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IMPOTENCY OF EU INSTITUTIONS REGARDING THE ENFORCEMENT OF STABILITY AND GROWTH PACT

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Abstract
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Key words
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1. INTRODUCTION

There are not many issues in European law which would whip up so many controversial emotions among lawyers, politicians and especially economists at once. The Stability and Growth Pact (SGP) was criticized by many of them. Former President of The Commission Romano Prodi once stated: „I know very well, that the stability pact is stupid“[1]. Was Mr. Prodi wrong? Answer to this question will be one of the goals of this article. What I will discuss here is also the impotency and disability of EU institutions regarding the enforcement of SGP. I will bring brief legal and factual background of the problematic and then raise critical questions and remarks. This article is neither meant as an economic analysis nor political polemics.

2. OVERVIEW

The legal background of the Pact in based in the Art. 99 – 104 EC[2]. These provisions of the Treaty accent the price stability and fiscal co-ordination of the EMU. The system could not be based on autonomous fiscal policy of member states and the surveillance of their budgetary discipline is absolute necessity. Brief description of the rules and procedures will be given in following chapter. The provisions of the Treaty are complemented by secondary legislation and acts: Council Regulation 1466/97[3] on the

[1] Romano Prodi, Le Monde, 17th October 2002

[2] The Treaty establishing the European Community

[3] Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies OJ L 209, 2.8.1997

preventive procedure of Art. 99 EC, Council Regulation 1467/97[4] on speeding up and clarifying the implementation of the Excessive deficit procedure (description will be given in following chapter) and legally binding Resolution of the European Council from 17 June 1997. The mentioned acts were amended in 2005 as an outcome of the reform of the Pact.

3. RULES OF THE PACT

The aim of this article is to criticise ineffectual enforcement of the Pact, hence I will not describe all the rules and procedures of the system and I will focus on its stumbling blocks.

The SGP is based on two dominating rules. Members' annual budget deficit shouldn't exceed 3% of the annual GDP and the amount of national debt shouldn't be higher than 60% of GDP or approaching that value. The basic idea came from German former prime-minister Theo Waigel in the middle of 90's. In mid 90's Germany was strong economy and monetary engine of the EU. The idea of surveillance on all participating states was the way how to ensure strict budgetary discipline among other members. How ironic could this fact seem will be clear in the end of this paper.

The process itself is monitored by the Commission and the ECOFIN[5]. All member states, those not participating in EMU included, have to forward regular reports and prognosis on the condition of their economy and measures connected with the fiscal policy. The Commission evaluates given data and if estimates that there is risk of real or potential breach of rules it is entitled to start the Excessive Deficit Procedure (EDP). EDP has tree stages. The process begins with the opinion of the Commission on the risk forwarded to the Council. The Council then brings decision on the recommendation from the Commission by its qualified majority to the delinquent state. If there is no significant change in the performance of the state, the decision will be made public. The idea behind this step was probably to cause serious pressure on the state involved. If member state persists to fail to fulfil the criteria, the ECOFIN may decide to give notice to the member state and claim regular reports on taken measures.

The third stage, as the most problematic part, consists of serious actions against the delinquent state. It can be requested to make non-interest deposit reaching up to 0,5 % of its GDP. This deposit can be lately turned into non-refundable payment as sanction for the gross breach of the rules. In the

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[4] Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure OJ L 209, 2.8.1997

[5] Council of Ministers of Economy

history of the Pact this procedure never arrived at this final stage. Was one of the reasons impotence of institutions to act or rather vague regulation of the procedure in the Treaty?

I will discuss the answers on following case, which is the best example that can be found in the development of the SGP.

4. GERMANY AND FRANCE IN THE ROLE OF OUTSIDERS OR WRECKERS?

In 2003 the Council found the deficits in Germany and France excessive and started the EDP with the recommendation. Both countries were given one year to resolve their problems and correct the deficit situation. In the end of the year 2003 the Commission issued a recommendation to the Council stating that both countries had not yet taken any significant actions to cut the deficit. The Commission proposed to give both countries notice under Art. 104(9) to adopt measures to adjust the situation and reduce their deficits by 1 % and 0, 8 % of GDP respectively. The Council proved to be highly political body and there was real political deal happening among some of bigger member states. Germany and France, following the approach "Scratch my back and I will scratch yours"[6], helped each other to avoid the award of legally binding decision requiring them to remedy unfavourable situation. This decision would probably bring the EDP to the last stage of sanctions and Germany and France were certainly aware of this fact. But what happened instead, was the adoption of spurious legal act called "conclusion". Therein The Council expressed contentment with the public commitment of France and Germany to improve the situation and recommended to correct the deficit until 2005. The ECOFIN decided to hold up EDP and issued its will to monitor further behaviour of touched member states. While the Maastricht Treaty says countries should treat economic policy as a matter of common concern[7], this was an example of extreme unilateralism.

The regulation of EMU a European law itself sustained significant defeat in this case. Considering that it was particularly Germany calling for strict fiscal rules in EMU the situation seems pretty ironic. This one was neither the first nor the only case of EDP that was started against a state. In 2002 there was recommendation issued by the ECOFIN against Ireland and Portugal having fiscal problems. The political pressure on those member states made them comply with the recommendation and tighten their fiscal policy, mainly at the costs of large budget cuts. This lay-out brings back to

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[6] There is qualified majority in the Council needed to adopt decision applying EDP, the delinquent state excluded. Also Great Britain and Italy helped to form the blocking minority in the Council.

[7] In the consolidated version it is Art. 99 of the Treaty Establishing European Community

memory famous Orwell's quote that could be easily paraphrased:"All the states are equal, but some of them are more equal."

In that moment the EMU found itself in the same position it would have been if the act had never been in force. This case could serve as dangerous precedent regarding the decision process not only within EMU, but in more areas of European law. From that moment it became more obvious that anything Europe's big governments sew together, the same governments can split at the seams. Eye-opening lesson, isn't it?

5. THE ECJ INVOLVED

Obviously the Commission was not happy at all to see this outcome of the process. It raised a case in front of the ECJ and brought an action for annulment of the "conclusion" of ECOFIN. The Commission argued there was no legal basis for such legal act and challenged the Council for not adopting formal instruments recommended by the Commission. The Court in its judgement[8] agreed with the first argument, but there was great debate over the roles of both institutions regarding the decision making procedure within EDP and the outcome was the disagreement of the Court with the later issue[9].

Following the arguments of the Commission the 'conclusion' to hold up EDP against Germany and France was annulled by reason of lack of legal basis for such a decision. On the other hand the Court stressed the leading role of the Council in the procedure. It agreed with the Council's argument that it has no legal obligation to adopt any act[10]. The Court declared the right of discretion lying exclusively in the hands of the Council. The Council is the institution bearing the responsibility for enforcing budgetary discipline[11]. Did the ruling of the Court mean victory of one of the institutions? And which one should it be? The Judgement was presented by both institutions as their own victory. But, by my opinion, there was nothing to celebrate in the Commission.

The Court here missed an opportunity to rule actively and bring tighter and stricter interpretation of vague rules. There were still many unanswered questions regarding the role of both institutions in the enforcement procedure. The weakest point was still the vulnerability in the crossfire of

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[8] Case C-27/04, Commission vs. Council, judgement of 13 July 2004

[9] More on analysis of the decision see D.Doukas, The Frailty of the Stability and Growth Pact and the European Court of Justice: Much Ado about Nothing?" (2005) 32 Legal Issues of Economic Integration (The Hague: Kluwer Law International) 293-312

[10] Above note 7, paras 32-24, *!

[11] Ibid., 7, paras 76-79

political influences and pressures[12]. The impotency of ECJ opened doors for wider discussion about the structural reform of the Pact, which seemed truly dead by then.

6. THE REFORM OF THE PACT

After above-discussed pathetic case of mightier member states' ignorance towards rules there was still a disagreement on the basic ideas and extent of the reformed Pact. There was rigour approach of smaller member states which had done rather well in consolidation of their fiscal policy in contrast with the laxity of big ones[13]. From today's perspective the statement of former vice-president of the Bundesbank Jűrgen Stark, that the status quo would be the best solution[14] seems a little short-sighted.

After long struggle above the outcome of the negotiation, on 23 and 24 March 2005 the reformed Pact was signed by the Council[15]. Existing legislation was amended by Council Regulation 1055/2005 and Council Regulation 1056/2005[16]. The fact that it was again the political organ deciding about the new document didn't bring any great hope for the change[17]. And so it was. The review of the Pact was not based on any change of the 3% and 60% basic rules, neither was there any comment about the enforcement procedure, which was the burning issue. On contrary, the application of these rules became more flexible. What changed was the exceptional excess of deficit. Since then the member state may breach the rule of the Pact temporarily if there is annual fall of GDP more than 2%. Next reformed provision was the interpretation of so-called "other relevant

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[12] B. Dutzler, A.Hable,The ECJ and the Stability and Growth Pact – Just the beginning? (2005), EIoP Vol.9 Issue No.3, Page 15

[13] J.-V. Louis, The review of the stability and growth pact (20060 Common market law review 43: Page 85

[14] See the speech of Jűrgen Stark, former – vice president of the Bundesbank Manotsbericht, one of the main actors and negotiators of the reformed Pact, "Die Bűchse der Pandora", Jan. 2005, http [www.bundesbank.de/download/press/reden20050118_stark.pdf]

[15] See Presidency Conclusion of the Brussels European Council, endorsing the Report of the Council of 20 March 2005 on "Improving the implementation of the Stability and Growth Pact" Annex II

[16] Council Regulation (EC) No. 1055 of 27 June 2005 amending Regulation (EC) No. 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, O.J.2005, L174/1; Council Regulation (EC) No. 1056 of 27 June 2005 amending Regulation (EC) No. 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, O.J. 2005, L 174/5

[17] See e.g. E.H.Buiter, How to reform the Stability and Growth pact, European Bank for Reconstruction and Development (2003)

factors" to be taken into account when assessing whether a deficit above 3% of GDP is excessive. In other words, if there is a reason to start Excessive Deficit Procedure. The old Pact referred to "other relevant factors" without specifying what these might be. By contrast, the new Pact provides an explicit and relatively long list of "other relevant factors" such as pension and structural reforms, investments for education, innovation and development. The immense will of bigger member states to make the Pact "highly equal" represents the incorporation of the expenses on unification of Germany, which happened more than 13 years before the Pact was reformed. (!!!). Do you think of G. Orwell once again now?

There were not only these ineffective changes brought by the reform. Member States are required to consolidate and strengthen their fiscal policy in periods of good economic growth. However, all the history of the system doesn't bring much confidence in such proclamations.

As a result of the reforms, member states have now wide room for manoeuvre when trying to escape EDP. The diction of excuses allows them to apply so-called creative accounting by hiding the majority of budgetary expenses behind so-called relevant factors. SGP became a public finance consolidation system during safe periods of economic growth. This idea is very much different from the one in the beginning of the process in 1997.

7. SOME CRITICAL REMARKS & CONCLUSION

The reform in 2005 was other example of impotency of EU institutions to make functionless rules stricter and enforceable if their personal interests are at stake. The Pact still suffers from vague and uncertain terms. Free rules and the absence of automatic enforcement procedure don't mark colourful future for the document and the system based whereon. In 2005 the EMU missed an opportunity to make the Pact work for every one of involved state equally without any preferences and favours. By my opinion, if SGP will not get rid of the system "being its own judge" there won't be a way how to ensure long-term stability and efficiency of the system.

There are recent fears we are facing here. There is still apparent lack of states' personal responsibility for the stability of common currency. This lack of stability could, under certain circumstances, provoke European Central Bank to tighten up fiscal policy, e.g. by increasing the interest rates. This kind of measures would, by implication, influence economic growth and that would be a contrario to the fundamental idea of the system, maintenance of the stability. The flexibility of the Pact is does not directly means arbitrariness of parties concerned, but to avoid that, there would have to be more serious sense of responsibility of all authorities[18].

[18] J.-V. Louis, The review of the stability and growth pact (20060 Common market law review 43: Page 106

SGP is directed to another crisis. The economies of member states are weakened by global recession. In the beginning of November 2009 there were 20 of 27 member states in breach of the Pact. In the case of Greece estimated budget deficit for next year reaches 12% of its annual GDP[19]. There is no space for calls for stricter rules and unfortunately it seems that will not ever be.

Finally, are we able to answer the question: Was Romano Prodi wrong saying that the Pact is stupid? He was indeed. But the stumbling block here is not the Pact itself, but the performance of member states while applying it.

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[19] Revised Greek deficit figures caused outrage. A. Willis EUobserver.eu; http://euobserver.com/9/28853

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SOME THOUGHTS ON ENFORCEABILITY OF COMMISSION DECISIONS AND THE RATIFICATION OF THE LISBON TREATY

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Abstract in original language
Současná Evropská komise, která vykonávala funkci v období let 2004-2009, měla být od 1. listopadu 2009 nahrazena novou. Nicméně, s ohledem na nepředpokládané překážky v ratifikačním procesu Lisabonské smlouvy, této Komisi musí být prodlouženo funkční období, ve kterém, mezi jinými funkcemi, vydává mnoho právních aktů. Tento příspěvek se zaměří na prozkoumání možnosti, zda, a pokud ano, za jakých podmínek, tyto právní akty mohou narazit na obtíže v procesu jejich aplikace a vynucení, které vyplývají z výšeuvedeného.

Key words in original language
Evropská komise; Lisabonská smlouva; Rozhodnutí; Vynutitelnost.

Abstract
The Commission in charge for the 2004-2009 term should have been replaced by a new one as from the 1.11.2009. However, due to obstacles in the ratification process of the Lisbon Treaty, the "old" Commission has to serve a prolonged term, in which, among other functions, it produces a number of legal acts. This contribution aims to explore the possibility, whether, and if yes, under which conditions, these legal acts can face any legal difficulties in the process of their application and enforcement emanating from the aforementioned conditions.

Key words
European Commission; Lisbon Treaty; Decision; Enforceability.

1. INTRODUCTION: LISBON TREATY AS A LONG-WANTED CHILD

The Lisbon Treaty came into the existence after the rejection of former so-called Constitutional treaty. Its main political aim[1] is to modernise the functioning of the European Union and to make an end to the institutional crisis lasting for more than a decade.

After the creation of the European Union in 1993, a debate on democratic legitimacy emerged. Especially, a notion of so-called democratic deficit has

[1] See the *Preamble of the Lisbon Treaty*. OJ C 306, 17 December 2007, p. 1.

become widely-used, even though being rather obscure and indefinite.[2] The EU started to be labelled quite often as un-democratic, distant, technocratic and without popular legitimacy. These characteristics were felt as short-comings of the other-day institutional design. Also, at the 1992 Intergovernmental Conference (IGC), some major issues concerned the institutional design were not successfully resolved. Thus, necessary changes were to be passed at the subsequent IGC scheduled for 1996.

Nevertheless, revision by the Treaty of Amsterdam was still felt as inaccurate, non-ambitious and not meeting the expectations of both politicians and the public.[3] Moreover, a serious challenge of the biggest enlargement ever was lying ahead. For these reasons, yet another treaty revision had been planned.

Treaty of Nice was to meet almost the same expectations as the Treaty of Amsterdam. But, in the end, partial issues of the size of qualified majority and technical adjustments to enlargement became the most prominent. Once again, no revolutionary and distinct changes were passed.

Leaders agreed instead, even before entry to force of the Treaty of Nice (sic!), to hold another IGC in 2004. What was important, they also issued a quite detailed declaration, annexed to the Treaty of Nice that specified issues for further debate.[4] The perceived need for wider and deeper debate on the Future of the EU was transformed into concrete terms in the Laeken Declaration, which provided, inter alia, for the creation of the Convention on the Future of Europe.[5] This assembly was to present its recommendations

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[2] See eg. Lord, Ch. *Assessing Democracy in a Contested Polity*. In: Journal of Common Market Studies, 2001, Vol. 39, No. 4, p. 645. See also Majone, G. *Europe's 'Democratic Deficit': The Question of Standards*. In: European Law Journal, 1998, Vol. 4, No. 1, p. 16; [2] Pogge, T. W. *Creating Supra-National Institutions Democratically: Reflections on the European Union's "Democratic Deficit"*. In: The Journal of Political Philosophy, 1997, Vol. 5, No. 2, pp. 163-182; Moravcsik, A. *In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union*. In: Journal of Common Market Studies, 2002, Vol. 40, No. 4, pp. 603-24.

[3] See eg. Glen, C. M. *Re-Writing Maastricht: The Politics of the 1999 Inter-Governmental Conference*. In: Southeastern Policy Review, 2000, Vol. 27, No. 4, pp. 655-678.

[4] See Declaration Nr. 23 dealt with questions on future of the EU and called for deeper and wider debate on these issues. Clear distinction of competences between the EU and member states, legal position of the Charter of Fundamental Rights, overall simplification of the Treaties and the role of national parliaments were the most prominent domains of interest. See *Treaty of Nice Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts*. Official Journal C 80, 10 March 2001.

[5] This declaration, adopted at the meeting of the European Council on December, 14th-15th, 2001, posed 60 detailed questions on the future of the EU. It contained three parts – Europe at a crossroads, Challenges and reforms in renewed Union and Convening the Convention on the Future of Europe. A timetable for a new treaty had been established – the Convention was to present its conclusions after one-year deliberations in 2003. Then, in 2004, IGC would be convened to pass a new treaty. See *Laeken Declaration of 15*

to the European Council.[6] Then, the IGC in 2004 would be convened and the IGC would pass final decisions.

However, the actual outcome of the Convention was a draft of the European Constitution.[7] This draft[8] was to meet challenges of higher transparency, decision-making efficiency and efforts to get Union closer to its citizens. It was presented on 18 July 2003 at the meeting of the European Council in Rome. Although being a remarkable attempt from constitutional and juristic point of view, the text was not welcomed with fanfares.

After unsuccessful efforts of Italian and Irish presidencies, the text of the Constitution was finally adopted on 17 - 18 June 2004 in Rome. But the main challenge lied only ahead – in order to come into effect, the Treaty Establishing Constitution of Europe had to be ratified in all member states, pursuant to their respective national constitutional procedures.[9] Despite the overall atmosphere of latent dissent, the ratification process was started and ran almost smoothly till referenda in France and the Netherlands took place.[10] The citizens of these two founding countries rejected the project.

December 2001 on the future of the European Union. Available at [online] www.ena.lu, cit. 13 November 2009.

[6] This requirement for the form was not met. See below.

[7] Due to the fact that the Convention encountered many problems, especially with creation of controversial creation of permanent posts of president and ministry of foreign affairs, redefinition of qualified majority (QMV) according to the size of population and number of states and smaller Commission were introduced, the President of the Convention, Valerie Giscard d'Estaign attempted to solve emerged hostile situation by taking rather risky path – he presented a draft of the European Constitution. This document would have to be adopted as it stood; i. e. further deliberations of the IGC were ruled out. Not only it was closed, but it also substituted fully the existing Treaties. See e.g. Blahušiak, I. *Some Thoughts on the Process Leading to the Adoption of Lisbon Treaty*. In: Zborník z medzinárodnej konferencie doktorandov a mladých vedeckých pracovníkov konanej v dňoch 3. – 5. 4. 2008 v priestoroch ÚZ NR SR Častá – Papiernička. 1. vyd. Bratislava: Univerzita Komenského v Bratislave, 2008, pp. 316-327.

[8] See *Draft Treaty Establishing Constitution for Europe*. Available at [online] http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf, cit. 18 November 2009.

[9] This procedure was to be successfully concluded by October, 2006. The draft treaty also contained rather obscure provision stating that if, by November, 1st, 2006, the Treaty would be ratified only by four fifths of member states, the matter will be delegated to the European Council for further deliberations. See Article IV-443, § 2 of the Treaty Establishing Constitution for Europe.

[10] 29 May 2005 in France and 1 June 2005 in the Netherlands. See eg. Walker, N. *Europe's Constitutional Engagement*. In: Ratio Juris, 2005, Vol. 18, No. 3, pp. 387-299.

Although a solid number of 18 ratifications have been collected, the EU fell into state of shock.[11] Various options, what to do after the reflection period is over, were taken into account.[12] Although this might have seemed to someone to be a healthy debate, situation was very close to the overall stalemate. British and Austrian presidencies showed rather weak efforts to revive problematic unwanted child. Indeed, at the beginning of 2007, almost nothing evidenced for Constitution (or changes encapsulated in it) to be adopted. But the contrary was true.

For a longer period, expectations on German presidency were voiced. Germany, headed by Chancellor A. Merkel, held presidency of the EU in the first half of 2007. As early as 17 January 2007 Chancellor Merkel claimed reflection period to be over. In following months, she toured all of the capitals of Member States and listened carefully to the leaders. Merkel's efforts have paid – at the meeting of the European Council in Brussels, on 21 - 23 June 2007 a rather surprising outcome for many was achieved. Leaders agreed on mandate for a new IGC that was to adopt new, so-called Reform Treaty.[13]

Following IGC was fast indeed and almost free of problems.[14] One could even say that the IGC, especially compared to Nice negotiations, was rather

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[11] Luxemburg PM, Jean-Claude Juncker was the first one to call for reflection period for the EU. The EU was to be given a time to clarify and discuss further proceedings and, also, to give more time for ratification to member states that had not done so yet. See *Jean-Claude Juncker states that there will be a period for reflection and discussion but the process to ratify the Constitutional Treaty will continue with no renegotiation*. Available at at [online] http://www.eu2005.lu/en/actualites/communiques/2005/06/16jclj-ratif/index.html, cit. 20 November 2009.

[12] There were supporters of retaining of the draft Constitution, who proposed concluding ratification process of the existing draft (even not in all of the member states). Another group backed retaining only the first two parts of the draft; i. e. the Constitution in a narrow sense and the Charter of the Fundamental Rights. And, finally, there was a group that proposed "cherry-picking", meaning incremental implementation of some novelties introduced in the Constitution, with(out) need of revision of existing framework of the primary law. See for example Sarkozy's proposal of "Mini-Treaty" presented in autumn 2006 in Brussels. Sarkozy, N. *L'Europe de demain - Une nouvelle vision francaise.* Available at [online] http://www.friendsofeurope.org/download/Sarkozy_080906.pdf, 15 November 2009.

[13] Leaders had learned from the "Laeken adventure" – this time, the mandate was drafted very precisely and no strange formation was introduced. See *Brussels European Council 21/22 June 2007 – Conclusions.* Available at [online] www.eu2007.de/en/News/download_docs/Juni/0621-ER/010conclusions.pdf, cit. 15 November 2009.

[14] Poland stood for its reputation of the European trouble-maker – it asked for an opt-out for application of the Charter of Fundamental Rights and also for preservation of the so-called Ioannina compromise. Polish negotiators were successful and concessions to their demands were made. Rather generous opt-outs were given also to the Britain, which not only preserved its exclusion from the Schengen acquis, but also obtained the same opt-out as Poland. Italians received one additional MEP, Bulgarians can write "Euro" on banknotes in

"boring". Final text was approved by the European Council on 18 - 19 October 2007 and the celebration of signature of the new treaty was held in Lisbon on 17 December, 2007.[15] In the meantime, the Treaty was renamed consistently with established practice according to a place of signature, from the "Reform Treaty" to the "Lisbon Treaty".[16]

2. RATIFICATION PROCESS OF THE LISBON TREATY

However, the road for a new treaty was not blossomed. There was still a need to pass through the ratification process in all Member States. In contrast to the ratification process of the Constitution, the vast majority of member states chose the parliamentary way. Nevertheless, some problems emerged even though. The most problematic was situation in Ireland, Poland and the Czech Republic.

There were also proposals to hold popular vote in the Great Britain and Denmark, but the respective governments were reluctant to realize these proposals.[17] Also, a minor threat emerged in Slovakia, where the then political opposition threatened to water down the ratification. The government faced serious problems due to threat of opposition not to vote for the Treaty, if a draft Press Bill would be approved. Nevertheless, the Treaty was approved, thanks to support of the party representing Hungarian minority.[18]

Cyrillic, the French don't need to be feared of "free and undistorted competition" since this was on their demand left out from the preamble of new treaty and instead a social dimension has been accented. The Czech Republic was successful with its supposedly revolutionary proposal for procedure of reverse transfer of competences back from the Union level to the member states. Austria, with its demands to establish a firm proportion of foreign students at universities was not successful and the matter (to no surprise) was dropped. See e.g. Blahušiak, I. *Some Thoughts on the Process Leading to the Adoption of Lisbon Treaty*. In: Zborník z medzinárodnej konferencie doktorandov a mladých vedeckých pracovníkov konanej v dňoch 3. – 5. 4. 2008 v priestoroch ÚZ NR SR Častá – Papiernička. 1. vyd. Bratislava: Univerzita Komenského v Bratislave, 2008, pp. 316-327.

[15] See *European leaders sign new EU treaty in Lisbon.* Available at [online] http://www.euractiv.com/en/future-eu/european-leaders-sign-new-eu-treaty-lisbon/article-169112, cit. 19 November 2009.

[16] Hereinafter referred also as "the Treaty".

[17] See for Denmark eg. *Denmark rules out referendum on EU Treaty*. Available at [online]http://www.euractiv.com/en/future-eu/denmark-rules-referendum-eu-treaty/article-169046, cit. 20 November 2009. For the Great Britain see eg. David Cameron admits *Lisbon treaty referendum campaign is over*. Available at [online] http://www.guardian.co.uk/politics/2009/nov/04/david-cameron-referendum-campaign-over, cit. 19 November 2009.

[18] See e.g. *Slovakia, Poland ratify Lisbon Treaty*. Available at [online] http://www.euractiv.com/en/future-eu/slovakia-poland-ratify-lisbon-treaty/article-171547, cit. 18 November 2009.

Table 1 provides for more detailed overview on the ratification process of the Lisbon Treaty in the all of the Member States.

TABLE 1: RATIFICATION PROCESS OF THE LISBON TREATY

Country	**Procedure**	**Date of Ratification**
Austria	Parliamentary	13 May 2008
Belgium	Parliamentary	15 October 2008
Bulgaria	Parliamentary	28 April 2008
Cyprus	Parliamentary	26 August 2008
Czech Republic	Parliamentary	13 November 2009
Denmark	Parliamentary	29 May 2008
Estonia	Parliamentary	23 September 2008
Finland	Parliamentary	30 September 2008
France	Parliamentary	14 February 2008
Germany	Parliamentary	25 September 2009
Greece	Parliamentary	28 August 2008
Hungary	Parliamentary	6 February 2008
Ireland	Referendum	23 October 2009
Italy	Parliamentary	8 August 2008
Latvia	Parliamentary	16 June 2008
Lithuania	Parliamentary	26 August 2008
Luxemboug	Parliamentary	21 July 2008
Malta	Parliamentary	2 February 2008
Poland	Parliamentary	13 October 2009
Portugal	Parliamentary	17 June 2008
Romania	Parliamentary	11 March 2008
Slovakia	Parliamentary	24 June 2008

Slovenia	Parliamentary	24 April 2008
Spain	Parliamentary	8 October 2008
Sweden	Parliamentary	10 December 2008
The Netherlands	Parliamentary	12 September 2008
United Kingdom	Parliamentary	16 July 2008

Source: European Commission. Available at [online][http://europa.eu/lisbon_treaty/countries/index_en.htm#.

In the following subsections, attention will be focused on the three countries that were the last to ratify the Lisbon Treaty. Issues hindering or slowing down the ratification process will be described for each respective country.

2.1 IRELAND

As predictions and analyses were warning, the most problematic situation with the ratification of the Treaty was to emerge in Ireland, where, according to country's constitutional order, a referendum needed to be held. This, in the situation that the overall popular support for the Treaty was not certain,[19] raised particular concerns for meeting the "deadline" for collecting of all ratifications by the beginning of the year 2009.

Indeed, the popular support for the Treaty was not sufficient, as was shown in the referendum held on 12 June 2008. Irish voters rejected the Treaty, when only 46,6% voted for and the 53, 4% were against. Turnout was quite low, only 53,13 %.[20] The reasons for voting "no" were predominantly un-awareness of the precise content of Lisbon Treaty and fears of not sufficient protection of Irish identity and its military neutrality.[21]

Almost immediately, diplomatic attempts to "save" the ratification process of the Treaty started. Following the rejection of the Treaty in Ireland in last year's referendum and after consultations by the Irish Parliament to

[19] See *Irish 'yes' to Lisbon Treaty 'not certain'*. Available at [online] http://www.euractiv.com/en/future-eu/irish-lisbon-treaty-certain/article-170687, cit. 15 November 2009.

[20] Out of 3 million of elligible voters. See for more details *Referendum on The Lisbon Treaty (Twenty-Eighth Amendment of the Constitution Bill 2008) 12-June-2008.* Available at [online] http://www.referendum.ie/referendum/archive/display.asp?ballotid=78&page=0, cit. 17 November 2009.

[21] See Qvortrup, M. *Rebels without a Cause? The Irish Referendum on the Lisbon Treaty*. In: Political Quarterly, 2009, Vol. 80, No. 1, pp. 59-66. Also see Brugha C. M. *Why Ireland rejected the Lisbon Treaty*. In: Journal of Public Affairs, 2008, Vol. 8, No. 4, pp. 303-308.

determine the main areas of concern, the Irish government presented its requirements at the 11 - 12 December 2008 European Council.[22]

The Council agreed to retain number of Commissioners at the level provided for in the Treaty of Nice, as well as granting Ireland guarantees in the fields of taxation, military neutrality, ethical issues and workers' rights. Nevertheless, the precise legal form and scope of the guarantees was yet to be determined.

Following the March 2009 European Council, Irish Prime Minister Brian Cowen stated that "*the guarantees promised in December must be legally robust in order to reassure the public about the Treaty. Whilst I respect the fact that other Member States do not wish to re-ratify the Lisbon Treaty, I made it clear that for my part the legal guarantees will have to be attached to the EU Treaties at the next possible opportunity. Presuming that we reach a satisfactory outcome over the coming months, I believe we will have a good basis for consulting the Irish people again later this year*."[23]

This statement laid down the plan for concluding the ratification process of the Lisbon Treaty in Ireland. Although not very popular, the preferred solution came out to be a holding of new referendum on the matter, similarly to the situation that emerged in the ratification process of the Treaty of Nice in Ireland in 2001 and 2002.[24]

In the meantime, a lot changed in Ireland since the first referendum. An informational campaign of the government improved the general knowledge on the Treaty.[25] Also, economic crisis played a role as a catalyst of the moods in the Irish society; its impacts were considerable and the Irish started to realize the safeguarding economical role of the EU.[26]

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[22] *Brussels European Council 11 and 12 December 2008: Presidency Conclusions*. Dostupné z [online] *www.consilium.europa.eu/ueDocs/cms_Data/docs/104692.pdf, cit. 27. 8. 2009.*

[23] See Europan Commission. *The Lisbon Treaty an Ireland*. Available at [online] http://ec.europa.eu/ireland/lisbon_treaty/lisbon_treaty_progress/index_en.htm, cit. 20 November 2009.

[24] Ireland held two referenda to ratify the Treaty of Nice. The first one in 2001 was not successful, thus a new one was held in 2002. See e.g. Gilland, K. *Ireland's second referendum on the Treaty of Nice, October 2002*. Available at [online] www.sussex.ac.uk/sei/documents/irelandno1.pdf, cit. 18 November 2009.

[25] See e.g. *Poll shows rise in Lisbon Treaty support.* Available at [online] http://www.rte.ie/news/2009/0918/eulisbon.html, cit. 19 November 2009.

[26] See e. g, *Ireland announces Lisbon referendum date.* Available at [online] http://euobserver.com/9/28429, cit. 16 November 2009.

At the European Council meeting on 18 - 19 June 2009, legal guarantees for Ireland were agreed, meant as incentives to gain the popular support in Ireland.[27] The Decision of the Heads of State or Government of the 27 Member Stated of the EU, Meeting within the European Council, on the Concerns of the Irish People on the Treaty of Lisbon and Solemn Declaration on Workers' Rights, Social Policy and other issues were annexed to the Conclusions of the aforementioned European Council meeting. [28] It reaffirmed the commitment of the European Council to see the Lisbon Treaty to enter into force by the end of 2009.

As for the precise guarantees given to the Irish, it stated that "*provided the Treaty of Lisbon enters into force, a decision would be taken, in accordance with the necessary legal procedures, to the effect that the Commission shall continue to include one national of each Member State*."[29] It also recognized other "concerns of the Irish people" relating to taxation policy, the right to life, education and the family, and Ireland's traditional policy of military neutrality, as well as a number of social issues, including workers' rights.

The aforementioned decision of the Heads of State or Government gives legal guarantee that matters it covers will be unaffected by the entry into force of the Treaty of Lisbon. From legal point of view, it is interesting to notice that "*content* [of the Decision] *is fully compatible with the Treaty of Lisbon and will not necessitate any ratification of that Treaty.* [T]*he Decision is legally binding and will take effect on the date of entry into force of the Treaty of Lisbon…*[A]*t the time of the conclusion of the next accession Treaty…the annexed Decision in a* [form of] *Protocol* [will] *be attached..to the Treaty on European Union and the Treaty on the Functioning of the European Union*".[30]

From purely legal point of view, all of the guarantees, except for the decision not to reduce the Commission, have a form of so-called subsidiary treaty, adopted within the framework of the European Council. It will become binding on the same day as the Lisbon Treaty comes into force, i. e. 1 December 2009.

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[27] The guarantees were used for the first time in 1992 after the first referendum on the Treaty on European Union in Denmark. Danish opt-out from the European Monetary System came into the existence precisely as a result of these guarantees. See for more details *Denmark: EMU opt-out clause*. Available at [online] http://europa.eu/legislation_summaries/economic_and_monetary_affairs/institutional_and_economic_framework/l25061_en.htm, cit. 13. 11. 2009.

[28] See *Brussels European Council 18 and 19 June 2009: Presidency Conclusions*. Available at [online] www.consilium.europa.eu/ueDocs/cms_Data/docs/108622.pdf, cit. 14 November 2009.

[29] Ibid.

[30] Ibid.

The guarantees in the area of right to life, family and education will have legal effects only within the Irish territory and will not in any case prejudice the legal position and relations within other countries. They do not alter the provisions of Lisbon Treaty, but rather constitute a basis for their interpretation in respect of Ireland.

The guarantees in the field of defence and security also can be perceived as an authentic interpretation in the terms of legal theory. Nevertheless, there is one substantial difference from the former group of guarantees - these latter will apply to all Member States of the EU.

The decision not to reduce the Commission will be dealt with separately, according to the required procedure. Although nowadays the decision constitutes merely a political obligation, it is well expected to create also legal obligations. Due to this hybrid nature, it can be attributed to the category of soft-law of the EU.[31]

In the light of these developments, the second referendum took place on 2 October 2009. At bigger turnout of 59 %, more than 2/3 of voters voted for the Treaty.[32] This outcome represented a kind of turning point in ratification process. of the Lisbon Treaty in the whole EU. Very swift reactions that were brought about by result of the second Irish referendum were not expected by many. Let us analyse the impact of the second referendum in Poland and in the Czech Republic.

2.2 POLAND

Situation in Poland with the ratification of the Lisbon Treaty after defeat of eurosceptical Prime Minister Jaroslaw Kaczynski in parliamentary elections in the autumn 2007 and his substitution by more Europe-oriented Donald Tusk was rather complicated. Although the parliamentary ratification was chosen and the fact that country's parliament was one of the first to ratify the Lisbon Treaty, overall process of ratification in Poland was somewhat difficult and in the end it ended the second latest.

Although defeated, J. Kaczynski threatened the ratification of the Treaty, seeking for additional legal guarantees to protect Poland's interests in the EU. Operating with Germanophobic and homophobic arguments and

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[31] This is not said to mean that the decision will not be respected; in fact, that would be in author's point of view highly improbable, due to political sensitivity of the matter.

[32] For the Treaty voted 67, 1%, only 32. 9 % of voters were against. That represents more than 20 % swing to "yes" voters compared with 2008 vote. See for more details *Results received at the Central Count Centre for the Referendum on Treaty of Lisbon 2009*. Available at [online] http://www.referendum.ie/referendum/current/index.asp?ballotid=79, cit. 20 November 2009.

counting on fact that the votes of his party were crucial for ratification,[33] he managed to slightly delay the parliamentary phase of the process. However, a political compromise was finally struck in the spring 2008. It was agreed between to ratify the treaty by a parliamentary vote. In this atmosphere, both houses of the Polish parliament adopted the Treaty on 1 and 2 April 2008 respectively without any considerable hindering.[34]

However, Lech Kaczynski, President of Poland, stated almost immediately after the successful parliamentary ratification that he would not sign the Treaty and thus conclude the ratification process, until Prime Minister Tusk would not fulfil the political agreement guaranteeing that the terms that Poland had negotiated at the IGC 2007[35] could not be changed.

The issue then became a part of bigger struggle in the arena of domestic policy over the influence in the field of formation of Polish foreign policy between the Government and President. Thus, L. Kaczynski repeatedly promised to sign the Treaty and repeatedly broke his promises until he finally proclaimed the Treaty to be dead after June 2008 referendum in Ireland and stated that he would not be able to ratify it until the Treaty is approved by the Irish. Thus, a stalemate in ratification came into existence.

Situation altered quite radically after the October 2009 Irish referendum. Within days, L. Kaczynski invited President of the European Commission J. M. Barosso and President of the European Parliament Jerzy Buzek for a ratification ceremony. Stating that "*The fact that the Irish people changed their minds meant the revival of the treaty, and there are no longer any obstacles to its ratification,*"[36] he ratified the Treaty after year and half of

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[33] For example, in March 2008, the Polish president Lech Kaczynski warned that ratification of the Treaty without an opt-out of the Charter could allow gay activists to force Poland to accept homosexual "marriage" or civil unions. See *Kaczynski twins threaten Polish ratification of Lisbon Treaty*. Available at [online] http://euobserver.com/9/25842, cit. 19 November 2009.

[34] The Lower House (Sejm) passed the Treaty on April, 1st, 2008 by 384 votes for, 56 against and 12 abstaining. The Upper House (Senate) did so one day after by 74 votes for, 17 against and 6 abstaining. See e. g. *Polish Parliament clears EU Treaty bill*. Available at [online] http://www.euractiv.com/en/future-eu/polish-parliament-clears-eu-treaty-bill/article-171267, cit. 20 November 2009.

[35] Represented by brothers Kaczynski and having negotiated and opt-out from the application of the EU Charter on Fundamental Rights.

[36] See *President of Poland signs Lisbon Treaty*. Available at [online] http://www.telegraph.co.uk/news/worldnews/europe/poland/6290694/President-of-Poland-signs-Lisbon-Treaty.html, cit. 16 November 2009.

confusion and opposite statements, leaving the Czech Republic as the only Member State not having ratified the Lisbon Treaty.[37]

2.3 CZECH REPUBLIC

The Czech Republic was the last Member State to ratify the Lisbon Treaty. This situation was similar to the situation with ratification of the 2004 constitutional treaty, when the country was the only in the EU not to even decide if the ratification would be in a parliamentary way or by means of referendum.

Chamber of Deputies, the lower house of the Czech Parliament, started ratification process on 1 April 2008, by ordering the Treaty to be discussed in its committees for Constitutional and legal affairs, European affairs and Foreign affairs, which is not dissimilar procedure from the standard one.

The upper house of the Parliament, the Senate, however, opted for a non-standard procedure, by referring the Treaty to the Constitutional Court for inspection on its compatibility with the Constitution of the Czech Republic by its resolution from 24 April 2008.[38]

As a reaction, the Czech Constitutional Court declared on 26 November 2008[39] Articles selected by the complaining Members of the Senate of the Lisbon Treaty to be compatible with the Czech Constitution and thus opened way for parliamentary ratification. To be more precise, the Court stated that Articles 2/1, 4/2, 352/1 and 216 of the Treaty on Functioning of the EU and 2, 7, 48/6 and 48/7 of the Treaty on the European Union (after revision by the Lisbon Treaty), as well as the Charter of Fundamental Rights of the European Union are not in the violation of the Czech constitutional order.

Although this might have seemed to some as a clear-cut decision, the ratification process remained very slow, not only with President Klaus casting eurosceptic doubts, but also with uncertain support of ruling party of Civic Democrats needed for successful ratification. Doubts were also casted by the fact that the Constitutional Court had ruled only on the selected provisions and not the whole Treaty.

