and the author of paper with preparation of alternative conception of regulation the adoptions. The specialist for adoptions were consulted and their list is presented in begining of the article.

The authors came out during the preparation of alternative conception mainly from critical evaluation of actual text of draft of recodified Civil Code. Already in whole beginning of critical conclusions is the author pointing out that the basic building stone of the recodification is using the principle of discontinuity and separation from the period of socialistic legislation during the creation of text, which is now preparing, however it is not further commented, that the legal regulation set by legal codexes from 1960's was modernized after year 1989 based on the international obligations of Czech republic (or ČSFR). The consequences of accession to a European Convention on Adoption of Children from the year 1963 were to harmonize the national legal regulation with the text of named convention, because of the fact, that named convention is still binding for Czech Republic, the suggestion of recodified Civil Code shall be in general principles as same as actual legal regulation regulated by socialistic family code. Other critical conclusions are pointing at crucial contradiction in terms and are expressing disagreement with used terminology

The authors of alternative conception used as basic stone for its creation the draft of revised European Convention on adoption on children, which was prepared by Council of Europe. Consequence of probable czech accession to revised Convention would be to prepare another significant novel of intended text of prepared Civil Code, and all of this in situation, when the recodifying commission as background for preparation of recodification should take in account the drafts of international conventions too. Draft of recodified Civil Code but didn't take in account the revised Convention at all.

In next part of paper is the author engaged more in details in specific suggested changed. Before all he commented the creation of general clause, which is aimed to definition of adoption, elimination of improper financial gain and guarantee the legal obligation of all the professionals to educate themselves.

Futher the author pointed at the terminology change projected the principle of bests interests of the child into text of draft from the reason of understandableness, because draft of Civil Code came out from the terminology having no pillar in actual modern international regulation.

Other important part, which was point of author's interest, was projection of requirements of revised Convention concerning the age limits. It is a characteristic for actual czech legal regulation, and in the last analysis the contemplated recodification of Civil Code, that no age limits are concretely set. On the contrary the revised Convention is based on the determinaton of minimal or maximal age limist for specific situations, which should be necessarily projected into the draft of conceptual changes. The age limits are now suggested for the minimal necessary age of an adopter, definition of child, further for minimal age difference between an adopter and an adoptee and finally also for minimal age, when the child must agree with adoption (if the age limit is reached). Author explains also reasons for each limit.

From author's point of view the most importat part of changes made on the draft of recodified Civil Code is concerning with preadoptional care. Author deduced the importance of preadoptional care, when especially pointed at fact, that relationships in field of adoption are connected with important status changes. Author stressed the basic idea of adoption thus the will to create a new family, which should be imitation of biological parentage. Author considers a preadoption care to be unfungible element, which should ensure sufficient number of information leading to the conclusion, that there was established the bound between the prospective adopter and adoptee, which is same as between parents and children, and so is fulfilled the condition for adoption itself.

Enumeration of necessary preliminary enquiries mentioned in revised Convention, which should serve as background for well-informed position deciding body, is started with theoretic basis and considerations. Futher author dealt with projection this enquiries into the text of draft of recodified Civil Code. This part is started with elimination of duplex system of decision-making of adminstrative bodies and courts in cases of preadoptional care.

Final part of essential changes is regulation of automatic conversion revocable adoption to the irrevocable only by lapse of period of time set by law, if isn't transformed on basis of adopter's petition.

In the end pointed author at eligibility of termonological change in whole text of family-law part of the draft of recodified Civil Code concerning institut named according to actual legal regulation „paternal responsibility“ and according to draft of recodified Civil Code „paternal rights and duties“, when he recommended return to actual, already contentually clear term „paternal responsibility“.