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[37] L. Kaczynski's signature was seen by some as a move towards 2010 presidential campaign, when President tried to secure more support by pretending to be europhile. See *Vaclav Klaus flies Eurosceptic flag alone*. Available at [online] http://www.guardian.co.uk/commentisfree/2009/oct/13/vaclav-klaus-lisbon-treaty, cit. 20 November 2009.

[38] Czech President was also a party to this proceedings.

[39] See *Decision Pl. ÚS. 19/08 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*. Available at [online] http://angl.concourt.cz/angl_verze/doc/pl-19-08.php.

Nevertheless, after political negotiations especially within the party of Civic Democrats, the Chamber of Deputies ratified the Treaty. By 125 votes for, 61 against, it approved the Treaty on 18 February 2009.[40] After some further delays, the upper house - Senate - had ratified the Treaty on 6 May 2009. Out 79 appearing on the vote, 59 voted for, 20 against, 5 abstained and 2 left the house.[41]

After this date, only Presidential signature was missing to complete the ratification process in the Czech Republic. Although there were some legal experts saying that President shall not delay his signature by any means, citing respective provisions of the Czech Constitution,[42] real progress was very slow.

The group of "defeated" Members of the Senate had further slowed down the ratification process, since they declared an intention to challenge the compatibility of the Treaty as whole with the Czech Constitution. This was welcomed move by President Klaus, who almost naturally declared its intention to wait for the second decision of the Constitutional Court.

Since the Czech Constitution provides for no limited time period within which the Members of the Senate should have filed their petition to the Court, they were able to considerably delay the whole process. The actual date of filling the Senators' petition to the Court was 29 September 2009, almost half a year since the ratification process in the both Houses of the Czech Parliament was successfully finished. Members of the Senate, represented by their colleague Jiří Obelfazer demanded the Court to clearly state "*whether the EU would still be an international organisation and not a certain "superstate" after the adoption of the Lisbon treaty*."[43]

It took another month for the Court to elaborate the final opinion on the compliance of the Treaty with the Czech Constitution as a whole. On 3

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[40] See *Parlament České Republiky, Poslanecká sněmovna. 46. schůze, 11. hlasování, 18. 2. 2009, 09:47 Lisabonská smlouva pozměňující Smlouvu o Evrop.unii*. Available at [online] http://www.psp.cz/sqw/hlasy.sqw?G=48969, cit. 18 November 2009.

[41] See Senát Parlamentu České Republiky. *181/ 6 - Vládní návrh, kterým se předkládá Parlamentu České republiky k vyslovení souhlasu s ratifikací Lisabonská smlouva pozměňující Smlouvu o Evropské unii a Smlouvu o založení Evropského společenství dát souhlas k ratifikaci*. Available at [online] http://www.senat.cz/xqw/xervlet/pssenat/hlasy?G=9887&O=7, cit. 18 November 2009.

[42] See e.g. *Rychetský v ČT ke Klausovi: Podpis smlouvy nebo vlastní stížnost*. Available at [online] http://www.ct24.cz/ceske-predsednictvi/lisabonska-smlouva/56473-rychetsky-v-ct-ke-klausovi-podpis-smlouvy-nebo-vlastni-stiznost/, cit. 21 November 2009.

[43] See *Czech senators file new complaint against Lisbon treaty*. Available at [online] http://www.ceskenoviny.cz/eu/zpravy/senatori-predlozili-novy-navrh-na-ustavni-prezkum-lisabonu/400038?id=400057, cit. 20 November 2009.

November 2009 it stated[44] that there is no variance between these two legal instruments and thus ruling out any factual reason for not concluding the ratification process in the Czech Republic. The Court declared that the Lisbon Treaty as a whole, Articles 7, 8, 9, 10/1, 13/1, 14/2, 17/1, 17/3, 19/1, 20, 21/2/h, 42/2, 47, 50/2 to 50/4 Treaty on the European Union (after revision by the Lisbon Treaty) and Articles 3, 78/3, 79/1 and 83 Treaty on Functioning of the EU are not in the violation of the constitutional order of the Czech Republic.

It also dismissed the proposals to inspect the compatibility of the Treaty on European Union and Treaty on European Community with the Czech Constitutional order.[45] It also dismissed similar claim for Art. 2, 4 and 216 Treaty on Functioning of the EU. Members of the Senate also wanted to proclaim the Decision of the Head of States and Governments in relation to the concerns of the Irish people adopted on June 18th and 19th, 2009, as an international treaty falling within the scope of Art. 10a of the Czech Constitution and thus needing further ratification. Finally the Court dismissed the claim to join the case with another case dealing with Rules of Procedure of the both Houses of Parliament.

In the meantime, European Council meeting in Brussels had agreed on legal guarantees for the Czech Republic, similar in form to those granted to Ireland. This was a response to the last demand of President Klaus, who asked for an opt-out in application of the Charter of Fundamental Rights of the EU within the territory of the Czech Republic.[46] Conclusions of 29 - 30 October 2009 European Council state on this matter that: "*Heads of State or Government have agreed that they shall, at the time of the conclusion of the next Accession Treaty and in accordance with their respective constitutional requirements, attach the Protocol…to the Treaty on European Union and the Treaty on the Functioning of the European Union. In this context, and with regard to legal application of the Treaty of Lisbon and its relation to*

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[44] See *Nález sp. zn. Pl. ÚS 29/09 z 3. 11. 2009*. Available at [online] http://www.concourt.cz/clanek/GetFile?id=2150, cit. 18 November 2009.

[45] A terminology note: Complainants denoted the contested instruments as the Maastricht Treaty (for which the Court deduced that it should be the TEU in "Maastricht", i. e. 1992, version) and "Treaty of Rome" (for which the Court deduced more that it should be the TEC after the revision by the TEU in 1992). This is, in the most decent way to say, a very strange terminology showing lack of some elementary knowledge on the primary law of the EU.

[46] President Klaus demanded an opt-out from the Charter, saying he was attempting to shield the Czech Republic from property claims made by ethnic Germans expelled from the country after the WW II. See *Lisbon treaty turmoil as Czechs demand opt-out*. Available at [online] http://www.guardian.co.uk/world/2009/oct/09/eu-lisbon-treaty-czech-republic, cit. 17 November 2009; *EU grants Czech Republic Lisbon treaty concession*. Available at [online] http://www.guardian.co.uk/world/2009/oct/30/czech-republic-lisbon-treaty, cit. 17 November 2009.

legal systems of Member States, the European Council confirms that : a) The Treaty of Lisbon provides that "competences not conferred upon the Union in the Treaties remain with the Member States" (Art. 5(2) TEU); b) The Charter is "addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law" (Art. 51(1) Charter)."[47]

Thus, enlarging the area of application of Protocol No 30 of the Lisbon Treaty on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom to the territory of Czech Republic has catered the last demand by President Klaus.

The effects of these decisions, strengthened by the result of October 2009 referendum in Ireland were seen almost immediately. Only 6 hours after the second ruling of the Czech Constitutional Court, President Klaus issued his proclamation. He stated that although expecting the decision of the Constitutional Court, he "*deeply disagrees*" with its contents and reasoning. He also challenged legal quality and form of the decision, stating that "*it is not a neutral legal analysis, but a biased political pledge for the Lisbon Treaty produced by its supporters*" and went on saying that this fact can be seen on "*not-fully-adequate confrontational style of elaborating and presentation of the decision*".[48] After final remark that "*the Czech Republic ceases to be a sovereign state*"[49] after entry of the Lisbon Treaty into force, he shortly announced that he had ratified the Treaty.[50]

3. CONSEQUENCES FOR THE DECISION MAKING PROCESS OF THE COMMISSION

As we have seen from the previous two sections of this contribution, Lisbon Treaty experienced not only a very long process of "birth" but also sometimes rather twisty process of its ratification. Due to the delays in Ireland, Poland and the Czech Republic, it was not possible to meet the date

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[47] *Brussels European Council 29 - 30 October 2009. Presidency Conclusions*. Available at [online] www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/.../110889.pdf, cit. 14 November 2009.

[48] See *DOKUMENT: Prezident Klaus vysvětluje, proč podepsal Lisabon*. Available at [online] http://zpravy.idnes.cz/dokument-prezident-klaus-vysvetluje-proc-podepsal-lisabon-pqc-/domaci.asp?c=A091103_161503_domaci_kot, cit. 18 November 2009.

[49] Ibid.

[50] Jiří Obelfalzer did not give up his struggle against the Treaty, claiming that he would consider lodging a complaint with the European Court of Human Rights for failure of the Czech Republic to grant him a lawful proceedings in the Czech Constitutional Court. See *Trapnost s Lisabonem končí, radují se politici. Jiní hrozí Štrasburkem*. Available at [online] http://zpravy.idnes.cz/trapnost-s-lisabonem-konci-raduji-se-politici-jini-hrozi-strasburkem-1kf-/domaci.asp?c=A091103_101750_domaci_bar, cit. 20 November 2009.

of entry to force projected to the beginning of the year 2009. It was also not possible to conclude the process well ahead before end of the term of 2004-2009 Commission, set to the 31 October 2009. Thus, as a consequence of these delays, new Commission has not[51] been formed and some doubts are casted over its activities.

Some of these doubts are related to the question whether the enforceability of the Commission decisions is anyhow hindered as a result of the situation described above. In the next subsections, let us explore the possibility, whether, and if yes, under which conditions, these legal acts can face any legal difficulties in the process of their application and enforcement emanating from the aforementioned conditions.

3.1 RELEVANT PROVISION OF THE TREATY

From legal point of view, the situation when the "old" Commission is supposed to serve for a prolonged term is clear. Although not expressly provided for in the Treaties, primary law solves it by analogy. Article 5 Treaty on the European Union (after the revision by the Treaty of Nice; hereinafter referred to as "TEU") states that "*…[T]he Commission…shall exercise [its] powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the other provisions of this Treaty*."[52] This is acknowledged also in the Article 7 Treaty Establishing the European Community (after the revision by the Treaty of Nice, hereinfater "TEC"): "*Each institution shall act within the limits of the powers conferred upon it by this Treaty*."[53]

Thus, even if the Commission should serve only for 5-years term only, as Article 214 TEC state in its first paragraph and the Treaties does not expressly state the procedure to be followed in the event of formation of a new Commission only after the expiry of mandate of the previous one, the situation that has been caused by the delays in the ratification process of the Lisbon Treaty does not pose any legal difficulties.

The primary law of the EU provides at two place for solution for similar situations when either the whole body of Commissioners is censured or a single Commissioner resigns or is compulsory retired. In the Article 214 TEC an exemption is made from the five years rule in the case if the motion

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[51] At the time of writing, which is November 2009.

[52] Art. 5 Treaty on the European Union (after the revision by the Treaty of Nice). OJ C 321 E, 29 December 2006, p. 1.

[53] Art. 7 Treaty Establishing the European Community (after the revision by the Treaty of Nice). OJ C 321 E, 29 December 2006, p. 1.

of censure was adopted. Then, as the TEC provides, *"[The Commission] shall continue to deal with current business until [it is] replaced in accordance with Article 214. In this case, the term of office of the Members of the Commission appointed to replace them shall expire on the date on which the term of office of the Members of the Commission obliged to resign as a body would have expired*."[54]

Similarly, in the last paragraph of the Article 215 TEC provides for the situation when a single Commissioner is retired or resigns. Then, "*Members of the Commission shall remain in office until they have been replaced or until the Council has decided that the vacancy need not be filled.*"[55]

We can see a strong emphasis on continuity of work of Commission, that is to be achieved even in situations when it was censured or it is short of one or more regular members. Per analogiam it is possible to set out rules for the situation that was brought about in November 2009.

We can interpret the wording of abovementioned provisions of Article 215 TEC so that the Commission shall continue in its office. However, we shall not forget to read out the limitation set thereof, stating that the Commission shall deal only "*with current business*". This limitation is very important to be noted, in order identify any legal difficulties in enforcement of Commission decisions adopted in the period between expiry of term of office of the old Commission and forming of new one.

We can also set out the rules for appointment procedure in 2014. Article 215 TEC states that *"[T]he term of office of the Members of the Commission appointed to replace [the censured Commission] shall expire on the date on which the term of office of the Members of the Commission obliged to resign as a body would have expired.*"[56] Thus, if we per analogiam perceive the situation provided for in Article 215 TEC, the wording of this provision leave no room for any other interpretations but the one concluding that the term of Commission formed after the first Commission of President Barosso shall end in 2014, irrespectively when exactly it is formed.

From this brief analysis, we can conclude that there is no other limitation for adoption of Commission decisions than the fact they cannot be adopted outside the framework of "*current business*".

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[54] Art. 214 Treaty Establishing the European Community (after the revision by the Treaty of Nice). OJ C 321 E, 29 December 2006, p. 1.

[55] Art. 215 Treaty Establishing the European Community (after the revision by the Treaty of Nice). OJ C 321 E, 29 December 2006, p. 1.

[56] Ibid.

3.2 CONSEQUENCIES OF THE "CURRENT BUSINESS" LIMITATION

If we intend to inspect consequences of the "*current business*" limitation, we have to analyze the procedure that can bring them about.

To think about any limitations to the enforceability of the decisions of the Commission, we can take a decision imposing a fine in the framework of the EC competition policy as the first example. In this case, the "*current business*" limitation is hardly probable to be invoked, since competition policy is falling within the ambit of "*current business*".

Another example could be adoption of a decision in a policy area, where the Commission had not acted acting before. This would be more probable case for application of the "*current business*" limitation. Let's inspect the possible procedure in this case.

Article 230 TEC states that (only) "*The Court of Justice shall review the legality of acts adopted…by the Commission…, other than recommendations and opinions...*"[57] It also determines that the Court *"…shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers*."[58] Also, any natural or legal person may institute proceedings against a decision addressed to them or against a decision which is of their direct and individual concern, even if addressed to another person(s).

This Article provides us with some substantial answers. Firstly, it determines, who can challenge a decision of the Commission. Only the Parliament, the Council and any concerned legal or natural person can proceed with their claim. It is rather improbable for the Commission to challenge its decisions themselves.

Another point is the grounds that these decisions can be challenged on. Convening with the "*current business*" limitation, the claims of lack of competence, infringement of either the Treaty or essential procedural requirement, as well as misuse of powers could be invoked.

We have thus a certain number of potential subjects that can hamper the enforceability of the Commission decisions for claiming them to be out of

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[57] Art. 230 Treaty Establishing the European Community (after the revision by the Treaty of Nice). OJ C 321 E, 29 December 2006, p. 1.

[58] Ibid.

"*current business*" and thus to fall into some or all of the reasons for annulation by the Court of Justice.

However, the last section of Article 230 TEC provides for a very stringent limitation. It sets out the foreclosure period of two months for the proceedings to be started. If an authorized subject fails to institute the proceedings under Art. 230 TEC "*within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be*",[59] the Court has no power to declare a decision that would be challenged this way as void.

4. CONCLUSIONS

Thus, we can see that there really is a leeway for introduction of a new factual reason for challenging the legality of the decisions of the Commission, represented by using the "current business" limitation and Art. 230 TEC. If such a proceeding was incited and would be successful, it would hamper the enforceability of the Commission decisions. Nevertheless, if read the aforementioned Article to the end, we encounter a stringent limitation of 2 months, which makes the procedure above rather difficult to take and effectively minimalises number of such claims to the number located at the scale of numbers not very far away from zero.

Thus, we can conclude, that rather complicated ratification process of the Lisbon Treaty has had, at the time of writing, some not so positive consequences on the process of the formation of new Commission. Nevertheless, owing to the rules set out by the Treaties, this rather non-positive situation shall not have in short or even medium time-scale substantial implication to the functioning of the Commission by radically hampering enforceability of its decisions. These would be brought about probably in the situation when a new Commission would not be formed for a longer time period, which at the time of writing does not appear to be the case.

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REFERENCES FOR A PRELIMINARY RULING TO THE EUROPEAN COURT OF JUSTICE

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Abstract
References for a preliminary ruling are specific to Community law. Whilst the European Court of Justice is, by its very nature, the supreme guardian of Community legality, it is not the only judicial body empowered to apply Community law. That task also falls to national courts, in as much as they retain jurisdiction to review the administrative implementation of Community law, for which the authorities of the Member States are essentially responsible; many provisions of the Treaties and of secondary legislation - regulations, directives and decisions - directly confer individual rights on nationals of Member States, which national courts must uphold. National courts are thus by their nature the first guarantors of Community law. To ensure the effective and uniform application of Community legislation and to prevent divergent interpretations, national courts may, and sometimes must, turn to the Court of Justice and ask that it clarify a point concerning the interpretation of Community law, in order, for example, to ascertain whether their national legislation complies with that law. Petitions to the Court of Justice for a preliminary ruling are described in art.234 of the Treaty.

Key words
Community law; European Court of Justice; Community legality.

Preliminary action is the most significant action brought before the European Court of Justice, which ensures uniform application and interpretation of European law.

According to art.234 of the Treaty forming the European Community, if before a court of a Member State it is raise an issue of interpretation of Community law, that court can (and if it is a supreme court, whose decision can not be contested according to the national procedure is required) ask the European Court of Justice to rule by a decision of interpretation on EU rules. Therefore, to ensure uniform interpretation of Community law, a system of cooperation was preferred which stated that European Court of Justice has to be consulted by national courts when the latest have to apply a provision of Community law in a dispute with reference to them. They have

to know if this provision is valid or to specify the meaning that they intend to give it.[1]

Of particular importance to obtain a response from the European Court of Justice is the wording of a question affected by the national court. The questions raised by them have certain limits well established namely: questions must be in connection with the trial pending before them and they have to reffer to the interpretation or validity of EU rules, so no general or policy questions are to be made. In such cases the Luxembourg Court pointed out that the problem posed by national courts would not require clarification and recalls also the conditions on which this has to be form.

Interpretation or assessment of the validity of EU rules, amended by the European Court of Justice is required both by the mandatory court (and for all other courts that are called in the national remedies to adjudicate the same issue), and by other courts before which the text in question will be raised.[2] On the other hand, the EU court case is off the idea that the obligation to use the procedure is no preliminary question for the national court if the meaning of community is so clear, that it leaves no place to reasonable doubt or if the provision has formed the subject of the questions in the past and the European Court has already ruled.[3] Therefore, the national judge himself becomes the Community courts. After all, finding disability national law against the norm is not the attribute of Community European Court of Justice, but the seised national court. That is why there is a need of knowledge by the national judge of the acquis communautaire, which includes, as already noted, the positive rules of Community law and their interpretation by the European Court in Luxembourg.

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[1] Jurisprudence has shown that different issues relevant for a preliminary ruling is based on a specific interpretation of another national law than that of their national courts, in connection with the interpretation chosen it is hypothetical, it is especially necessary to give reasons for decision reference to this issue. Thus, the issues to be sent are inadmissible in the situation that the national court gives no explanation of why they consider the interpretation invoked the only possible;

[2] On Matheus decision the European Court of Justice showed that a question on the possibility of accession of Spain, Portugal and Greece to the European community is not of its competence;

[3] Procedure of the prior actions of the validity of the Community legal nome is an incidental procedure. However, European Court of Justice on the validity of a Community legal rule will check in terms of form and drawbacks of the background material naturally in the context of all EU rules and under the proceding rule with respect for the hierarchy Community rules. In this hierarchy of rules first place is occupied by original law, the second place is the generally accepted principles of law of the Member States and third place is the public international law treaties concluded by the European community with other subjects of Public International Law. These three categories are followed by secondary Community law, within which there is also a hierarchy between the Community regulations and the execution, Fabian Gyula, European Court of Justice – Supranational Court of Justice, op.cit.page164.

The national court when deciding to address to the European Court a question, it will have to submit an application through a decision which will become the document instituting the Court and on its submission to the Registry Court that will mark the start of proceedings preliminary action. This decision has the character of a conclusion and can be linked to the conclusion that it has granted a new term or an expert in Romanian law.

As regards the formal requirements of that decision, because on Community level are not laid down such rules, courts are guided by their own procedural rules drafting sentences (France) or conclusions (Germany and England), the important issue being the decision to bring it from a national court, to include the question of the court and necessary reasons in fact and in law. It was noted that errors in forms are handled by the Court with great understanding, the following fact and substance of the question as it appears not even proceed to reformulate the question when it is too specific or too vague.

Question has been raised in practice which is the sanction for not recourse to the Court stated that such attitude of a court is a case of non-Community Treaties (the law), which can be repaired by means of an action under art.226 and art.227 of the Treaty. But, this action may be brought only by the Commission or a State Member of the Union. For ferenda law should be introduced an attack brought by parties to the dispute in the courts that decide ultimately and that refused referral to court, despite the fact there are arguments that this was necessary to resolve the dispute.

Court decision will be communicated directly to the Court of Justice, from the secretariat to the office or from graft to graft, and not through Ministry of Justice or other diplomatic channels, to improve cooperation between national courts and Community. Thus, the decision is sent to the Court in Luxembourg together with the entire file with or without an address written by the national court.

Since the national court is the one who reffers to the European Court, he may withdraw at any time this referral. If the national court decision to reffer to the Community is attacked by domestic remedies and the National Supreme Court suspended or revoked for reasons of illegality referral decision, the Court finds that the action has become obsolete and resolution. It should be noted that the onset of an appeal against the decision of the referral has no effect on dispute settlement proceedings before the European Court of Justice. Community is announced when the court registry after the national court that the appeal or appeal against the decision of referral have suspensive effect under national law, the Court suspends the process.

Regarding the interpretation and effect of Community law over national courts in preliminary rulings, the Treaty of Rome is silent, but the answer to this question was developed gradually by the Court. A preliminary ruling is mandatory for the national court that solicited it. Court of Justice ruled that the purpose of the preliminary ruling is to decide on the law and this

decision is binding fo national courts in the interpretation of Community provision and Community act in question. National Court which judges one appeal against the decision of the first national court requested preliminary interpretation is bound by the decision of the Court, when national courts are not bound by substantive decisions of the supreme court of the Member State concerning the interpretation of Community law. Even if the supreme court to obtain a preliminary ruling from the European Court of Justice, the court is required to fund the preliminary ruling, not the National Supreme Court decision.

In principle, the court's interpretation of Community law is applicable at the time of entry into force and apply also to existing legal relationship before the decision. A provision declared by the Court to be invalid, must be regarded as such upon entry into force. In any event, under the principle of certainty of legal relations and declare invalid when a Community measure has considerable economic and legal onerous, the Court limited the temporal effects of its decision.

Due to the particular features of national legal systems of Member States where there can prior actions, would create a Community law for each Member State in the interpretation and enforcement of valid legal rules created by the bodies. The base for preliminary action is the report of collaboration, mutual trust between the Community courts and national courts with mutual respect skills.

It has been observed in practice, however, an action reserved towards the European Court of Justice by the national judges for the purposes of its referral of questions of interpretation due to incorrect knowledge or ignorance of mechanism and purpose of preliminary action. Higher courts, including, have this attitude and refuse to have a compliance obligation to notify the European Court. Also in practice it was found that the courts sometimes complain that the Court's decision making process takes too much discretion on the wording, clarifying questions asked and shows that judicial dialogue between national courts and Community courts can be improved. Also to be noted that in respect of proceedings before the European Court it takes a long time, which means a delay to resolve the dispute before the national court, which involves the negative rise of economic, social and financial consequences. Some practitioners consider that even translation of the allegations in French, and all documents sent to the Community courts are an impediment when refers to the Court in Luxembourg.

It is known that to relieve the Court of high volume of activity in 1989 was established the Court of First Instance or the Court of First Instance, but the division of powers has not brought urgency regarding the procedure prior actions, the power to resolve, they remain still below monopoly Court which decides in this case at first and in the last.

In conclusion we must state that most of the mentoring decisions, establishing general principles in matters of law were taken during this procedure. Recall here the validity of direct and priority application of Community law, the responsibility of the office of Member States, fundamental rights, fundamental freedoms of the common market or treatment nondiscriminatory in labour industry in terms of sexuality.

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ODVOLACÍ MECHANIZMUS V MEDZINÁRODNEJ INVESTIČNEJ ARBITRÁŽI

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Abstract in original language
Investičná arbitráž je postavená na jednostupňovom konaní. V súčasnosti je možné vydaný nález zrušiť len za reštriktívne stanovených dôvodov, ale nie je možný jeho prieskum v rámci odvolania. Prebieha však diskusia, či nie je vhodné vytvoriť aj odvolací orgán v rámci systému investičnej arbitráže, ktorý by zamedzil rozporným rozhodnutiam, jednotnému výkladu ustanovení a tým zvýšil legitimitu celého systému. Tento príspevok sa snaží zhrnúť túto diskusiu a zároveň upozorniť aj na iné možnosti vývoja investičnej arbitráže.

Key words in original language
Investičná arbitráž; prieskum nálezu; odvolací mechanizmu.

Abstract
System of investment arbitration is a single-tiered system. Rendered award can be challenged and set aside only on strictly defined reasons. However, various governments and institutions are discussing the possibility to introduce appellate mechanism to the system of investment arbitration as a panacea to avoid inconsistent decisions, strength the common interpretation of legal concepts and to increase the legitimacy of the system. This contribution tries to summarize the discussion and draws attention to other possible means how to achieve desired goals.

Key words
Investment arbitration; review of award; appellate mechanism.

ÚVOD

Tento rok uplynulo 50 rokov od podpísania prvej dvojstrannej dohody o ochrane investícií, ktorá predpokladala riešenie sporov medzi štátom a zahraničným investorom prostredníctvom arbitráže. O necelých tridsať rokov neskôr bol podaný prvý návrh investora na zahájenie arbitráže proti štátu.[1] A od tohto okamihu sa investičná arbitráž rozvíjala a pribúdal počet arbitrážnych podaní.

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1 MARSHALL, Fiona. *Defining New Institutional Options for Investor-State Dispute Settlement* [online]. [Winnipeg (Kanada)]: International Institute for Sustainable Development, september 2009[cit. 14. novembra 2009]. Dostupné na World Wide Web <http://www.iisd.org/publications/pub.aspx?pno=1174>. str. 1.

Investičná arbitráž vychádzala z predchádzajúcich právnych vzorov a bola nastavená ako jednostupňové konanie, ktoré bolo zakončené konečným rozhodnutím záväzným pre strany. S rozvíjajúcou sa rozhodovacou činnosťou sa začali vyskytovať aj prípady rozporných nálezov. A tak sa rozvinula diskusia o možnosti odvolania voči nálezom v investičnej arbitráži.

Tento príspevok sa pokúša zhrnúť súčasný stav investičnej arbitráže s poukázaním na súčasné možnosti prieskumu vydaných nálezov. Rozlišuje možnosti prieskumu nálezu vydaného v konaní vedenom Washingtonským strediskom pre riešenie sporov z investícií (ICSID) a nálezov vydaných mimo ICSID.

V ďalšej časti popisuje stav diskusie o odvolaní v investičnej arbitráži. Zameriava sa úpravu v investičných zmluvách uzatvorených Spojenými štátmi americkými, ktoré sú najväčším presadzovateľom myšlienky odvolania. Následne upozorňuje na iniciatívu Sekretariátu ICSID, ktorý sa pokúsil navrhnúť vytvorenie odvolacieho orgánu v rámci ICSID. V ďalších častiach sa pokúša zhrnúť dôvody pre umožnenie odvolania, ale aj nevýhody, ktoré by prinieslo a na záver aj ťažkosti pri vytváraní odvolacieho orgánu.

Posledná časť načrtáva iné možnosti, ako odstrániť nedostatky súčasnej investičnej arbitráže, ktoré viedli k úvahám o umožnení odvolania.

1. SÚČASNÉ MOŽNOSTI PRIESKUMU VYDANÝCH NÁLEZOV

1.1 MOŽNOSTI PRIESKUMU NÁLEZOV VYDANÝCH MEDZINÁRODNÝM STREDISKOM PRE RIEŠENIE SPOROV Z INVESTÍCIÍ (ICSID)

Rozhodcovský nález vydaný v rámci systému Dohovoru o riešení sporov z investícií medzi štátmi a občanmi druhých štátov (ďalej aj „Washingtonský dohovor“)[2] môže byť preskúmaný len taxatívne stanovenými spôsobmi. Arbitráž podľa Washingtonského dohovoru tvorí uzatvorený systém, takže nález nie je možné podrobiť iným opravným prostriedkom, ako tým, ktoré predvída samotný Washingtonský dohovor.[3]

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2 420/1992 Sb.. *ICSID Convention, regulations and Rules* [online]. [Washington (USA)]: International Centre for Settlement of Investment Disputes, apríl 2006 [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>.

3 čl. 53 ods. 1 Washingtonského dohovoru. YANNACA-SMALL, Katia. *Improving the System of Investor-State Dispute Settlement: An Overview* [online]. [Paríž (Francúzsko)]: Organisation for Economic Co-operation and Development, február 2006 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*www.oecd.org/dataoecd/3/59/36052284.pdf* >. str. 4.

Strana, či už ide o štát alebo investora, môže požiadať o výklad nálezu[4], revíziu nálezu[5] v prípade objavenia nových skutočností alebo podať návrh na zrušenie nálezu[6].

O výklade nálezu, alebo o rozsahu nálezu, rozhoduje pôvodný tribunál. Iba ak nie je možné opätovne zvolať pôvodný tribunál, ustanoví sa nový.

Rovnaký systém funguje aj pre prípad revízie nálezu. V tomto prípade sú strany ešte obmedzené čo do kvality novej skutočnosti, ktorá umožňuje revíziu nálezu, a čo do lehoty, v ktorej je možné návrh a revíziu podať. Aby bolo možné podať návrh na revíziu nálezu, musí sa objaviť skutočnosť, ktorá rozhodujúcim spôsobom ovplyvňuje nález. Zároveň strana, ktorá návrh podáva, nevedela o tejto skutočnosti počas pôvodného konania a svoju nevedomosť nespôsobila vlastnou nedbalosťou. Návrh na revíziu musí byť podaný do 90 dní od objavenia sa novej skutočnosti, maximálne však do troch rokov od vydania nálezu.

V prípade zrušovacieho konania o náleze už nerozhoduje pôvodný tribunál. Samotné zrušenie je povolené len z dôvodov taxatívne vymedzených. Tieto dôvody sa týkajú procesných vád na strane samotného tribunálu, takže je pochopiteľné, prečo o nich rozhoduje iný orgán. Nález je možné zrušiť len v prípade, ak nebol tribunál riadne ustanovený, tribunál zjavne prekročil svoju právomoc, na strane člena tribunálu sa vyskytla korupcia, počas konania došlo k závažnému porušeniu základných procesných pravidiel alebo nález nebol odôvodnený. Aj v tomto prípade je možnosť podať návrh na zrušenie obmedzená lehotami. Návrh je možné podať len do 120 dní od vydania nálezu, prípadne do 120 dní od zistenia, že nález bol ovplyvnený korupciou člena tribunálu.

Ako už bolo povedané, o zrušení nerozhoduje pôvodný tribunál. Za účelom posúdenia žiadosti na zrušenie nálezu sa zriadi trojčlenný ad hoc výbor. V prípade, ak výbor rozhodne o zrušení nálezu, spor môže byť opätovne predložený na rozhodnutie novému tribunálu.

Ani jedna z vyššie uvedených možností prieskumu nálezu neumožňuje vecný prieskum nálezu. Washingtonský dohovor sám vylučuje podrobiť nález odvolaniu. Takže v súčasnosti investičná arbitráž vedená v rámci Washingtonského dohovoru je len jednostupňová bez možnosti plnohodnotného odvolania.

1.2 MOŽNOSTI PRIESKUMU NÁLEZOV VYDANÝCH MIMO ICSID

4 čl. 50 Washingtonského dohovoru

5 čl. 51 Washingtonského dohovoru

6 čl. 52 Washingtonského dohovoru

Washingtonský dohovor, a systém investičnej arbitráže v rámci neho, nie je jediným spôsobom riešenia sporov medzi zahraničným investorom a štátom. V dvojstranných dohodách o ochrane investícií sa ako spôsob riešenia sporov medzi štátom a zahraničným investorom vyskytuje aj možnosť predložiť spor stálemu rozhodcovskému súdu[7] alebo tribunálu ad hoc[8].

V takomto prípade je rozhodcovský nález podrobený obdobnému režimu[9], ako je to pri náleze vydanom v rámci medzinárodnej obchodnej arbitráže. Takže o možnosti prípadného prieskumu vydaného nálezu bude rozhodovať národný právny poriadok v štáte vydania nálezu, prípadne v štáte, kde by mal byť nález vykonaný.

Môžeme povedať, že možnosti prieskumu vydaných nálezov sú v súčasnosti vo veľkej miere harmonizované. Podľa informácií na internetových stránkach UNCITRAL[10] približne 60 jurisdikcií prijalo modelový zákon UNCITRAL o medzinárodnej obchodnej arbitráži[11] (ďalej aj „modelový zákon UNCITRAL“) ako svoj domáci zákon a mnoho iných sa ním nechalo inšpirovať. Čo sa týka výkonu rozhodcovských nálezov, tak až 144 štátov[12] je zmluvnou stranou Dohovoru o uznaní a výkone cudzích rozhodcovských nálezov[13] (ďalej aj „Newyorský dohovor“). Z týchto dôvodov sa obmedzím

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7 Napr. dohoda medzi ČR a Velkou Britániou 646/1992 Sb.

8 Napr. dohoda medzi ČSFR a Holandskom 569/1992 Sb., dohoda medzi ČSFR a SRN 573/1992 Sb.

9 YANNACA-SMALL, Katia. *Improving the System of Investor-State Dispute Settlement: An Overview* [online]. [Paríž (Francúzsko)]: Organisation for Economic Co-operation and Development, február 2006 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*www.oecd.org/dataoecd/3/59/36052284.pdf* >. str. 6.

10 *Status 1985-UNCITRAL Model Law on International Commercial Arbitration* [online]. United Nations Commission on Internationa Trade Law [cit. 14. novembra 2009]. Dostupné na World Wide Web <*http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html* >.

11 UNCITRAL. *1985-UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006* [online]. United Nations Commission on Internationa Trade Law [cit. 14. novembra 2009]. Dostupné na World Wide Web <*http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf* >.

12 *Status 1958-Convention on the Recognition and Enforcement of Foreign Arbitral Awards* [online]. United Nations Commission on Internationa Trade Law [cit. 14. novembra 2009]. Dostupné na World Wide Web <*http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html* >.

13 *74/1959 Sb.. 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York" Convention)* [online]. United Nations Commission on International Trade Law [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html>.

len na modelový zákon UNCITRAL a Newyorský dohovor pri posudzovaní možností prieskumu nálezov.

1.2.1 MODELOVÝ ZÁKON UNCITRAL

Modelový zákon umožňuje buď opravu a interpretáciu vydaného nálezu[14] alebo zrušenie nálezu.[15]

Tribunál, ktorý vydal nález, môže z vlastnej iniciatívy alebo na základe žiadosti jednej zo strán, ktorá o tom upovedomila druhú stranu, opraviť chyby v počtoch, prípadne preklepy. Taktiež môže na žiadosť strany, ktorá opätovne musela upovedomiť aj druhú stranu, interpretovať niektorú časť nálezu. Táto interpretácia sa potom stane súčasťou samotného nálezu. Opravu alebo interpretáciu je možní iniciovať v lehote 30 dní od vydania nálezu. V tomto prípade teda nejde o žiadny plnohodnotný prieskum nálezu, ale o kontrolu preklepov, prípadne len dovyjasnenie textu.

Modelový zákon nepripúšťa iný opravný prostriedok voči rozhodcovskému nálezu, ako je možnosť jeho zrušenia. A samotný návrh na zrušenie nálezu je možné podať len za taxatívne stanovených dôvodov. Týmito dôvodmi sú nespôsobilosť strany alebo neplatnosť arbitrážnej doložky, strana nebola riadne upovedomená o ustanovení rozhodcu alebo rozhodcovského konania, alebo nemohla v konaní riadne uplatniť svoje požiadavky, nález sa týka sporu, pre ktorý nebola uzatvorená rozhodcovská zmluva, alebo nález presahuje rozsah zmluvy, rozhodcovský tribunál nebol riadne ustanovený. O zrušení nálezu bude rozhodovať národný súd, nie medzinárodný orgán či tribunál. Tento súd môže zrušiť nález aj z vlastného podnetu, ak predmet sporu nie je možné rozhodnúť v arbitráži, prípadne rozhodnutie bolo v rozpore s verejným poriadkom krajiny, v ktorej je o zrušení nálezu rozhodované (t.j. v štáte, kde bol nález vydaný). Ani v tomto prípade nie je možné hovoriť o plnohodnotnom prieskume nálezu po vecnej stráne. Hoci sa vyskytli prípady, kedy niektoré súdy prostredníctvom verejného poriadku rozširovali rozsah prieskumu nálezu[16], nie je možné hovoriť o možnosti odvolania prostredníctvom tohto inštitútu. Samotné dôvody sa týkajú na jednej strane opäť procesných vád a na druhej samotných predpokladov arbitráže, nie vecnej stránky sporu.

Modelový zákon UNICTRAL tiež upravuje postup uznania a výkonu rozhodcovského nálezu. Tento postup a najmä dôvody prečo nie je možné

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14 čl. 33 modelový zákon UNCITRAL.

15 čl. 34 modelový zákon UNCITRAL.

16 TAMS, Christian J. An Appealing Option? The Debate about an ICSID Appellate Structure. *Essays in Transnational Economic Law* [online]. 2006, no. 57 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*http://ssrn.com/abstract=1413694* >.str. 10.

nález vykonať sú obdobné ako v prípade New Yorkského dohovoru. Preto budú rozvedené nižšie.

1.2.2 NEWYORSKÝ DOHOVOR

Newyorský dohovor je významným úspechom v oblasti zjednávania unifikačných zmlúv. Vďaka vysokému počtu zmluvných strán je jedným z hlavných dôvodov obľuby medzinárodnej obchodnej arbitráže, keďže vydaný nález je možné pomerne jednoducho uznať a vykonať až v 144 krajinách, ktoré pokrývajú väčšinu medzinárodného obchodu.

Jeho rozšírenosť je aj jedným z faktorov, ktoré vedú strany i v sporoch v rámci zahraničných investícií k tomu, aby svoje spory riešili arbitrážou. I Washingtonský dohovor upravuje jednotne postup výkonu rozhodcovského nálezu v zmluvných štátoch.[17] Ak sa však strany rozhodnú, že svoj spor nepredložia ICSID, ale radšej využijú medzinárodnú arbitráž určenú primárne medzinárodnému obchodu, tak vydaný nález bude pomerne jednoducho vykonateľný vďaka Newyorskému dohovoru.

Dohovor upravuje v čl. V dôvody, prečo nie je možné rozhodcovský nález vykonať. Rozhodovanie o uznaní a výkone nálezu je poslednou možnosťou, kedy je možné uskutočniť nejaký prieskum nálezu. V tomto štádiu je možné nález nevykonať, a teda ho aj preskúmať, z obdobných dôvodov, ako je to pri jeho zrušení. Strana požadujúca neuznania a nevykonanie nálezu musí preukázať, že nález bol vydaný proti stane, ktorá nebola spôsobilá k jednaniu v arbitráži, prípadne rozhodcovská doložka bola neplatná, strane nebola riadne vyrozumená o ustanovení rozhodcu alebo nemohla z nejakých dôvodov uplatniť svoje požiadavky v konaní, nález sa týkal sporu, ktorý strany nepodrobili rozhodcovskej zmluve, alebo presahuje rozsah zmluvy, alebo zloženie tribunálu alebo vedenie konania nebolo v súlade s dohodou strán, či právom krajiny, kde konanie prebiehalo, alebo že nález nie je ešte pre strany záväzný, alebo bol zrušený alebo jeho výkon odložený v krajine vydania. Aj o uznaní a výkone bude rozhodovať národný súd. Opätovne má možnosť preskúmať nález aj z pohľadu arbitrability sporu podľa miesta uznania výkonu a podľa verejného poriadku.

Aj pri týchto dôvodoch, keďže ide o obdobné ako v predchádzajúcej časti, môžem zhrnúť, že ide o prieskum procesného postupu a predpokladov konania rozhodcovského konania, nie o plnohodnotný vecný prieskum.

1.2.3 ŠPECIFICKÉ MOŽNOSTI PRIESKUMU NÁLEZOV VYDANÝCH MIMO ICSID

Keďže medzinárodná arbitráž je založená na dohode strán, tak aj rozhodovanie o spore zahraničnej investície prostredníctvom tohto postupu, bude regulované primárne vôľou strán. Strany sa môžu dohodnúť na

17 čl. 53 – 55 Washingtonského dohovoru

špecifikách arbitrážneho postupu vo svojom konkrétnom prípade. Takže strany môžu doplniť svoju dohodu o arbitráži aj ustanovením, v ktorom si upravia prípadné odvolanie. A takto sa môže štát a zahraničný investor dohodnúť, že prvý nález bude možné predložiť na prieskum novému tribunálu, ktorý ho preskúma aj z vecnej stránky. Tým si strany pre konkrétny prípad vytvoria možnosť vlastného plnohodnotného odvolania.

Špecifická možnosť prieskumu je možná v prípade, ak sa strany dohodli, že svoj spor predložia Medzinárodnému rozhodcovskému súdu Medzinárodnej obchodnej komory v Paríži.[18] Jeho Pravidlá rozhodcovského konania (ďalej aj „Pravidlá MOK“)[19] upravujú špecifický prieskum pripravovaného nálezu ešte pred jeho samotným vyhlásením. Podľa čl. 27 Pravidiel MOK musí byť každý pripravovaný rozhodcovský nález pred jeho podpísaním rozhodcami predložený Súdu k prieskumu. Súd potom môže navrhnúť úpravy formy nálezu ale aj upozorniť tribunál na podstatné vecné body nálezu.[20] Avšak konečné rozhodnutie je na strane tribunálu. Tento postup je zameraný primárne na kontrolu formálnej stránky nálezu, ale aj samotné upozornenie k vecným bodom môže mať následný vplyv na rozhodnutie tribunálu. Nejde však samozrejme o plnohodnotný prieskum po vecnej stránke.

2. INICIATÍVY SMERUJÚCE K PLNOHODNOTNÉMU ODVOLANIU V MEDZINÁRODNEJ INVESTIČNEJ ARBITRÁŽI

2.1. MNOHOSTRANNÁ DOHODA O MEDZINÁRODNÝCH INVESTÍCIÁCH (MAI)

Prvé úvahy nad možnosťou odvolania v investičnej arbitráži sa objavili začiatkom 90. rokov minulého storočia.[21] Prvý pokus o jeho právne zakotvenie sa uskutočnil počas zjednávania Mnohostrannej dohody o medzinárodných investíciách na pôde OECD.

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18 YANNACA-SMALL, Katia. *Improving the System of Investor-State Dispute Settlement: An Overview* [online]. [Paríž (Francúzsko)]: Organisation for Economic Co-operation and Development, február 2006 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*www.oecd.org/dataoecd/3/59/36052284.pdf* >. str. 14.

19 *Pravidlá rozhodcovského konania MOK*[online]. [Paríž (Francúzsko)]: International Cahmber of Commerce, 2009 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*http://www.iccwbo.org/court/arbitration/id4093/index.html* >.

20 YANNACA-SMALL, Katia. *Improving the System of Investor-State Dispute Settlement: An Overview* [online]. [Paríž (Francúzsko)]: Organisation for Economic Co-operation and Development, február 2006 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*www.oecd.org/dataoecd/3/59/36052284.pdf* >. str. 15.

21 tamtiež. str. 8.

Jedna z delegácií počas vyjednávaní navrhla zaradenie odvolacieho mechanizmu do úpravy v MAI. Avšak vo výsledku sa štáty nedohodli na žiadnom právnom texte, ktorým by bol vložený do návrhu MAI. A zavedenie odvolacieho mechanizmu ostalo predmetom prípadnej zmeny dohovoru prostredníctvom dodatku.[22]

2.2 AKTIVITY SPOJENÝCH ŠTÁTOV AMERICKÝCH

Spojené štáty sú asi najaktívnejším štátom presadzujúcim zavedenie možnosti odvolania v medzinárodnej investičnej arbitráži.

Zriadenie odvolacieho mechanizmu sa stalo jedným zo základných cieľov americkej administratívy pri vyjednávaní zmlúv o ochrane investícií. Za účelom rozvoja mechanizmov na riešenie sporov medzi investorom a štátom majú americký vyjednávači presadzovať aj zriadenie odvolacieho orgánu, alebo obdobného mechanizmu, ktorý má zabezpečiť väčšiu vzájomnú súladnosť interpretácie ustanovení zmlúv o ochrane investícií.[23]

Táto inštrukcia sa následne pretavila do ustanovenia modelovej dvojstrannej zmluvy o ochrane investícií[24] (ďalej aj „modelová zmluva USA“). V ustanovení čl. 28 ods. 10 predvída zriadenie odvolacieho orgánu prostredníctvom mnohostranného dohovoru. V prípade, ak bude takáto dohoda prijatá, majú sa aj strany dvojstrannej dohody snažiť dosiahnuť dohodu, vďaka ktorej bude možné, aby takýto vzniknutý odvolací orgán preskúmaval aj rozhodnutia vydané na základe tejto dvojstrannej dohody.

Zároveň príloha D modelovej zmluvy USA predpokladá vytvorenie dvojstranného odvolacieho mechanizmu. Po troch rokoch od účinnosti zjednanej dvojstrannej dohody o ochrane investícií, majú strany rozhodnúť, či zriadia dvojstranný odvolací orgán alebo obdobný mechanizmus na prieskum nálezov vydaných na základe tejto dvojstrannej zmluvy.

Ustanovenia z čl. 28 ods. 10 a aj prílohy D modelovej zmluvy USA sa dostali napr. do zmluvy o voľnom obchode medzi Spojenými štátmi a

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22 *Negotiating Group on the Multilateral Agreement on Investment (MAI) - Selected issues on dispute settlement (Note by the Chairman) DAFFE/MAI(98)12* [online]. [Paríž (Francúzsko)]: Organisation for Economic Co-operation and Development, 13. marec 1998 [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://www1.oecd.org/daf/mai/pdf/ng/ng9812e.pdf>.

23 *19 USC 3802, 2002 Trade Promotion Act, Section 2102 (b)(3)(G)(iv)* [online]. [cit. 14. novembra 2009]. Dostupné na World Wide Web <*http://www.gpo.gov/fdsys/pkg/PLAW-107publ210/html/PLAW-107publ210.htm* >.

24 US 2004 Model BIT [online]. [cit. 14. novembra 2009]. Dostupné na World Wide Web <www.state.gov/documents/organization/117601.pdf >.

Chile[25], dohody o voľnom obchode medzi Spojenými štátmi a Singapurom[26], či dohode o voľnom obchode s Dominikánskou republikou a piatimi stredoamerickými krajinami (Kostarika, Salvador, Guatemala, Honduras a Nikaragua - CAFTA)[27], ale aj do ďalších.

Spojené štáty taktiež zahrnuli do dvojstranných dohovorov aj ustanovenie pripomínajúce predbežný prieskum nálezu podľa Pravidiel MOK v Paríži. V tomto prípade však návrh nálezu neposudzuje nestranný orgán, ale samotné strany, ktoré môžu predložiť tribunálu svoje pripomienky. Podľa ust. čl. 9 písm a) modelovej zmluvy USA, môže každá strana sporu požiadať, aby tribunál pred vydaním nálezu jeho návrh zaslal k pripomienkovaniu stranám. A tie majú 60 dní na to, aby návrh pripomienkovali. Následne má tribunál tieto pripomienky zvážiť a v lehote 45 dní uplynutia lehoty na pripomienkovanie vydať konečný nález.[28] Takéto ustanovenie sa následne objavilo v zmluvách o voľnom trhu medzi Spojenými štátmi a Chile, Marokom alebo CAFTA a Dominikánskou republikou.

2.3 NÁVRH SEKRETARIÁTU ICSID

Sekretariát publikoval 26. októbra 2004 svoj vlastný diskusný návrh[29] rozoberajúci možné zmeny arbitráže v rámci Washingtonského centra. Jedným z návrhov, ktorý sekretariát predniesol, je aj zriadenie odvolacieho orgánu v rámci systému ICSID.

Sekretariát odôvodnil potrebu vytvorenia takého orgánu tým, že už 20 krajín prostredníctvom dvojstranných zmlúv o ochrane investícií predvída vytvorenie odvolacieho orgánu, a zároveň sú tieto krajiny aj zmluvnými

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25 čl. 10.19 ods. 10, príloha 10-H zmluvy o voľnom obchode medzi USA a Chile [online]. [cit. 14.novembra 2009].Dostupné na World Wide Web <hhttp://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-textt>.

26 čl. 15.19 ods. 10 zmluvy o voľnom obchode medzi USA a Singapurom [online]. [cit. 14.novembra 2009].Dostupné na World Wide Web <http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text>.

27 čl. 10.20 ods. 10, príloha 10-F zmluvy o voľnom obchode medzi USA a CAFTA a Dominikánkou republikou [online]. [cit. 14.novembra 2009].Dostupné na World Wide Web <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>.

28 US model BIT čl. 9 písm. a)

29 ICSID Secretariat. *Possible Improvements of the Framework for ICSID Arbitration* [online]. [Washington (USA)]: International Centre for Settlement of Investment Disputes, 22. október 2004 [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14>.

stranami Washingtonského dohovoru.[30] Preto, ak by boli vytvorené samostatné odvolacie orgány mimo systém ISCID, došlo by k popretiu základných cieľov[31] vytvorenia odvolacieho mechanizmu, ako sú koherentnosť a konzistentnosť celého systému investičnej arbitráže. Zároveň, v záujme zachovania účinnosti a hospodárnosti, je vhodnejšie, ak bude vytvorený jeden odvolací orgán v rámci ISCID namiesto niekoľkých. Tento odvolací orgán by potom zastrešoval arbitráže vedené podľa rôznych pravidiel (podľa Washingtonského dohovoru, v rámci dodatkových pravidiel, mimo ICSID podľa pravidiel UNCITRAL alebo pred stálymi rozhodcovskými súdmi).[32]

Už samotný spôsob vytvorenia odvolacieho orgánu, tak ako ho navrhoval sekretariát, nie je bezrozporný. Podľa sekretariátu stačí, ak bude orgán vytvorený prostredníctvom rozhodnutia Správnej rady, ktorá prijme Pravidlá odvolacieho orgánu.[33] Týmto sa chce vyhnúť problémom, ktoré by spôsobila zmena Washingtonského dohovoru, ktorá by musela zmeniť čl. 53 ods. 1 zakazujúci odvolanie voči rozhodcovskému nálezu. Aby mohla byť taká zmena prijatá, bola by nutné ratifikácia všetkými zmluvnými štátmi.[34] Preto sekretariát navrhuje, aby možnosť podať odvolania bola umožnená vrámci jednotlivých dvojstranných dohovorov, čím by došlo k zmene pravidla medzi zmluvnými štátmi tejto dvojstrannej dohody v zmysle čl. 41 Viedenského dohovoru o zmluvnom práve.[35] Takto by sa obišla nutnosť meniť Washingtonský dohovor súhlasom všetkých zmluvných strán.[36]

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30 tamtiež. str. 14.

31 K cieľom odvolacieho mechanizmu viď nasledujúcu časť.

32 ICSID Secretariat. *Possible Improvements of the Framework for ICSID Arbitration* [online]. [Washington (USA)]: International Centre for Settlement of Investment Disputes, 22. október 2004 [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14>. str. 15-16.

33 tamtiež. Príloha str. 1.

34 Washingtonský dohovor k dňu 14. novembra 2009 podpísalo 156 štátov, z toho 144 ho aj ratifikovalo. Dostupné na World Wide Web <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home>.

35 ICSID Secretariat. *Possible Improvements of the Framework for ICSID Arbitration* [online]. [Washington (USA)]: International Centre for Settlement of Investment Disputes, 22. október 2004 [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14>. Príloha str. 2.

36 *South Centre Analytical Note – Developments on Discussions for the Improvement of the Framework for ICSID Arbitration and the Participation of Developing Countries*

Návrh sekretariátu počíta s tým, že odvolací orgán by sa skladal z 15 členov volených Správnou radou na základe návrhu generálneho sekretára. Funkčné obdobie členov by malo byť šesť rokov, s tým, že v rámci prvej voľby by 8 členov bolo zvolených len na 3 roky, čím by sa zabezpečila priebežná výmena členov. Každý člen odvolacieho orgánu by mal pochádzať z inej krajiny. Zároveň by mal byť každý člen uznávanou autoritou, ktorý prejavili odbornú znalosť z práva, medzinárodných investícií a zmlúv o ochrane investícií.[37]

Z členov odvolacieho orgánu by následne generálny sekretár menoval odvolací tribunál. Zásadne by mal mať tribunál troch členov, ale strany sporu sa môžu dohodnúť na inom počte. Členov odvolacieho tribunálu by vyberal odvolací orgán po konzultáciách so stranami sporu.[38]

Takto vytvorený tribunál by následne mohol preskúmať napadnutý nález z dôvodov, ktoré sú v súčasnosti uvedené v čl. 52 Washingtonského dohovoru. Taktiež bolo navrhnuté, aby mohol tento tribunál preskúmať nález aj zo stránky vecnej.[39] A vo výsledku by mohol pôvodný nález potvrdiť, zmeniť alebo zrušiť. Zároveň by mohol aj nález zrušiť z dôvodov uvedených v čl. 52. V prípade zrušeného nálezu, alebo v prípade, ak zmena nálezu nerieši spor medzi stranami, tie môžu predložiť spor novému tribunálu, prípadne ak to prikáže odvolací tribunál, tak by bol spor vrátený pôvodnému tribunálu. [40]

Čo sa týka nákladov odvolania (poplatky, výdavky tribunálu), tie by mala niesť zásadne strana podávajúca odvolanie. Následne môže tribunál rozhodnúť o náhrade nákladov. Strana domáhajúca sa prieskumu nálezu by mala zároveň poskytnúť bankovú záruku vo výške hodnoty nálezu.[41]

SC/TADP/AB/INV1 [online]. [Ženeva (Švajčiarsko)]: South Centre, február 2005 [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://www.southcentre.org/index.php?option=com_docman&task=doc_download&gid=245&Itemid=69>. str. 5.

37 ICSID Secretariat. *Possible Improvements of the Framework for ICSID Arbitration* [online]. [Washington (USA)]: International Centre for Settlement of Investment Disputes, 22. október 2004 [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14>. str. 3.

38 tamtiež, str. 3-4.

39 tamtiež, str. 4.

40 tamtiež. Str. 5.

41 tamtiež, str. 6.

Sekretariát navrhuje, aby lehota na odvolanie bola stanovená medzi 60 až 120 dňami.[42]

Tento návrh žiadal zainteresovanú verejnosť, a samozrejme samotné zmluvné štátny Washingtonského dohovoru reprezentované Správnou radou, aby sa k nemu vyjadrili. Po ukončení stanoveného obdobia na zbieranie odpovedí, vydalo 12. mája 2005 ICSID ďalší pracovný dokument[43].

Problematika odvolacieho orgánu bola zhrnutá v jednom odstavci. Podľa tohto odstavca, ak by sa mal vytvoriť odvolací orgán, najvhodnejšie je, aby sa vytvoril jediný orgán v rámci ICSID miesto samostatných odvolacích orgánov založených jednotlivými zmluvami na ochranu investícií. V súčasnosti je však založenie takéhoto orgánu predčasné, aj s ohľadom na ťažkosti spomínané v návrhu sekretariátu. Avšak sekretariát má naďalej študovať túto problematiku.[44]

2.4 DÔVODY PRE VZNIK ODVOLACIEHO ORGÁNU

Obhajoba vzniku odvolacieho mechanizmu sa obecne zameriava na potrebu zjednocovania rozhodovacej činnosti jednotlivých arbitrážnych tribunálov. Tento argument zaznel počas rokovaní o mnohostrannom dohovore o ochrane investícií.[45] Taktiež je priamo spomínaný v americkom federálnom zákone dávajúcom inštrukciu pri zjednávaní zmlúv o ochrane investícií vytvárať aj odvolací mechanizmus.[46] Súladnosť a súdržnosť rozhodovania boli jednými zo základných argumentov, prečo aj Sekretariát ICSID prišiel so svojou iniciatívou.[47] Potreba zjednocovania rozhodnutí sa objavuje ako

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42 tamteiž, str. 7.

43 *Working Paper of the ICSID Secretariat – Suggested Changes to the ICSID Rules and Regulations*[online]. [Washington (USA)]: International Centre for Settlement of Investment Disputes, 12. máj 2005 [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=25_1.pdf>.

44 tamtiež. str. 4.

45 *Negotiating Group on the Multilateral Agreement on Investment (MAI) - Selected issues on dispute settlement (Note by the Chairman) DAFFE/MAI(98)12* [online]. [Paríž (Francúzsko)]: Organisation for Economic Co-operation and Development, 13. marec 1998 [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://www1.oecd.org/daf/mai/pdf/ng/ng9812e.pdf>.

46 *19 USC 3802, 2002 Trade Promotion Act, Section 2102 (b)(3)(G)(iv)* [online]. [cit. 14. novembra 2009]. Dostupné na World Wide Web <*http://www.gpo.gov/fdsys/pkg/PLAW-107publ210/html/PLAW-107publ210.htm* >.

47 ICSID Secretariat. *Possible Improvements of the Framework for ICSID Arbitration* [online]. [Washington (USA)]: International Centre for Settlement of Investment Disputes,

jeden z prvých argumentov za pri analyzovaní problematiky odvolania v investičnej arbitráži.[48]

Hoci sekretariát ICSID pripúšťa, že nejednotnosť rozhodnutí nie je obecným znakom rozhodovacej praxe tribunálov v systéme ICSID, upozorňuje na to, že so zväčšujúcou sa popularitou investičnej arbitráže, a tým aj väčším počtom rozhodnutí, sa môže dostaviť aj väčšia rozkolísanosť rozhodnutí.[49] K nejednotnosti rozhodovania prispieva aj nejednotnosť orgánov, ktoré rozhodujú. Spory z medzinárodných investícií môžu byť rozhodnuté či už v rámci systému ICSID, ale aj pred tribunálmi ad hoc či stálymi rozhodcovskými súdmi, ako sú MOK (ICC) či Arbitrážny inštitút Štokholmskej obchodnej komory (SCC). A ani samotný systém ICSID nie je jednotný, keď umožňuje spor predložiť nie len stranám Washingtonského dohovoru, ale aj v prípade nezmluvných štátov prejedná spor v rámci Dodatkových pravidiel.

Zjednocovaním výsledkov rozhodnutí sa zvýši právna istota účastníkov, ktorí budú môcť lepšie predvídať výsledky svojich sporov. Predvídateľnosti by malo prispieť aj to, že jednotlivé rozhodnutia budú lepšie odôvodnené odvolacím orgánom a následne aj „prvostupňovými tribunálmi“, keď tie budú vedieť, že ich rozhodnutia musia obstáť aj pred tribunálom odvolacím.[50] Väčšia predvídateľnosť má potom vo výsledku priniesť väčšiu atraktívnosť samotného systému investičnej arbitráže. Ten sa stane prijateľnejším pre väčší počet štátov a aj investorov, čo by následne malo

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22. október 2004 [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14>. str. 14.

48 GAR-OR, Noemi. The Concept of Appeal in International Dispute Sttlement. *The European Journal of International Law* [online]. 2008, no. 1 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*http://ejil.oxfordjournals.org/cgi/content/abstract/19/1/43*>. str. 3; TAMS, Christian J. An Appealing Option? The Debate about an ICSID Appellate Structure. *Essays in Transnational Economic Law* [online]. 2006, no. 57 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*http://ssrn.com/abstract=1413694* >. str. 17.

49 ICSID Secretariat. *Possible Improvements of the Framework for ICSID Arbitration* [online]. [Washington (USA)]: International Centre for Settlement of Investment Disputes, 22. október 2004 [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14>. str. 15.

50 BJORKLUN, Andrea K. *The Continuing Appeal of Annulment: Lessons from Amco Asia and CME*. In WEILER, Todd ed. *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* [online]. [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://ssrn.com/abstract=911627>. str. 514.

viesť k prilákaniu ďalších zahraničných investorov, ktorí budú radšej investovať v stabilnom a predvídateľnom prostredí.[51]

Odvolací orgán má prispieť aj k hľadaniu naozaj správneho výsledku v spore.[52] Odvolanie by malo umožniť odstrániť prípadné práve a faktické chyby v rozhodnutí.[53]

2.5 NEVÝHODY ODVOLACIEHO MECHANIZMUS

Obecne arbitráž, a v tomto konkrétnom prípade investičná arbitráž, je postavená na systéme jednokolového rozhodovania, kedy rozhodnutie tribunálu je pre strany záväzné. Tvorcovia Washingtonského dohovoru, či jednotlivých dvojstranných dohovorov o ochrane investícií, nadali prípadné rozhodcovské tribunály dôverou[54] a nepokladali za nutné podrobiť ich rozhodnutia následnej plnohodnotnej kontrole v odvolacom procese.

Zavedením odvolacieho procesu sa celý systém odkloní od konečnosti arbitrážnych rozhodnutí.[55] Je pravdepodobné, že miesto jedného rozhodnutia, budú vyžadované až dve, kým sa spor vyrieši. Štáty, ktoré neuspejú pred arbitrážnym tribunálom, budú z politických dôvodov, aby uspokojili domácu verejnosť (voličov), často siahať aj po možnosti odvolania, ak sa stane odvolanie súčasťou celého systému. A i ekonomicky silnejší investori môžu siahať po odvolaní, ak naopak rozhodnutie tribunálu nebude v ich prospech. Následne pravidelným podávaním odvolania sa minimalizuje právna hodnota „prvostupňových" rozhodnutí[56], a strany budú

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51 tamtiež, str. 515.

52 TAMS, Christian J. An Appealing Option? The Debate about an ICSID Appellate Structure. *Essays in Transnational Economic Law* [online]. 2006, no. 57 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*http://ssrn.com/abstract=1413694* >. str. 27.

53 YANNACA-SMALL, Katia. *Improving the System of Investor-State Dispute Settlement: An Overview* [online]. [Paríž (Francúzsko)]: Organisation for Economic Co-operation and Development, február 2006 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*www.oecd.org/dataoecd/3/59/36052284.pdf* >. str. 12.

54 TAMS, Christian J. An Appealing Option? The Debate about an ICSID Appellate Structure. *Essays in Transnational Economic Law* [online]. 2006, no. 57 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*http://ssrn.com/abstract=1413694* >. str. 16.

55 ICSID Secretariat. *Possible Improvements of the Framework for ICSID Arbitration* [online]. [Washington (USA)]: International Centre for Settlement of Investment Disputes, 22. október 2004 [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14>. str. 15.

56 TAMS, Christian J. An Appealing Option? The Debate about an ICSID Appellate Structure. *Essays in Transnational Economic Law* [online]. 2006, no. 57 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*http://ssrn.com/abstract=1413694* >. str. 16.

presúvať ťažisko sporu až pred odvolací orgán. Určitým ospravedlnením pre odklon od princípu konečnosti rozhodnutia je skutočnosť, že v investičnej arbitráži ide často o otázky verejného záujmu, kedy môže záujem nad vecne správnym rozhodnutím prevážiť nad snahou o konečné rozhodnutie.[57]

S odklonom od konečnosti arbitrážneho rozhodnutia ide ruka v ruke aj násobne dlhšia doba, kým sa dospeje ku právne záväznému rozhodnutiu. Už v súčasnosti nie je arbitráž takým rýchlym spôsobom riešenia sporov, ako sa obecne predpokladá[58], ale tým, že strany budú podávať odvolanie, tak sa nádej na rýchle riešenie sporu ešte oddiali. A nie je vylúčené, že niektorá zo strán môže využiť túto možnosť účelovo, aby vyvolala prieťahy[59], a tým odkladala výkon rozhodnutia[60]. Riziku časových prieťahov je možné predchádzať stanovením lehôt na rozhodnutie[61], avšak stanovenie časových limitov pôjde zase proti zabezpečeniu správneho rozhodnutia.

S časom úzko súvisia aj finančné náklady. Tým, že bude konanie dlhšie, stúpnu aj nároky na finančné, ale aj personálne, zdroje.[62] A v tomto prípade budú mať opäť výhodu ekonomicky silnejšie štáty ale aj ekonomicky silnejší investori. Takže zavedenie odvolania rovnako bude v neprospech

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57 YANNACA-SMALL, Katia. *Improving the System of Investor-State Dispute Settlement: An Overview* [online]. [Paríž (Francúzsko)]: Organisation for Economic Co-operation and Development, február 2006 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*www.oecd.org/dataoecd/3/59/36052284.pdf* >. str. 13.

58 BJORKLUN, Andrea K. *The Continuing Appeal of Annulment: Lessons from Amco Asia and CME*. In WEILER, Todd ed. *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* [online]. [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://ssrn.com/abstract=911627>. str. 513.

59 TAMS, Christian J. An Appealing Option? The Debate about an ICSID Appellate Structure. *Essays in Transnational Economic Law* [online]. 2006, no. 57 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*http://ssrn.com/abstract=1413694* >. str.14.

60 ICSID Secretariat. *Possible Improvements of the Framework for ICSID Arbitration* [online]. [Washington (USA)]: International Centre for Settlement of Investment Disputes, 22. október 2004 [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14>. str. 15.

61 YANNACA-SMALL, Katia. *Improving the System of Investor-State Dispute Settlement: An Overview* [online]. [Paríž (Francúzsko)]: Organisation for Economic Co-operation and Development, február 2006 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*www.oecd.org/dataoecd/3/59/36052284.pdf* >. str. 13.

62 BJORKLUN, Andrea K. *The Continuing Appeal of Annulment: Lessons from Amco Asia and CME*. In WEILER, Todd ed. *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* [online]. [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://ssrn.com/abstract=911627>.str. 513.

najmä rozvojových štátov, ktoré nemajú toľko zdrojov[63], ale taktiež aj v neprospech menších spoločností[64], ktoré majú predsa len obmedzenejšie zdroje, ako štáty so svojím administratívnym aparátom.

Zavedením odvolacieho orgánu sa nemusí vyriešiť ani problém nekonzistentných rozhodnutí. Jednotlivé rozhodnutia sú vydávané na základe hmotnoprávnych ustanovení zmlúv o ochrane investícií. A tieto ustanovenia, hoci sú obdobne formulované, sú používané v rôznom kontexte a zmluvné strany (štáty zjednávajúce tieto zmluvy) im dávajú odlišné obsahy. Takže rozhodnutia podľa jednej zmluvy nemusí byť také isté, aké by za rovnakej faktickej situácie boli podľa zmluvy inej.[65]

2.6 USTANOVENIE ODVOLACIEHO ORGÁNU

Problematiku ustanovenia odvolacieho orgánu uvádzal už Sekretariát vo svojom návrhu.[66] V súčasnosti bolo uzatvorených približne 2500[67] dvojstranných zmlúv o ochrane investícií, niekoľko mnohostranných dohovorov, medzi nimi napr. dohoda medzi CAFTA a Dominikánskou republikou a USA alebo Energetická charta, ktoré sa zaoberajú aj medzinárodnými investíciami. Roztrieštenosť právnej úpravy, kedy zmluvy používajú obdobné pojmy, ale pridávajú im niekedy viac, inokedy menej odlišné významy, je jedným z hlavných dôvodov, prečo nie je možné

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63 *South Centre Analytical Note – Developments on Discussions for the Improvement of the Framework for ICSID Arbitration and the Participation of Developing Countries SC/TADP/AB/INV1* [online]. [Ženeva (Švajčiarsko)]: South Centre, február 2005 [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://www.southcentre.org/index.php?option=com_docman&task=doc_download&gid=245&Itemid=69>. str. 19.

64 TAMS, Christian J. An Appealing Option? The Debate about an ICSID Appellate Structure. *Essays in Transnational Economic Law* [online]. 2006, no. 57 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*http://ssrn.com/abstract=1413694* >. str.15.

65 LEGUM, Barton. *Options to Establish an Appellate Mechanism for Investment Disputes.* In SAUVANT, Karl P. *Appeals mechanism in international investment disputes.* New York: Oxford University Press, 2008, str.235.

66 ICSID Secretariat. *Possible Improvements of the Framework for ICSID Arbitration* [online]. [Washington (USA)]: International Centre for Settlement of Investment Disputes, 22. október 2004 [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14>. príloha str. 1.

67 LEGUM, Barton. *Options to Establish an Appellate Mechanism for Investment Disputes.* In SAUVANT, Karl P. *Appeals mechanism in international investment disputes.* New York: Oxford University Press, 2008, str. 234.

hovoriť vždy o súladnej rozhodovacej praxi.[68] Takže, aby mohol odvolací orgán naozaj zabezpečiť súladnosť judikatúry, je jedným z predpokladov to, že bude môcť preskúmavať rozhodnutia vydané na základe všetkých (alebo aspoň veľkej väčšiny) týchto zmlúv.

Okrem veľmi nereálnej možnosti zmeny a doplnenia všetkých týchto zmlúv, je tu možnosť vytvoriť odvolací orgán v rámci ICSID, tak ako to navrhoval jeho Sekretariát. Právne najčistejšou možnosťou by bola zmena Washingtonského dohovoru, ktorá by odstránila zákaz odvolania a poskytla právny základ pre vznik odvolacieho orgánu. A následne každý spor predložený ICSID by mohol byť podrobený aj odvolaniu. Takto by sa väčšine sporov z zahraničných investícií dala možnosť prieskumu v odvolaní.

Avšak, ako je nereálne dosiahnuť zmenu všetkých zmlúv o ochrane investícií, tak je veľmi náročné zaručiť, aby došlo k dohode na zmene a následnej ratifikácii tejto úpravy všetkými 156[69] zmluvnými stranami Washingtonského dohovoru. Možnosť, ktorú uvádza Sekretariát vo svojom návrhu, teda že založenie odvolacieho orgánu len zmenou pravidiel ICSID, ktorú môže uskutočniť Správna rada, je síce jednoduchšia, ale predsa len právne rozpornejšia. A stále tu ostáva nutnosť zmeny dvojstranných zmlúv o ochrane investícií, aby sa strany odchýlili od zákazu odvolania vo Washingtonskom dohovore. Takže len postupne by pribúdali zmluvy umožňujúce odvolanie (ako prvé by to boli niektoré zmluvy uzatvorené USA, ktoré odvolanie predvídajú už teraz).

I samotné ustanovenie odvolacieho orgánu v rámci ISCID vyvoláva námietky. Keďže ISCID je organizovaný ako súčasť Svetovej banky a jej prezident je predsedom Správnej rady, je namietaný konflikt záujmov. A aj niektoré ďalšie súčasti Skupiny Svetovej banky môžu mať finančné záujmy v sporoch prebiehajúcich pred ISCID. Takejto námietke by sa dalo vyhnúť, keby sa ISCID stalo nezávislou medzinárodnou organizáciou.[70]

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68 TAMS, Christian J. An Appealing Option? The Debate about an ICSID Appellate Structure. *Essays in Transnational Economic Law* [online]. 2006, no. 57 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*http://ssrn.com/abstract=1413694* >. str.19.

69 Washingtonský dohovor k dňu 14. novembra 2009 podpísalo 156 štátov, z toho 144 ho aj ratifikovalo. Dostupné na World Wide Web <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home>.

70 MANN, Howard, COSBEY, Aaton, PETERSON, Luke, MOLTKE, Konrad von. *Comments on ICSID Discussion Paper, "Possible Improvements o the Framework for ICSID Arbitration"* [online]. [Winnipeg (Kanada)]: International Institute for Sustainable Development, december 2004 [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://www.iisd.org/publications/pub.aspx?pno=667>. str. 13.

Ďalšie problémy súvisia so samotným obsadením odvolacieho orgánu. Členovia odvolacieho orgánu budú mať veľkú možnosť ovplyvniť rozhodovaciu prax v takej citlivej oblasti ako sú zahraničné investície a ich ochrana. Návrh Sekretariátu obsahoval kritérium, ktoré je obdobné ako pri členoch odvolacieho orgánu WTO. Keďže tento model sa už osvedčil, bol by dobre použiteľný aj v prípade odvolacieho orgánu pre investičné spory.[71]

3. INÉ MOŽNOSTI VÝVOJA

Ako už bolo naznačené vyššie, zriadenie odvolacieho orgánu v rámci investičnej arbitráži nie je jednoduché a zatiaľ ani nepanuje obecná zhoda, že takýto orgán je vôbec nutné. Nevýhody jeho zriadenia sú stále veľmi podstatné, najmä predĺženie rozhodovania a oddialenie končeného rozhodnutia, a taktiež aj zvýšené náklady. Ani problém, ktorý rieši, teda nekonzistentnosť rozhodovacej praxe, nie je taký výrazný, ako by sa mohol zdať. A existujú iné možnosti ako ho riešiť.

Jednou z nich je zriadenie stáleho medzinárodného súdu, ktorý by sa zaoberal medzinárodnými investíciami.[72] Základným argumentom je, že aj v investičnej arbitráži ide o rozhodovanie obecne otázok verejného práva, a preto by si aj táto oblasť zaslúžila stály súd, ktorý by bol nezávislý a nestranný. Avšak aj v takomto prípade nastupujú obdobné argumenty, ako pri zriaďovaní odvolacieho orgánu. Bolo by nutné pozmeniť jednotlivé dvojstranné zmluvy o ochrane investícií, prípadne, čo by bolo asi vhodnejšie, úspešne uzavrieť mnohostrannú zmluvu o ochrane investícií, ktorá by zriadila takýto súd. Tým by vznikla obdobná situácia, ako napr. v prípade námorného práva, ktoré bolo kodifikované do jedného zmluvného celku a zároveň sa zriadil aj Medzinárodný súd pre námorné právo.[73]

Zaujímavou možnosťou, ktorá by si však taktiež vyžiadala vytvorenie stáleho orgánu, je systém obdobný predbežnej otázke[74] známej z

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71 tamtiež, str. 14.

72 HARTEN, Gus Van. *A Case for an International Investmen Court*[online]. 16. júl 2008 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*http://ssrn.com/abstract=1153424*>.

73 LEGUM, Barton. *Options to Establish an Appellate Mechanism for Investment Disputes.* In SAUVANT, Karl P. *Appeals mechanism in international investment disputes.* New York: Oxford University Press, 2008, str. 236.

74 TAMS, Christian J. An Appealing Option? The Debate about an ICSID Appellate Structure. *Essays in Transnational Economic Law* [online]. 2006, no. 57 [cit. 14. novembra 2009]. Dostupné na World Wide Web <*http://ssrn.com/abstract=1413694* >. str. 44 a násl.; BJORKLUN, Andrea K. *The Continuing Appeal of Annulment: Lessons from Amco Asia and CME*. In WEILER, Todd ed. *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* [online]. [cit. 14. novembra 2009]. Dostupné na World Wide Web <http://ssrn.com/abstract=911627>. str. 513.

európskeho práva. V takomto prípade by sa zriadil stály orgán, ku ktorému by sa mohol obrátiť tribunál, prípadne aj strany sporu, podľa toho, ako by sa nastavili pravidlá, s výkladovou otázkou. Išlo by napríklad o výklad zásadnej otázky v práve medzinárodných investícií (výklad niektorého zo základných inštitútov) alebo v prípade, keď sú rôzne názory vyskytujúce sa v prechádzajúcich nálezoch.[75]

Ďalšou možnosťou sú samostatné odvolacie orgány, ktoré by sa vytvorili na základe jednotlivých zmlúv o ochrane investícií. Vďaka tomuto by možno časom vzrástla podpora pre odvolací orgán, a následne by sa jednoduchšie hľadal konsenzus pre jeho vytvorenie, ak by sa takéto orgán osvedčili. Avšak neriešili by hlavný dôvod, prečo sa vôbec uvažuje o vzniku odvolacieho orgánu. Ak by boli jednotlivé samostatné odvolacie orgány, tak by stále nedochádzalo k zjednocovaniu rozhodovacej praxe a vo výsledku by sa nič nezmenili oproti súčasnému stavu.

Podľa môjho názoru najjednoduchším spôsobom ako zabezpečiť súladný rozvoj rozhodovania vo veciach medzinárodných investícií, je naďalej prehlbovať použitie už vydaných rozhodnutí ako kvázi-precedensov či faktických precedensov.[76] Zavedenie záväzných precedensov v oblasti medzinárodného práva nie je možné. Neexistuje tu hierarchia rozhodovacích orgánov, takže nie je možné povedať, ktoré súdy či tribunály tvoria vyššiu inštanciu, ktorej rozhodnutia sú záväzné pre inštanciu nižšiu.[77] Argumentom proti právne záväznej povahe predchádzajúcich rozhodnutí v medzinárodnom práve je aj Štatút Medzinárodného súdneho dvora, podľa ktorého nie je súd viazaný svojimi rozhodnutiami, a tie sú záväzné len pre strany sporu (čl. 59). Zároveň podľa čl. 38 ods. 1 písm. d) sú rozhodnutia len podporným zdrojom poznania medzinárodného práva.[78] Avšak táto podporná rola umožňuje pôsobiť predchádzajúcim rozhodnutiam ako faktickým precedensom.

Už v súčasnosti tribunály sledujú rozhodnutia vydané inými tribunálmi a vo svojich rozhodnutiach na ne poukazujú, pričom sa snažia argumentačne

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75 MARSHALL, Fiona. *Defining New Institutional Options for Investor-State Dispute Settlement* [online]. [Winnipeg (Kanada)]: International Institute for Sustainable Development, september 2009[cit. 14. novembra 2009]. Dostupné na World Wide Web <http://www.iisd.org/publications/pub.aspx?pno=1174>. str. 41.

76 HORN, Norbert; KRÖLL, Stefan. Arbitrating foreign investment disputes. The Hague : Kluwer Law International, 2004. str. 199.

77 MARSHALL, Fiona. *Defining New Institutional Options for Investor-State Dispute Settlement* [online]. [Winnipeg (Kanada)]: International Institute for Sustainable Development, september 2009[cit. 14. novembra 2009]. Dostupné na World Wide Web <http://www.iisd.org/publications/pub.aspx?pno=1174>. str. 36.

78 tamtiež, str. 36.

vyrovnať s ich výsledkami.[79] Týmto spôsobom sa môžu vyrovnať aj s rôznymi interpretáciami obdobných pojmov použitých v rôznych zmluvách, na základe ktorých boli jednotlivé nálezy vydané. Využitie prechádzajúcich rozhodnutí ako faktických precedensov v investičných sporoch uľahčuje zvyšujúca sa verejnosť predchádzajúcich rozhodnutí. Rozhodnutia vydané v rámci ICSID či NAFTA sú vo veľkej miere zverejňované, takže je možné sa k ním bez väčšej námahy dostať. Určitým problémom sú rozhodnutia vydané pred stálymi rozhodcovskými súdmi, ktoré zachovávajú pravidlá medzinárodnej obchodnej arbitráže, kde rozhodnutia nie sú zásadne zverejňované.[80] Avšak v prípadoch sporov zo zahraničných investícií, ide o spory, kde je výrazne zastúpený verejný záujem. Zároveň v nich ide o prieskum vládnych aktov, takže je žiaduce, aby boli tieto nálezy verejne dostupné.[81] Širšia dostupnosť jednotlivých rozhodnutí umožní tribunálom zoznámiť sa s praxou v obdobných prípadoch, poskytne argumentačné nástroje právnym zástupcom strán a vo výsledku vyvolá tlak, aby v obdobných situáciách bolo rozhodované obdobne. Takto samoregulačnou činnosťou systému sa dospeje k súladnosti rozhodnutí.

ZÁVER

Hoci je zavedenie možnosti odvolania v investičnej arbitráži podporované mnohými pádnymi argumentami, nemyslím si, že nastal jeho čas. Investičná arbitráž predstavuje relatívne účinný a rýchly nástroj, ako riešiť spory z medzinárodných investícií. S jej rozšírením súvisí aj určitá nesúrodosť rozhodovacej praxe, avšak tá je prítomná v akomkoľvek právnom systéme. Samotná rozkolísanosť súvisí aj s roztrieštenosťou právnej úpravy regulujúcej vzájomné práva a povinnosti štátu a zahraničného investora. V takomto systéme jednoduché zavedenie odvolania nie je schopné priniesť želané výsledky. Naopak, aby malo odvolanie účinok zjednocovania rozhodovacej činnosti, bolo by nevyhnutné zjednotiť samotné pravidlá medzinárodných investícií.