**Reviewer:** MILANA HRUŠÁKOVÁ

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# THE REVIEW OF THE CONSUMER ACQUIS IN A CONTEXT OF THE CZECH LAW DE LEGE LATA

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## Key words

Consumer protection, review of consumer acquis, implantation of directives

The article deals about the review of consumer acquis. The consumer acquis cover 8 directives that protected consumers (Directive 85/577/EEC, Directive 90/314/EEC, Directive 93/13/EEC, Directive 94/47/EC, Directive 97/7/EC, Directive 98/6/EC, Directive 98/27/EC and Directive 1999/44/EC). The author tries to find the most serious problematic parts of implementation directives in Czech Law.

The notion of the 'consumer' is closely linked with the notion of the 'supplier' who makes legal acts as a part of its entrepreneurial activities, while the consumer does not make such acts as a part of its entrepreneurial activities. The definition of 'acting' is, as regards entrepreneurial activities, somewhat problematic in the particular legal systems (the broad and the narrow conception of entrepreneurial activities; objective and subjective assessment of one's own acts) and is not uniform even in judicial decisions by the ECJ.

In the Czech legal regulation, the interconnection of the notion of 'consumer' and 'entrepreneurial activities' is made even more complicated because of the unclear definition of 'entrepreneurial activities' and 'entrepreneur' in the Commercial Code and the Trade Licences Acts and their mutual links.

Under the Czech law, a 'consumer' can be both a natural person and a legal person. In the case of Directive 93/13/EEC, this is a non-conforming implementation. A member state may, in our opinion, extend the protection provided to consumers even to non-professionals (legal persons) but it may not subsume such subjects under the notion of 'consumers': there needs to be a different term, e.g. 'non-professionals'.

It cannot be generally stated that a consumer is protected less than subjects in B2B or C2C relationships. In certain cases, however, the Czech legislation does provide a lesser protection to consumers than that normally accorded to subjects in similar general relationships under civil law (cf. Section 56 of the Civil Code, under which unfair contractual understandings are voidable, while similar acts are null and void in the case of B2B, as governed by Section 39 of the Civil Code). From the point of view of the sense and purpose of consumer protection, such a state of legal regulation is unacceptable and should be removed in the future.

The fragmentary nature of implementation of directives may be evidenced by only partial implementation of some provisions of certain directives, such as Directive 1999/44/EC (failure to implement the right to withdraw from a contract in the event a supplier fails to rectify a faulty situation within a reasonable period of time or if a supplier rectifies a faulty situation but causes significant discomfort to the consumer), Directive 97/7/EC (failure to implement the release from the consumer's obligation to pay the price in the event of an inertia selling; the transposition has been only partial because the consumer is merely not obliged to surrender any performance that has not been ordered).

The lack of an interconnection between the implemented directives on consumer protection is not always immediately apparent, though it is sometimes directly obvious from the diction of e.g. translation or the actual

transposition (this is, for instance, typical of the notion of 'good faith', which should have the counterpart of 'good manners' in the Czech law; however, the notion 'good faith' was slavishly and non-systematically included in the legal regulation). At other times, the absence of links to existing private law institutes becomes clear from explanatory and contextual implications. This concerns, for instance, the failure to implement to duty to provide information in a clear and comprehensible manner in the event of pre-contract duty to inform as a part of solution acts, which stands in contrast to legal acts of obligation (information constituting the offer), which do include this duty. Thus while acts of obligation may be generally prosecuted under Section 37 of the Civil Code as null and void legal acts (whose implementation is therefore essentially superfluous), the pre-contract duty to inform, which does not manifest signs of the offer, badly misses the provision setting the duty to inform in a clear and comprehensible manner because Section 37 of the Civil Code is not applicable.

The Czech Law contains some problematic parts that need to be amended. The amends have to be realised in the context of existing institution of the Czech Law and in the context of the review of consumer acquis.

**Reviewer:** RADOVAN DÁVID

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# TRANSPARENCY PRINCIPLE UNDER THE DIRECTIVE ON UNFAIR TERMS IN CONSUMER CONTRACTS

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## Key words

Transparency principle, clear and intelligible language, Unfair Contract Terms Directive

## 1. Legal theoretical background

The consumer is a weaker party to the contract; he has less bargaining power, information and knowledge. As a result, it is easy for big suppliers to set terms to the detriment of the consumer, and the consumer has practically no chance to alter them. It is the case when particularly standard form contracts are concerned which are widely used nowadays.