Zavedenie odvolania by taktiež poprelo jednu z výhod investičnej arbitráže, a to jej je relatívna rýchlosť. Strany by museli čakať približne dva razy tak dlho, kým by sa ich spor definitívne vyriešil. Zároveň s tým by museli vynaložiť násobne viac prostriedkov, aby mohli viesť tak dlhé konanie. To môže vo svojom dôsledku odradiť najmä menších investorov od domáhania sa svojich práv a na druhej strane aj menšie štáty budú váhať, či prevezmú záväzky ochrany zahraničných investícií.

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79 HORN, Norbert; KRÖLL, Stefan. Arbitrating foreign investment disputes. The Hague : Kluwer Law International, 2004. str. 200.

80 tamtiež. str. 200.

81 tamtiež. str. 201.

Naopak existujú možnosti, ktoré sú taktiež schopné riešiť problém rozdielnej rozhodovacej praxe. Rozširujúca sa verejnosť vydaných nálezov umožňuje stranám dopredu zvážiť svoju pozíciu v spore na základe skúseností iných. Taktiež v následnom spore môžu strany využiť takto ponúkané argumenty pre svoje potreby. A v dôsledku to vyvoláva tlak na rozhodcovský tribunál, aby bral ohľad na predchádzajúce rozhodnutia a argumentačne sa s nimi vyrovnal. Takto vedená diskusia medzi rôznymi tribunálmi nakoniec povedie k čoraz väčšej koherentnosti vydávaných rozhodnutí za vynaloženia menších nákladov, ako by stálo zavedenie plnohodnotného odvolacieho mechanizmu pokrývajúceho väčšinu investičných sporov.

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PRINCÍP/ZÁSADA ROVNOSTI A ZÁKAZU DISKRIMINÁCIE

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Abstract in original language
Princíp rovnosti a zákazu diskriminácie. Predmetom tohto príspevku je poskytnutie analýzy súdneho vývoja koncepcie rovnosti a zákazu diskriminácie v komunitárnom práve. V ňom sa bližšie upriamujem na rozdielne prístupy k rovnosti a zákazu diskriminácie v oblasti spoločnej poľnohospodárskej politiky a diskriminácie na základe pohlavia. Ďalej rozvíjam problematiku rozširovania a obmedzenia rozsahu aplikácie zákazu diskriminácie na základe pohlavia. V texte sa tiež zaoberám problematikou diskriminácie transsexuálov a osôb s odlišnou sexuálnou orientáciou. Poslednú časť príspevku som venoval posúdeniu opodstatnenosti kritiky v súvislosti s rozhodnutím ESD vo veci Mangold.

Key words in original language
Princíp rovnosti a zákazu diskriminácie.

Abstract
The Principle of Equality and Non-Discrimination.This contribution provides an analysis of the judicial development of the concept of equality and non-discrimination in the community law. It takes closer look at differing approaches to equality and non-discrimination in the area of common agricultural policy and gender discrimination. It further elaborates the problematics of the extension and limits to the scope of application of the latter. In the last part of this paper I turn to consider the relevance of criticism given with regard to the decision of the Court of Justice in Mangold case.

Key words
The Principle of Equality and Non-Discrimination.

1. K PROBLEMATIKE KONCEPCIÍ ROVNOSTI A UPLATNENIA ZÁKAZU DISKRIMINÁCIE

Koncepcie rovnosti a zákazu diskriminácie boli a stále sú pre svoj komplexný charakter, mnohosť významov a rôznorodý spôsob uplatnenia v práve predmetom neutíchajúcich diskusií právnych teoretikov po celom svete.1 Za účelom lepšieho pochopenia ich postavenia v právnych

1 Tento príspevok Mgr. Jána Čipkára, interného dokdoranda Katedry teórie štátu a práva Právnickej fakulty v Košiciach (SR), predstavuje výstup z riešenia čiastkovej úlohy grantového projektu VEGA č. 1/0325/08 – Sociokultúrne determinanty tvorby a pôsobenia práva v európskom právnom priestore.

poriadkoch európskeho právneho priestoru uvádzajú autori **Christopher McCrudden** a **Haris Kountouros** štyri základné a vzájomne prepojené prístupy v ich ponímaní.

Prvý prístup chápe rovnosť ako samostatný princíp všeobecného uplatnenia, tvoriaci súčasť ústavných garancií právnych poriadkov jednotlivých štátov. Predstavuje rozumnosť a jeho porušenie sa považuje za iracionálny jav. Tento prístup nachádza svoje vyjadrenie aj v určitých špecifických kontextoch, a to jednak v konkrétnych oblastiach práva, ako napr. v pracovnom práve, alebo sa môže viazať na status dotknutého subjektu, ako je pohlavie, rasa, náboženstvo, postihnutie a pod.2

Druhý prístup chápe rovnosť ako „ochranu cenených verejných dobier (prized public goods),“ vrátane ochrany verejných subjektívnych práv, akými sú základné práva a slobody. Na rozdiel od racionálneho prístupu, tento je založený na myšlienke, že „verejné dobrá“ patria v zásade každému bez rozdielu, pričom dôraz sa kladie skôr na ich rozdelenie, než na osobné charakteristiky adresátov.3

Kým v prípade druhého prístupu má porušenie rovnosti charakter svojvoľného odopretia dobier, ktoré by v princípe mali patriť všetkým, zásah do princípu rovnosti podľa **tretieho prístupu** znamená diskrimináciu nositeľov určitých charakteristík (ako rasa, pohlavie a pod.) tým, že sa na ne prihliadne v prípadoch, v ktorých je ich použitie neodôvodnené.

Podľa **štvrtého prístupu**, ktorý vníma rovnosť ako aktívnu podporu rovnosti možností medzi určitými skupinami nositeľov uvedených charakteristík, majú orgány verejnej moci viac než len povinnosť zabezpečiť neexistenciu diskriminácie, a to pozitívnymi krokmi presadzovať rovnosť možností.4

Rovnako **Xavier Groussot** v úvode svojho pojednania o princípe rovnosti poukazuje na dva základné modely koncepcie rovnosti, a to na rovnosť procesnú alebo formálnu, ktorá znamená rovnosť každého pred zákonom, spájajúcu sa s koncepciou rovnosti možností a rovnosť hmotnú, ktorá korešponduje s rovnosťou výsledkov, vzťahujúcu sa na samotný obsah práva a vnímanú ako celospoločenský cieľ.5 Viacerí významní autori však

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2 McCrudden, Ch., Kountouros, H.: Human Rights and European Equality Law. SSRN, 2006, s. 2. http://papers.ssrn.com /sol3/ papers.cfm?abstract_id=899682 (1.9.2009)

3 McCrudden, Ch., Kountouros, H.: Human Rights and European Equality Law. SSRN, 2006, s. 3. http://papers.ssrn.com /sol3/ papers.cfm?abstract_id=899682 (1.9.2009)

4 McCrudden, Ch., Kountouros, H.: Human Rights and European Equality Law. SSRN, 2006, s. 4. http://papers.ssrn.com /sol3/ papers.cfm?abstract_id=899682 (1.9.2009)

5 Groussot, X.: General Principles of Community Law. Groningen: Europa Law Publishing 2006, s. 161

upozorňujú na to, že vzhľadom na množstvo rôznorodých funkcií a mnohorakých významov rovnosti ako právneho inštitútu, možno mať odôvodnenú pochybnosť o tom, či má vôbec koncepcia rovnosti nejaký materiálny obsah.6

Variabilita funkcií koncepcie rovnosti je vlastná nielen právnym poriadkom členských štátov, ale aj právnemu poriadku Spoločenstva, v ktorom pôsobí na viacerých úrovniach. Odvážim sa tvrdiť, že koncepcia rovnosti a zákazu diskriminácie predstavuje fundamentálnu ideu, z ktorej vyviera celý integračný proces Európskej únie. Veď napr. zákaz diskriminácie na základe štátnej príslušnosti je východiskovou požiadavkou a „stavebným kameňom" základnej slobody voľného pohybu v rámci vnútorného trhu. O tomto závere svedčí aj to, že v čl. 3 ods. 1 bod g) Zmluvy o ES sa uvádza ako jedna z aktivít Spoločenstva činnosť smerujúca k vytvoreniu systému zabezpečujúcemu nenarušovanie súťaže na vnútornom trhu. Myšlienka slobodnej hospodárskej súťaže a požiadavka, aby sa k porovnateľným výrobkom pristupovalo rovnako, je s koncepciou rovnosti neoddeliteľne spätá.

Uplatnenie zákazu diskriminácie na základe pohlavia v komunitárnom právnom poriadku, spolu s opatreniami zakazujúcimi diskrimináciu z dôvodu rasy či veku v posledných rokoch, svedčí o významnom posune v pojatí koncepcie rovnosti, ktorá sa tým stala súčasťou základných práv komunitárneho práva. Autori **Christopher McCrudden a Haris Kountouros** v tejto súvislosti hovoria o posune k tretiemu z vyššie spomínaných prístupov, a to k tzv. „status-based equality." 7 Výslovné zakotvenie koncepcie rovnosti, založenej na osobných charakteristikách, pôvodne „vytvarovanej" judikatúrou ESD, v Zmluve o ES alebo v antidiskriminačných smerniciach je podľa môjho názoru jedným z dôkazov správnosti postupu ESD pri formulovaní „materiálnej ústavy" Spoločenstva, čo v konečnom dôsledku spätne legitimizuje právotvornú činnosť súdu v tejto oblasti.

Ako som to už naznačil vyššie, koncepcia rovnosti nefunguje v komunitárnom práve len ako súčasť ochrany základných práv, ale pôsobí v ňom aj ako samostatná všeobecná právna zásada uznaná ESD, ktorá presahuje pozitívnu úpravu koncepcie rovnosti v Zmluve o ES.8 V zmysle

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6 Tridimas, T.: General Principles of Community Law, 2. vyd. , Oxford: Oxford University Press 2006, s. 60

7 McCrudden, Ch., Kountouros, H.: Human Rights and European Equality Law. SSRN, 2006, s. 4. http://papers.ssrn.com /sol3/ papers.cfm?abstract_id=899682 (1.9.2009)

8 Ide napr. o čl. 12 Zmluvy o ES: „V rámci predmetu úpravy tejto zmluvy, bez toho, aby boli dotknuté jej zvláštne ustanovenia, je zakázaná diskriminácia z dôvodu štátnej príslušnosti. Rada môže postupom podľa článku 251 prijímať pravidlá zakazujúce takú diskrimináciu," čl. 34 (2) Zmluvy o ES, dotýkajúci sa oblasti spoločnej poľnohospodárskej politiky: „Spoločné regulovanie podľa odseku 1 môže zahŕňať všetky opatrenia potrebné k dosiahnutiu cieľov stanovených v článku 33, predovšetkým reguláciu cien, subvencovanie jej výroby, tak aj odbytu rôznych produktov,

ustálenej judikatúry ESD všeobecná právna zásada rovnosti predstavuje zákaz, aby sa k porovnateľným situáciám pristupovalo rozdielne, okrem prípadu, ak je tento rozdielny prístup objektívne odôvodnený.9 Súčasne vylučuje, aby sa v prípade neexistencie objektívneho dôvodu s rozdielnymi situáciami zaobchádzalo rovnako.10 V tejto súvislosti teda všeobecná právna zásada rovnosti, ktorej dodržiavanie podlieha preskúmavacej právomoci ESD, vedie komunitárne orgány k tomu, aby dôslednejšie zvážili záujmy dotknutých subjektov a svoj postup racionálne zdôvodnili, čo v konečnom dôsledku prispieva k zlepšeniu kvality komunitárnej právotvorby.

Bolo by však nesprávne zužovať rozsah uplatnenia uvedeného princípu len na opatrenia orgánov Spoločenstva. Orgány členských štátov sú všeobecnou právnou zásadou rovnosti tiež viazané, a to ako pri implementácii smerníc, tak aj vtedy, keď konajú v rozsahu pôsobnosti komunitárneho práva. Za určitých okolností sú dokonca záväzné aj pre fyzické a právnické osoby, a to predovšetkým v oblasti zákazu diskriminácie na základe štátnej príslušnosti, sexuálnej orientácie a zákazu nesúťažného konania.11

V nadväznosti na spomínané okruhy aplikácie všeobecnej právnej zásady rovnosti, považujem za potrebné poukázať na odlišnú úlohu skúmanej zásady v prípade, keď sa skúma súlad komunitárneho opatrenia s ňou a v prípade, keď je predmetom prieskumu ESD opatrenie členského štátu. Odlišnosti v tomto smere si všíma **Takis Tridimas** a uvádza, že v prvom prípade je aplikácia rovnosti spojená s využitím diskrečnej právomoci komunitárnych orgánov, pričom ESD sa vo väčšej miere zameriava na účel skúmaného opatrenia. V druhom prípade ESD aplikuje všeobecnú právnu

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skladovacie a preklenovacie opatrenia a spoločné mechanizmy pre stabilizáciu dovozu alebo vývozu. Spoločná regulácia sa obmedzí na dosiahnutie cieľov určených v článku 33 a vylúči akúkoľvek diskrimináciu medzi výrobcami alebo spotrebiteľmi v rámci Spoločenstva," čl. 86 Zmluvy o ES: Čo sa týka verejných podnikov a podnikov, ktorým členské štáty priznávajú zvláštne alebo výlučné práva, tieto štáty neučinia ani nezachovajú opatrenia odporujúce pravidlám tejto zmluvy, predovšetkým pravidlám stanoveným v článkoch 12 a 81 až 89," čl. 141 (1) Zmluvy o ES : „Každý členský štát zaistí uplatnenie zásady rovnakého odmeňovania mužov a žien za rovnakú alebo rovnocennú prácu."

9 Pozri rozsudok ESD v spoj. prípadoch 117/76 a 16/77 Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. *v* Hauptzollamt Hamburg-St. Annen ; Diamalt AG *v* Hauptzollamt Itzehoe [1977] ECR 1753, bod 7

10 Pozri rozsudok ESD vo veci 106/83 **Sermide SpA *v* Cassa Conguaglio Zucchero and others [1984] ECR 4209, bod 28**

11 Tridimas, T.: General Principles of Community Law, 2. vyd. , Oxford: Oxford University Press 2006, s. 75

zásadu ako nástroj integrácie a sústredí sa predovšetkým na účinky dotknutého opatrenia.12

V skutočnosti je však ponímanie rovnosti, resp. zákazu diskriminácie ako všeobecnej právnej zásady a jej úloh v komunitárnom poriadku závislé aj od mnohých iných faktorov, než len od pôvodu skúmaného opatrenia. Je potrebné brať na zreteľ predovšetkým ciele, ktoré toto opatrenie sleduje a kontext, v ktorom sa aplikuje. V nasledujúcom texte sa preto budem venovať aplikácii všeobecnej právnej zásady rovnosti v konkrétnych oblastiach komunitárneho práva. Predtým však považujem za dôležité zmieniť sa o dvoch základných typoch, resp. subkoncepciách diskriminácie, a to o diskriminácii priamej, ako aj o diskriminácii nepriamej, ktoré majú rovnako zásadný vplyv na aplikáciu skúmanej všeobecnej právnej zásady.

Priama diskriminácia má povahu diskriminácie de iure, t. j. dochádza k nej napr. vtedy, ak právny poriadok členského štátu výslovne a výlučne vyhradí výkon určitého povolania pre vlastných štátnych príslušníkov, alebo napr. vtedy, ak právny predpis odoprie ženám prístup ku konkrétnemu povolaniu. V prípade nepriamej diskriminácie ide o diskrimináciu de facto. To znamená, že nevyplýva výslovne zo žiadneho právneho predpisu, napriek tomu vyvoláva diskriminačné účinky. Najčastejšie sa prípady nepriamej diskriminácie objavujú v spojitosti s porušením rovnosti pohlaví alebo v súvislosti so zamestnancami pracujúcimi na čiastočný úväzok (zamestnanci pracujúci na čiastočný úväzok sú horšie platení ako zamestnanci na plný úväzok a zo štatistík vyplýva, že väčšinu zamestnancov na čiastočný úväzok tvoria ženy).13

Význam vyššie uvedeného rozlišovania sa prejavuje predovšetkým v dôvodoch ospravedlňujúcich diskriminačné zaobchádzanie. V prvom rade, zákaz priamej diskriminácie podlieha značne obmedzenému počtu výnimiek, obsiahnutých v rámci primárneho práva (napr. čl. 30, čl. 39 ods. 4 Zmluvy o ES) alebo sekundárneho práva (čl. 2 smernice č. 76/207/EHS).14 Ako výnimky vyplývajúce z práva Spoločenstva sa tieto interpretujú reštriktívne. V druhom rade, nepriamu diskrimináciu možno ospravedlniť

12 Tridimas, T.: General Principles of Community Law, 2. vyd. , Oxford: Oxford University Press 2006, s. 76

13 K tomu pozri rozsudok ESD vo veci C-237/94 John O'Flynn *v* Adjudication Officer [1996] ECR I-2617, body 18 – 19

14 Smernica Rady 76/207 zo dňa 9. februára 1976 o vykonávaní zásady rovnakého zaobchádzania s mužmi a ženami, pokiaľ ide o prístup k zamestnaniu, odbornej príprave a postupu v zamestnaní a o pracovné podmienky, 1976, Úradný vestník (L39), s. 40 - 42

dôvodmi, ktoré v rámci komunitárneho práva nie sú ani výslovne ani vyčerpávajúco stanovené.15

V súvislosti s rôznymi typmi diskriminácie sa vynára ešte jeden pojem, a to tzv. **obrátená diskriminácia**. Ide o diskrimináciu vlastných štátnych príslušníkov členským štátom vo vzťahu k cudzím štátnym príslušníkom. Diskriminácia v tomto zmysle nie je komunitárnym právom zakázaná. Aj keď s ohľadom na uvedené platí, že ESD nemôže rozhodnúť o neplatnosti právneho predpisu členského štátu, ktorý pôsobí diskriminačne voči svojim vlastným občanom, v judikatúre ESD sa možno stretnúť s prípadom, keď súd skúmal súlad národného diskriminačného opatrenia v kontexte základnej slobody voľného pohybu osôb a rozhodol o jeho neplatnosti.16

V prípade Kraus ESD síce konštatoval neplatnosť nemeckej legislatívy, podľa ktorej mohol držiteľ zahraničného vysokoškolského diplomu používať nemecký titul až po autorizácii diplomu nemeckým orgánom, avšak nie z dôvodu diskriminácie na základe štátnej príslušnosti, ale pre obmedzenie uplatnenia základnej slobody voľného pohybu držiteľa diplomu.17

2. ZÁKAZ DISKRIMINÁCIE V OBLASTI POĽNOHOSPODÁRSKEJ POLITIKY

Ako som už poznamenal v úvode, medzi všeobecnou zásadou rovnosti a myšlienkou slobodnej hospodárskej súťaže existuje pevná väzba. Jej základnou funkciou je zabezpečiť ochranu hospodárskej súťaže proti jej narušeniu. Vyvstáva však otázka, ako sa tá táto funkcia uplatní v oblasti spoločnej poľnohospodárskej politiky, ktorá je vo významnej miere založená na intervencii zo strany komunitárnych orgánov, ovplyvňujúcej prirodzené pôsobenie hospodárskych síl na vnútornom trhu.

Skutočnosť, že orgánom Spoločenstva bola zverená široká miera voľného uváženia v tejto oblasti, korešpondujúca s mierou ich politickej zodpovednosti za jej riadne fungovanie v zmysle článkov 34 a 37 Zmluvy o ES, má v zmysle judikatúry ESD zásadný vplyv na aplikáciu predmetnej všeobecnej právnej zásady. V nadväznosti na to ESD zastáva názor, že nakoľko komunitárne orgány pri svojich politických rozhodnutiach vychádzajú z komplexného vyhodnotenia ekonomickej situácie, ESD nemôže nahrádzať toto vyhodnotenie svojím vlastným posúdením, ale musí

15 Groussot, X.: General Principles of Community Law. Groningen: Europa Law Publishing 2006, s. 164

16 Rozsudok ESD vo veci 98/86 Mathot [1987] ECR 27

17 Rozsudok ESD vo veci C-19/92 Dieter Kraus *v* Land Baden-Württemberg [1993] ECR I-1663

sa obmedziť len na skúmanie toho, či nie sú závery komunitárnych orgánov zjavne chybné a či nejde z ich strany o zneužitie právomoci, prípadne či ich postup jasným spôsobom neprekračuje hranice uváženia, ktorým disponujú.18 To znamená, že v prípade, ak sa komunitárne orgány rozhodnú znevýhodniť, resp. diskriminovať určitú skupinu subjektov, pôsobiacich v rámci vnútorného trhu, pretože si to podľa nich objektívne vyžaduje riadne fungovanie vnútorného trhu v oblasti spoločnej poľnohospodárskej politiky, súd tento postup zásadne nepovažuje za porušenie všeobecnej právnej zásady rovnosti, príp. zásady zákazu diskriminácie, a to aj napriek existencii podstatných rozdielov v prístupe k dotknutým skupinám subjektov trhu.

Aké aspekty sú však rozhodujúce pre stanovenie hranice medzi „prípustnou mierou diskriminácie“ a diskrimináciou, ktorá je v rozpore s komunitárnym právom?

Odpoveď na zásadnú otázku poskytuje ESD v rozsudku vo veci Royal Scholten Honig.19 V tomto prípade výrobcovia izoglukózy napadli platnosť nariadení Rady, na základe ktorých bolo pozastavené vyplácanie podpory pre producentov kukuričného škrobu, určeného na výrobu izoglukózy a namiesto neho bol zavedený systém poplatkov, zaťažujúcich výrobcov izoglukózy, a to za účelom odstránenia ich výhodného postavenia na trhu, ktoré títo požívali na úkor producentov cukru. Vo vzťahu k nariadeniu, ktoré pozastavilo vyplácanie podpory pre producentov kukuričného škrobu, ESD, poukazujúc na čl. 40 ods. 3 Zmluvy o ES (v súčasnosti čl. 34 Zmluvy o ES), v prvom kroku skúmal, či situácia izoglukózy je porovnateľná s postavením ostatných produktov výrobcov škrobu na trhu (v tejto súvislosti je pozoruhodné, že ESD namiesto statusu výrobcov v zmysle spomínaného článku, porovnával postavenie výrobkov). Súd zistil, že v prípade škrobu, resp. ostatných produktov získaných z izoglukózy na jednej strane a izoglukózy na strane druhej, nešlo o konkurenčné produkty, čo však naplatilo vo vzťahu k cukru a izoglukóze. Vzhľadom na túto skutočnosť, aj keď ESD pôvodne odkazoval na všeobecnú právnu zásadu rovnosti, uzavrel, že dotknuté nariadenie neporušilo pravidlo zákazu diskriminácie medzi producentmi, zakotvené v čl. 40 ods. 3 Zmluvy o ES.20

Vo vzťahu k zavedeniu systému poplatkov, zaťažujúcich výrobcov izoglukózy, súd opätovne zvažoval existenciu porovnateľnej situácie –

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18 Pozri napr. rozsudok ESD vo veci C-280/93 Federal Republic of Germany *v* Council of the European Union [1994] ECR I-4973

19 Rozsudok ESD v spoj. prípadoch 103/77 a 145/77 Royal Scholten-Honig (Holdings) Limited *v* Intervention Board for Agricultural Produce; Tunnel Refineries Limited *v* Intervention Board for Agricultural Produce [1978] ECR 2037

20 Pozri body 26, 27 a 32 rozsudku ESD v spoj. prípadoch 103/77 a 145/77 Royal Scholten-Honig (Holdings) Limited *v* Intervention Board for Agricultural Produce; Tunnel Refineries Limited *v* Intervention Board for Agricultural Produce [1978] ECR 2037

tentokrát však skúmal vzťah izoglukózy a cukru. Poukázal na to, že Rada uznala v úvodnej časti dotknutého nariadenia, že izoglukóza predstavovala priamu náhradu tekutého cukru, a tiež to, že akékoľvek komunitárne opatrenie, dotýkajúce sa jedného druhu produktu, má nevyhnutne vplyv na iný druh. Na základe zistenia porovnateľného postavenia izoglukózy a cukru na trhu, ESD konštatoval, že k výrobcom cukru a výrobcom izoglukózy sa aj napriek tomu pristupovalo odlišne. Odlišnosť prístupu spočíval v tom, že povinnosť výrobcov izoglukózy platiť poplatky za jej výrobu sa týkala celej produkcie, kým výrobcovia cukru túto povinnosť mali až po prekročení stanovených kvót.21

ESD tiež podotkol, že tento systém poplatkov bol výhodný len pre výrobcov cukru. Vzhľadom na konštatovanie odlišného prístupu súdom bola predmetom skúmania otázka, či bol tento odôvodnený objektívnymi okolnosťami. Zo strany komunitárnych orgánov zaznel argument, že vzhľadom na to, že cena izoglukózy zvykla byť závislá na intervenčnej cene cukru, vyššia cena cukru (podľa komunitárnych orgánov o 15 percent vyššia ako cena cukru za bežných okolností) predstavovala teoretickú výhodu pre výrobcov izoglukózy v rozsahu 15 percent, ktorá výhoda zhruba zodpovedala piatim zúčtovacím jednotkám maximálneho poplatku.22 ESD tento argument zamietol, pretože podľa neho rovnaká výhoda by sa dala dosiahnuť výrobcom cukru s výhodne situovaným podnikom s moderným vybavením.23

Ďalej bolo namietané, že výška poplatku, ktorú museli znášať výrobcovia izoglukózy, korešpondovala s poplatkovým zaťažením výrobcov cukru vo vzťahu k celej produkcii, za predpokladu, že by sa zohľadnili množstvá cukru vyrobené nad rámec upravených kvót. Aj tento argument súd zamietol, a to z toho dôvodu, že výrobcovia cukru získavali od pestovateľov cukrovú repu za zníženú cenu, určenú na výrobu cukru nad rámec stanovených kvót a výrobcovia cukru mohli obmedziť výšku

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21 Pozri bod 64 rozsudku ESD v spoj. prípadoch 103/77 a 145/77 Royal Scholten-Honig (Holdings) Limited *v* Intervention Board for Agricultural Produce; Tunnel Refineries Limited *v* Intervention Board for Agricultural Produce [1978] ECR 2037

22 Pozri bod 69 rozsudku ESD v spoj. prípadoch 103/77 a 145/77 Royal Scholten-Honig (Holdings) Limited *v* Intervention Board for Agricultural Produce; Tunnel Refineries Limited *v* Intervention Board for Agricultural Produce [1978] ECR 2037

23 Pozri bod 71 rozsudku ESD v spoj. prípadoch 103/77 a 145/77 Royal Scholten-Honig (Holdings) Limited *v* Intervention Board for Agricultural Produce; Tunnel Refineries Limited *v* Intervention Board for Agricultural Produce [1978] ECR 2037

poplatkového zaťaženia tým, že by jednoducho znížili výrobu, inými slovami, že by dodržiavali komunitárnym právom povolené množstvá.24

Na druhej strane, vo vzťahu k izoglukóze ESD zvýraznil, že samotné obmedzenie výroby by nemalo žiadny dopad na výšku poplatku za jednotku váhy. Na základe uvedeného teda ESD konštatoval, že systém poplatkov za výrobu izoglukózy bol v rozpore so všeobecnou právnou zásadou rovnosti, ktorej špecifickým vyjadrením je zákaz diskriminácie v zmysle čl. 40 ods. 3 Zmluvy o ES.

Takis Tridimas v súvislosti so skúmaným rozhodnutím poukazuje na tri závery, ktoré je možné z neho vyvodiť. Prvý záver sa dotýka vzťahu medzi existujúcim výrobkom a novým produktom, ktorý bol uvedený na trh. Výrobcovia existujúceho produktu nepožívajú neobmedzené právo na ochranu pred konkurenciou, vyplývajúcou z uvedenia nového výrobku na trh, a to aj napriek prebytku zásob na relevantnom trhu. Druhý záver sa týka účelu opatrení, zameraných na regulovanie výroby. Hlavným zámerom sporného nariadenia bolo zabezpečiť spravodlivé rozdelenie bremien medzi výrobcov izoglukózy a cukru uložením povinnosti producentom izoglukózy podieľať sa na úhrade nákladov, vzniknutých v oblasti výroby cukru. Rozsudok naznačuje, že sa tento zámer musí uskutočniť na základe racionálnych kritérií a koherentného regulačného systému, ktorý podľa názoru ESD v danom prípade chýbal. Tretí záver spočíva v tom, že ESD pri zisťovaní materiálnej rovnosti podrobne skúma dôvody uplatnené komunitárnymi orgánmi a posudzuje účinky opatrenia na porovnávaných skupinách výrobcov.25

Vyššie uvedený prípad zreteľne ilustruje metodológiu ESD pri posudzovaní tvrdeného porušenia princípu rovnosti. V prvom rade súd skúma, či sa produkty alebo producenti, vo vzťahu ku ktorým malo dôjsť k diskriminácii, nachádzajú v porovnateľnom postavení. Ako to vyplýva zo spomínaného prípadu, zdá sa, že súd stotožňuje porovnateľné postavenie s konkurenčným postavením. Inými slovami, súd zvažuje, či skúmané produkty spĺňajú rovnakú funkciu, a teda či sú vzájomne zameniteľné. Napr. v prípade Walter Rau26 ESD odôvodnil nesplnenie podmienky vzájomnej zameniteľnosti masla a margarínu osobitosťou a dôležitosťou komunitárneho trhu s mliekom, ďalej tým, že oleje a tuky a margarín plnia v rámci organizácie trhu, pod ktorú spadajú odlišné funkcie a trh s tukmi a olejmi nie je

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24 Pozri bod 80 rozsudku ESD v spoj. prípadoch 103/77 a 145/77 Royal Scholten-Honig (Holdings) Limited *v* Intervention Board for Agricultural Produce; Tunnel Refineries Limited *v* Intervention Board for Agricultural Produce [1978] ECR 2037

25 Tridimas, T.: General Principles of Community Law, 2. vyd. , Oxford: Oxford University Press 2006, s. 81

26 Rozsudok ESD vo veci 261/81 Walter Rau Lebensmittelwerke *v* De Smedt PVBA [1982] ECR-3961

ovplyvnený problémami, ktoré sú spojené s trhom s mliečnymi produktmi.27

V prípade záveru o zameniteľnosti produktov zásadne platí, že k obom sa musí pristupovať rovnako. Ak sa zistí, že výrobky, resp. výrobcovia sa v konkurenčnom postavení nenachádzajú (ako to bolo vo vyššie uvedenom prípade medzi škrobom a ostatnými produktmi zo škrobu, alebo v prípade medzi maslom a margarínom), ESD svoj prieskum súladu s princípom rovnosti ukončí. Naopak, zistenie porovnateľného postavenia (situácie) dotknutých výrobkov alebo výrobcov vedie súd k ďalšiemu skúmaniu, zameranému na hľadanie odpovede na otázku, či sa k dotknutým produktom, resp. producentom pristupovalo rozdielne.

V prípade Bananas28 musel ESD posúdiť súlad nariadenia Rady, ktorým došlo k založeniu spoločnej organizácie trhu s banánmi so všeobecnou právnou zásadou rovnosti. Navrhovateľ namietal nové rozdelenie tarifných kvót, ktoré podľa jeho názoru znevýhodňovalo obchodníkov podnikajúcich s banánmi pôvodom z tretích krajín, pretože malo za následok zníženie ich podielu na trhu, a to v prospech tých podnikateľov, ktorí obchodovali z banánmi vypestovanými v rámci Spoločenstva a krajín ACP (t. j. krajín Afriky, Karibiku a Pacifiku).

ESD v súvislosti so skúmaním odlišného prístupu najprv konštatoval, že spoločná organizácia trhu s banánmi zahŕňa podnikateľov, ktorí nie sú ani producenti ani konzumenti. Avšak v dôsledku všeobecnej povahy všeobecnej právnej zásady zákazu diskriminácie, zákaz diskriminácie sa vzťahuje aj na ďalšie kategórie podnikateľov, ktorí podliehajú spoločnej organizácií trhu.29

Následne ESD posúdil, že predmetné nariadenie malo na uvedené kategórie podnikateľov odlišný dopad. Pre podnikateľov, ktorí boli obchodovali s banánmi z tretích krajín malo prijatie nového systému tarifných kvót za následok obmedzenie možností dovozu, kým podnikatelia obchodujúci s banánmi zo Spoločenstva a z krajín ACP mohli dovážať špecifikované množstvá banánov z tretích krajín.30

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27 Pozri body 29 až 31 rozsudku ESD v spoj. prípadoch 103/77 a 145/77 Royal Scholten-Honig (Holdings) Limited *v* Intervention Board for Agricultural Produce; Tunnel Refineries Limited *v* Intervention Board for Agricultural Produce [1978] ECR 2037

28 Rozsudok ESD vo veci C-280/93 Federal Republic of Germany *v* Council of the European Union [1994] ECR I-4973

29 Pozri bod 68 rozsudku ESD vo veci C-280/93 Federal Republic of Germany *v* Council of the European Union [1994] ECR I-4973

30 Pozri bod 73 rozsudku ESD vo veci C-280/93 Federal Republic of Germany *v* Council of the European Union [1994] ECR I-4973

V prípade zistenia nerovnakého prístupu nastupuje tretí krok – skúmanie, či postup, spočívajúci v rozdielnom prístupe je odôvodnený objektívnymi okolnosťami. V tomto ohľade z vyššie uvedeného rozsudku vyplýva, že rozhodujúcim faktorom pre rozhodnutie súdu bolo neunesenie dôkazného bremena komunitárnymi orgánmi o danosti objektívnych okolností, nie nesplnenie povinnosti dotknutých výrobcov preukázať ich neexistenciu.31

Objektívne okolnosti môžu spočívať napr. v legitímnych cieľoch, o dosiahnutie ktorých sa komunitárne orgány v rámci politík Spoločenstva usilujú. Môžu spočívať tiež v snahe odstrániť osobitné ťažkosti v určitom hospodárskom odvetví. Rozdielnosť v prístupe medzi dvomi skupinami podnikateľov alebo produktov môže byť odôvodnená, ak je to potrebné na ochranu ich legitímnych očakávaní. Vo všeobecnosti je ale rozdielnosť prístupov akceptovaná v prípadoch, keď nie je založená na arbitrárnosti v tom zmysle, že prekračuje širokú diskrečnú právomoc komunitárnych orgánov. To isté platí v prípade, ak rozdielnosť prístupov spočíva v objektívnych rozdieloch, vyplývajúcich z hospodárskych okolností tvoriacich základ spoločnej organizácie trhu relevantných produktov.32 Vo vyššie spomenutom prípade Bananas ESD dospel k záveru, že nedošlo k porušeniu všeobecnej právnej zásady rovnosti, nakoľko spoločná organizácia trhu zabezpečila primerané rozdelenie rizík a výhod medzi rôzne kategórie obchodníkov.33

Uvedený prípad je príkladom toho, že v ekonomickej oblasti, všeobecná právna zásada rovnosti zakazuje iba opatrenia kladúce na obchodníkov väčšie riziká, ako sú tie, ktorých znášanie možno od obchodníkov rozumne očakávať vo svetle existujúcich hospodárskych podmienok. Vo všeobecnosti však možno vo vzťahu k požiadavke objektívneho odôvodnenia v prípade Bananas uzavrieť, že rozhodujúcim faktorom pre posúdenie rozporu dotknutého nariadenia so všeobecnou právnou zásadou rovnosti boli ciele smerujúce k dosiahnutiu spoločnej poľnohospodárskej politiky v oblasti trhu s banánmi, ktoré podľa ESD ospravedlňovali nerovnaký prístup komunitárnych orgánov.

Ako som už spomenul vyššie, komunitárne orgány za účelom dosiahnutia cieľov spoločnej poľnohospodárskej politiky disponujú širokou právomocou voľného uváženia. Prejavom tejto skutočnosti je rozsudok vo veci Wuidart,34 v ktorom ESD uviedol, že všade tam, kde je potrebné, aby

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31 Pozri bod 95 rozsudku ESD vo veci C-280/93 Federal Republic of Germany *v* Council of the European Union [1994] ECR I-4973

32 Tridimas, T.: General Principles of Community Law, 2. vyd. , Oxford: Oxford University Press 2006, s. 84

33 Rozsudok ESD vo veci C-280/93 Federal Republic of Germany *v* Council of the European Union [1994] ECR I-4973, bod 74

34 Rozsudok ESD v spoj. prípadoch C-267/88 a C-285/88 Gustave Wuidart and others *v* Laiterie coopérative eupenoise société coopérative and others [1990] ECR I-435

komunitárna legislatíva pri prijímaní pravidiel vyhodnotila ich budúce účinky, ktoré nemožno presne predvídať, toto posúdenie je otvorené prieskumu len vtedy, ak sa javí ako zjavne nesprávne vo svetle poznatkov, ktoré sú k dispozícii v čase prijatia dotknutých opatrení.35

Je potrebné zdôrazniť, že všeobecná právna zásada rovnosti sa neaplikuje len na komunitárne opatrenia, ale aj na opatrenia členských štátov. V prípade Klensch 36 mal ESD odpovedať na otázku, či zákaz diskriminácie zakotvený v čl. 40 ods. 3 Zmluvy o ES bráni členskému štátu vo výbere určitého spôsobu implementácie komunitárneho právneho aktu, ak by tento viedol na území členského štátu k diskriminácii medzi výrobcami v rámci Spoločenstva. ESD analyzoval rozsah aplikácie skúmanej všeobecnej právnej zásady zakotvenej v uvedenom článku Zmluvy o ES a poukázal na to, že táto všeobecná právna zásada je len osobitným vyjadrením všeobecnej právnej zásady rovnosti, ktorá je jednou z fundamentálnych princípov komunitárneho práva.37 ESD rozhodol, že za stavu, keď rôzne ustanovenia nariadenia ponechávajú možnosť výberu spôsobu implementácie na členské štáty, tieto musia pritom rešpektovať všeobecnú právnu zásadu zákazu diskriminácie. Všeobecná právna zásada rovnosti je záväzná pre všetky členské štáty, pretože pokrýva všetky opatrenia vzťahujúce sa na spoločnú organizáciu poľnohospodárskych trhov.38

3. ZÁKAZ DISKRIMINÁCIE NA ZÁKLADE POHLAVIA A POZITÍVNA DISKRIMINÁCIA

V čl. 141 Zmluvy o ES je zakotvená zásada, podľa ktorej majú muži a ženy dostať rovnakú mzdu za rovnakú prácu. V zmysle judikatúry však ESD považuje uvedenú zásadu za súčasť omnoho širšej koncepcie rovnosti pohlaví, ktorá presahuje spomínaný článok, ako aj ustanovenia sekundárneho práva. Toto ponímanie všeobecnej právnej zásady rovnosti sa zrodilo v judikatúre ESD v spojitosti s rozhodovaním sporov, vzniknutých medzi komunitárnymi úradníkmi a ich zamestnávateľskými orgánmi. V kontexte príspevkov vyplácaných za presídlenie, ESD v prípade Sabbatini39 rozhodol, že nariadenia určené pre zamestnancov

35 Pozri bod 14 rozsudku ESD v spoj. prípadoch C-267/88 a C-285/88 Gustave Wuidart and others *v* Laiterie coopérative eupenoise société coopérative and others [1990] ECR I-435

36 Rozsudok ESD vo spoj. veciach 201/85 a 202/85 Marthe Klensch and others *v* Secrétaire d'État à l'Agriculture et à la Viticulture [1986] ECR 3477

37 Pozri bod 9 rozsudku ESD vo spoj. veciach 201/85 a 202/85 Marthe Klensch and others *v* Secrétaire d'État à l'Agriculture et à la Viticulture [1986] ECR 3477

38 Pozri bod 10 rozsudku ESD vo spoj. veciach 201/85 a 202/85 Marthe Klensch and others *v* Secrétaire d'État à l'Agriculture et à la Viticulture [1986] ECR 3477

39 Rozsudok ESD vo veci 20/71 Luisa Sabbatini, née Bertoni, *v* European Parliament [1972] ECR 345

komunitárnych orgánov nemôžu pristupovať k zamestnancom rôzne podľa toho, či ide o muža alebo o ženu, pretože zánik statusu presídlenca musí aj pre mužov aj pre ženy závisieť od rovnakých kritérií, bez ohľadu na pohlavie.

V polovici sedemdesiatych rokov bol ESD v prípade Airola40 postavený pred úlohu rozhodnúť o námietkach komunitárnej úradníčky, ktorá po uzavretí manželstva získala štátne občianstvo svojho manžela, čím podľa názoru komunitárneho orgánu stratila status presídlenca, a tým aj nárok na príspevok s týmto statusom spojený. Súd po tom, čo poznamenal, že právna úprava členských štátov neupravovala nadobudnutie manželkinho štátneho občianstva úradníkom, ESD konštatoval, že koncepcia štátneho občianstva musí byť interpretovaná takým spôsobom, aby sa zabránilo akémukoľvek neodôvodnenému rozdielu v zaobchádzaní medzi úradníkmi ženského a mužského pohlavia, ktorí sú v skutočnosti v porovnateľnom postavení a nesmie byť vymedzená štátnym občianstvom. Rovnosť v zaobchádzaní teda vyžadovala, aby bol status presídlenca dotknutej komunitárnej úradníčky aj napriek uzatvoreniu manželstva zachovaný.

Medzník v oblasti zrovnoprávnenia mužov v komunitárnom práve nastal v spojených prípadoch Razzouk.41 ESD rozhodol, že vdovec po úradníčke by mal mať v zásade rovnaké právo na dôchodok ako vdova po úradníkovi. V zmysle príslušných nariadení, upravujúcich vzťahy medzi komunitárnymi zamestnancami a ich zamestnávateľmi, vdova po úradníkovi získala dôchodok bez ohľadu na jej závislosť na manželovi alebo na svojich vlastných zdrojoch, kým vdovec po úradníčke mohol získať dôchodok iba za predpokladu, že nemal vlastný príjem a preukázal, že bol natrvalo neschopný si tento príjem pre svoje postihnutie alebo vážne ochorenie zabezpečiť a aj napriek naplneniu uvedených podmienok by výška dôchodku nedosahovala výšku dôchodku, ktorý by bol vyplácaný vdove po zosnulom úradníkovi. ESD v tejto veci odkázal na svoje skoršie rozhodnutia vo veciach Sabbatini a Airola a potvrdil, že rovnaké zaobchádzanie s oboma pohlaviami je jedným zo základných práv, ktorých dodržiavanie má ESD povinnosť zabezpečiť. ESD preto neostávalo nič iné, ako dotknuté nariadenie v rozpornej časti zrušiť. Navyše súd dodal, že je povinnosťou komunitárnych orgánoch, aby vykonali nevyhnutné opatrenia na zosúladenie právnej úpravy s rozhodnutím súdu, avšak kým sa tak stane, nárok navrhovateľa na dôchodok sa bude posudzovať na základe ustanovení vzťahujúcich sa na vdovy.

Podstatným aspektom všeobecnej právnej zásady rovnosti je však nielen to, že vylučuje aplikáciu opatrení, ktoré vedú k priamej diskriminácii na

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40 Rozsudok ESD vo veci 21/74 Jeanne Airola *v* Commission of the European Communities [1975] ECR 221

41 Rozsudok ESD v spoj. veciach 75/82 a 117/82 C. Razzouk and A. Beydoun *v* Commission of the European Communities [1984] ECR 1509

základe pohlavia, ale tiež aplikáciu tých ustanovení, ktoré upravujú rozdielne zaobchádzanie medzi mužmi a ženami v súvislosti s výkonom zamestnania na základe iných kritérií než je pohlavie.42

Ako som už uviedol vyššie, komunitárne právo zakazuje nielen priamu, ale aj nepriamu diskrimináciu. Kým priama diskriminácia podlieha obmedzenému množstvu výnimiek, ktoré komunitárne právo explicitne stanovuje, v prípade nepriamej diskriminácie sa uplatnia objektívne dôvody, ktorých vyčerpávajúci zoznam nie je obsiahnutý v žiadnom z prameňov práva Spoločenstva.

Príkladom veci, v ktorej sa ESD zaoberal priamou diskrimináciou na základe pohlavia je rozsudok vo veci Kreil.43 Tento prípad sa týkal odmietnutia žiadosti uchádzačky o výkon dobrovoľnej služby v armáde so zameraním na údržbu elektroniky zbraní, pretože nemecké právo zakazovalo ženám slúžiacim v armáde prácu so zbraňami. Národný súd sa v tejto veci obrátil na ESD s otázkou, či smernica Rady č. 76/201/EHS,44 týkajúca sa implementácie všeobecnej právnej zásady rovnakého zaobchádzania s mužmi a so ženami v oblasti prístupu do zamestnania, odborného tréningu, postupu na vyššie pracovné miesta a pracovných podmienok, bráni aplikácii ustanovení nemeckého práva, ktoré zakazujú ženám pôsobiť na postoch v armáde, zahŕňajúcich styk so zbraňami. Nemecká vláda namietala, že otázky bezpečnosti nespadajú pod komunitárne právo, ale tvoria súčasť spoločnej zahraničnej a bezpečnostnej politiky, v ktorej si rozhodné slovo ponechali členské štáty.45 ESD v prvom rade poznamenal, že aj keď členské štáty prijmú vhodné opatrenia za účelom vnútornej a vonkajšej bezpečnosti, rozhodnutia dotýkajúce sa organizácie ich ozbrojených síl nespadajú úplne mimo rámec komunitárneho práva.46 Súd obzvlášť zdôraznil fakt, že výnimky zo zákazu

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42 Pozri napr. rozsudok ESD v spoj. veci C-399/02, C-409/92, C-425/92, C-34/93, C-50/93 a C-78/93 Stadt Lengerich *v* Angelika Helmig and Waltraud Schmidt *v* Deutsche Angestellten-Krankenkasse and Elke Herzog *v* Arbeiter-Samariter-Bund Landverband Hamburg eV and Dagmar Lange *v* Bundesknappschaft Bochum and Angelika Kussfeld *v* Firma Detlef Bogdol GmbH and Ursula Ludewig *v* Kreis Segeberg [1994] ECR I-5727, bod 20

43 Rozsudok ESD vo veci C-285/98 Tanja Kreil *v* Federal Republic of Germany [2000] ECR I-69

44 Smernica Rady 76/207 zo dňa 9. februára 1976 o vykonávaní zásady rovnakého zaobchádzania s mužmi a ženami, pokiaľ ide o prístup k zamestnaniu, odbornej príprave a postupu v zamestnaní a o pracovné podmienky, 1976, Úradný vestník (L39), s. 40 - 42

45 Rozsudok ESD vo veci C-285/98 Tanja Kreil *v* Federal Republic of Germany [2000] ECR I-69, body 11 a 12

46 Pozri bod 15 rozsudku ESD vo veci C-285/98 Tanja Kreil *v* Federal Republic of Germany [2000] ECR I-69

priamej diskriminácie sa nevzťahujú na ustanovenia Zmluvy o ES sociálneho charakteru, ktorých súčasť tvorí všeobecná právna zásada rovnakého zaobchádzania s mužmi a so ženami.47 ESD ďalej deklaroval, že uvedená právna zásada je všeobecne aplikovateľná, a že dotknutá smernica sa vzťahuje na zistený skutkový stav.48 Súd nakoniec namietanú nemeckú právnu úpravu obsiahnutú v čl. 12a Základného zákona vyhodnotil ako neprimeranú.

Je pozoruhodné, že v krátkom čase po tom, čo ESD vyniesol rozsudok vo veci, nemecký parlament schválil návrh na zmenu predmetného článku Základného zákona za účelom jeho zosúladenia s komunitárnym právom.49 Uvedené jasne nasvedčuje tomu, aký dopad majú všeobecné právne zásady komunitárneho práva na právne poriadky členských štátov. Inými slovami, porušenie princípu rovnosti môže viesť k novelizácii národného práva. V spomínanom prípade všeobecná právna zásada v podstate nepriamo prevážila dokonca nad ústavným článkom členského štátu.

K inému záveru ESD dospel v rozsudku vo veci Sirdar,50 ktorá sa rovnako týkala diskriminácie žiadateľky o službu v armáde, avšak tentoraz išlo o profesionálnu členku oddielu anglickej kráľovskej artilérie, ktorej bol ponúknutý prestup do oddielov kráľovského námorníctva. Ponuka však bola stiahnutá z dôvodu rozporu s pravidlom, ktoré vylučovalo, aby ženy boli členkami kráľovského námorníctva. Predtým, než sa ESD začal zaoberať otázkou, či odňatie možnosti ženám stať sa členkami vojenskej jednotky môže byť ospravedlnené výnimkami vyplývajúcimi zo smernice upravujúcej otázky rovnakého zaobchádzania, ESD potvrdil, že princíp rovnakého zaobchádzania nepodliehal žiadnej výnimke, ktorá by bola spojená s opatreniami organizácie vojenských síl, vydanými za účelom ochrany verejnej bezpečnosti.51

Čo sa týka rámca aplikácie komunitárneho práva, súd jednoznačne formuloval pravidlo, že národné opatrenia prijaté ozbrojenými silami spadajú pod pôsobnosť komunitárneho práva do tej miery, do akej majú

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47 Pozri bod 16 rozsudku ESD vo veci C-285/98 Tanja Kreil *v* Federal Republic of Germany [2000] ECR I-69

48 Pozri body 18 a 19 rozsudku ESD vo veci C-285/98 Tanja Kreil *v* Federal Republic of Germany [2000] ECR I-69

49 Groussot, X.: General Principles of Community Law. Groningen: Europa Law Publishing 2006, s. 174

50 Rozsudok ESD vo veci C-273/97 Angela Maria Sirdar *v* The Army Board and Secretary of State for Defence [1999] ECR I-7403

51 Pozri bod 19 rozsudku ESD vo veci C-273/97 Angela Maria Sirdar *v* The Army Board and Secretary of State for Defence [1999] ECR I-7403

tieto opatrenia dopad na rovnosť pohlaví.52 Následne súd pristúpil k analýze dotknutej smernice a uviedol, že čl. 2 ods. 2 smernice 76/207/EHS musí byť interpretovaný reštriktívne, lebo išlo o ustanovenie upravujúce výnimky zo zákazu priamej diskriminácie.53

V súvislosti so zakotvením akejkoľvek výnimky zo základného práva súčasne zdôraznil požiadavku dodržania princípu proporcionality. V tomto ohľade princíp proporcionality vyžaduje, aby výnimky zo základného práva boli upravené len vo vhodnom a nevyhnutnom rozsahu, potrebnom na dosiahnutie sledovaného cieľa.54 ESD poznamenal, že dôvod neprijatia uchádzačky o členstvo vo vojenskom oddiele bolo pravidlo schopnosti spolupracovať (interoperability rule), ktorého cieľom bolo zabezpečiť efektivitu v boji. Uvedené pravidlo vychádzalo zo štruktúry a funkcie kráľovského námorníctva pôsobiť v prvých útočných líniách. Vzhľadom na to, že súd považoval spomínané opatrenie za primerané a ospravedlňujúce len výlučne mužské zloženie vojenskej jednotky, rozhodol, že sťažovateľkou namietaný postup nebol v rozpore s čl. 2 ods. 2 uvedenej smernice.55

Jednou z najproblematickejších otázok, ktoré ESD musel v súvislosti so skúmaným princípom riešiť, bol vzťah medzi všeobecnou právnou zásadou rovnakého zaobchádzania a pozitívnej diskriminácie. Právnym základom pre uplatnenie pozitívnej diskriminácie v pracovnej oblasti ako výnimky z princípu rovnosti sa po prijatí Amsterdamskej zmluvy stal čl. 141 ods. 4 Zmluvy o ES, podľa ktorého „s ohľadom na plné zabezpečenie rovnakého zaobchádzania s mužmi a ženami v pracovnom procese nebráni zásada rovnakého zaobchádzania žiadnemu členskému štátu zachovať alebo zaviesť opatrenie, poskytujúce osobitné výhody pre uľahčenie odbornej pracovnej činnosti menej zastúpeného pohlavia alebo za účelom predchádzania či kompenzácie nevýhod v profesijnej sfére“ (čl. 141 ods. 4 ZES).

Na úrovni sekundárneho komunitárneho práva však bola problematika pozitívnej diskriminácie v pracovnej oblasti upravená skôr, a to článkom 2 ods. 4 už niekoľkokrát spomenutej smernice Rady č. 76/207/EHS z 9. februára 1976, v ktorom sa uvádzajú tri výnimky zo zásady rovnakého zaobchádzania - prvá, ak je určujúcim faktorom pohlavie pracovníka, druhá,

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52 Pozri bod 20 rozsudku ESD vo veci C-273/97 Angela Maria Sirdar *v* The Army Board and Secretary of State for Defence [1999] ECR I-7403

53 Pozri bod 23 rozsudku ESD vo veci C-273/97 Angela Maria Sirdar *v* The Army Board and Secretary of State for Defence [1999] ECR I-7403

54 Pozri bod 26 rozsudku ESD vo veci C-273/97 Angela Maria Sirdar *v* The Army Board and Secretary of State for Defence [1999] ECR I-7403

55 Pozri body 29-32 rozsudku ESD vo veci C-273/97 Angela Maria Sirdar *v* The Army Board and Secretary of State for Defence [1999] ECR I-7403

ak žena musí byť chránená, pokiaľ ide o tehotenstvo a materstvo a tretia, ak sa prijímajú opatrenia na podporu rovnakých príležitostí.

Práve vyššie uvedeným článkom a jeho vzťahom k všeobecnej právnej zásade zákazu diskriminácie sa ESD zaoberal v prípade Kalanke,56 v súvislosti s ktorým súd uviedol, že vnútroštátne predpisy, ktoré ženám zaručujú absolútnu a bezpodmienečnú prednosť pri vymedzovaní alebo postupe v zamestnaní, idú nad rámec presadzovania rovnosti príležitostí a prekračujú medze výnimky upravenej v čl. 2 ods. 4 smernice č. 76/207/EHS.57

V tomto ohľade je zaujímavé sledovať, akým spôsobom ESD vyriešil otázku vzťahu medzi materiálnou a formálnou koncepciou rovnosti. Ako som to už uviedol vyššie v rámci úvodnej časti tejto kapitoly, pod formálnou rovnosťou sa má predovšetkým na mysli tzv. rovnosť príležitostí, kým v prípade materiálnej rovnosti sa jedná o tzv. rovnosť výsledkov.

Podľa nemeckého práva, v prípade vymenovania (vrátane ustanovenia za štátneho zamestnanca alebo sudcu), ktoré sa neuskutočňovalo na účely zaškolenia, ženy, ktoré mali rovnakú kvalifikáciu ako muži uchádzajúci sa o to isté miesto, mali prednosť v prípade, ak sú nedostatočne zastúpené. Toto pravidlo sa uplatňovalo aj v prípade zaradenia do inej úradnej funkcie a povýšenia. V zmysle nemeckého práva o nedostatočné zastúpenie išlo vtedy, ak počet žien v jednotlivých mzdových, odmeňovacích a platových triedach v príslušnej skupine zamestnancov v rámci oddelenia nedosiahol najmenej polovicu z celkového počtu pracovníkov.58

Cieľom vnútroštátnej právnej úpravy bolo teda zabezpečenie rovnosti vo výsledku, predstavujúcej rovné rozdelenie pracovných miest medzi mužov a ženy na základe automatického uprednostňovania žien v odvetviach, v ktorých majú nedostatočné zastúpenie. Na druhej strane, čl. 2 ods. 4 dotknutej smernice ustanovoval ako prípustnú výnimku zo všeobecnej právnej zásady rovnakého zaobchádzania len opatrenia prijaté na podporu rovnakých príležitostí, t. j. opatrenia, ktoré aj keď sa javia ako diskriminačné, sú v skutočnosti zamerané na odstránenie alebo obmedzenie skutočných prípadov nerovnosti a poskytujú konkrétne výhody ženám v záujme zlepšenia ich schopnosti konkurovať na trhu práce a venovať sa kariére rovnoprávne s mužmi. Podľa názoru súdu sa systém zavedený

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56 Rozsudok ESD vo veci C-450/93 Eckhard Kalanke *v* Freie Hansestadt Bremen [1995] ECR I- 3051

57 Pozri bod 22 rozsudku ESD vo veci C-450/93 Eckhard Kalanke *v* Freie Hansestadt Bremen [1995] ECR I- 3051

58 Pozri bod 5 rozsudku ESD vo veci C-450/93 Eckhard Kalanke *v* Freie Hansestadt Bremen [1995] ECR I- 3051

nemeckou právnou úpravou snažil „dosiahnuť rovnaké zastúpenie mužov a žien na všetkých stupňoch a úrovniach v rámci oddelenia," a nahradiť „rovnosť príležitostí, ktorú predpokladá čl. 2 ods. 4 výsledkom, ku ktorému sa dá dospieť len uplatnením takejto rovnosti príležitostí."59

Aký záver teda možno vyvodiť z vyššie uvedeného rozhodnutia? Zo skutočností uvádzaných súdom vyplýva, že je prípustné podporovať ženy s cieľom poskytnúť im rovnosť príležitostí ale je v rozpore so zásadou rovnosti, aby sa táto dosahovala prednostným zaobchádzaním. V súvislosti s týmto rozhodnutím však treba poukázať na fakt, že sa uvedené konštatovanie vzťahuje len na tie opatrenia členských štátov, ktoré garantujú ženám absolútnu a bezpodmienečnú prednosť.60

Vzhľadom na to, že sa rozsudok vo veci Kalanke stretol s pomerne veľkou nevôľou odbornej obce,61 ESD bol v nasledujúcom období nútený zmeniť svoj striktne zamietavý prístup ku koncepcii rovnosti výsledkov vo vzťahu k výnimke upravenej v čl. 2 ods. 4 predmetnej smernice. Stalo sa tak v súvislosti s rozhodovaním vo veci Marshall,62 v ktorej súd skúmal súlad nemeckého práva, upravujúceho otázky prijímania pracovníkov štátnej služby do služobného pomeru.

Rovnako ako v prípade Kalanke príslušné ustanovenie právneho predpisu stanovovalo vo vzťahu k povýšeniu prednosť žien pred mužskými kandidátmi s rovnakou kvalifikáciou, avšak s tým rozdielom, že toto pravidlo neplatilo absolútne, ale len vtedy, ak neexistovali osobitné dôvody na strane mužského kandidáta, ktoré prevážili v jeho prospech. ESD poukázal na to, že aj za podmienok, keď mužský a ženský kandidáti sú rovnako kvalifikovaní pre výkon štátnej služby, existuje tendencia uprednostňovať mužských kandidátov.63 Dôvody sú rôzne, majúce pôvod v predsudkoch a stereotypoch dotýkajúcich sa rolí a schopností žien v pracovnom a súkromnom živote (napr. menšia flexibilita žien v rámci pracovného času, spôsobená rodinnými povinnosťami, starostlivosťou

59 Pozri bod 23 rozsudku ESD vo veci C-450/93 Eckhard Kalanke *v* Freie Hansestadt Bremen [1995] ECR I- 3051

60 Porovnaj rozsudok ESD vo veci C-409/95 Hellmut Marschall *v* Land Nordrhein-Westfalen [1996] ECR I-2143, bod 35

61 De Búrca, G., Craig, P. P.: EU Law, 4. vyd. Oxford: Oxford University Press 2008, s. 915

62 Rozsudok ESD vo veci C-409/95 Hellmut Marschall *v* Land Nordrhein-Westfalen [1996] ECR I-2143

63 Pozri bod 29 rozsudku ESD vo veci C-409/95 Hellmut Marschall *v* Land Nordrhein-Westfalen [1996] ECR I-2143

o domácnosť alebo neprítomnosťou v práci v dôsledku tehotenstva, narodenia dieťaťa a kojenia).64

Z vyššie uvedených dôvodov a zo samotnej skutočnosti, že mužský a ženský uchádzač majú rovnakú kvalifikáciu, nemožno vyvodiť záver o existencii rovnosti šancí.65 Na tomto základe ESD konštatoval, že opatrenie členského štátu, podľa ktorého majú byť ženskí uchádzači pre kariérny postup s rovnakou kvalifikáciou ako mužskí uchádzači uprednostňovaní v oblastiach s nízkym zastúpením ženských pracovníkov, s výnimkou, ak sú dané osobitné okolnosti na strane mužského kandidáta, spadá do pôsobnosti čl. 2 ods. 4 smernice, ak je toto opatrenie spôsobilé zmierniť dopad škodlivých následkov spoločenských postojov na ženské uchádzačky.66

Podľa ESD, na rozdiel od národnej právnej úpravy v prípade Kalanke, ustanovenie vnútroštátneho práva spadá do pôsobnosti čl. 2 ods. 4 smernice vtedy, ak v každom jednotlivom prípade poskytuje rovnako kvalifikovaným mužským kandidátom záruku, že uchádzači budú podrobení objektívnemu posúdeniu, ktoré zohľadní všetky kritériá týkajúce sa osoby kandidátov, a tiež záruku, že predmetná výnimka z pozitívnej diskriminácie žien v pracovnej oblasti preváži nad prednosťou poskytnutou ženským uchádzačom vtedy, keď jedno alebo viac kritérií preváži v prospech mužských uchádzačov.67 Súd uzavrel, že je na národných súdoch aby posúdili, či sú tieto podmienky a kritériá splnené.68

V porovnaní s rozsudkom vo veci Kalanke teda ESD akceptoval rovnosť výsledkov, čím rozšíril pôsobnosť výnimky upravenej v čl. 2 ods. 4 nad rámec rovnosti možností. Nemožno preto v plnej miere súhlasiť s tvrdením Daniely Lamačkovej o tom, že „ESD sa vo svojich rozhodnutiach opiera o vnímanie pozitívneho postupu ako rovnosti príležitostí.“69

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64 Pozri bod 29 rozsudku ESD vo veci C-409/95 Hellmut Marschall *v* Land Nordrhein-Westfalen [1996] ECR I-2143

65 Pozri bod 30 rozsudku Pozri bod 29 rozsudku ESD vo veci C-409/95 Hellmut Marschall *v* Land Nordrhein-Westfalen [1996] ECR I-2143

66 Pozri bod 31 rozsudku Pozri bod 29 rozsudku ESD vo veci C-409/95 Hellmut Marschall *v* Land Nordrhein-Westfalen [1996] ECR I-2143

67 Pozri bod 35 rozsudku Pozri bod 29 rozsudku ESD vo veci C-409/95 Hellmut Marschall *v* Land Nordrhein-Westfalen [1996] ECR I-2143

68 Pozri bod 34 rozsudku Pozri bod 29 rozsudku ESD vo veci C-409/95 Hellmut Marschall *v* Land Nordrhein-Westfalen [1996] ECR I-2143

69 Lamačková, D.: Zákaz diskriminácie v Európskej únii. In: *Výber z rozhodnutí Súdneho dvora Európskych Spoločenstiev*. Bratislava: Iura Edition 2007, č. 1, s. 7

Na tomto mieste považujem za potrebné poznamenať, že po vynesení rozsudku vo veci Marschall došlo k prijatiu Amsterdamskej zmluvy, ktorá rozšírila čl. 141 Zmluvy o ES o už vyššie citovaný odsek 4. V ňom uvedená formulácia o možnosti „zachovať alebo zaviesť opatrenie, poskytujúce osobitné výhody pre uľahčenie odbornej pracovnej činnosti menej zastúpeného pohlavia alebo za účelom predchádzania či kompenzácie nevýhod v profesijnej sfére," podľa môjho názoru potvrdzuje závery vyššie uvedeného rozsudku o tom, že pozitívna diskriminácia, ktorá je v súlade s komunitárnym právom, sa nevyčerpáva len opatreniami sledujúcimi zabezpečenie rovnosti možností.

Spomínaný článok a rozsudok predznamenal koniec reštriktívnej interpretácie zákazu diskriminácie ESD, nakoľko táto bola dlho predmetom kritiky niektorých členských štátov a tento kritický postoj sa musel odraziť aj v Amsterdamskej zmluve. Zaujímavé je to, že kým vo väčšine prípadov býva zmena primárneho zmluvného komunitárneho práva potvrdením alebo „kodifikáciou" rozhodovacej praxe ESD, v tomto prípade naopak vyjadruje kritické reakcie členských štátov na reštriktívny postoj ESD k pozitívnej diskriminácii.70

V línií rozsudku Marschall71 pokračoval ESD aj v prípade Badeck.72 Súd v ňom posudzoval, či vnútroštátny právny predpis, podľa ktorého ak disponujú ženskí a mužskí uchádzači na miesto vo verejnej správe rovnakou kvalifikáciou, majú v zmysle stanovených kvót pre zastúpenie žien prednosť ženské kandidátky za predpokladu, že „dôvody väčšej právnej váhy" nevyžadujú niečo iné.73 Podľa ESD uvedené ustanovenie nepredstavovalo rozpor s komunitárnym právom, pretože bralo do úvahy aj iné faktory, než len nízke zastúpenie žien na určitých pozíciách vo verejnej správe.

Rozsudky vo veci Marschall a Badeck svedčia o tom, že ESD sa svojou rozhodovacou činnosťou nesnaží konkurovať členským štátom a zasahovať do národných koncepcií v oblasti politiky pozitívnej diskriminácie, práve naopak, podporuje členské štáty, aby si tieto určili vlastné sociálne

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70 Pítrová, L., Pomahač, R.: Průvodce judikaturou evropského soudního dvora, 1. díl. Praha: Linde Praha 2000, s. 242

71 Pozri C-370/88 *Marschall* (13. 12. 1990)

72 Rozsudok ESD vo veci C-158/97 **Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen [2000] ECR I-1875**

73 Pozri bod 38 rozsudku ESD vo veci C-158/97 **Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen [2000] ECR I-1875**

a ekonomické ciele, ako aj prioritu medzi nimi. V tejto súvislosti vystupuje na úrovni komunitárneho práva princíp proporcionality, ktorý zohráva dôležitú úlohu pri zmierňovaní účinkov opatrení členských štátov v oblasti pozitívnej diskriminácie.

Rozsudok vo veci Lommers74 je vhodným príkladom pre štúdium vzťahu medzi princípom proporcionality a všeobecnou právnou zásadou zákazu diskriminácie.75 Holandské ministerstvo pôdohospodárstva umožnilo pre svojich pracovníkov využitie ním dotovaných voľných miest v škôlkach. Za účelom riešenia malého zastúpenia žien na ministerstve, boli tieto miesta vyhradené pre deti úradníčok, pričom deti úradníkov mužského pohlavia mohli dotované miesta využiť len v prípade núdze. ESD akceptoval, že cieľom uvedenej úpravy bolo zabezpečiť rovnosť možností ženám pri nástupe do zamestnania, a teda zlepšiť ich postavenie na trhu práce. Na druhej strane však poznamenal, že opatrenie, ktorého účelom je odstránenie faktickej nerovnosti, môže mať negatívny dopad v podobe návratu k tradičnému rozdeleniu rolí medzi mužmi a ženami.76 Preto ak je cieľom opatrenia členského štátu podpora rovnosti možnosti medzi mužmi a ženami a tento cieľ by bolo možné dosiahnuť rozšírením pôsobnosti dotknutého opatrenia aj na pracujúcich otcov, ich vylúčenie by bolo v rozpore s princípom proporcionality.77

Otázkou prípustnosti pozitívnej diskriminácie v pracovnej oblasti na základe opatrenia, prijatého za účelom zabezpečenia rovnosti podľa výsledkov, sa ESD zaoberal v prípade Abrahamsson.78 Opatrenie tentoraz uprednostňovalo uchádzačov pohlavia s menšinovým zastúpením, ktorí aj keď boli dostatočne kvalifikovaní, nedisponovali rovnakou kvalifikáciou ako uchádzači iného pohlavia. Neúspešní kandidáti o post profesora na katedre vied hydrosféry univerzity v Göteborgu pred príslušným národným orgánom namietali menovanie kandidátky, ktorá sa podľa názoru výberovej komisia pôvodne umiestnila vo výberovom konaní na treťom mieste, avšak vzhľadom na to, že uchádzačka, ktorá mala podľa komisie najlepšie kvalifikačné predpoklady svoju prihlášku stiahla a na druhom mieste sa

74 Rozsudok ESD vo veci C-476/99 H. Lommers *v* Minister van Landbouw, Natuurbeheer en Visserij [2002] ECR I-2891

75 Pozri bod 39 rozsudku ESD vo veci C-476/99 H. Lommers *v* Minister van Landbouw, Natuurbeheer en Visserij [2002] ECR I-2891

76 Pozri bod 41 rozsudku ESD vo veci C-476/99 H. Lommers *v* Minister van Landbouw, Natuurbeheer en Visserij [2002] ECR I-2891

77 Pozri bod 42 rozsudku ESD vo veci C-476/99 H. Lommers *v* Minister van Landbouw, Natuurbeheer en Visserij [2002] ECR I-2891

78 Rozsudok ESD vo veci C-407/98 Katarina Abrahamsson, Leif Anderson *v* Elisabet Fogelqvist [2000] ECR I-5539

umiestnil mužský kandidát, bola to ona, kto nakoniec profesorské miesto na uvedenej katedre získal.

Podľa ESD uvedené vnútroštátne právo, upravujúce výberové konanie, nebolo založené na jasných a jednoznačných kritériách zameraných na predchádzanie alebo kompenzáciu nevýhod v oblasti profesionálnej kariéry členov menej zastúpeného pohlavia.79 Aj keď súd zdôraznil, že automatické uprednostnenie menej zastúpeného pohlavia nie je cieľom opatrenia, nedostatok objektívnosti pri posudzovaní špecifických situácii kandidátov spôsobuje ťažkosti pri preskúmaní správnosti výberu dovoleného čl. 2 ods. 4 smernice 76/207/EHS.80

Metóda výberu víťazného kandidáta bola totiž založená len na príslušnosti k menej zastúpenému pohlaviu, bez ohľadu na prednosti ostatných kandidátov. V dôsledku toho ESD považoval za nevyhnutné posúdiť prípustnosť predmetnej právnej úpravy z hľadiska čl. 141 ods. 4 Zmluvy o ES. Súd dospel k zisteniu, že metóda výberu kandidáta bola neproporcionálna vo vzťahu k sledovanému cieľu.81 Nakoniec uzavrel, že čl. 141 ods. 4 a smernica bráni tomu, aby bola prijatá taká národná právna úprava, o akú išlo v tomto prípade. Na tomto mieste považujem za potrebné poznamenať, že aj keď sa ESD venoval posúdeniu súladu právnej úpravy členského štátu s čl. 141 ods. 4 Zmluvy o ES (na rozdiel do rozsudku vo veci Badeck), súd nijakým spôsobom nevymedzil vzťah medzi príslušným článkom Zmluvy a ustanovením čl. 2 ods. 4 dotknutej smernice.

4. ZA HRANICAMI ZÁKAZU DISKRIMINÁCIE NA ZÁKLADE POHLAVIA - ROVNOSŤ AKO NEPÍSANÉ PRÁVO

Zásadný dopad na ponímanie všeobecnej právnej zásady rovnosti malo súdom formulované pravidlo vo veci Razzouk,82 podľa ktorého rovnosť na základe pohlavia je základným právom, a preto vo vzťahu medzi inštitúciami a ich zamestnancami nie sú požiadavky všeobecnej právnej zásady v žiadnom prípade limitované na tie, ktoré vyplývajú z čl. 141 Zmluvy o ES alebo zo smerníc prijatých v tejto oblasti. Vo svetle prístupu, podľa ktorého rovnosť pohlaví tvorí súčasť širšieho spektra základných práv, došlo k značnému rozšíreniu aplikácie tohto druhu rovnosti na

79 Pozri bod 50 rozsudku ESD vo veci C-407/98 Katarina Abrahamsson, Leif Anderson *v* Elisabet Fogelqvist [2000] ECR I-5539

80 Pozri body 52 a 53 rozsudku ESD vo veci C-407/98 Katarina Abrahamsson, Leif Anderson *v* Elisabet Fogelqvist [2000] ECR I-5539

81 Pozri bod 56 rozsudku ESD vo veci C-407/98 Katarina Abrahamsson, Leif Anderson *v* Elisabet Fogelqvist [2000] ECR I-5539

82 Rozsudok ESD v spoj. veci 75/82 a 117/82 C. Razzouk and A. Beydoun *v* Commission of the European Communities [1984] ECR 1509, bod 17

prípady, ktoré spadajú nielen mimo rámec diskriminácie na základe pohlavia.

Tento jav zreteľne ilustruje rozsudok ESD vo veci P. v S.[83] Navrhovateľka v konaní pred vnútroštátnym súdom bola pôvodne zamestnancom vzdelávacieho zariadenia, ktorý po roku pôsobenia u zamestnávateľa oznámil svojmu nadriadenému, že má v úmysle podstúpiť proces zmeny pohlavia. Tento proces, začínajúci obdobím, počas ktorého sa navrhovateľ správal a obliekal ako žena, vyústil do série chirurgických zákrokov menšieho rozsahu, vďaka ktorým mal navrhovateľ nadobudnúť fyzické znaky ženy. Skôr, než navrhovateľka stihla absolvovať konečnú operáciu, dostala od zamestnávateľa výpoveď. V nadväznosti na to podala na národný súd žalobu, pretože mala za to, že sa stala obeťou diskriminácie na základe pohlavia.

Vychádzajúc z predložených otázok položených národným súdom vo veci samej, ESD posudzoval, či s ohľadom na účel smernice č. 76/207/EHS čl. 5 ods. 1 uvedenej smernice, podľa ktorého uplatňovanie zásady rovnakého zaobchádzania, pokiaľ ide o pracovné podmienky, vrátane podmienok upravujúcich prepustenie znamená, že mužom aj ženám sa zaručia rovnaké podmienky bez diskriminácie z dôvodu pohlavia, vylučuje prepustenie transsexuála z dôvodu súvisiaceho s jeho alebo jej zmenou pohlavia. Inými slovami, súd bol nútený odpovedať na otázku, či môže všeobecná právna zásada presiahnuť ustanovenia komunitárneho právneho predpisu.

ESD s poukazom na rovnosť ako súčasť základných práv konštatoval, že pôsobnosť predmetnej smernice nemožno obmedziť na diskrimináciu založenú na skutočnosti, že osoba príslušníkom jedného alebo druhého pohlavia.[84]

Z hľadiska účelu a povahy práv, ktoré sa snaží zabezpečovať, je rozsah pôsobnosti smernice taký, aby sa vzťahoval aj na diskrimináciu založenú na zmene pohlavia dotknutej osoby, ako je to v tomto prípade. Podľa názoru súdu, takáto diskriminácia je v zásade, aj keď nie výlučne, založená na pohlaví dotknutej osoby, kde sa s osobou prepustenou z dôvodu, že on alebo ona zamýšľa podrobiť sa alebo sa už podrobila zmene pohlavia, zaobchádza nepriaznivo v porovnaní s osobami pohlavia, za príslušníka alebo príslušníčku ktorého sa osoba pokladala predtým, než podstúpila zmenu pohlavia.[85] Tolerovať takúto diskrimináciu, pokiaľ ide o túto osobu, by

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83 Rozsudok ESD vo veci C-13/94 **P v S and Cornwall County Council** [1996] ECR I-2143

84 Pozri bod 20 rozsudku ESD vo veci C-13/94 **P v S and Cornwall County Council** [1996] ECR I-2143

85 Pozri bod 21 rozsudku ESD vo veci C-13/94 **P v S and Cornwall County Council** [1996] ECR I-2143

znamenalo nerešpektovať dôstojnosť a slobodu, na ktorú má on alebo ona nárok a ktoré je súd povinný chrániť.86

V súvislosti s vyššie uvedenými závermi súdu si možno všimnúť dva odlišné prístupy k rovnosti. Prístup v bode 21 rozsudku („s osobou...sa...zaobchádza nepriaznivo v porovnaní s osobami pohlavia, za príslušníka alebo príslušníčku ktorého sa osoba pokladala predtým, než podstúpila zmenu pohlavia“) korešponduje s koncepciou formálnej rovnosti. Základom pre zistenie, či došlo k porušeniu rovnosti z formálneho hľadiska, bolo porovnanie zaobchádzania s navrhovateľom so zaobchádzaním s inou osobou. Súd zamietol názor členského štátu, podľa ktorého sa prístup k navrhovateľovi mal porovnať s prístupom k transsexuálovi pôvodne ženského pohlavia a namiesto neho za účelom porovnania spôsobu zaobchádzania prijal pohlavie navrhovateľa pred jeho zmenou. Bod 22 však podľa môjho názoru naznačuje, že ESD svoj záver o diskriminácii navrhovateľa nezaložil na kritériu zaobchádzania s podobne alebo rovnako situovanou osobou, ale na rozpore s materiálnou rovnosťou, t. j. na tom, že prepustenie transsexuála z dôvodu súvisiaceho so zmenou pohlavia bolo v rozpore s jeho základným právom na ľudskú dôstojnosť.

Za zmienku stojí skutočnosť, že ESD pri svojom rozhodovaní v podstatnej miere vychádzal zo stanoviska generálneho advokáta Tesaura, ktorý v ňom uvádzal paralelu medzi znevýhodňujúcim zaobchádzaním so ženami a transsexuálmi. Podľa neho, tento jav je často spojený s negatívnym morálnym úsudkom, ktorý nemá nič spoločné s ich schopnosťami. Uviedol, že v tejto otázke sa žiada taká ochrana rovnosti ako základného práva, ktorú poskytujú ústavy najpokrokovejších krajín.87 Generálny advokát teda navrhol najprogresívnejšie riešenie, a to na základe teleologickej interpretácie, za účelom vyplnenia medzier v komunitárnom práve, a to odvodením všeobecných právnych zásad a cieľov sociálneho komunitárneho práva. Zdôraznil tiež myšlienku generálneho advokáta Trabucchiho, podľa ktorej komunitárne právo nie je len ekonomický systém, ale odzrkadľuje aj koncepciu sociálnej spravodlivosti a európskej integrácie.88

Odvážny prístup v prípade P. v S., založený na pokrokovej interpretácii základných práv, sa však v judikatúre ESD počas nasledujúcich rokov neuplatnil. Už v čase prijatia rozhodnutia v uvedenom prípade sa diskutovalo o tom, či pravidlo, podľa ktorého by sa transsexuáli nemali

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86 Pozri bod 22 rozsudku ESD vo veci C-13/94 **P v S and Cornwall County Council** [1996] ECR I-2143

87 Pozri stanovisko Generálneho advokáta Tesaura vo veci C-13/94 **P v S and Cornwall County Council** zo dňa 14. decembra 2005

88 Pozri bod 24 stanoviska Generálneho advokáta Tesaura vo veci C-13/94 **P v S and Cornwall County Council** zo dňa 14. decembra 2005

znevýhodňovať v zamestnaní iba z dôvodu, že sú transsexuálmi, vzťahuje aj na osoby rovnakej sexuálnej orientácie.

Príležitosť na odstránenie tejto dilemy mal ESD v súvislosti s rozhodovaním vo veci Grant.89 Navrhovateľka vo veci samej bola zamestnankyňou prevádzkovateľa železníc, ktorá požiadala svojho zamestnávateľa o poskytnutie cestovných zliav pre svoju partnerku, opierajúc sa o ustanovenie pracovnej zmluvy, priznávajúce cestovné zľavy partnerom zamestnancov opačného pohlavia, a to za podmienky vyhlásenia, že zamestnanec a jeho partner žijú v zmysluplnom vzťahu už minimálne dva roky. Vzhľadom na to, že zamestnávateľ jej odmietol priznať požadovanú výhodu, z dôvodu, že v prípade osoby, ktorá nežije v manželskom zväzku, môžu byť cestovné zľavy poskytnuté len partnerom opačného pohlavia, navrhovateľka sa obrátila na národný súd so žalobou, tvrdiac, že konanie zamestnávateľa predstavuje diskrimináciu na základe pohlavia. Poukazovala najmä na skutočnosť, že jej mužskému predchodcovi v zamestnaní, ktorý vyhlásil, že žije so ženou v zmysluplnom vzťahu viac ako dva roky, boli poskytnuté výhody, ktoré jej boli odmietnuté. Opierala sa tiež o závery rozsudku P. v S., z ktorých podľa nej vyplývalo, že diskriminácia na základe sexuálnej orientácie spadala do pôsobnosti čl. 141 Zmluvy o ES a o to, že odopretie uvedených výhod nebolo objektívne odôvodnené.