Standard form contracts are usually drafted by lawyers who tend to use legal jargon as a means of setting precise terms. These terms are sometimes not comprehensible for laymen as they do not grasp the specifics of legal language. Given this situation, the Council of the European Union adopted the Directive on Unfair Terms in Consumer Contracts which seeks both to prevent the use of unfair terms and to ensure that all terms are written in plain and intelligible language.

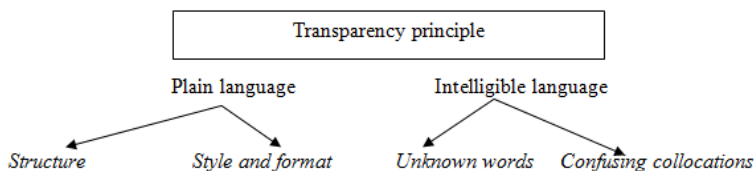
## 2. Scope of application and the criteria of transparency principle

The Directive does neither relate to all contractors nor to all contracts. The scope of the application of the Directive is limited both subjectively and objectively. The Directive applies only to consumer contracts where terms were not individually negotiated and are in writing. Consumer contracts are contracts between a supplier and a consumer. The Directive therefore relate not only to terms for general use but also to terms which are drafted for a single use.

Transparency principle requires the terms to be formulated in “plain” and “intelligible” language. The aim of the principle is to ensure that the consumer will have a real opportunity to comprehend the terms arising out of the contract. The requirements of “plain” and “intelligible” complement and overlap each other. The criterion “plain” refers more to the formal requirements of drafted terms, whereas intelligibility relates more to the linguistic aspects of formulated terms (substantive requirements).

Formal requirements are met if the contract is well-arranged. The structure and the style and format of a contract should be adapted to comply with the transparency principle. The structure means chiefly the proportionate length of a contract and the division of terms into sections according to the subject matter. The style and format is meant to include the size of font and the choice of colour scheme.

Contractual terms are drafted in intelligible language if their substance is comprehensible to the consumer. To comply with the transparency principle, the supplier has to avoid the use of confusing collocations and terms which could be unknown to the consumer. In this respect, terms should be formulated in ordinary language and the supplier should not use legal jargon, extensive definitions, words borrowed from other languages, etc.



Picture 1: Scheme of Transparency principle

### 3. Benchmark of the average consumer

Transparency principle should ensure that terms are plain and intelligible not only to lawyers but mainly to laymen. The criteria “plain” and “intelligible” are assessed by reference to the average consumer. To determine the substance of the benchmark it is necessary to define the average consumer. Generally speaking, there are two main concepts of the consumer. The first is of the weak consumer who is neither informed nor observant. The second conception was developed through the case-law of the European Court of Justice and presumes the consumer who is reasonably well informed and reasonably observant and circumspect. The objective of the Directive is not to protect all consumers. The clauses do not have to be comprehensible to every consumer. The Directive is silent on the guidelines how to define the average consumer. However, given the objective of the Directive, it is to be assumed that the conception developed by the ECJ will apply.

### 4. Consequences of intransparency and final remarks

The Directive states that in case of any doubts about the meaning of a term, the interpretation most favourable to the consumer will prevail. The *contra proferentem* rule is the only explicitly provided legal consequence of the incorporation of intransparent terms. The rule applies only in individual litigations where there is usually an interest to uphold the term with the most advantageous meaning. In collective litigations, where any person with legitimate interest in protecting consumers’ rights takes legal action to prevent the use of unfair terms drawn up for general use, the rule is not applicable as it can cause a failure to win the case. It is suggested that in case of collective litigation, the court has to take into account the least favourable interpretation of the term to assure that the term will be considered to be unfair. It is not excluded that even in individual litigation the intransparent clause will be held unfair. This can happen only if the term, given the most favourable interpretation, causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

The use of transparent terms is crucial for the protection of consumers. The consumers should have a real opportunity to examine all terms and to grasp their nature. To achieve the aim of the Directive, it is necessary to inform the consumers of their rights, and that bodies with legitimate interest in protecting the consumers’ rights take more active approach to run information campaign on their rights and to pursue all legal means to prevent the use of unfair terms.