Podľa ESD bola existencia „zmysluplného“ vzťahu s osobou opačného pohlavia po dobu minimálne dvoch rokov ako predpoklad vzniku nároku zamestnanca aplikovateľná nezávisle od pohlavia dotknutého zamestnanca. Cestovné zľavy sa totiž rovnakým spôsobom odmietnu zamestnancovi žijúcemu s osobou rovnakého pohlavia, ako aj zamestnankyni žijúcej s osobou rovnakého pohlavia, čo nezakladá diskrimináciu na základe pohlavia. Podľa ESD bolo potrebné zobrať do úvahy skutočnosť, že Spoločenstvo ku dňu rozhodovania neprijalo pravidlo, ktoré by smerovalo k zrovnoprávneniu postavenia osôb, majúcich vzťah s osobou rovnakého pohlavia, s heterosexuálnymi partnermi. Súd ďalej konštatoval, že vzťah takých osôb sa vo väčšine členských štátov považuje za rovnocenný trvalému heterosexuálnemu vzťahu len v súvislosti s obmedzeným množstvom práv alebo nie je predmetom žiadneho osobitného uznania.90

Na základe týchto okolností ESD uzavrel, že za aktuálneho stavu v rámci Spoločenstva nie sú trvalé vzťahy medzi dvoma osobami rovnakého pohlavia na úrovni vzťahov medzi osobami opačného pohlavia a komunitárne právo zamestnávateľov ich nenúti za považovať za

89 Rozsudok ESD vo veci C-249/96 **Lisa Jacqueline Grant *v* South-West Trains Ltd. [1998] I-621**

90 Pozri bod 32 rozsudku ESD vo veci C-249/96 **Lisa Jacqueline Grant *v* South-West Trains Ltd. [1998] I-621**

rovnocenné.91 Za týchto podmienok je len úlohou vnútroštátneho zákonodarcu prijať v prípade potreby opatrenia, spôsobilé ošetriť túto situáciu.92

Podľa ESD v prípade P. v S., na ktorý sa navrhovateľka odvolávala, bola diskriminácia založená najmä, ak nie výlučne, na pohlaví dotknutého zamestnanca. Súd mal za to, že záver o neprípustnosti tohto druhu diskriminácie z rovnakého dôvodu ako diskriminácia založená na príslušnosti osoby k určitému pohlaviu, sa obmedzuje len na prípad zmeny pohlavia zamestnanca a tento nemožno aplikovať na rozdielne zaobchádzanie založené na sexuálnej orientácii osoby.93 Inými slovami, ESD vyložil rozsudok vo veci P. v S. reštriktívne a uzavrel, že nerovnaké zaobchádzanie z titulu sexuálnej orientácie nemožno považovať za diskrimináciu na základe pohlavia.

Ani argument navrhovateľky o tom, že vo svetle niektorých ustanovení medzinárodného práva (konkrétne Medzinárodného dohovoru o občianskych a politických právach zo dňa 19. decembra 1966) by sa malo komunitárne právo interpretovať tak, že sa vzťahuje aj na diskrimináciu založenú na sexuálnej orientácii, nepadol na úrodnú pôdu. ESD síce uznal, že dohovor, ktorého sa navrhovateľka dovolávala, je súčasťou medzinárodných nástrojov, vzťahujúcich sa na ochranu ľudských práv, ktoré súd berie do úvahy pri aplikácii všeobecných princípov komunitárneho práva, avšak pripomenul, že rešpektovanie základných práv, ktoré tvoria integrálnu súčasť všeobecných právnych zásad, je podmienkou legality komunitárnych aktov, tieto práva nemôžu bez ďalšieho spôsobiť rozšírenie pôsobnosti ustanovení Zmluvy o ES nad rámec právomocí Spoločenstva.94

Na základe uvedeného konštatovania je zrejmé, že podľa ESD otázky sexuálnej orientácie spadajú mimo pôsobnosť komunitárneho práva a čl. 141 Zmluvy o ES nepredstavuje nástroj, ktorý by sa mal použiť ako právny základ pre právotvornú aktivitu ESD. Mám za to, že toto pravidlo možno vnímať ako ostrý protiklad k ambicióznemu prístupu súdu vo veci P. v S., v ktorej bola ochrana poskytnutá transsexuálom dokonca „poistená“ koncepciou nepísaných základných práv, a to následne po tom, čo súd konštatoval existenciu diskriminácie porovnaním stavu pred a po zmene

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91 Pozri bod 35 rozsudku Pozri bod 32 rozsudku ESD vo veci C-249/96 **Lisa Jacqueline Grant *v* South-West Trains Ltd. [1998] I-621**

92 Pozri bod 36 rozsudku Pozri bod 32 rozsudku ESD vo veci C-249/96 **Lisa Jacqueline Grant *v* South-West Trains Ltd. [1998] I-621**

93 Pozri bod 42 rozsudku Pozri bod 32 rozsudku ESD vo veci C-249/96 **Lisa Jacqueline Grant *v* South-West Trains Ltd. [1998] I-621**

94 Pozri body 43 až 45 rozsudku Pozri bod 32 rozsudku ESD vo veci C-249/96 **Lisa Jacqueline Grant *v* South-West Trains Ltd. [1998] I-621**

pohlavia navrhovateľky, aj keď vlastne nebolo zrejmé, či sa navrhovateľka po absolvovaní operačných zákrokov skutočne stala ženou, resp. či ju súd za ženu považoval.

Zdržanlivý postoj ESD vo vzťahu k zákazu diskriminácie osôb s rovnakou sexuálnou orientáciou vnímam ako prejav politického pragmatizmu ESD, majúceho na zreteli potenciálne účinky rozhodnutia súdu v prípade poskytnutia ochrany osobám s rovnakou sexuálnou orientáciou cestou základného práva v rámci koncepcie ochrany proti diskriminácii na základe pohlavia. V rozhodnutí ESD možno badať aj výrazný dôraz na dynamický charakter všeobecných právnych zásad ako prameňa komunitárneho práva, a to v už vyššie uvedenej formulácii: „...komunitárne právo sa za aktuálneho stavu nevzťahuje na diskrimináciu na základe sexuálnej orientácie, o ktorú ide v tomto prípade.“95

Negatívne stanovisko ESD v tejto otázke do istej miery zmierňuje bod rozsudku, v ktorom akoby súd nabádal členské štáty k tomu, aby prijali vlastné právne úpravy v otázke zákazu tohto druhu diskriminácie a ošetrili to, čo nemohol ESD ošetriť svojím rozhodnutím.96 Podľa môjho názoru však nemožno poprieť to, že zo strany ESD došlo k zásadnému kroku späť v oblasti ochrany základných práv, a to najmä za stavu, keď podľa Generálneho advokáta Elmera samotný ESD v predchádzajúcej judikatúre potvrdil, že Zmluvu o ES nemožno vykladať na základe koncepcií morálky uplatňujúcich sa v jednotlivých členských štátoch.97

5. ROZSUDOK ESD VO VECI MANGOLD98

Vývoj judikatúry posledných rokov v oblasti diskriminácie sa stal predmetom horlivej diskusie odbornej verejnosti, ktorá prerástla rámec skúmaného princípu a dotkla sa problematiky celkového postavenia všeobecných právnych zásad ako prameňa komunitárneho práva a ich vplyvu jednak na rozdelenie kompetencií medzi Spoločenstvo a členské štáty, rovnako ako aj na rozdelenie právomocí podľa Zmluvy o ES medzi komunitárne orgány.99 Predovšetkým vo vzťahu k rozdeleniu kompetencií je zo strany odborníkov namietané, že ESD svojou právotvorbou založenou

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95 Pozri bod 47 rozsudku Pozri bod 32 rozsudku ESD vo veci C-249/96 **Lisa Jacqueline Grant *v* South-West Trains Ltd. [1998] I-621**

96 Pozri bod 36 rozsudku Pozri bod 32 rozsudku ESD vo veci C-249/96 **Lisa Jacqueline Grant *v* South-West Trains Ltd. [1998] I-621**

97 Raitio, J.: The Principle of Legal Certainty in EC Law. Dordrecht: Kluwer Law International 2003, s. 184

98 Rozsudok ESD vo veci C-144/04 Werner Mangold v Rüdiger Helm [2005] ECR I-9981

99 Pozri napr. Herzog, R., Gerken L.: Stop the European Court of Justice http://www.cep.eu/HerzogEuGH-Webseite_eng.pdf

na odvolávaní sa na všeobecné právne zásady zbavuje členské štáty ich fundamentálnych kompetencií a v neprípustnej miere zasahuje do ich vnútroštátnych právnych poriadkov. Významným „katalyzátorom" protestov v tomto smere bol rozsudok ESD vo veci Mangold, dotýkajúci sa pracovného trhu a sociálnej politiky, ktoré tvoria jadro kompetencií členských štátov. Dôvod negatívnej reakcie na uvedený rozsudok spočíval v tom, že podľa ESD sa komunitárne právo má interpretovať tak, že odporuje ustanoveniu nemeckého pracovného práva.

Nemecká právna úprava obsahovala ustanovenie, ktoré dávalo zamestnávateľom možnosť bez obmedzení uzavierať zmluvy na dobu určitú s pracovníkmi vo veku 52 rokov a staršími, a to s cieľom podporiť ich profesionálne začlenenie. Navrhovateľ, ktorý uzavrel so svojím zamestnávateľom pracovnú zmluvu na dobu určitú v súlade s uvedenou právnou úpravou, mal za to, že obmedzenie platnosti zmluvy je v rozpore so smernicou Rady č. 2000/78/ES z 27. novembra 2000, ktorá ustanovuje všeobecný rámec pre rovnaké zaobchádzanie v zamestnaní a povolaní. Nesúlad s komunitárnym právom podľa neho spočíval v diskriminácii pracovníkov starších ako 52 rokov, s ktorými bolo možné na rozdiel od mladších pracovníkov uzatvoriť pracovnú zmluvu bez toho, aby bola naplnená podmienka existencie objektívneho dôvodu (napr. dočasná potreba výkonu práce, príp. nadväznosť ustanovenia určitej doby na vzdelávanie s cieľom umožniť nástup pracovníka do aktívneho pracovného života).

ESD v prvom kroku preveril, či predmetná vnútroštátna právna úprava spĺňa požiadavky princípu proporcionality. Uviedol, že pokiaľ ide o rozdielne zaobchádzanie založené na základe veku, čl. 6 ods. 1 uvedenej smernice ustanovuje, že členské štáty môžu ustanoviť, že takéto rozdiely v zaobchádzaní nie sú diskrimináciou, ak v kontexte vnútroštátnych právnych predpisov sú objektívne a primerane odôvodnené oprávneným cieľom vrátane zákonnej politiky zamestnanosti, trhu práce a cieľov odbornej prípravy a ak prostriedky na dosiahnutie cieľa sú primerané a nevyhnutné.100 Súd konštatoval, že právna úprava, ktorá za jediné kritérium pre uplatnenie pracovnej zmluvy na dobu určitú považuje vek pracovníka bez toho, aby bolo preukázané, že ustanovenie vekovej hranice ako takej, nezávisle od iných kritérií spojených s daným trhom práce a osobnou situáciou dotknutej osoby, je objektívne nevyhnutné na uskutočnenie cieľa profesionálneho začlenenia starších nezamestnaných pracovníkov, sa má považovať za úpravu, ktorá prekračuje rámec toho, čo je primerané a nevyhnutné na dosiahnutie sledovaného cieľa.101 Súd teda obvyklým postupom zistil rozpor nemeckého práva s princípom proporcionality.

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100 Rozsudok ESD vo veci C-144/04 Werner Mangold *v* Rüdiger Helm [2005] ECR I-9981, bod 58

101 Pozri bod 65 rozsudku ESD vo veci C-144/04 Werner Mangold *v* Rüdiger Helm [2005] ECR I-9981

V tomto bode by sa vec považovala za uzavretú, nebyť okolnosti, že v čase uzavretia pracovnej zmluvy ešte neuplynula lehota na prebratie uvedenej smernice. S prihliadnutím na skutočnosť, že v zmysle konštantnej judikatúry smernice nemajú horizontálny priamy účinok, sa javilo ako nepravdepodobné, že by konanie pred vnútroštátnym súdom skončilo v prospech navrhovateľa. ESD však bol iného názoru, ktorý založil na dvoch základných argumentoch.

Po prvé, ako to vyplýva z rozsudku, okolnosť, že v čase uzavretia zmluvy ešte neuplynula lehota na prebratie smernice, nemôže tvrdenie ESD o rozpore s princípom proporcionality spochybniť, pretože v zmysle skoršieho rozhodnutia súdu vo veci Inter-Environment,102 sa členské štáty musia počas lehoty na prebratie smernice zdržať prijímania opatrení, ktoré by mohli vážne ohroziť uskutočnenie cieľa ustanoveného danou smernicou.103

Po druhé, v zmysle bodu 74 rozsudku samotná smernica nezakotvovala zásadu rovnakého zaobchádzania v oblasti zamestnania a povolania. Podľa čl. 1 dotknutej smernice jej účelom je výlučne ustanovenie všeobecného rámca pre boj proti diskriminácii v zamestnaní a povolaní na základe náboženstva alebo viery, zdravotného postihnutia, veku alebo sexuálnej orientácie, pričom zásada zákazu týchto foriem diskriminácie má svoj pôvod v rôznych medzinárodných nástrojoch a ústavných tradíciách, ktoré sú spoločné všetkým členským štátom.104 Z týchto dôvodov ESD konštatoval, že zásadu diskriminácie na základe veku treba považovať za všeobecnú zásadu práva Spoločenstva, ktorej dodržiavanie nemôže závisieť od uplynutia lehoty poskytnutej členským štátom na prebratie smernice, ktorou sa má zaviesť všeobecný rámec boja proti diskriminácii na základe veku, najmä pokiaľ ide o zabezpečenie primeraných prostriedkov súdnej ochrany, dôkazné bremeno, ochranu proti represáliám, sociálny dialóg, pozitívnu činnosť a iné špecifické opatrenia na vykonanie takejto smernice.105

Generálny advokát Mazák vo svojom stanovisku vo veci Palacios106 vyjadril pochybnosť o správnosti a presvedčivosti vyššie uvedených

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102 Rozsudok ESD vo veci C-129/96 **Inter-Environnement Wallonie ASBL *v* Région wallonne [1997] ECR I-7411**

103 Rozsudok ESD vo veci C-144/04 Werner Mangold *v* Rüdiger Helm [2005] ECR I-9981, bod 67

104 Pozri bod 74 rozsudku ESD vo veci C-144/04 Werner Mangold *v* Rüdiger Helm [2005] ECR I-9981

105 Pozri bod 76 rozsudku ESD vo veci C-144/04 Werner Mangold *v* Rüdiger Helm [2005] ECR I-9981

106 Stanovisko Generálneho advokáta Mazáka vo veci C-411/05 Félix Palacios de la Villa *v* Cortefiel Servicios SA, doručené súdu dňa 15. februára 2007

dôvodov pri svojom konštatovaní o existencii všeobecnej zásady zákazu diskriminácie z dôvodu veku. V prvom rade poukázal na to, že rôzne medzinárodné dokumenty a ústavné tradície spoločné pre členské štáty, na ktoré sa ESD v rozsudku Mangold odvoláva síce uznávajú všeobecnú právnu zásadu rovnosti zaobchádzania, ale nie – okrem niekoľkých prípadov, ako napríklad fínska ústava – osobitnú zásadu diskriminácie z dôvodu veku ako takú.107

Možno vyššie uvedenú kritiku neexistencie právneho základu všeobecnej právnej zásady diskriminácie z dôvodu veku považovať za oprávnenú? Na prvý pohľad sa zdá, že áno – napr. Dohovor o ochrane ľudských práv a základných slobôd spomínanú právnu zásadu neupravuje, aj keď nič nebráni tomu, aby táto bola odvodená zo všeobecnej právnej zásady zákazu diskriminácie bez existencie objektívnych dôvodov v zmysle čl. 14 Dohovoru. Netreba však zabudnúť na čl. II-81 Zmluvy zakladajúcej Ústavu pre Európu, v ktorom sa uvádza nasledovné: „Je zakázaná akákoľvek diskriminácia z akéhokoľvek dôvodu ako je pohlavie, rasa, farba pleti, etnický a sociálny pôvod, genetické charakteristiky, jazyk, náboženstvo alebo viera, politický alebo iný názor, príslušnosť k národnostnej menšine, majetok, narodenie, postihnutie, vek alebo sexuálna orientácia.“ V tejto súvislosti však vzniká otázka, či vzhľadom na „osud“ uvedeného dokumentu, t. j. na neukončený ratifikačný proces, možno považovať odvolanie sa na základné právo, upravené v Zmluve zakladajúcej Ústavu pre Európu, za legitímne, inými slovami, či možno takéto právo zameniť za „ústavné tradície spoločné všetkým členským štátom.“ Mám za to, že odpoveď na položenú otázku musí byť kladná – dokument bol totiž prijatý a podpísaný vedúcimi zástupcami členských štátov Európskej únie.

Generálny advokát Mazák ďalej uviedol, že vyvodenie existencie zákazu diskriminácie z osobitného dôvodu zo všeobecnej zásady rovnosti považuje za nepresvedčivé, pričom v tejto súvislosti poukázal na bod 28 rozsudku ESD vo veci Cadman.108 Podľa môjho názoru však z uvedeného bodu rozsudku možno vyvodiť celkom odlišný záver, pretože tento hovorí: „Rovnako ako súd uviedol v rozsudku vo veci Defrenne v bode 12, tento princíp (pozn. – princíp rovnakého odmeňovania), ktorý je špecifickým vyjadrením všeobecnej právnej zásady rovnosti, ktorý zakazuje, aby sa s porovnateľnými situáciami zaobchádzalo rozdielne, ak nie je rozdielnosť objektívne odôvodnená, tvorí súčasť základov Spoločenstva.“ Som presvedčený, že ESD v tomto bode rozsudku len inými slovami vyjadril to, že rovnaké odmeňovanie, aj keď ide len o jedno z vyjadrení rovnosti, možno považovať za všeobecnú právnu zásadu komunitárneho práva. Rovnaký prístup použil ESD aj vo veci Mangold tým, že uznal zákaz diskriminácie na

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107 Pozri bod 88 stanoviska Generálneho advokáta Mazáka vo veci C-411/05 Félix Palacios de la Villa *v* Cortefiel Servicios SA, doručené súdu dňa 15. februára 2007

108 Rozsudok ESD vo veci C-17/05 B.F. Cadman *v* Health & Safety Executive [2006] ECR I-9583

základe veku ako vyjadrenie všeobecnej zásady rovnosti za samostatnú všeobecnú právnu zásadu.

Generálny advokát v ďalšom texte svojho stanoviska vyjadril znepokojenie nad skutočnosťou, že „Súdny dvor neuznal, že smernica 2000/78 má horizontálny účinok, ale skôr preklenul jeho neexistenciu tým, že pripísal priamy účinok zodpovedajúcej všeobecnej právnej zásade práva."109 Podľa neho by mohla vzniknúť problematická situácia „ak by sa táto koncepcia obrátila prakticky hore nohami tým, že by sa všeobecnej právnej zásade práva Spoločenstva, ktorú – ako napr. v tejto veci – možno považovať za vyjadrenú v osobitnej právnej úprave Spoločenstva priznal taký stupeň samostatnosti, že by sa jej bolo možné dovolávať namiesto a nezávisle od tejto právnej úpravy."110 V zmysle bodu 138 jeho stanoviska by „taký prístup vyvolal nielen vážne pochybnosti vo vzťahu k právnej istote, ale tiež spochybnil rozdelenie kompetencií medzi Spoločenstvo a členské štáty a pridelenie právomocí Zmluvy vo všeobecnosti."

V podobnom duchu sa nesie aj stanovisko Generálneho advokáta Ruiz-Jarabo Colomer vo veci Michaeler111 zo dňa 24. januára 2008, ktorý súhlasí s vyššie uvedeným názorom generálneho advokáta Mazáka, pretože podľa neho vyššie uvedená aplikácia všeobecných právnych zásad „spôsobuje nielen nedostatok právnej istoty, ale aj deformuje charakter systému prameňov, čím mení typické komunitárne právne akty len na dekoratívne pravidlá, ktoré môžu byť poľahky nahradené všeobecnými právnymi zásadami."112

Podľa môjho názoru však vyššie uvedené názory vychádzajú z nesprávneho základu – z rozsudku v prípade Mangold vôbec nevyplýva, že by ESD priznal všeobecnej právnej zásade zákazu diskriminácie na základe veku horizontálny priamy účinok. ESD len uviedol nasledovné: „Vzhľadom na všetky predchádzajúce skutočnosti treba na druhú a tretiu otázku odpovedať tak, že právo Spoločenstva, najmä článok 6 ods. 1 smernice č. 2000/78, sa

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109 Stanovisko Generálneho advokáta Mazáka vo veci C-411/05 Félix Palacios de la Villa *v* Cortefiel Servicios SA, doručené súdu dňa 15. februára 2007, bod 132

110 Pozri bod 132 stanoviska Generálneho advokáta Mazáka vo veci C-411/05 Félix Palacios de la Villa *v* Cortefiel Servicios SA, doručené súdu dňa 15. februára 2007

111 Stanovisko Generálneho advokáta Ruiz-Jarabo Colomer v spojenej veci C-55/07 a C-56/07 Othmar Michaeler Subito GmbH *v* Arbeitsinspektorat der Autonomen Provinz Bozen (teraz Amt für sozialen Arbeitsschutz) Autonome Provinz Bozen a Ruth Volgger Othmar Michaeler Subito GmbH *v* Arbeitsinspektorat der Autonomen Provinz Bozen (teraz Amt für sozialen Arbeitsschutz) Autonome Provinz Bozen, prednesené dňa 24.1.2008

112 Pozri bod 21 stanoviska Generálneho advokáta Ruiz-Jarabo Colomer v spojenej veci C-55/07 a C-56/07 Othmar Michaeler Subito GmbH *v* Arbeitsinspektorat der Autonomen Provinz Bozen (teraz Amt für sozialen Arbeitsschutz) Autonome Provinz Bozen a Ruth Volgger Othmar Michaeler Subito GmbH *v* Arbeitsinspektorat der Autonomen Provinz Bozen (teraz Amt für sozialen Arbeitsschutz) Autonome Provinz Bozen, prednesené dňa 24.1.2008

má vykladať tak, že odporuje takej vnútroštátnej úprave, aká je v spore vo veci samej, ktorá, okrem prípadov, keď existuje úzka väzba na predchádzajúcu pracovnú zmluvu na dobu neurčitú uzavretú s tým istým zamestnávateľom, umožňuje bez obmedzení uzavierať pracovné zmluvy na dobu určitú, ak pracovník dosiahol vek 52 rokov.“113

V nadväznosti na to ESD konštatoval, že „je na vnútroštátnom súde, aby zabezpečil plnú účinnosť všeobecnej zásady zákazu diskriminácie na základe veku tým, že nebude aplikovať žiadne ustanovenie vnútroštátneho práva, ktoré je s ňou v rozpore, a to aj vtedy, ak lehota na prebratie smernice ešte neuplynula.“114

Nič vo vyššie citovanej formulácii záverov rozsudku nenaznačuje, že by sa medzi všeobecnou právnou zásadou a jednotlivcami vytváral priamy vzťah, a že je vnútroštátny súd povinný aplikovať všeobecnú právnu zásadu priamo namiesto odporujúcej vnútroštátnej právnej normy. Existujú predsa aj iné prostriedky a postupy, ktoré možno použiť za účelom dosiahnutia účinkov všeobecných právnych zásad vo vnútroštátnom právnom poriadku, a to okrem iného aj tie, ktoré ESD využil v skúmanom prípade: konformný výklad a vylúčenie aplikácie odporujúceho vnútroštátneho práva, nehovoriac o tzv. predbežnej dovolateľnosti komunitárneho práva podľa doktríny Inter-Environment, ktorú som spomenul vyššie.

Mám za to, že ESD využitím uvedených postupov poskytol navrhovateľovi vo veci samej minimálnu záruku, spočívajúcu v tom, že vzhľadom na to, že nie je možné očakávať účinnú aplikáciu komunitárnej smernice, je možné sa dovolávať všeobecnej právnej zásady zákazu diskriminácie na základe veku, vyjadrenej v čl. 1 dotknutej smernice, ale len s tým cieľom, aby bola vylúčená aplikácia nezlučiteľných vnútroštátnych právnych noriem.

ESD teda nepriznal všeobecnej právnej zásade priamy účinok v tom zmysle, že by táto právna zásada zakladala pre odporcu v konaní vo veci samej povinnosť nediskriminovať navrhovateľa vo veci samej s ohľadom na vek. Potvrdzuje to aj Martina Jánošíková, keď uvádza, že „slovenský súd, ak by bol v pozícii nemeckého súdu, ktorý položil predbežné otázky, a dostal by takú odpoveď, aká je obsiahnutá v rozsudku vo veci Mangold, by mal znova prerušiť konanie v zmysle čl. 144 ods. 2 Ústavy SR a podať návrh na ústavný súd na začatie konania o súlade právnych predpisov.“115

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113 Rozsudok ESD vo veci C-144/04 Werner Mangold *v* Rüdiger Helm [2005] ECR I-9981, bod 78

114 Pozri rozsudok ESD vo veci C-144/04 Werner Mangold *v* Rüdiger Helm [2005] ECR I-9981, bod 78

115 Jánošíková, M.: Poznámky k rozsudku „Mangold.“ In: *Výber z rozhodnutí Súdneho dvora Európskych spoločenstiev.* Bratislava: Iura Edition 2007, č. 1, s. 69

V súvislosti s chápaním inštitútu priameho účinku aktov komunitárneho práva zdieľam názor Denysa Simona o tom, že je potrebné prihliadať na existenciu rozličných foriem dovolateľnosti a k pôsobeniu záväzného účinku komunitárneho práva, ktoré nie je závislé len na štrukturálnom princípe priameho účinku komunitárneho práva v tradičnom zmysle slova, ale ktoré odráža aj štrukturálny princíp prednosti komunitárneho práva. Podľa Simona „vývoj vzťahov medzi komunitárnym právom a vnútroštátnymi právnymi poriadkami svedčí o tom, že sa obe kľúčové pojmy – priamy účinok a prednosť – spolu rozchádzajú, a že sa účinky komunitárneho práva pomaly a iste a bez akýchkoľvek ďalších prívlastkov sústreďujú okolo pojmu súdnej ochrany práv, ktorým sa rozumie schopnosť vnútroštátneho sudcu zabezpečiť účinnosť komunitárneho práva i súdnej ochrany jeho subjektov.“116 Simon dodáva, že „v závislosti na tom je možné dospieť nie k polarizácii, ale ku stupnici, ktorá začína minimálnou súdnou ochranou práv a končí posilnenou ochranou práv a v ktorej sa v porovnaní s tradičným delením založeným na pojme priamy účinok viac odráža súčasný stav judikatúry.“117

Aj keby však ESD rozsudkom vo veci Mangold priznal všeobecnej právnej zásade zákazu diskriminácie na základe veku priamy účinok v tradičnom ponímaní, nebolo by s ohľadom na predchádzajúcu judikatúru to nič prekvapivé ani výnimočné. Už v roku 1976 ESD v prípade Defrenne II konštatoval, že všeobecná právna zásada rovnakého odmeňovania mužov a žien sa vzťahuje nielen na činnosť orgánov verejnej moci, ale aj na kolektívne zmluvy, upravujúce prácu za mzdu, rovnako ako aj na zmluvy medzi jednotlivcami. V tomto duchu rozhodoval ESD aj v prípade Angonese.118 Navrhovateľ vo veci samej namietal rozhodnutie súkromnej banky, ktoré mu bránilo z dôvodu chýbajúceho jazykového osvedčenia v možnosti zúčastniť sa výberového konania na pracovné miesto v banke. Podľa neho bolo jazykové osvedčenie v rozpore so zákazom diskriminácie na základe štátnej príslušnosti podľa čl. 39 Zmluvy o ES. Berúc do úvahy dôležitosť uvedeného zákazu, ESD dospel k záveru, že sa tento vzťahuje aj na súkromné osoby.119

S poukazom na vyššie uvedené aspekty považujem dôvodenie ESD v rozsudku vo veci Mangold za presvedčivé, avšak s jednou podstatnou výhradou. Z textu rozsudku vôbec nie je zrejmé, v čom spočíva porušenie dotknutej všeobecnej právnej zásady. Vzhľadom na to, že v prípade

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116 Simon, D.: Komunitární právní řád. Praha: ASPI, 2005, s. 357

117 Simon, D.: Komunitární právní řád. Praha: ASPI, 2005, s. 357

118 Rozsudok ESD vo veci C-281/98 Roman Angonese and Cassa di Risparmio di Bolzano SpA [2000] ECR I-4139

119 Pozri bod 36 rozsudku ESD vo veci C-281/98 Roman Angonese and Cassa di Risparmio di Bolzano SpA [2000] ECR I-4139

uvedenej smernice a všeobecnej právnej zásady nejde o identickú právnu úpravu, bolo namieste, aby sa ESD okrem uvedenia dôvodov inkompatibility vnútroštátnej právnej úpravy s čl. 6 ods. 1 smernice 2000/78, venoval aj tejto otázke.

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EUROPEAN LEGAL RELEVANCE IN MATTERS CONCERNING MINORITIES AND HUMAN RIGHTS

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Abstract
Throughout history minorities "problems" appeared practically in two cases:

1) In situations where atrocities were committed against certain minorities, which have aroused the disapproval of the international community; and

2) When the brutal intervention (enemy) of a country in favor of an ethnic or religious minority generated certain tensions which were amplified when the interventionist power under the protection of minorities umbrella has initiated territorial claims.

In the current stage of development of European law, three major principles have won the European community in issues concerning minorities and human rights:

a) Human rights issues within the competence of the EU Member State and its authority must be resolved without foreign interference, according to the general principle that each state is sovereign in its territory;

b) Citizens belonging to national minorities should enjoy equal rights with ethnic majority. In addition, they should ensure the maintenance of cultural identity, respecting them the traditions and the way of life, being unacceptable any attempt to assimilate with the majority population, according with the principle non-discrimination and unpersecution of any kind;

c) According to the principle of international cooperation of states on the rights of minorities is crucial that all EU Member States to adhere to a set of principles generally recognized corresponding to a particular standard recognized by the Council of Europe.

In Romania the idea of an autonomous community, basically territorial can not be reconciled with the provisions of Article 1 paragraph 1 of the Constitution, which consecrated the national, sovereign, independent, unitary and indivisible character of the Romanian state. In the meeting of experts in Geneva in 1991 for national minorities, the Romanian delegation presented a code of conduct of States for international cooperation on minority issues. The code also specifies that in their cooperation on these issues, Member States of the European Union will fully repeat the 10 principles of the Helsinki Final Act

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Key words
Minorities ; human rights ; European law ; autonomous community

1. GENERAL ASPECTS AND ELEMENTS OF HISTORICAL ORDER

Minority problem one of the main problems in terms of political and legal implications has contributed important subject of negotiations on an international level, even after the first medical conflagration. In peace treaties that concluded bilateral agreements or declarations, states have undertaken to protect rights of national minorities.

Minority problem one of the main problems in terms of political and legal implications has contributed important subject of negotiations on an international level, even after the first medical conflagration. In peace treaties that concluded bilateral agreements or declarations, states have undertaken to protect rights of national minorities. In all democratic constitutions in Central and Eastern Europe requires that each State Party shall ensure and guarantee the rights of minority groups and Czech ethnic. Constitution doesn't include a specific chapter on rights and freedoms, as they are contained in a stand-alone document" having constitutional power - Charter and fundamental freedoms-considered part of the constitutional order of the Czech Republic". In Slovakia there is an important part in the constitution that are mentioned in art. 43 are submitted rights and freedoms including the rights of minority and ethnic groups. Romanian Constitution enshrined in the "general principles - the right to identity" an important article (Article 6) which provides that: "The State recognizes and guarantees the right of persons belonging to national minorities to preserve, develop and express their ethnic, cultural, linguistic and religious, and in paragraph (2) is added as protection in the favor of the persons belonging add as protection for people belonging to national minorities "should conform with the principles of equality and discrimination in relation to other Romanian citizens. In the present communication we shall consider briefly the protection of ethnic identity in the context of international human rights documents and the discussions ongoing in the literature of international law in terms of minority rights. Literature has not succeeded in defining a scientificaly sens - the concept of minority legal - component of the international regime of protection of human rights. Given the multitude of interests of states in whose territories lives in this group & quot; definitions proposed in the literature of international law and in the UN or the Council of Europe documents are by definition because excellent highlight certain dimensions of the category of minorities. Over time I am aware of some necessary and useful operational definition "in approaching and solving a particular problem in a given time, is clearly influenced by the option or interests they have proposed committees". We believe that the more elaborate definition of the concept of minority has been given to the Council of Europe to draft an additional protocol to the Convention, European, Human Rights on the Rights of National Minorities, 1201 that the 1993 recommendation of the Parliamentary Assembly of the Europa Council. The

recommendation national minority expression refers to a group of people from one state: a) residing in the territory of that State and its citizens b) maintain old ties, solid and durable with the State c) feature ethnic, cultural, religious or linguistic characteristics d) sufficiently representative although they are less numerous than the general population of this state or it's region e) are animated by the will to keep together what form their common identity, especially culture, their traditions, religion and language. No one today can deny the existence of minority groups within a state or another and this appeared in international law that the extremes of the twentieth century, was concerned to protect the minority. In their evolution, minority problems have appeared practically in two cases:

1)in time periods that have been committed atrocities against certain minorities that have aroused the disapproval of the international community engage the country that use or encourage such practices in a climate of isolation and political criticism.

2)if the brutal intervention of a community majority in favor of ethnic, religious or sexual, generating tensions related exentuale territorial claims, under the umbrella idea of protection. At the beginning of the third millennium, international law enshrine three principles have won international community in matters concerning minorities and human rights: 1)The first principle advocate for the recognition of territorial sovereignty of each state, and human rights issues are the responsibility of the State as such and should be resolved without outside interference only by its authorities; 2)the second principle refers to the fact that citizens belonging to national minorities should not be discriminated against or persecuted, they must enjoy equal rights with citizens of the majority, and in addition are given maintenance of cultural identity, to have respect how life and traditions, find unacceptable any attempt to assimilate with the majority population; 3)principle of international cooperation of states in the field of minority rights is the third principle, which postulates that all states of the world firmly adhering to the set of generally recognized worldwide; Regarding the application of the principles enunciated in Romania do these specifications:

2. A REALISTIC AND OBJECTIVE EVALUATION OF ROMANIA'S POLICY OF NATIONAL MINORITIES IN THE FIRST DECADE OF XXI CENTURY.

In Romania, the idea of a community-in essence territorial autonomy consecrated the unitary and indivisible national state, sovereign and special independent. The disposition on minorities is in article 6 of the Constitution which stipulates that " The State recognizes and guarantees the right of persons belonging to national minorities the development and expression of their ethnic, cultural, linguistic and religious identity. According to lawyers politicians generally converge to consider the issue of minorities as very important in the life of the country to be solved in a political framework democratic. They insisted that minority issues to be resolved in the legal framework of sovereign nation states, respecting the integrity and

independence. On the other hand has been revealed and the idea of collective rights. Literature scientifically argued specifies that:"all human rights and freedoms are also both individual and collective. This is because the fundamental right is by nature subjective legal right and right is efficiency and subjective existence only in the context of the subject of legal relations with other subjects of law (judicial relationships) ... The man can not oppose the Company but neither should it melted. Relationship should be properly seen because otherwise there is a risk that an item be sacrificed. Yet individuality in the universal value of human rights put personality sa. That's why, whether it is human rights in general or the rights of Romanian citizens, the holder of the rights or freedoms is impossible to a community, a social group, but the person physics, man Roman citizen to those stipulated in the constitution. 2. Romanian Government to guard with each other state institutions to " respect for equal rights for all citizens and the rights of persons belonging to minorities, providing and guaranteeing the preservation of their ethnic, linguistic, cultural and religious. These rights are exercised with respect for unity and territorial integrity of Romania, in conditions of loyalty to the Romanian state, persons belonging to minorities" So, publications (magazines, newspapers, paper and publishing) in Hungarian, German, Serbian, Serbian, Bulgarian, Russian, French, Italian etc. with repertory theaters in the languages of the nationalities Hungarian, German, Jewish, universities and institutions teaching in Hungarian, German, Turkish, English counties with populations etc.

In the Geneva meetings of experts in matters of national minorities in 1991, the Romanian delegation submitted and discussed " the code of conduct of States in the field of international cooperation on minority issues, on which sets out a series of rules of conduct that must hold Member cooperation on minority issues that states must organize cooperation on minority issues. For the principle of cooperation in the field of minority rights in Romania's initiative was agreed that participating States will comply fully with the 10 princes of the Helsinki Final Act. Particularly interesting was the debate issues of national minorities and their legal status in the international conference " Central Europe and its national minorities' place in Bucharest on 15-16 September 1994, attended by specialists and politicians of the countries of Central . In this Parliamentary Seminar have expressed two main ways: a)reflected a prevailing opinion that should be granted " minority interests in a wide accompanied by administrative decentralization, but the bottom of a required loyalty to the national unit; b)A second perspective has focused idea that "minorities should be given as binding where a demand autonomy"; invoking the precedents set in Europe and presenting a series of conflict situations because " the majority did not would be paid by the obligations referred to minorities. Necessary to point out, within this international colloquium, the opinions expressed by representatives of ethnic minority Hungarian UDMR, Marko Bela held that " in fact in a united Europe all nations are minorities, and their naturally have created mechanisms to

protect minorities from majority. Laszlo Borbely, parliamentary UDMR determined to show a trend that some countries in the region to declare states of national minorities is considered as a real particular assimilation. It's true that during people's democratic regimes there were also trends, bulgarisation refer to ethnic Turks and Roma in Bulgaria even, but in Romania, Hungarian and Roma minority populations have remained intact, observing them the geographical habitat. It notorious that in Harghita county, 93% live population of ethnic Hungarians and the lands inhabited by the Székely, the majority population is of the same ethnicity. UDMR considered the concept of internal self-determination " harm the sovereignty of the state, demanding that in the domestic affairs of the Hungarian minority to decide its representatives. An opposite view was expressed by Academician Prof. Edouard Jonve who claimed that asserted that "the claims of the minority, the state is threatened. Minorities demand rights and powers belonging to the factual and legal people and then ask the question where the boundary between people and minorities? " Romanian point of view was presented at this seminar by the chief parliamentary diplomacy in that period Professor entitled Teodor Melescanu who expressed disagreement on minority problems by drawing borders within the existing " or minor changes to the latter, with reference to the plan as validation of the Balladur; would create a precedent dangerous " Romanian diplomacy DISCLAIMS concept of: "positive discriminate" which includes giving special rights to actually, liquidation discrimination by providing a "surplus" of minority rights. In international practice situations in which they were the majority ethnic minorities has additional advantages, but these provisions were not followed by a proportional increase their loyalty towards the gallant.

3. FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES

Protection of minorities was is and will be the chief concern of the Council of Europe adopted in 1994 Framework Convention for the Protection of National Minorities-prepared for the first intstrument international legal protection, rights of national minorities. The Convention in the spirit of decisions meeting Heads of State or Government of Vienna in October 1993, the protection of minorities, the rights and freedoms of persons belonging to minorities is part of the international protection of human rights and therefore constitutes an area of care international.