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# THE NEW APPROACH IN THE REGULATION OF NOMINAL CAPITAL IN COMPANY LAW: FUNDAMENTAL CHANGES OR DEADLOCK?

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## Key words

Company law, nominal capital, limited liability, registration of companies, competition

It is believed that the regulation of nominal capital plays a major role in company law, fulfilling various functions and thus serving the common good. Basically there are two types of business/commercial companies. The first group is characterized by the unlimited liability of the partners for the debts of the company. The second group can be distinguished from the first with respect to the liability of the partners for in this group the partners (members, shareholders) are not liable for the debts of the company. This is the point where we reach the core of the traditional concept of nominal capital regulation. Regulations usually consider important, as a quid pro quo for the limited liability of the partners, to state mandatory rules on nominal capital minimums of a substantial amount. The basic idea behind this regulation is that in this case creditors are deprived of the possibility to seek satisfaction for their claims against the members of the company, the sole basis for satisfying their claims being the company assets.

The basic reasoning for the necessity of nominal capital-minimums is creditor-protection. According to this concept, the larger minimum on nominal capital is set forth in our codes, the larger level of protection creditors can enjoy. It is believed by some that the regulation of nominal capital minimums plays a filter-role: filters promoters and only the capable, the economically potent is allowed to proceed and set up a company and at the same time enjoy limited liability. In this sense, nominal capital is the redemption-price of limited liability.

Following the 2004 accession of ten new member-states to the European Union, a new chapter of economic competition has started, which has been enhanced after the latest expansion-round. Prior to the accession of the former socialist block, a considerable competition also existed to draw foreign investments and efforts were made in the then-candidate countries to make themselves more attractive for foreign capital than the others. In the 1990's candidates had many means to reach their goals, basically offering considerable tax allowances or even tax-exemptions to spur up economic growth and thus contribute to the economic transition and closing-up. In the EU the above means are no longer disposable, there is only a limited arsenal to benefit from, for only techniques in full conformity with European law are allowed. This results in the new chapter of rivalry, the competition of member states. In this competition company law has started to play an increasing role. The age of tax-allowances seems to have passed. Company law has to promote investments and supply as much level of freedom for promoters and partners as possible. At the same time, a modal shift in EU policy on company law has been realised: creditor-protection has lost considerable ground in favour of the preferential treatment of small- and medium sized enterprises. This new situation rises the value of competition law regulation: the more competitive a company law is, the more competitive the country's economy can be.

Following from the aforementioned, in recent years the outlines of a new trend could be examined: moving further from what we defined as the traditional approach towards nominal capital. What we can observe is

that more and more legislations change their viewpoint on nominal capital and to a little extent handle the old approach on nominal capital minimum regulations as barriers to market entry and obstacles to run small or medium sized enterprises. This matter has not been dealt with independently and isolated from other important rules affecting SME's market position. Changes were usually carried out hand in hand with an overall simplification of both substantial and procedural rules.

We believe that the basic goal of company law is to draw up an equilibrium between the rightful expectations of creditor-protection and the promotion of freedom concerning the establishment and operation of companies. However, we strongly feel that the basic goals of creditor-protection can be reached through traditional means of civil law, basically contract law and the arsenal company law employs is not necessary adequate to supply the same level of protection. In this sense, company law can not guarantee anything but a rather limited success in creditor protection. rules of creditor-protection, if not serving their real purposes, can be considered considerable barriers to market entry for SME's and can be treated as anticompetitive measures. Anticompetitive in the sense of the competitiveness of companies and in the sense of anticompetitiveness of company law. That is why we support the idea of the reduction of nominal capital limits in company law. We are of course aware of the fact that this measure in itself is not able to supply competitive advantages, but can play a major role even in a symbolic way. However, we urge reforms be carried out completely and steadily and thus modernise company law.