To assess, set and checked on the rights covered by the Framework Convention for the Protection of National Minorities are the fundamental rights of individuals and individual rights not colective. In time since the adoption and until present, the Convention has created a practice rights complaint individual and not collective because each statement of the trace that refers to "persons belonging to national minorities "During the discussions for drafting the document specifically designed to protect minorities were no controversy behind which were outlined two views: one that leaves states free to choose ways and means of implementing the

principles over who engaged in the Treaties and another that result of "creating an institutional tool, that an additional document to be such that a content to allow its use as a means of coercion of states, through legal means, by the international court. There appeared some confusion, which persist even now, due to misinterpretation regarding the content of the Recammendation that in 1201 the Assembly formulation of Art. 11 of the draft Protocol (R1211) states "in areas where the majority are persons belonging to national minorities have the right to dispose of the appropriate local government or local, or special status as historical and territorial situation and in accordance with specific legislation National State". Most trenchant position expressed a former general secretary of the EC Catherine Lalumiere who said that the idea of collective rights injuring individual rights, noting that in official documents of the Councils of Europe are submitted individual rights and not support the high group. We can see the above mentioned international officials that "by granting collective rights, is likely to abandon the right to vote (...) is essential to give the individual the right to choose the group in hand and to maintain the freedom to leave". A problem that led to fierce debate has circumscribed the right to identity the minorities. The Convention revealed that the right to identity of ethnic minority can not affect the political-legal status of territories states " Nothing in the present framework Convention or any act contrary to fundamental principles of international law, particularly the principle of ";sovereign equality, territorial integrity and political independence of states"-Established Article 21 of the Convention. It should be noted that the Convention establishes certain goals which member Contracting Parties undertake to comply with its laws and policies such as: equality before the law, adoption of measures for preservation and putting in a different culture their territory, protect religious identity, minority languages and traditions ensuring access to mass media, establishment of free cross-border relations and cooperation with persons lawfully staying in other states.

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UNIVERSAL PERIODIC REVIEW: EFFECTIVE MONITORING OF HUMAN RIGHTS STANDARDS?

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Abstract in original language
Opisom štruktúry univerzálneho periodického hodnotenia Rady OSN pre ľudské práva sa autor pokúsi zodpovedať otázku, či môže toto nové hodnotenie slúžiť ako efektívna metóda kontroly ľudsko-právnych štandardov na univerzálnej úrovni. Rámec a charakter ľudsko-právneho preskúmania sú v tomto smere značne dôležité. Príspevok analyzuje pozadie univerzálneho periodického hodnotenia ako jednej z funkcií Rady pre ľudské práva, jeho postup a skorú prax.

Key words in original language
Rada OSN pre ľudské práva, univerzálne periodické hodnotenie, ľudské práva

Abstract
By describing the Universal Periodic Review of the United Nations Human Rights Council, author attempts to answer the question, whether this new review process could serve as an effective monitoring instrument of human rights standards at the universal level. The scope and character of the human rights scrutiny is of great importance in this regard. The contribution analyses background of the Universal Periodic Review as one function of the Human Rights Council, its procedure and early practice.

Key words
UN Human Rights Council, Universal Periodic Review, Human Rights

1. INTRODUCTION

The system of human rights protection at universal level can be divided into the treaty-based and charter-based one. For treaty as well as charter-based universal system certain level of dynamism is characteristic. With regard to treaty system the unification of treaty bodies and their procedures is discussed and steps towards unify monitoring treaty body are prepared.[1] The

[1] See Concept paper on the High Commissioner's proposal for a unified standing treaty body, HRI/MC/2006/2, 22 March 2006. For an analysis of possible method of achieving the reform of treaty bodies, see Michael Bowman, 'Towards a unified treaty body for

main reform of the charter-based universal system has been partly accomplished by creation of the Human Rights Council (Council).

The Council is from 2006 successor of the Commission on Human Right (Commission), which was the subsidiary body of the Economic and Social Council (ECOSOC) and operated from 1946. The new body is subsidiary organ of the General Assembly (GA).[2] This enables the Council to report directly to the General Assembly and bypass the ECOSOC, what was one of the aims of the Commission's reform.[3] Since GA will review the Council's status within five years, it is possible, that it will be promoted to the position of full United Nations (UN) organ in 2011. That would create three councils for the three principal areas of work of organization.[4] The Council has become "responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner".[5]

2. HUMAN RIGHTS COUNCIL

The Council consists of forty-seven member-states elected directly and individually by secret ballot by the majority of the members of the GA.[6] It is slightly smaller than the Commission, but not expert body. Therefore, one can expect politicisation of the work in the future in geographic groups.[7] Members will serve for period of three years and will not be eligible for immediate re-election after two consecutive terms.[8] Membership is open to all UN member states and "contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments" should be taken into account.[9] They should uphold the highest standards in

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monitoring compliance with UN human rights conventions? Legal mechanisms for treaty reform' (2007) Human Rights Law Review 7 (1), pp 225-249.

[2] General Assembly Resolution 60/251,Human Rights Council, 15 March 2006 (A/RES/60/251), para 1.

[3] H. J. Steiner, P. Alston, R. Goodman, *International Human Rights in Context, Law, Politics, Morals* (OUP, Oxford 2007), 3rd edition, p 737.

[4] R Smith, Textbook on International Human Rights, Third edition (OUP, Oxford 2007), p 58.

[5] General Assembly Resolution 60/251, para 2.

[6] Ibid, para 7.

[7] The Council consists of 13 members from African States, 13 from Asian States, 6 from Eastern European States, 8 from Latin American and Caribbean States, and 7 from Western Europe and Other States. Ibid.

[8] General Assembly Resolution 60/251, para 2.

[9] Ibid, para 8.

the promotion and protection of human rights.[10] Taken into consideration the record of countries elected for the first period, it is clear that systematic violation of human rights did not disqualify states to be elected. However, some of the worst human rights offenders were not elected.[11] Safeguard against possibility to have the gross and systematic violator among the Council's members has been set up. Such a member may be suspended by two-thirds majority of GA members present and voting.[12] It will be interesting to observe, whether the Council will define what constitute gross and systematic violations of human rights. Some argued against explicit criteria limiting eligibility for membership, which could exclude states having doubts and reservations regarding human rights from necessary discussions about solid human rights consensus.[13]

Despite of original suggestion of UN Secretary General in 2005 to create smaller standing body[14], the Council does not have the permanent character. It meets regularly throughout the year for no fewer than three sessions per year for a total duration of no less than ten weeks.[15] This was welcomed as "a major step forward that will allow for more timely response to developing human rights situations".[16] It is also possible to hold special sessions, when needed, at the request of Council member with the support of one third of the Council membership.[17] That competence has been already utilised for twelve times until November 2009. No hesitation to use this tool might be the sign of capability to act promptly on situations which evoke international concerns. To compare with the Commission, which had this procedural instrument from 1990,[18] only five special sessions were held

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[10] Ibid, para 9.

[11] F. J. Hampson, 'An Overview of the Reform of the UN Human Rights Machinery' *Human Rights Law Review* 2007, 7(1), 7 – 27, p 14.

[12] General Assembly Resolution 60/251, para 8.

[13] N. Ghanea, 'From UN Commission on Human Rights to UN Human Rights Council: one step forwards or two steps sideways?' *International and Comparative Law Quarterly* 2006, 55 (3), 695 – 705, p 699.

[14] In larger freedom: towards development, security and human rights for all, Report of the Secretary General, General Assembly, 21 March 2005, A/59/2005, para 183.

[15] General Assembly Resolution 60/251, para 10.

[16] Human Rights Council: No More Business as Usual, Human Rights Watch, p 1; available at <http:// www.hrw.org /legacy/backgrounder/un/un0506/un0506.pdf > (accessed 10 June 2009).

[17] General Assembly Resolution 60/251, para 10.

[18] See ECOSOC Resolution 1990/48, 25 May 1990; ECOSOC Decision 1993/286: Procedure for special sessions of the Commission on Human Rights, 28 July 1993.

until its termination.[19] Novelty can be found in the 'Methods of Work' of the Council,[20] which poses the requirement of "results-oriented" special session. The outcomes should be practical, the implementation of which can be monitored and reported on the following regular session of the Council for possible follow-up decision.[21]

As successor of the Commission, the Council assumed all the Commission's mandates, mechanisms, functions and responsibilities in addition to the new ones.[22] In order to maintain a system of 'special procedures', expert advice and the complain procedure existed until 2006, the Council had additional temporary function; to review all assumed mandates, mechanisms, functions and responsibilities. The improvement and rationalisation could have been made, where necessary. This review process had to be completed within the on year time from 19 June 2006.[23] The working group has been created in order to achieve this goal.[24] After a few months of discussions in both the working groups to formulate agenda, programme of work, methods of work and rules of procedure and the working group to undertake the review, "it become obvious that, rather than striving to improve on what had been created under the Commission, the fight had become centred on how to preserve the protections offered by those mechanisms".[25] Finally, the Council adopted core framework for Special procedures, Complain procedure and Universal Periodic Review mechanism in scope of, so called,

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[19] Available at <http://www2.ohchr.org/english/bodies/chr/special-sessions.htm> (accessed on 10 August 2009).

[20] Human Rights Council Resolution 5/1: Institution-building of the United Nations Human Rights Council, 18 June 2007, A/HRC/RES/5/1, (institution-building resolution), Part VI. Methods of Work.

[21] Ibid, D. Special sessions of the Council, para 128.

[22] Accordingly, the illustrative list of main functions includes: (a) to address situations of violations of human rights and make recommendations thereon; (b) to contribute towards the prevention of human rights violation; (c) to respond promptly to human rights emergencies; (d) to promote effective coordination and mainstreaming of human rights within UN; (e) to promote human rights education, learning, advisory services, technical assistance, and capacity-building; (f) to serve as a forum for dialogue on thematic issues on all human rights; (g) to make recommendations to the General Assembly for the development of international human rights law; (h) to make recommendations with regard to the promotion and protection of human rights; (i) to promote implementation of human rights obligations undertaken by states; (j) to follow-up to the human rights goals and commitments emanating from UN conferences and summits; (k) to undertake a universal periodic review; (l) to submit an annual report to the General Assembly. Ibid, paras 3 – 5.

[23] Ibid, para 6.

[24] Human Rights Council Decision 1/104, 30 June 2006, A/HRC/DEC/1/104.

[25] M. Abraham, Building the New Human Rights Council: Outcome and analysis of the institution-building year (Friedrich-Ebert-Stiftung, Geneva 2007), p 4.

'institutional building package' of 18 June 2007, which also includes Rules of Procedures, Agenda and already mentioned Methods of Work.[26] Main work has been accomplished, but specification of particular functions and configuration of competences has still taken place.

The review mechanism, complementing the reporting procedures before treaty bodies, was planed as measure that would help avoid the politicization and selectivity of the Commission's existing system.[27] The UN Secretary General accentuate requisite of "the notion of universal scrutiny". It is assumed, that if human rights screening of all UN member states is assessed by other member states, it can eliminate rebuke of double human rights standards. It would be irrelevant whether the country is small and without influential supporters; no one would be able to escape from a review.

3. CHARACTERISTIC OF UNIVERSAL PERIODIC REVIEW

Basic framework of the "Universal Periodic Review" (UPR) supported and approved by the GA requires the review of objective and reliable information of the fulfilment of human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all states.[28] One year after discussion on many proposals, the Council managed to adopt procedural requirements of the UPR.[29] Any hope for expert scrutiny of information has been dropped, since the UPR is explicitly "intergovernmental process".[30] However, it has to be conducted in "an objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner".[31] It is cooperative mechanism where interactive dialogue plays major importance.[32] The country under review

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[26] Human Rights Council Resolution 5/1: Institution-building of the United Nations Human Rights Council, 18 June 2007, A/HRC/RES/5/1; Human Rights Council Resolution 5/2: Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council, 18 June 2007, A/HRC/RES/5/2.

[27] Explanatory note by the Secretary General, Addendum to the In larger freedom, Report of the Secretary General, General Assembly, 23 May 2005, A/59/2005/Add.1, paras 7 - 8.

[28] General Assembly resolution 60/251, 3 April 2006 (A/RES/60/251), para 5 (e).

[29] For analyses of preceding discussion see F. D. Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System' *Human Rights Law Review,* 2007, 7(1), 109 – 139.

[30] Human Rights Council Resolution 5/1: Institution-building of the United Nations Human Rights Council, 18 June 2007, A/HRC/RES/5/1, Part I: Universal Periodic Review Mechanism, para 3 (d).

[31] Ibid, para 3 (g).

[32] Ibid, para 3 (b).

should be "fully involved", and "the level of development and specificities of countries" should be taken into account.[33] This general language, symptomatic of principles, will be used by some governments to excuse their pure human rights performance base, inter alia, on economical, political, religious or cultural grounds. It can be considered inappropriate for Human Rights Council to include such a formulation in its resolution, since "it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."[34] There is nothing to indicate, that countries will not take particularities into account, but members of the Council should have minimal sympathy to it.

Moreover, the main UPR objective is the improvement of the human rights situation on the ground and not to justify low human rights status quo. Other objectives are: the fulfilment of the State's human rights obligations and commitments and assessment of positive developments and challenges faced by the State; the enhancement of the State's capacity and of technical assistance, in consultation with, and with the consent of, the State concerned; the sharing of best practice among States and other stakeholders; support for cooperation in the promotion and protection of human rights; the encouragement of full cooperation and engagement with the Council, other human rights bodies and the Office of the High Commissioner for Human Rights.[35]

The obligations reviewed periodically are those emerged from the UN Charter, the Universal Declaration on Human Rights, human rights instruments to which a state is party, voluntary pledges and commitments made by states, and from international humanitarian law. While reference to "specificities of the countries" taken into account could not have positive effect on 'soft law' development, to classify the Universal Declaration on Human Rights as basic document constituting the states' human rights obligation is, per se, very positive step towards its legal bindingness in international human rights law. From the broader international law perspective, the inclusion of "applicable international humanitarian law" could be also seen as quite constructive, since some countries still argue the mandate of charter-based human rights bodies to act in this area.[36]

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[33] Ibid, para 3 (e), (l).

[34] Vienna Declaration and programme of Action, World Conference on Human Rights, 25 June 1993, General Assembly, A/CONF.157/23, para 5.

[35] Human Rights Council Resolution 5/1: Institution-building of the United Nations Human Rights Council, 18 June 2007, A/HRC/RES/5/1, Part I: Universal Periodic Review Mechanism, para 4.

[36] See P. Alston, J. Morgan-Foster, W. Abresch, 'The Competence of the UN Human Rights Council and its special procedures in relation to armed conflicts: extrajudicial

4. PROCEEDING

The UPR is conducted mainly in the Working Group on Universal Periodic Review (Working group), which consists of all the Council's member states. Forty-eight states will be review per year during three sessions of the Working group of two weeks each according to "order of review". The first states were chosen by the lots from each regional group. Alphabetical order should be applied beginning with those countries thus selected, unless other countries volunteer to be reviewed. In practice, firs states to be review in firs year of UPR in operation are the Council members and observers.[37]

Following phases of the UPR could be distinguished:

1. preparation of the information;

2. the review itself;

3. outcome document adopted by the Working group;

4. consideration and adoption of the UPR outcome by the Council;

5. follow-up by reviewed states on implementation the outcome.[38]

4.1 PREPARATION OF THE INFORMATION

Basis of the UPR is the review of objective information, that is: the national report; the compilation of information contained in the reports of treaty bodies, special procedures, and other UN documents; and the summary of credible and reliable information provided by other relevant stakeholders[39] The national report is prepared by state concerned and should not exceed 20 pages. States are encouraged to prepare the information through a broad consultation process at the national level with all relevant stakeholders. It is expected that countries will consult the national report at least with all non-governmental organisations (NGOs) at national level working in human

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executions in the "war on terror"' *European Journal of International Law* 2008, 19 (1), 183 – 209.

[37] Human Rights Council Resolution 5/1: Institution-building of the United Nations Human Rights Council, 18 June 2007, A/HRC/RES/5/1, Part I: Universal Periodic Review Mechanism, paras 5 - 12.

[38] Information and Guidelines for relevant stakeholders on the Universal Periodic Review mechanism, Office of the High Commissioner for Human Rights, July 2008, para 4; available at <http://www.ohchr.org/EN/HRBodies/UPR/Documents/TechnicalGuide EN.pdf> (accessed on 10 July 2009).

[39] Human Rights Council Resolution 5/1: Institution-building of the United Nations Human Rights Council, 18 June 2007, A/HRC/RES/5/1, Part I: Universal Periodic Review Mechanism, para 15.

rights field. In addition to this, other organisations belonging to civil society in the country can be regarded as "relevant" and should participate in the consultation process. In practice, some states restricted consultations only to NGOs (Netherlands, Slovakia), while others consulted also professional organisations of lawyers, judiciary or journalists (Tunisia) and members of civil society expert in human rights (United Kingdom).[40] Nevertheless, not only broad exchange of views is important. In attempt to present realistic picture of the country's human rights record, state concerned will need to take into account suggestions and information provided by relevant stakeholders. The national report should thus evolve as objective as possible.

To balance the national report, the Office of the High Commissioner for Human Rights (OHCHR) will present two sets of document; the compilation of information contained in UN documents and the summary of credible and reliable information. Both of them shall not exceed 10 pages. The compilation of information from the UN documents will contain the reports of treaty bodies, special procedures, including observations and comments by the State concerned, and other relevant official UN documents. The summary of credible and reliable information from relevant stakeholders may include NGOs, National Human Rights Institutions, human rights defenders, academic institutions ad research institutes, regional organization, as well as civil society representatives. Quite exact requirement for information submitted were adopted by the Council itself, e. g. to cover a maximum four-year time period, submitted no longer than five pages etc.[41] Since some states expressed strong opposition to the proposition that OHCHR should analyse the information[42], it should only summarize and compile them. Some degree of evaluation and analysis will be however necessary in the line to make compact summary of 10 pages, which will avoid duplication of information.

4.2 THE REVIEW ITSELF

Centre of the review itself is an "interactive dialogue" between the country review and members of the Council. During the interactive dialogue in the Working group as well as before adoption of outcome, states have opportunity to present replies to questions or issues. Review is facilitated

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[40] See National Reports available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx>.

[41] See Human Rights Council Decision 6/102, 27 September 2007, A/HRC/DEC/6/102, Part I: General Guidelines for the preparation of information under the Universal Periodic Review; Information and Guidelines for relevant stakeholders on the Universal Periodic Review mechanism, OHCHR, July 2008.

[42] M. Abraham, Building the New Human Rights Council: Outcome and analysis of the institution-building year (Friedrich-Ebert-Stiftung, Geneva 2007), p 38.

by, so called, 'troika' – a group of three rapporteurs of the Council's members from different regional groups. 'Troika' prepares the report of the Working group and also transfers the question of the observer states or other stakeholders to the state under review.[43] Formal division of UPR process between the Working Group and the Council will release more time of the Council's plenary session for other agenda items. The lack of speaking and meeting time, which is essential for genuine and substantive dialog, had imposed serious restrictions on the ability of the Commission to function effectively.[44] Short time for NGOs caused that there was no guarantee for statements to be adequately listened to, discussed, or acted upon in the Commission's agenda.[45] Now, there is no guarantee for that either, but NGO's statements can be more focused on each country. Structure of UPR allows Council's members to meet outside Council's session. Each country will be reviewed for three hours in the working group.[46] NGOs and NHRI may attend the review in the Working group. It will allow them to raise issues they identify as important within particular state, in right forum.

4.3 OUTCOME ADOPTED BY THE WORKING GROUP

Working group adopts the report on country reviewed. Additional half an hour will be allocated for the adoption.[47] A content of the report is not specified. In practice, these reports include presentation by the state under review, summary of interactive dialogue and responses by the state, and conclusions and recommendations. The cooperative character is genuine in this regard. The report includes variety of recommendations made individually by states, thought recommendations do not express position of Working group as a whole. This approach forestalls its politicization.

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[43] Human Rights Council Resolution 5/1: Institution-building of the United Nations Human Rights Council, 18 June 2007, A/HRC/RES/5/1, Part I: Universal Periodic Review Mechanism, paras 18 – 21.

[44] A. J. Almeida, Backgrounder on the reform of the United Nations Commission on Human Rights (Rights and Democracy: International Centre for Human Rights and Democratic Development, Montreal, 2005), p 31.

[45] M. Abraham, A new chapter for human rights. A handbook on issues of transition from the Commission on Human Rights to the Human Rights Council (International Service for Human Rights and Friedrich Ebert Stiftung, Geneve 2006), p 93.

[46] Human Rights Council Resolution 5/1: Institution-building of the United Nations Human Rights Council, 18 June 2007, A/HRC/RES/5/1, Part I: Universal Periodic Review Mechanism, para 22.

[47] Human Rights Council Resolution 5/1: Institution-building of the United Nations Human Rights Council, 18 June 2007, A/HRC/RES/5/1, Part I: Universal Periodic Review Mechanism, para 23.

4.4 UPR OUTCOME ADOPTED BY THE COUNCIL

The role of the Council, sitting in plenary during the annual session, is restricted to adoption of final outcome in form of report. Up to one hour will be allocated for its consideration. The report has to include a summary of the proceeding, conclusions, recommendations, and the voluntary commitments of the state concerned. It may also include assessment of human rights situation in the country and sharing of best practices.[48] In practice, it includes also state's replies presented before the adoption of the outcome by the plenary to questions or issues that were not sufficiently addressed during the interactive dialogue in the Working Group. Members of the Council, observer states, NGOs and NHRI may express their views and make comments before outcome is adopted.[49]

There should be no accusation made that UPR will duplicate the reporting procedure before treaty bodies. Not only because it should, expressis verbis, represent an added value and complement other human rights mechanism,[50] but also because the UPR has different character and purpose.[51] Recommendations made under UPR will not create unify approach to state obligations, since UPR reference documents and legal duties vary significantly. Some states were already urged in UPR outcome to follow their human rights obligations within regional organizations, while others were urged to ratify even basic international instruments. The level of expertise of expert bodies can not be replaced by scrutiny of governments. Further, the examination of compliance with any norm contained in human rights treaties inside UPR should not occurs "in order to protect the integrity of the treaty procedures".[52] The UPR represents additional political pressure in order to implement expert recommendations of treaty bodies. This kind of pressure can be more useful in international arena than pure expert decisions. The UPR has, therefore, real potential to complement and follow-up work of expert treaty bodies.

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[48] Ibid, paras 26 - 27.

[49] Ibid, paras 30 – 31.

[50] HRC Resolution 5/1: Institution-building of the United Nations Human Rights Council, 18 June 2007, A/HRC/RES/5/1, Part I: Universal Periodic Review Mechanism, para 3 (f).

[51] For analysis of reporting procedure under ICCPR, see e. g. : D McGoldrick, *The Human Rights Committee, Its Role in the Developmnet of the International Covenant on Civil and Political Rights* (Clarendon Press, Oxford 1991), reprinted 2001, pp 62 – 119.

[52] F. J. Hampson, 'An Overview of the Reform of the UN Human Rights Machinery' (2007) *Human Rights Law Review* 7(1), 7-27, p 17.

4.5 FOLLOW-UP

The UPR outcome contains all the recommendations included in the Working group's report. In other worlds, recommendations are included in the UPR outcome without voting about them rather than being formulated by sensitive and secrete political discussions. Recommendations without support of the state concerned are identified in the outcome. States make clear objections against such recommendations. No argument on voluntary or indirect agreement with obligations can be made. That means there is any kind of strict legal follow-up procedure. The legal character and force of obligations undertaken by states, if any, is more than unclear. It is stated, that UPR outcome "should be implemented primarily by the State concerned".[53] Unfortunately, follow-up process is formulated very weakly. It is only required that subsequent review focus, inter alia, on the implementation of the preceding outcome.[54] On the other hand, the Council may "decide if and when any specific follow-up is necessary". Moreover, it may address "cases of persistent non-cooperation with the mechanism" after exhausting all efforts to encourage a state to cooperate with the UPR.[55] This provision can be describe as "one of the most significant victories on the UPR",[56] even thought it is not apparent yet how will 'specific follow-up', or other action taken, look like. This possibility will come for the Council after the first round of UPR, when compliance with recommendations in UPR report will be reviewed. Since first cycle will take four years, from 2008 to 2011, it is not expected that the Council will consider any specific action before that time. It is, however, very important, that the Council has possibility and mandate to develop its practices or guidelines to deal with non-cooperative states.

5. CONCLUSION

The co-operational attitude is inclined to whole UPR. The international community is expected to assist states in implementing the recommendations and conclusions regarding capacity-building and technical assistance. The state concerned has to be consulted and has to consent with such assistance.[57] Furthermore, the Council requested the Secretary General to establish two UPR trust founds: one to facilitate the participation of

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[53] Ibid, para 33.

[54] Ibid, para 34.

[55] Ibid, para 38.

[56] M. Abraham, Building the New Human Rights Council: Outcome and analysis of the institution-building year (Friedrich-Ebert-Stiftung, Geneva 2007), p 41.

[57] Human Rights Council Resolution 5/1: Institution-building of the United Nations Human Rights Council, 18 June 2007, A/HRC/RES/5/1, Part I: Universal Periodic Review Mechanism, para 36.

developing countries in the UPR and second to help countries implement recommendations emanating form the UPR.[58] This would allow countries' delegations to prepare adequately and answer the question more accurately during the interactive dialogue. Great difference could be seen in this regard during the first year in operation. Some state delegations participated in the discussion in Geneva consisted of up to thirty members, while other states were advocated only by one person. Many states have repeatedly stressed that not compliance with human rights obligations is not due to the lack of respect but due to the lack of financial and human resources. The UPR, therefore, represents mechanism which can practically assist countries.

To sum up, the UPR can be effective tool for monitoring of human rights standards, when state is willing to improve its human rights behaviour. For example, Bahrain – the very first country examined by UPR – decided to create participatory review processes to share good practice and experience on enhancing of human rights situation in other countries; to developed media and communication strategy to encourage awareness of civil society in follow-up; to develop and adopt action plan to implement UPR outcome.[59] Voluntary pledges could be good example how to use the review. It can be helpful mechanism even when state is willing but unable to change systematic approach to human rights because of technical and economical background. However, it is not strong mechanism in case of state that violates human rights deliberately. On the other hand, no country may ignore the UPR, since the voice of international society towards human rights is heard equally.

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[58] Human Rights Council Resolution 6/17: Establishment of funds for the universal periodic review mechanism of the Human Rights Council, 28 September 2007, A/HRC/RES/6/17.

[59] See National Report Submitted in accordance with paragraph 15 (A) of the Annex to Human Rights Council resolution 5/1 (Bahrain), Human Right Council, Working Group on the Universal Periodic Review, 11 March 2008, A/HRC/WG.6/1/BHR/1.

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EUROPEAN NOTARIAT'S INTEGRATION IN THE EUROPEAN JUDICIAL NETWORK IN CIVIL AND COMMERCIAL MATTERS

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Abstract
The Council of the Notariats of the European Union confirms its intention to make a positive contribution to the construction of the European Judicial Area in civil matters. The main objective is to make procedures easier for citizens and businesses. The notariat's integration in the Network will help to achieve this objective and improve the functioning of the Network. Consequently, the Council of the Notariats of the European Union welcomes the European Commission's proposal to further integrate the legal professions in this network and, more specifically, the notariat as public officials, issuers of public documents that circulate in the European Union in the same way as judgements.

Key words
European integration; European notariat's integration; liberal professions.

A European Judicial Network (hereafter'Network') in civil and commercial matters was established following Council Decision No 2001/470/EC of 28 May 2001. Since its creation, this Network has been the subject of several assessment meetings. At the meetings of 13 December 2005 and 6 June 2006, the European Commission put on the agenda the possibility of integrating the professional services in the Network. The CNUE attended these meetings representing its 19 member notariats and wishes to respond to the European Commission's questions on the subject.

1. I. THE NOTARIAT'S PARTICIPATION IN THE NETWORK'S ACTIVITIES BRINGS ADDED VALUE FOR CITIZENS AND BUSINESSES.

In line with the objectives of the Hague Programme for freedom, security and justice and improved access to the law for citizens – particularly with regard to cross-border legal relations – the CNUE would be pleased to see the Network gradually being opened up to the legal professions[1]1, as initiated by the European Commission, and particularly to civil law notaries,

[1] Report on the application of Council Decision No 2001/470/EC establishing a European Judicial Network in civil and commercial matters, COM (2006)203 of 16 May 2006, point 4.2.

who are public officials, issuers of public documents that circulate in the European Union in the same way as judgements. Moreover, in his speech in Brussels on 26 April 2006, the Vice-President of the European Commission, Franco Frattini, specified that civil law notaries in particular could and should be further integrated into the activities of the Network to this end. The European notariat's participation in the Network can bring added value for citizens and businesses in Europe thanks to the delegation of judicial cooperation missions provided for by Community legislation In accordance with the objectives cited in Recital 6 of Decision 2001/470/EC of 28 May 2001 on the improvement, simplification and acceleration of effective judicial cooperation between the Member States, the notariat's participation in the Network's activities is of practical use in legal practice in the EU and will help the Network achieve its goals.

1. The notariat can contribute to simplifying procedures within the Network by using not only significant IT tools but also through close cross-border cooperation and pre-existing contacts. The notariat can help accelerate procedures within the network by having few intermediaries in cross-border contacts and through the use of new technologies (already widespread within the notariat). Finally, the notariat's participation in the Network could result in an improvement in the network and in judicial cooperation. The notariat's participation supports the quality of judicial cooperation in the Network, notably through better transposition of Community instruments. Moreover, an improvement in notarial services provided for citizens can be anticipated.

2. Furthermore, positive effects could result for example from enhanced and structured cooperation between notarial organisations in cross-border affairs. This would also allow the creation of new possibilities to improve civil law notaries' cooperation with other members of the Network, such as judges.

3. Extrajudicial procedures figure amongst the EU institutions' policy priorities in civil justice matters. The civil law notary acts as a public official and helps lessen the courts' workload by offering preventive justice. The notariat's future membership of the Network can fill the gap that currently exists within the Network in dispute prevention procedures and, because of its specific role, it will be able to simplify effective judicial cooperation between Member States. Recourse to alternative dispute resolution and the role of the civil law notary therein is worth special attention.

4. The notariat already carries out important tasks such as those mentioned in Regulations 2001/44/EC ('Brussels I') and 2004/805/EC (European Enforcement Order). With the progressive integration of the EU's policy in justice matters, it is possible that other tasks will be delegated to civil law notaries in order to use up the potential available to speed up and enhance judicial cooperation between Member States.

2. EXAMPLES OF THE NOTARIAT'S FIELDS OF ACTIVITIES WITHIN THE NETWORK

1. Article 3 of Decision 2001/470/EC of 28 May 2001 sets out the Network's missions and activities and states the activities in which the notariat's integration in the Network would be particularly beneficial, such as:

    a. the smooth operation of procedures having a cross-border impact and the facilitation of request for judicial cooperation between the Member States, in particular where no Community or international instrument is applicable;

        i. Settling successions

        ii. The trade register and company law

        iii. The land registers and real estate transfers

        iv. Family law, notably in the area of divorce and matrimonial property regimes

        v. Mediation procedures

    b. The effective and practical application of Community instruments or conventions in force between two or more Member Sates, such as:

        i. Regulation of 22 December 2000 concerning jurisdiction and the recognition and enforcement of judgements in civil and commercial matters ('Brussels I' Regulation No 2001/44/EC)

        ii. Regulation of 21 April 2004 creating a European Enforcement Order for uncontested claims ('European Enforcement Order' Regulation No 2004/805/EC).

3. LEGAL BASIS

1. Article 2 of Decision 2001/470/CE already offers two possibilities for the notariat's participation in the Network through identification or designation by the Member States:

    a. Article 2 paragraph 1(b) states that the Network shall be composed of central bodies and central authorities provided for in Community instruments or instruments of international law;

b. Article 2, paragraph 1(d) of Decision 2001/470/EC[2] is already a possible legal basis for the notariat's participation in the Network as a member.

2. As stated in the European Commission's report, the notariat and other legal professions have already been integrated into the Network by some Member States, such as:

   a. in France where the notariat has been designated as a 'central authority' within the meaning of Article 2, paragraph 1(b) of Decision 2001/470/EC[3]

   b. in the Czech Republic where the legal professions have been well integrated as members of the Network according to Article 2 paragraph 1(d). Through this creation, an 'interface' with the legal professions has been established within the national contact point.

4. DETAILED CNUE PROPOSALS

1. In practice, the notariat can contribute to the Network's activities in the following ways:

   a. Suggestions with a view to integrating the notariat in the Network

      i. Designate the notariat as a 'central authority' in the context of the competences of each notariat at national level in accordance with the Community instruments (e.g. 1972 Basel Convention; European Enforcement Order; Article 2 paragraph 1(b) of Decision 2001/470/EC);

      ii. Designate the notariat as 'another legal or administrative authority' in order to participate in the Network (Article 2, paragraph 1(d) of Decision 2001/470/EC);

      iii. Create direct access for the notariat to the Network's national contact points;

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[2] The Network is composed of any other appropriate judicial or administrative authority with responsibilities for judicial cooperation in civil and commercial matters whose membership of the Network is considered to be useful by the Member State to which it belongs.

[3] The Conseil supérieur du notariat français is designated as a liaison body in the framework of the application of the Basel Convention of 16 May 1972 on the Establishment of a Scheme of Registration of Wills (see declaration relating to Article 3 of the abovementioned convention, deposited in the instrument of approval of 20 September 1974).

iv. Ensure access to the CIRCA Intranet for the person responsible from the national notariat;

The notariat's participation in meetings of the Network's members;

b. The notariat's commitment to implement the following measures:

i. The progressive setting up of a 'network of delegates for the Network' from national notarial organisations (interlocutors for the notariat) to begin coordinated cooperation and deal with cross-border legal questions; the beginning of a pilot project that could be extended progressively to all CNUE members;

ii. Add to the Network's website, for example European and national factsheets directly concerning the notariat;

iii. Ensure access to information on the national notarial organisations' websites in a language other than their respective national languages;

iv. Designate a contact person from the CNUE for cooperation with the European Commission.

5. CONCLUSIONS

The CNUE confirms its intention to make a positive contribution to the construction of the European Judicial Area in civil matters. The main objective is to make procedures easier for citizens and businesses. The notariat's integration in the Network will help to achieve this objective and improve the functioning of the Network. Consequently, the CNUE welcomes the European Commission's proposal to further integrate the legal professions in this network and, more specifically, the notariat as public officials, issuers of public documents that circulate in the European Union in the same way as judgements.

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APPLICATION OF THE PRINCIPLE OF SUBSIDIARITY ON DECISION MAKING OF THE ECJ IN THE AREA OF FUNDAMENTAL RIGHTS PROTECTION

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Abstract in original language
Příspěvek se zabývá vlivem principu subsidiarity na rozhodovací činnost Soudního dvora Evropských společenství zvláště v oblasti ochrany základních práv. Soudní dvůr neplní svou funkci při kontrole dodržování tohoto principu v jeho užším smyslu jinými orgány EU a rovněž tento princip neaplikuje na svoji vlastní aktivistickou rozhodovací činnost. Při posuzování principu subsidiarity v jeho širším smyslu je zřejmé, že zatímco procedurální rovina tohoto principu – vyčerpání místních opravných prostředků – není v případě Soudního dvora aplikovatelná, jeho hmotněprávní rovina (včetně doktríny margin of appreciation) může jistou roli při ochraně základních práv Soudním dvorem hrát.

Key words in original language
Princip subsidiarity; Soudní dvůr Evropských společenství; ochrana základních práv.

Abstract
This contribution focuses on influence of the principle of subsidiarity on the decision making of the European Court of Justice (ECJ) especially in the area of fundamental rights protection. It is argued that the ECJ does not fulfill its function in controlling the observance of the principle in its narrow sense by other EU bodies and that the ECJ does not apply the principle to its own activist rulings. Considering the wide sense of the said principle, it is clear that while application of the procedural part of the principle – exhaustion of local remedies – is not possible in the case of the ECJ, the material part of this principle (including the margin of appreciation doctrine) may play certain role in protection of fundamental rights by the ECJ.

Key words
Principle of subsidiarity; European Court of Justice; fundamental rights protection.

1. INTRODUCTION

The principle of subsidiarity has been part of the European law since the beginning of the 90s. Its fundamental function has been to help with distribution of powers between the European Union and the Member States. Since its introduction, the principle has undergone a massive development in the foundation treaties and it was also included in the Charter of

Fundamental Rights of the European Union. I argue that this principle could influence the fundamental rights protection. Since the ECJ plays a central role in protection of fundamental rights in the EU, this contribution aims to examine the relationship between the principle of subsidiarity and the ECJ especially in this area.

2. THE PRINCIPLE OF SUBSIDIARITY

The general definition or description of the principle of subsidiarity has been submitted by number of authors. As an illustration it is worth to mention at least two of them. According to G. A. Bermann the subsidiarity expresses *"a preference for governance at the most local level consistent with achieving government's stated purposes"*. The principle of subsidiarity in this sense promotes a number of values, e. g. political liberty, flexibility or diversity.[1] Similarly, J. Finnis submits that in larger communities the decision-making process is estranged to those who will apply such decisions. There fore the larger communities should not appropriate functions which may be efficiently administered and executed by smaller units.[2] Apart of these definitions, one can not leave out of consideration the encyclical letter of pope Lev XIII *"Rerum novarum: On Capital and Labor"*[3] and the encyclical letter of pope Pius XI *"Quadragesimo Anno,"*[4] The formulations of principle of subsidiarity in these encyclical letters are operative even today. On the basis of two different views of the encyclical letters, it is theoretically possible to discern so-called positive and negative concept of subsidiarity. The positive concept corresponds to the possibility or even necessity of intervention by a larger (superior) community toward a smaller (inferior) one. The negative concept means a limitation of powers of the larger community toward the smaller one.

I argue that in the area of European law (including the field of fundamental rights) it is possible to generally discern the principle of subsidiarity in its

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[1] Bermann, G. A.: Taking Subsidiarity Seriously: Federalism in the European Community and the United States. Columbia Law Review, 1994, Vol. 94, No. 2, pp. 339 – 344.

[2] Finnis, J.: Natural Law and Natural Rights. Oxford: Clarendon Press, 1980, reprint 2003, pp. 147. Cited from Barinka, R.: Evropská úmluva o lidských právech a doktrína margin of appreciation. Doctoral thesis, 2007, available from http://is.muni.cz/th/9687/pravf_d/.

[3] Lev XIII.: Rerum Novarum. Encyclical Letter on Capital and Labor [cited 1. 11. 2009]. Available from http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum novarum_en. html.

[4] Pius XI.: Quadragesimo Anno: Encyclical Letter on Reconstruction of Social Order [cited 1. 11. 2009]. Available from http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html. For detailed analysis of development of the subsidiarity principle as a philosophical concept see Millon-Delsol, Ch.: L' État subsidiaire. Ingérence et non-ingérence de l'Etat: le principe de subsidiarité aux fondemements de l'histoire européenne. Paris : Preses Universitaires de France, 1992, pp. 15 – 60.

narrow sense and in its wide sense. The narrow meaning of the principle could be found in article 5 paragraph 2 of the Treaty Establishing the European Community (TEC) which states:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.[5]

There is also a special Protocol on the application of the principles of subsidiarity and proportionality attached to TEC which states detailed conditions to be examined when assessing consistency of certain action with the principle of subsidiarity. The narrow meaning of the said principle is concerned with the non-exclusive competence of the Community (Union). I argue in a different place that the area of fundamental rights protection may be in its majority included in the non-exclusive competence of the Union.[6] It follows that most actions of the Union in the fundamental rights protection should be in principle subjected to the subsidiarity test.

The principle of subsidiarity in its wide sense could be found in the preamble of the Treaty on European Union (TEU):

"(…) Resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity (…)"[7]

Similar mentions are present also in The Charter of Fundamental Rights of the European Union. The wording of the TEU preamble seems to be clearly wider than the definition of the principle of subsidiarity in article 5 paragraph 2 TEC. In my opinion, the wide sense of the principle of subsidiarity in the European law is close to the general meaning of subsidiarity described above.[8] In the field of fundamental rights, however,

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[5] The Lisbon Treaty moved the definition of subsidiarity principle into article 5 paragraph 3 of the Treaty on European Union. The wording of the definition was slightly changed (a regional level of governance was expressly mentioned), however this "cosmetic adjustment" will probably have no effect on the practical application of the principle.

[6] Jirásek, J.: Sekundární normotvorba EU v oblasti ochrany základních práv a princip subsidiarity, Právní rozhledy, Praha: C. H. Beck, Vol. 17, No. 12, 2009, pp. 435 – 436.

[7] The Lisbon Treaty did not amend or change the TEU preamble.