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# REFORM OF THE HUNGARIAN INSURANCE LAW

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## Key words

Hungary, Insurance law, reform

There is a relevant lawmaking process in Hungary, the codification of the new Civil Code. The Hungarian Ministry of Justice and Law Enforcement and its experts stated, that their work is in final stage, so it's time to talk about the latest tendencies and improvements in a nutshell, focusing mostly on insurance contract law. In this paper I would like to deal only with matter of principles.

There are countries with separate Act of Insurance Contract Law, for example the so called "Versicherungsvertragsgesetz" in Germany, but in Hungary the lawmaker chose another way keeping the current dual system of codes: one for the private and one for the public law.

The main goal of the original proposition was to separate consequently private and public rules, but the concept has changed during the codification, to make the Civil Code an abstract act, all rules with secondary importance will be promulgated on a lower hierarchical level.

The Hungarian Civil Code deals only with insurance contracts (characterized by the concept of risk-distribution), and says nothing about insurance associations with legal personality, which has to be revised, because there are insurance legal relationship on the ground of association's membership.

The question of using dispositive or cogent (mandatory) rules is always hard to answer. The principle of freedom of contract is often competes with the principle **of insurer and customer protection**.

There is a trend in the EU to label micro ventures, or rather small and medium enterprises (SME) as customers, but the insurance sector has a promise from the under-secretary of the Ministry of Justice and Law Enforcement to label only natural persons as customers in connection with insurance contract law. Of course there is a great need to create an effective customer protection but today there is almost a separate civil law of customer's so it's wise to define the requirement's of being customer as precisely as possible.

There are three main areas of one-sided cogency: customer protection, insurance contract law and labour law. In all three legal fields the main goal of the regulation is to protect the weaker party of the legal relationship. The customer, the insured person and the employee are presumed indisputably to be weaker than the other party (insurer, employer etc.) from an economical point of view, but today it's not always true in insurance contracts. The rules of insurance contract law was modelled for community contracts with the State Insurer in 1959, but today in **business to business** (B2B) contractual relationships the insured (legal) persons are often stronger, than the insurers.

This rule sanctions the breaching of the principle of cooperation in the civil law, if the insurer is lazy to answer to the proposal, then the contract will be formed as a consequence, and it's irrelevant, if the proposition disagrees with the custom of trade or with the insurer's **commercial practice**. In that case the assumption of risk in the discrete insurance is in contrast to the principles of insurance mathematic and statistic, so the insurer will probably resign the contract. Of course in the practice the insurer makes the contractual offer, and not the client. The liability insurance contract evolved firstly to protect the **tortfeasor**, it helps not to be

cleared out in case of small negligence and high amount of damage, but today it protects the aggrieved person at least so much in case of the tortfeasor's ability or will to pay is missing.

There is much to do with the codification, and of course it's hard to choose the correct solutions acceptable by both insurers and – especially customer – insureds too. Their direction is unquestionable good, and I hope that their self-sacrificing work will be successful, and call forth a well-working Civil Code.

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# EUROPEISATION OF TORT LAW

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## Key words

Europeisation of law, regulatory europeisation of tort law, spontaneous europeisation of tort law, Principles of European Tort Law

Article deals with legal aspects of europeisation of tort law. The aim of this paper is to show individual methods of harmonization of tort law.

The term europeisation can be analyse from two insights. Firstly, it refers to the general meaning often used on the field of political science and secondly this term contains intradisciplinary approach. Article focuses on the later one while dealing with europeisation of law, particularly tort law.

Europeisation of law may be understood as a phenomenon of broadening of the scope of European law, as well as the emergence of new legal disciplines in Europe, linked to European integration.

Europeisation has three main consequences: a fundamental change in the systems of sources of law in the legal systems of European countries, a coming closer of legal systems which contributes to the break up of the common law family of legal system as well as of the legal systems derived from continental European countries, and changes in terms of methodology of legal sciences.

Harmonization of European tort law is conditional on regulatory processes by way of EC regulations and directives and on the other hand by way of spontaneous europeisation of tort law.

Nowadays, regulatory europeisation in the field of tort law is only fragmentary and unsystematic. The European Union institutions followed the aim of creating a single European market without barriers to trans-border trade and exchange. However, the heart and soul of tort law remained outside the scope of scrutiny and control exerted by the European institutions. In the area of tort law, the activities of the European institutions were confined only to choice of law, partly to consumer matters and matters relating to insurance against civil liability in respect of the use of motor vehicles. Probably the most important is the Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

Spontaneous europeisation, also called harmonization in weak sense or soft law, means the effort of distinguished scholars and practitioners from several states to try to identify the common core of European systems of tort law and to restate the result in an accesible manner. This approach is not new but has long legal tradition beginning at Roman law.

Draft of the Common Frame of Reference (DCFR) also belongs to the soft law category. It contains principles, definitions and model rules of European private law. Book VI. of DCFR also contains rules of noncontractual liability arising out of damage caused to another. In contrast to other soft law projects DCFR does not include only general principles but also contains particular rules.

Principles of European Tort Law (PETL) project is one of the most interesting legal tool from the soft law category, therefore last part of the article focuses on their fundamental characteristic.

The European Group on Tort Law is a group of scholars in the area of tort law established in 1992. The group meets regularly to discuss fundamental issues of tort law liability as well as recent developments and the future directions of the law of tort. The Group has drafted a collection of Principles of European Tort Law (PETL) similar to the Principles of European Contract Law (PECL) drafted by the European Contract Law Commission. Within the framework of this cooperation, the Group has presented the Principles in a public conference on May, 2005, in Vienna.

In order to attain the necessary overview of the various legal systems, written country reports on the tort law have been prepared. Commentary was written from these country reports and was issued at the same time as PETL.

The goal of PETL is to serve as a basis for the enhancement and harmonization of the law of torts in Europe. They can serve as a kind of framework for the further development of a harmonised European tort law. The Principles of European Tort Law are a compilation of guidelines aiming at the harmonization of European tort law.

Under the PETL principles it is clear that a person has to compensate another person's harm only if certain requirements for liability are met. In other words, a person's obligation to render compensation is only established if the damage is legally attributable to him. The basis norm thus makes clear that "*casum sentit dominus*". The starting point is therefore that every person has to bear his loss himself, which is only departed from if there is a legal basis for shifting it to another. The second starting point is that damage has to be compensated. Damages serve primarily the aim of compensation but also prevention. The core and also the conclusion is that a person to whom damage to another is legally attributable is liable to compensate that damages.

Principles of European Tort Law may serve both as a source and as an anchor for law reform at the national level. Principles may stimulate the debate about the future of this tremendously important field of law in Europe.

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# DIFFERENCES BETWEEN CZECH AND POLISH FAMILY LAW – COMPERATIVE ANALYSIS

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## Key words

Marriage, registered partnership, divorce, fault, separation, Ombudsman for Children, parental responsibility, period of time

This article deals with differences between Czech and Polish Family Law. The aim of this paper is to show the important differences and to compare them. Basic sources of law: (Czech) Family Code and (Polish) Family and Guardianship Code were used the most.

Regulation connected with marriage (being a union of a man and a woman) is similar in Czech and Polish law, but there is no legal recognition for same-sex partners in Poland. In the Czech Republic there is Registered Partnership Act (Zákon ze dne 26. ledna 2006 o registrovaném partnerství a o změně některých souvisejících zákonů), which granted homosexuals the long awaited rights (for example inheritance and health care, alimony rights). In my opinion this is the first step to legalize same – sex marriages in the Czech Republic (besides there is – in general - a global lobby to legalize it and other same - sex relationship). Marriage links not only men with woman, but also parents with children, and legalizing same – sex marriages will drain marriage of the social meaning it has nowadays. In Poland there are a lot of voices saying that same – sex relationships should be allowed, but they are not (fortunately).

The differences we can also find in divorce (first - in definition because according to FGC disintegration matrimonial life must not be only irretrievable but also complete – well it is connected with each other but this record in FGC exists).

In Poland, a court – deciding on a divorce - is obliged to establish whether one of the spouses - and if so which one – is to be blamed for breakdown of the marriage, and it is also important because of some reasons (maintenance duty of the spouse who is found to be exclusively responsible for the breakdown of the marriage, for moral reasons). Both spouses or none of them can also be deemed to be guilty.

FC does not mention about fault in divorce, but protects a spouse who "did not predominantly take part in breakdown of the marriage through violation of marriage duties", so in reality it means that he/she is "innocent". A very interesting is also regulation connected with a "uncontested/agreed divorce".

A big difference is also in fact that in the Czech Republic there is no legal separation (situation in which the partners in a married couple live apart), but in Poland there is (and it is "easier" to go through a separation process than a divorce, and the separation has almost the same consequences like divorce). This situation is in some way difficult for spouses, because they cannot marry again during separation (it does not terminace the marriage), but on the other hand there is still a chance that spouses will change their opinion and will decide to start all over again. Regulation connected with separation is - in my opinion - the advantage of polish law.

The Czech law does not know the institution of Ombudsman for Children. Ombudsman for Children (Rzecznik Praw Dziecka) in Poland was established by the Law on the Ombudsman for Children. He guards the rights of the child defined in the Constitution of the Republic of Poland, the Convention on the Rights of the Child and other rules of law. Ombudsman for Children undertakes his actions to protect that rights (in particular the rights: to life and health protection, to be brought up in the family, to decent social conditions, to education) and to protect the child against violence, cruelty, exploitation, depravity, neglect and any other evil treatment. In exercising his powers he takes into consideration the fact that the family is the natural milieu for the full and harmonious child's development.

That function is another instrument for protecting children's rights, making it more visible - so this is the advantage of polish family law.

Quite important differences are also connected with court's jurisdiction. According to Czech law a petition for a divorce is submitted to the District Court for the district in which the couple had its last place of cohabitation in the Czech Republic, provided at least one of the spouses lives in the district, but in Poland divorce cases are examined by the regional court (sąd okręgowy) with jurisdiction for the most recent place of joint residence of the spouses.

In Poland district courts (sądy rejonowe)- family and juvenile cases divisions (guardianship courts - sądy opiekuńcze) competent on the grounds of a child's domicile - are competented to decide in cases relating to parental responsibility, but in the Czech Republic it is the District Court (sąd okręgowy) which is pertinent to the district where the child is resident.

Court's jurisdiction in each particular	The Czech Republic	Poland
Divorce	the District Court	the regional court
Parental responsibility	the District Court	the district court – the guardianship court

Table 1: Differences in the court's jurisdiction in each particular

There are also many differences - more or less important in period of time in each particular.

Table 2: Differences in period of time in each particular

Differences in period of time	The Czech Republic	Poland
The authority of the church or religious society must deliver the report of marriage to the relevant office within:	3 days	5 days
Time to change the name after divorce:	1 month	3 months
The father of the child of an unmarried mother is obliged to provide an adequate contribution for mother to coverage of living for:	2 years	3 months, more on mother's demand
Time to give the court a final statement about the management of the child's property after the end of guardianship	2 months	3 months

The Czech and Polish Family Law is very similar. Of course there are differences, but it is typical to the legal system in every country. But in my opinion Polish regulation is better, because of institutions: separation, Ombudsman for Children, and because of fact that same-sex relationships are not allowed.

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