[8] C.f. Schilling, T.: Subsidiarity as a Rule nad a Principle, or: Taking Subsidiarity Seriously. Jean Monnet Working Paper, 1995 [cited 14. 11. 2009]. Available from http://centers.law.nyu.edu/jeanmonnet/papers/ 95/9510ind.html. Schilling discerns the subsidiarity in its narrow meaning in article 5 paragraph 2 TEC and in its wider meaning in the TEU preamble. It is however not entirely clear whether he identify the wider meaning of the principle in European law with the general sense of the principle (as defined e. g. in the above mentioned encyclical letters).

the wide reading of the principle in question has a special connotation which will be discussed in part four of this contribution.

3. THE ECJ AND THE PRINCIPLE OF SUBSIDIARITY IN ITS NARROW SENSE

The narrow meaning of the principle of subsidiarity (as described in art. 5 paragraph 2 TEC) affects the ECJ in two ways. First, its task is to ensure that in the interpretation and application of the fundamental Treaties the law is observed (art. 220 TEC). This means inter alia that in the review procedure the ECJ must control whether the reviewed act has been adopted with due regard to the principle of subsidiarity. Second, the activist role of the ECJ raises an immodest question whether the principle of subsidiarity should be also applicable on its own decision making, i. e. whether the words "Community shall take action" in art. 5 par. 2 covers also the ECJ and its rulings. In the following parts of this contribution I shall examine both these issues with special regard to the fundamental rights protection.

3.1 THE ECJ AS A BODY ENFORCING THE PRINCIPLE OF SUBSIDIARITY TOWARDS OTHER EU BODIES

It is true that inserting the subsidiarity principle into the founding Treaties was welcomed with great expectations, especially by opponents to federalization of the Union. However, it is also true that the ECJ did absolutely frustrate anyone who believed in some magic power of the said principle. Simply, although breach of this principle by legislative bodies of the Union has been pleaded several times before it, the ECJ has never annulled any act on the basis of disregarding the principle of subsidiarity, nor it has established any test that would specify steps to be taken by the ECJ when examining observance of the principle in question.

From comparative point of view it is true that similar provisions on subsidiarity contained in constitutions of federative states are treated by the constitutional courts with problems and timidity. However, last decade shows that some changes in this respect were undergone by the US Supreme Court[9] and the Constitutional Court of Germany. The case law of the last mentioned court on the subsidiarity issues even led the German Parliament to adopt a constitutional amendment which restricted the powers of the German Constitutional Court with respect to adjudication of the compliance of federal acts with the said principle.[10]

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[9] Sander, F.: Subsidiarity Infringements before the European Court of Justice: Futile Interference with Politics or a Substantial Step towards EU Federalism. Columbia journal of European Law, Vol. 12, 2006, pp. 551 - 555.

[10] For overview and critics see Taylor, G.: Germany: A Slow death for Subsidiarity? International Journal of Constitutional Law, Vol. 7, 2009, pp. 139 - 154.

Some authors argue that the principle of subsidiarity is not justiciable since it is a political principle and requires assessment of issues which are better solved by the legislative bodies than by the judiciary.[11] I argue that the principle of subsidiarity is not more political than the principle of proportionality which is regularly used by courts. More over, it is not clear why the ECJ does not control at least formal compliance with the principle (i. e. each legal act must contain reasons that it is in accordance with the principle of subsidiarity). Further more, the Court can certainly (and without remarkable difficulties) seek to verify whether the EU institutions themselves really examined the possibility of alternative remedies at or below Member State level.[12] In my opinion, it is not sufficient if the EU legislator only states that the EU must act since it is better than individual actions by Member States.

The ECJ's attitude towards subsidiarity principle does not differ in any way in the area of fundamental rights protection. It is then inevitable to come to a conclusion that legislative and other EU acts concerning fundamental rights protection are not in fact subject to the principle of subsidiarity: the unification of fundamental rights in the EU level is therefore possible.

3.2 THE ECJ AS A BODY SUBJECTED TO THE PRINCIPLE OF SUBSIDIARITY

The above mentioned wording of art. 5 par. 2 TEC would seem to be primarily addressed to institutions and bodies of the Union concerned with legislation or with issuing administrative decisions. However, this narrow interpretation of the said article blunts the effect of the principle of subsidiarity because of two important facts. First, as demonstrated above, there is no real control over adhering this principle by legislative and administrative bodies, since the ECJ has failed to do this. Second, it is a well-known truth that the ECJ often takes recourse to a wide reading of the foundation Treaties and of the secondary legislation and such interpretation itself may be in antagonism toward the subsidiarity principle.

G. A. Berman when examining the possible functions of subsidiarity in practice concludes that "[i]*f the Council or Commission may be presumed to observe the principle of subsidiarity in adopting legislation, then those who are called on to interpret that legislation – including the Court of Justice but more commonly the various Member State officials who administer and enforce it – should, in case of doubt, favor the interpretation that most respect that principle."*[13]

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[11] Toth, A. G.: Is Subsidiarity Justiciable? European Law Review, Vol. 19, 1994, pp. 268 - 285.

[12] Bermann, *supra* note 1, pp. 391.

[13] Bermann, *supra* note 1, pp. 366 – 367.

From this point of view, the answer to the question whether the rulings of the ECJ should also observe the principle of subsidiarity seems to be in affirmative. Moreover, the wording of art. 5 par. 2 TEC does not eliminate such interpretation since it only talks about "action of the Community". I would presume that there could hardly be any objection against a thesis that decisions of the ECJ are "actions of the Community".

However, it is clear that the principle of subsidiarity can not be applied to the decision making of the ECJ in such a way that the Court may choose which case it will decide and which not. The application of the subsidiarity principle in the decisions of the ECJ must have its limitations. Since the main role of the said principle is to distribute powers between the Union and the Member States and since such division is not a question of individual case but must be applicable in general, the principle of subsidiarity should be observed by the Court when giving general interpretation of European law. Or more precisely, the ECJ should consider the said principle if it has to make a "political choice" in distribution of powers while interpreting European law.

It is also important to bear in mind that the ECJ plays a different role than the legislative and political bodies of the Union: the interpretation of the law has certain rules and limits which are usually not present in political decision-making. De Búrca points it nicely:

"The Court is not free in the same sense as other institutions to use law as an instrument of policy. But simply because it is distinct from other institutions, and does not have the same kind of active political agenda does not mean that the Court makes no active policy choices. Neither does it mean that Community law, and the Court as the agent which enforces that law, is simply an instrument for making political bargains stick and for crystallizing agreed policy aims."[14]

Unlike the legislative bodies of the Union, the ECJ does not have expressly specified duty to reason whether its decisions are in accordance with the subsidiarity principle (the Protocol on the application of the principles of subsidiarity and proportionality only refers to "proposed Community legislation" and does not mention the judicial decisions). However, if the ECJ makes similar political choices to those, which are in the legislative level subjected to the subsidiarity scrutiny, there is no reason why the ECJ should not include in its decision a similar reasoning concerning the principle of subsidiarity.

It is presumably not surprising that in practice the ECJ does not feel the principle of subsidiarity as a limitation to its rulings. Moreover, it has no

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[14] De Búrca, G.: The Principle of Subsidiarity and the Court of Justice as an Institutional Actor. Journal of Common Market Studies, Vol. 36, No. 2, 1998, pp. 232.

need to explain whether its ruling is in conformity with the said principle. As a striking example it is worth to mention the case *Factortame III*[15] in which the German government argued that the creation of a right in damages by judicial decision of the ECJ would be incompatible with the allocation of powers between the Community institutions and the Member States. The question of subsidiarity was there fore impliedly raised before the ECJ. The Court, however, fabricated on its own the conditions of the state liability without stating why these conditions could not be better determined by individual Member States.

Since the area of fundamental rights protection in EU level was in its entirety created by the ECJ without any basis in founding treaties, one could argue that the whole concept could be in breach of principle of subsidiarity. This however seems to be too simplifying. First, both courts - the ECJ and the Court of First instance - ruled that the principle of subsidiarity could not be applied retroactively (i. e. on actions of the EU adopted before 1993).[16] Second, in 60's and 70's the ECJ was under a great pressure put by constitutional courts of the Member States to create a sufficient protection of fundamental rights.

However, introduction of the principle of subsidiarity in the EU law seems to have no impact on the protection of human rights provided by the ECJ. More over, it is possible to conclude that the principle of subsidiarity did not prevent the ECJ in its activist case-law in the area of fundamental rights.[17]

This can be demonstrated by two cases connected with discrimination issues decided by the ECJ. In *P v S and Cornwall County Council*[18] the ECJ ruled against the discrimination against transsexuals although the founding treaties did not contain necessary power for the EU to act in this area. This was introduced only later in 1997 by the Amsterdam Treaty. In *Mangold*[19] the ECJ dealt with discrimination based on age. The time limit for implementation of a directive governing this matter did not expire yet in the time of the dispute. The Member States, therefore, treated this matter by themselves. More over, the directive in question empowered the Member States to unequal treatment under certain conditions. The ECJ however held that the principle not to be discriminated on the basis of age is one of the

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[15] Case C-46/93 *Brasserie du Pêcheur* and case C-48/93 *Factortame* [1996] ECR I-1029.

[16] Case T-29/92 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid* [1995] ECR II-289, paras. 330 and 331; cases C-36/97 and C-37/97 *Hilmar Kellinghusen* [1998] ECR I-6337, para. 35.

[17] Tridimas, T.: The General Principles of EU Law. 2nd Edition. New York: Oxford University Press, 2006, pp. 184.

[18] Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143.

[19] Case C-144/04 *Mangold* [2005] ECR I-9981.

general principles of EU law. The Court left no room for Member States to deal with this issue differently.

4. THE ECJ AND THE PRINCIPLE OF SUBSIDIARITY IN ITS WIDE SENSE

The principle of subsidiarity in its wide sense holds that international fundamental rights standards are best implemented at the lowest level of government.[20] The wide reading of subsidiarity principle has – especially in the field of fundamental rights protection – two dimensions: a procedural one and a material one. As I show in the next part, the procedural level of subsidiarity is not applicable to the proceedings before the ECJ. On the other side, the material level of subsidiarity can be found in the ECJ's case-law and it has an impact on its decisions.

4.1 THE PROCEDURAL LEVEL OF SUBSIDIARITY

If a fundamental right of a person is breached, such person should be protected in the first place by a local authority (court). If the breach is not remedied then it should be possible to appeal to higher state authorities whereas the highest authority is usually a supreme or constitutional court. Only if the national state did not provide an efficient remedy, the affected person can seek such remedy by an international fundamental rights body.

The procedural level of subsidiarity principle - which may be identified as a rule of exhaustion of local remedies before commencing an international dispute – is a part of customary international law and was explicitly recognized by the International Court of Justice in case *Interhandel*.[21] The rule was however predominantly developed in the area of international protection of fundamental rights: it can be found in different regional conventions on protection of fundamental rights which always state that the international protection of fundamental rights is subsidiary to the national protection. The subsidiarity principle is set forth in article 46 paragraph 1 of the American Convention on Human Rights[22] and is confirmed by the case law of the Commission and the Inter-American Court of Human Rights.[23] The exhaustion of local remedies rule is also (in a more relaxed manner)

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[20] Carter, W. M.: Rethinking Subsidiarity in International Human Rights Adjudication. Hamline Journal of Public Law and Policy, Vol. 30, 2008, pp. 319.

[21] Case *Interhadel* [1959] I. C. J. Reports pp. 6: *„The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law (…)“*.

[22] American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123.

[23] E. g. case (preliminary objections) *Velásquez-Rodríguez vs. Honduras* [1987] Series C, No. 1; case *Castillo-Páez vs. Peru* [1996] Series C, No. 24, and many others.

contained in article 56 of the African Charter on Human Rights and People's Rights[24] and is further elaborated by the case-law of the Commission;[25] the recently established court has not considered this rule yet. The most important (from the European point of view) is of course the principle of subsidiarity included in article 35 paragraph 1 of the European Convention for the protection of Human Rights and Fundamental Freedoms ("ECHR").[26] Accordingly, the case-law of the European Court of Human Rights accents the necessity of exhaustion of national remedies; nevertheless it also highlights the duty of the ECHR Member States to adopt such efficient remedies.[27]

Application of the procedural level of subsidiarity on the proceedings before the ECJ is, however, practically impossible. The ECJ, the Court of First Instance or the Civil Service Tribunal are clearly not international courts protecting individual fundamental rights in the extent and manner as the above mentioned regional courts of human rights. These European courts do not review decisions of national courts. They deal with interpretation of European law via preliminary questions, judicial review of acts of EU bodies and institutions, infringement proceedings with Member states and several other proceedings. In majority of these proceedings the European courts are the first (and sometimes the sole) instance: there are no national proceedings which precede the proceedings before the European courts and which are to be exhausted. Similarly in the preliminary question procedure the ECJ does not review decisions of the national courts, it only rules on interpretation or validity of European law without deciding on the merits. The local remedies exhaustion rule would be in all of these procedures in principle unrealizable.

4.2 THE MATERIAL LEVEL OF SUBSIDIARITY

According to the material level of subsidiarity in the wide sense (the subsidiarity "in content") the initial definition of the content of international

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[24] African Charter on Human Rights and People's Rights, adopted 27th June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

[25] For example in the decision 59/91 was the complaint held admissible although the local remedies had not been exhausted, since the appeal of the complainant had been treated by national courts fruitlessly for 12 years. The African Commission on Human and People's Rights: Information sheet No. 3. Communication Procedure, Organisation of African Unity. [cited 23. 10. 2009]. Available from http://www.achpr.org/english/information_sheets/ACHPR%20inf.%20sheet%20no.3.doc.

[26] European Convention for the protection of Human Rights and Fundamental Freedoms, adopted 4th November 1950, ETS No. 005, available from http://conventions.coe.int/Treaty/EN/Treaties/Html/005.htm.

[27] Case *Scordino and Others vs. Italy* (application No. 36813/97), paras. 140 – 149; Case *Nikolova and Velichkova vs. Bulgaria* (application No. 7888/03), para. 49.

fundamental rights should be reserved to national authorities.[28] Some authors argue that in the case-law of the ECJ in the field of fundamental rights it is possible to find certain aspects of this subsidiarity principle. For example, the Court relies on the constitutional traditions of the Member States when defining the content of fundamental rights. The ECJ also uses a stricter scrutiny when it reviews the acts of the EU institutions than when it reviews the acts of Member States implementing the European law or derogating from the treaties' obligations.[29] It is worth to mention that these aspects developed by the case-law were to certain degree adapted by the Charter of Fundamental Rights of the European Union.[30]

The material level of subsidiarity is however predominantly connected with the doctrine of margin of appreciation developed by the European Court of Human Rights.[31] The basic idea is that the Member States of the ECHR should be primary liable for observing the ECHR and they should maintain a certain margin of appreciation when regulating the society. The European Court of Human Rights should not act too actively and it should not set a uniform high standard of fundamental rights protection.

Unlike the European Court of Human Rights, the ECJ and the Court of First Instance do not have subsidiary role regarding the observation of law in the interpretation and application of the founding treaties (article 220 TEC). The observation of the law, however, covers also observation of the principle of subsidiarity. If this principle is interpreted in its wide sense, it is clear that the ECJ could apply the doctrine of margin of appreciation in the area of the fundamental rights protection.[32] This conclusion is to be derived also from the article 52 paragraph 3 of the Charter of Fundamental Rights of the EU:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

Since the European Court of Human Rights is the only body which can authoritatively interpret the ECHR and since this court applies the doctrine of margin of appreciation when interpreting the ECHR, the ECJ should

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[28] Carter, *supra* note 20, pp. 326.

[29] Carozza, P. G.: Subsidiarity as a Structural Principle of International Human Rights Law. The American Journal of International Law, Vol. 98, No. 38, 2003, pp. 54 - 56.

[30] See preamble and articles 52 paragraph 6 and 51 paragraph 1 of the Charter.

[31] For the first time introduced in the case *Handyside v United Kingdom* [1976] Series A 24.

[32] But see Peers, S.: Taking Rights Away? Limitations and Derogations. In: Peers, S., Ward, A. (eds): The EU Charter of Fundamental Rights: Politics, Law and Policy. Oxford : Hart Publishing Co., 2004, pp. 168 – 169.

respect the interpretation made by the European Court of Human Rights. Therefore, the ECJ should use the margin of appreciation doctrine in the same manner as the European Court of Human Rights.

The margin of appreciation doctrine could have two important impacts on the decision making of the ECJ in the area of fundamental rights protection: on the one side, this doctrine could limit to a certain degree the ECJ in its activist case law; on the other side this doctrine could provide the ECJ with a certain room for judging sensible issues such as abortion[33] or same-sex marriages. Although the EU was and still is predominantly economic body, the ECJ has already dealt with both these sensible issues[34] and many similar ones may occur. If the ECJ tried to find a uniform solution to these issues, the Member States would probably not accept it.

Finally, it is worth to mention that the ECJ has already used the doctrine of margin of appreciation in several decisions.[35]

5. CONCLUSION

In conclusion, the introduction of the principle of subsidiarity in its narrow sense in the EU law had almost no impact on the decision making of the ECJ. The Court did not in fact control the observance of the said principle by other EU bodies and institutions nor did it apply the principle to its own decisions.

Regarding the principle of subsidiarity in its wide sense, it is clear that the procedural part of this principle is not applicable to the ECJ. The material part, however, could have significant effect on the ECJ's case law in the area of fundamental rights protection via the doctrine of margin of appreciation.

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[33] For an interesting analysis of the abortion clause in the Irish constitution with respect to the EU actions and principle of subsidiarity see Moens, A. G.: The Subsidiarity Principle in European Community Law and the Irish Abortion Issue, IUS Gentium, Vol. 9, 2003, pp. 35 - 71.

[34] Case C-159/90 *SPUC v. Grogan* [1991] ECR I-4685; cases C-122/99 P a C-125/99 P *D. v. Council* [2001] ECR I-4319.

[35] Case C-274/99 P *Connoly* [2001] ECR I-1611, paras. 41 and 49; cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk* [2003] ECR I-4989, para. 83; case C-540/03 *Parliament v. Council* [2006] ECR I-5769, paras. 54 – 66; case C-145/04 *Spain v. United Kingdom* [2006] ECR I-7917, para. 94; cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351, para. 360.

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SVOBODA VOLBY A VÝKONU POVOLÁNÍ VS. SVOBODA TELEVIZNÍHO A ROZHLASOVÉHO VYSÍLÁNÍ V JUDIKATUŘE EVROPSKÉHO SOUDNÍHO DVORA A EVROPSKÉHO SOUDU PRO LIDSKÁ PRÁVA

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Abstract in original language
Příspěvek přibližuje na základě rozhodovací činnosti Evropského soudu pro lidská práva a Evropského soudního dvora vztah mezi ochranou práv obsažených v Evropské úmluvě o ochraně lidských práv a základních svoboda a tou, poskytovanou na úrovni Evropských společenství, a to na příkladu ochrany svobody projevu, resp. svobody televizního a rozhlasového vysílání (demokratický prvek) a svobody volby a výkonu povolání (ekonomický prvek)

Key words in original language
Svoboda televizního a rozhlasového vysílání; Volba a výkon povolání; Evropská úmluva o ochraně lidských práv; Evropský soud pro lidská práva; Evropský soudní dvůr.

Abstract
This paper deals, based on case law of the European Court of Human Rights and the European Court of Justice, with the relation between a protection of rights under the European Convention on Human Rights and that granted by the European Communities using as example broadcasting freedom (democratic element) and freedom of profession (economic element).

Key words
Freedom of broadcasting; Freedom of profession; European Convention on Human Rights; European Court of Human Rights; European Court of Justice.

1. ÚVOD

Ochrana základních práv a svobod člověka patří mezi fundamentální požadavky moderní demokratické společnosti. Tato základní práva, jejichž primární funkcí je ochrana před zásahy veřejné moci, jsou, jak již z jejich účelu vyplývá, namířena proti činnosti státních orgánů. Tento charakteristický prvek základních práv se však s ohledem na stále užší spolupráci a konečně integraci evropských států v podobě Evropských společenství, resp. Evropské unie začal poněkud stírat. Členské státy totiž přenesly v rámci svých integračních snah část svých pravomocí (nejen) na výše uvedené mezinárodní organizace. V této souvislosti tak vyvstala zákonitě otázka, do jaké míry jsou členské státy těchto mezinárodních organizací s ohledem na přenesení některých svých výsostných práv

zproštěny závazku dodržovat určitý standard ochrany základních práv a svobod. Tento je přitom zaručen řadou mezinárodních dohod. Mezi nejvýznamnější z nich bezesporu patří Evropská úmluva o ochraně lidských práv a základních svobod (EÚOLPS) obsahující rozsáhlý, nikoliv však ucelený katalog základních práv a svobod. Určité nedostatky lze spatřit zejména v oblasti hospodářských práv. Tento stav tak kontrastuje se shora uvedenými integračními snahami států, jejichž hnacím motorem je právě ekonomická integrace založená na ochraně hospodářsky významných práv a svobod.

Cílem příspěvku je proto přiblížit vztah mezi mírou ochrany zajišťovanou EÚOLPS a tou, která je poskytována členskými státy, resp. orgány Evropských společenství. Jako "referenční vzorek" byly vybrány typicky demokraticky laděná svoboda projevu resp. její součást - svoboda televizního a rozhlasového vysílání, na jedné straně a svoboda volby a výkonu povolání, tj. svoboda s jednoznačným ekonomickým podtextem, na straně druhé. Analýza se přitom opírá zejména o rozhodovací činnost Evropského soudu pro lidská práva (ESLP) a jeho protějšku, Evropského soudního dvora (ESD).

2. EVROPSKÁ ÚMLUVA O OCHRANĚ LIDSKÝCH PRÁV A ZÁKLADNÍCH SVOBOD

EÚOLPS z roku 1953, jež vznikla na půdě Rady Evropy, přísluší s ohledem na její předmět úpravy zvláštní postavení mezi mezinárodními smlouvami. Společně se svými dodatkovými protokoly[1] ztělesňuje *„nejstarší smluvní úpravu svého druhu zaměřující se na regionální ochranu lidských práv*“.[2] Je tak poněkud s podivem, že takto významná úmluva neobsahuje žádné ustanovení, které by upřesňovalo její postavení v rámci národních právních řádů členských států Rady Evropy. Rovněž ESLP na této skutečnosti nic nezměnil. Na rozdíl od ESD[3] ESLP v průběhu své rozhodovací činnosti nedospěl k závěru, že by se EÚOLPS měla aplikovat přednostně, tj. bez ohledu na případnou odlišnou úpravu v národních právních řádech. Zůstává tak v diskreci členských států, aby vztah k EÚOLPS upravily. V této souvislosti je možné se setkat s celou šíří možné úpravy - postavením obyčejného zákona počínaje[4] a ústavním zákonem v případě Rakouska konče.

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[1] EÚOLPS byla do dnešní doby doplněna celkem 14 dodatkovými protokoly, přičemž protokoly č. 10 a č. 14 doposud nenabyly účinnosti.

[2] Grabenwarter, Ch.: Europäische Menschenrechtskonvention, 3. vydání, Mnichov: C.H.Beck, 2008, s. 1.

[3] ESD, rozsudek ze dne 15.07.1964 ve věci 6/64 (E.N.E.L.), Sb. 1964, s. 1251, 1269; ESD, rozsudek ze dne 17.12.1970 ve věci 11/70 (Internationale Handelsgesellschaft), Sb. 1970, s. 1125, 1135.

[4] Např. Německo, Itálie či Švédsko.

2.1 EÚOLPS A MEZINÁRODNÍ ORGANIZACE

Poněkud složitější situace, než která panuje mezi EÚOLPS a národními právními řády, je možné vysledovat v případě vztahu EÚOLPS k mezinárodním organizacím. Tyto sice s ohledem na stávající znění EÚOLPS, konkr. jejího čl. 59 odst. 1, nemohou k EÚOLPS přistoupit, a stát se tak jejími členy. Tyto organizace proto nejsou apriori povinny dodržovat standard ochrany práv a svobod, jak je tomu v případě členských států Rady Evropy. Tato skutečnost však neznamená, že by EÚOLPS neměla v tomto ohledu žádný význam. Jasným důkazem jsou toho Evropská společenství resp. Evropská unie. Zde je EÚOLPS uznána jako pramen poznání práva,[5] kterému je přisuzován mimořádný význam.[6] I přesto však ESD není v tomto případě povinen svá rozhodnutí automaticky „konzultoval" s judikaturou ESLP, což dokládají i některá rozdílná stanoviska citovaných soudů.[7] Tento stav je sám o sobě nežádoucí, neboť vnáší do ochrany lidských práv nejistotu.[8]

Skutečnost, že jednání orgánů Evropských společenství, resp. Evropské unie není možné postoupit ESLP k přezkumu,[9] však nevylučuje možnost tzv. nepřímého přezkumu komunitárních právních předpisů skrze přezkum právních norem členských států, jimiž byla provedena jejich transformace. Toto platí zejména tehdy, kdy členským státům není při transformaci ponechán žádný, resp. mají jen omezený prostor pro volné uvážení. ESLP pro takovéto případy dovodil, že se členské státy i přes přenesení určitých výsostných práv na Evropská společenství nemohou svých závazků z EÚOLPS zprostit.[10] Členské státy se tak de facto mohou dostat do situace, kdy jsou povinny transformovat ustanovení komunitárního práva, a to i

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[5] ESD, rozsudek ze dne 14.05.1974 ve věci 4/73 (Nold), Sb. 1974, s. 491, bod 13.

[6] ESD, rozsudek ze dne 15.5.1986 ve věci C-222/84 (Johnston), Sb. 1986, s. 1651, bod 18; ESD, rozsudek ze dne 18.06 1991 ve věci C-260/89 (ERT), Sb. 1991, s. I-2925, bod 41.

[7] ESD, rozsudek ze dne 18.10.1989 ve věci C-374/87 (Orkem), Sb. 1989, s. 3344, oproti tomu ESLP, rozsudek ze dne 25.02.1993 (Funke), Ser. A 256-A (1993); ESD, rozsudek ze dne 21.09.1989 ve věci C-46/87 (Hoechst), Sb. 1989, s. 2859, oproti tomu ESLP, rozsudek ze dne 16.12.1992 (Niemietz), Ser. A 251-B (1992).

[8] Rozdílná rozhodnutí ESD a ESLP není možné vyloučit ani do budoucna. Ačkoliv nově ratifikovaná Lisabonská smlouva počítá s právní závazností EÚOLPS a případným přezkumem rozhodnutí ESD ESLP, i nadále zůstává tato možnost podmíněna ratifikací 14. dodatkového protokolu ze strany Ruska, jenž upravuje možnost přístupu Evropské unie k EÚOLPS.

[9] ESLP, rozsudek ze dne 18.02.1999 (Matthews), RJD 1999-I.

[10] Ibid. Viz rovněž ESLP, rozsudek ze dne 18.02.1999 (Waite und Kennedy), RJD 1999-I. Srovnej Fredriksen, H.-H.: Individualklagemöglichkeiten von den Gerichten der EU nach dem Vertrag über eine Verfassung für Europa, in: Zeitschrift für europarechtliche Studien, 2005, s. 131.

přesto, že to v konečném důsledku bude znamenat porušení závazků stanovených EÚOLPS.

K určitému zamezení této poněkud absurdní situace přispěl ESLP svým rozsudkem ve věci Bosphorus.[11] V souladu s tímto rozhodnutím stát, který je členem mezinárodní organizace, na kterou přenesl část svých pravomocí, neporuší své závazky plynoucí pro něj z EÚOLPS, pokud tato mezinárodní organizace je schopna zaručit takovou míru ochrany lidských práv, která odpovídá přinejmenším ochraně zaručené EÚOLPS. Je-li tato podmínka splněna, vychází ESLP z domněnky, že k porušení závazků z EÚOLPS nedošlo. Příkladem takovéto mezinárodní organizace jsou právě Evropská společenství.[12]

Jelikož ESLP zde hovoří o garancích ochrany z pohledu uceleného systému a nerozlišuje mezi jednotlivými druhy práv či svobod, platí tento usus bezpochyby rovněž jak pro svobodu televizního a rozhlasového vysílání, tak i svobodu volby a výkonu povolání.

2.2 EÚOLPS A SVOBODA TELEVIZNÍHO A ROZHLASOVÉHO VYSÍLÁNÍ

EÚOLPS svobodu televizního a rozhlasového vysílání přímo nezmiňuje, nýbrž ji podřazuje pod obecnou svobodu projevu v souladu s čl. 10 odst. 1. Co přitom spadá pod pojem televizního a rozhlasového vysílání, je možné do jisté míry dovodit z čl. 10 odst. 1 věta 3. EÚOLPS, kde se hovoří o rozhlasovém a televizním vysílání společně s filmovou projekcí. Tato však do užšího pojmu předmětné svobody nespadá. Na druhou stranu je však nutné brát v potaz postupný vývoj dotčené oblasti, což dokládá i "rozšíření" oblasti, které je poskytována s odkazem na televizní a rozhlasové vysílání ochrana, o přenos signálu za pomocí kabelu.[13] Tento způsob přenosu tak doplnil již tradiční způsob šíření signálu vzduchem v podobě elektromagnetických vln.

Na tomto místě je potřeba zdůraznit, že ochranu související s televizním a rozhlasovým vysíláním není možné striktně oddělit od zbývajících oblastí, které jsou subsumovány pod svobodu projevu jako takovou. Řeč je zde o svobodě názoru či svobodě volného šíření či naopak přijímání informací. Právě díky těmto svobodám jsou chráněny všechny myslitelné formy

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[11] ESLP, rozsudek ze dne 30.06.2005 (Bosphorus), 2005-VI. Srovnej Bröhmer, J.: Die Bosphorus-Entscheidung des Europäischen Gerichtshofs für Menschenrechte - Der Schutz der Grund- und Menschenrechte in der EU und das Verhältnis zur EMRK, in: Europäische Zeitschrift für Wirtschaftsrecht, 2006, s. 71 an. nebo Heer-Reißmann, Ch.: Straßburg oder Luxemburg? - Der EGMR zum Grundrechtsschutz bei Verordnungen der EG in der Rechtssache Bosphorus, in: Neue juristische Wochenschrift, 2006, s. 192 an.

[12] ESLP, rozsudek ze dne 30.06.2005, *(*Bosphorus*)*, 2005-VI, bod 155 an.

[13] ESLP, rozsudek ze dne 28.03.1990 (Groppera), Ser. A 173 (1990).

komunikace bez ohledu na médium, které je přenáší,[14] což v případě svobody televizního a rozhlasového vysílání představuje neopomenutelný faktor. Svoboda televizního a rozhlasového vysílání totiž spočívá toliko v ochraně relací a programů, resp. jejich obsahů, které jsou tímto způsobem odvysílány. Neomezuje se přitom pouze na obsahy s politickým podtextem, ale zahrnuje též zábavné programy či reklamní spoty,[15] jejichž výroba a veřejná prezentace mnohdy představují pokud ne jediný, pak dozajista podstatný zdroj příjmů dotčených subjektů.[16] Svoboda rozhlasového a televizního vysílání tak přímo zasahuje i do jiných oblastí, oblast volby a výkonu povolání nevyjímaje.

2.3 EÚOLPS A SVOBODA VOLBY A VÝKONU POVOLÁNÍ

Ačkoliv, nebo spíše právě proto, že se v případě výkonu povolání jedná společně s právem vlastnit majetek o jednu ze základních ekonomicky orientovaných svobod, resp. práv, není ani jedna z nich v textu EÚOLPS přímo upravena.[17] Tento deficit se však podařilo alespoň částečně odstranit za pomocí rozhodovací praxe ESLP, který pojal svobodu volby a výkonu povolání pod jiná práva a svobody, která EÚOLPS zaručuje: čl. 8 (právo na respektování soukromého a rodinného života)[18], čl. 10 (svoboda projevu)[19] či čl. 14 (zákaz diskriminace).

ESLP ve svých rozhodnutích, ve kterých se ochranou výkonu povolání zabýval, poukazuje zejména na skutečnost, že i přes primárně ekonomickou stránku citované svobody ji není možné oddělit od privátní sféry jednotlivce.[20] Jednotlivci tak má být poskytnuta nejen možnost zajistit si

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[14] Viz Kühling, J.: Die Kommunikationsfreiheit als europäisches Gemeinschaftsgrundrecht, 1. Aufl., Berlin: Duncker und Humblot, 1999, s. 145 an.

[15] ESLP, rozsudek ze dne 20.11.1989 (Markt Intern), Ser. A 165 (1989); ESLP, rozsudek ze dne 24.02.1994 (Casado Coca), Ser. A 285 (1994); ESLP, rozsudek ze dne 23.06.1994 (Jacubowski), Serie A 291-A (1994).

[16] Jelikož vymezení subjektů, kteří se mohou svobody slova a potažmo svobody televizního a rozhlasového vysílání dovolávat, není nikterak blíže specifikován, nelze než dát zapravdu J. Kühlingovi, dle kterého se této svobody mohou dovolat všechny dotčené osoby. Viz Kühling, J.: Die Kommunikationsfreiheit als europäisches Gemeinschaftsgrundrecht, 1. Aufl., Berlin: Duncker und Humblot, 1999, s. 157.

[17] Ochrana vlastnictví byla v rámci EÚOLPZS zajištěna až na základě prvního dodatkového protokolu přijatého v roce 1954. Ochrana se však týká výlučně již nabytého majetku, což ve svém důsledku neumožňuje odvodit z této svobody přímo i svobodu volby a výkonu povolání.

[18] ESLP, rozsudek ze dne 16.12.1992 (Niemietz), Ser. A 251-B (1992).

[19] ESLP, rozsudek ze dne 20.12.1989 (Markt Intern), Ser. A 165 (1989); ESLP, rozsudek ze dne 28.03.1990 (Groppera), Ser. A 173 (1990).

[20] ESLP, rozsudek ze dne 16.12.1992 (Niemietz), Ser. A 251-B (1992).

prostřednictvím výkonu určité hospodářské činnosti prostředky pro uspokojení jeho životních potřeb, ale i prostor pro navázání sociálních kontaktů ve společnosti.[21]

2.4 SVOBODA VOLBY A VÝKONU POVOLÁNÍ A SVOBODA TELEVIZNÍHO A ROZHLASOVÉHO VYSÍLÁNÍ

O hospodářskou činnost ve shora uvedeném smyslu se bezpochyby jedná i v případě komerčních sdělení, reklam,[22] které byly zveřejněny prostřednictvím rozhlasu či televize. Tento fakt, díky němuž se pro reklamní sdělení otevírá možnost ochrany na základě čl. 10 odst. 1 EÚOLPS, však nebyla státy po dlouhou dobu akceptována. Státy poukazovaly v této souvislosti zejména na skutečnost, že komerční sdělení jakožto výraz svobody výkonu povolání, která není v EÚOLPS explicitně zmíněna, nemůže požívat ochrany této úmluvy.[23] Tento názor však nesdílel ESLP. Ten poté, co se svým jasným stanoviskem k dané problematice nejprve poněkud váhal,[24] potvrdil,[25] že i výkon ekonomické činnosti spadá pod ochranu poskytovanou čl. 10 odst. 1 EÚOLPS. V případě rozhlasového a televizního vysíláni přitom ESLP zdůraznil úlohu plurality názorů,[26] k níž velkou měrou přispívají i soukromí provozovatelé rádiových a televizních stanic. S souvislosti s tímto rozhodnutím však vyvstala otázka, do jaké míry mohou být tito soukromí provozovatelé omezeni při výkonu svých vysílacích práv.

Určitou indicii k nalezení odpovědi na shora uvedenou otázku nabízí samotné znění čl. 10 odst. 2 EÚOLPS. Tento článek obsahuje obecnou úpravu, která upřesňuje podmínky, za nichž může k omezení svobody projevu dojít. V případě televizního a rozhlasového vysílání je však nutné vzít do úvahy i odst. 1 citovaného článku, neboť tento umožňuje omezit soukromé vysílání i prostřednictvím stanovení podmínek v rámci národních licenčních řízení.

Aby však nedocházelo s odvoláním na čl. 10 odst. 2 EÚOLPS k nekontrolovaným zásahům do svobody projevu, vyžaduje EÚOLPS kumulativní splnění jasně daných předpokladů. Konkrétně se musí jednat o zásahy či omezení, které jsou předvídány zákonem a zároveň

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[21] ESLP, rozsudek ze dne 27.07.2004 (Sidabras a Džiautas), RJD 2004-VIII.

[22] ESLP, rozsudek ze dne 20.12.1989 (Markt Intern), Ser. A 165 (1989).

[23] ESLP, rozsudek ze dne 25.03.1985 (Barthold), Ser. A 90 (1985).

[24] Ibid.

[25] ESLP, rozsudek ze dne 20.12.1989 (Markt Intern), Ser. A 165 (1989); ESLP, rozsudek ze dne 28.03.1990 (Groppera), Ser. A 173 (1990).

[26] ESLP, rozsudek ze dne 24.12.1993 (Informationsverein Lentia), Serie A 276 (1993).

v demokratické společnosti nezbytné. Nebyly-li by tyto podmínky splněny, jednalo by se v daném případě o porušení ustanovení EÚOLPS. Jak však dokládá praxe ESLP, nepoužije se na všechny formy svobody projevu stejný „metr". Státům je ponechán určitý prostor pro zvážení, do jaké míry bude té které formě projevu zaručena ochrana vyplývající z EÚOLPS.[27] Rozhodující pro vytýčení tohoto prostoru je přitom význam daného jednání pro společnost, její demokratizaci. Z toho lze usuzovat, že v případech, kdy určitá vyjádření či jiné projevy svobod zajištěných v čl. 10 EÚOLPS jsou nezbytná pro zachování demokratického uspořádání společnosti,[28] je nutné počítat s restriktivní interpretací čl. 10 odst. 2 EÚOLPS v tom smyslu, že zásahy státu budou aprobovány pouze ve výjimečných případech. Je nasnadě, že požadavek restriktivního výkladu se nebude týkat sdělení komerční povahy.[29] V těchto případech je tak ponechán smluvním státům EÚOLPS větší prostor pro případné zásahy do svobody projevu, potažmo svobody televizního a rozhlasového vysílání upravené v EÚOLPS. Mimo jiné i prostřednictvím licenčního řízení.

3. OCHRANA PRÁVA NA KOMUNITÁRNÍ ÚROVNI

Poněkud odlišná situace, co se ochrany práv a svobod jednotlivce týče, panuje na komunitární úrovni. Zde totiž na rozdíl od Rady Evropy do dnešního dne[30] nebyl vytvořen,[31] resp. prosazen jednotný katalog základních práv, který by byl pro členské státy právně závazný. V původním textu zakládajících smluv Evropských společenství se s výjimkou zákazu diskriminace nesetkáme s ochranou žádného základního práva. Tato skutečnost byla zpočátku umocněna i judikaturou ESD, který odmítal svoji příslušnost při posuzování otázek týkajících se záruk těchto práv.[32]

Zvrat přišel až v roce 1969 v souvislosti s rozhodnutím ve věci Stauder, ve kterém ESD dovodil, že základní práva jsou součástí obecných zásad komunitárního právního řádu, a je proto zapotřebí poskytovat jim soudní

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[27] Viz Scheyli, M.: Die Abgrenzung zwischen ideellen und kommerziellen Informationsgehalten als Bemessungsgrundlage der „margin of appreciation" im Rahmen von Art. 10 EMRK, in Europäische Grundrechte-Zeitschrift, s. 455.

[28] Viz Kühling, Die Kommunikationsfreiheit als europäisches Gemeinschaftsgrundrecht, 1. Aufl., Berlin: Duncker und Humblot, 1999, s. 179.

[29] ESLP, rozsudek ze dne 25.08.1998 (Hertel), Rep. 1998-VI; ESLP, rozsudek ze dne 05.11.2002 (Demuth), 2002-IX.

[30] Příspěvek byl zpracován ke stavu před 1.12.2009, kdy by měla nabýt účinnosti Lisabonská smlouva.

[31] S Listinou základních práv Unie počítala Smlouva o Ústavě pro Evropu z roku 2004. Tato však nebyla členskými státy Evropské unie ratifikována.

[32] ESD, rozsudek ze dne 04.02.1959 ve věci 1/58 (Stork), Sb. 1958/59, s. 64; ESD, rozsudek ze dne 01.04.1965 ve věci 40/64 (Sgarlata), Sb. 1965, s. 312.

ochranu.[33] V rozhodnutích, která poté následovala, jako např. rozhodnutí ve věci Internationale Handelsgesellschaft,[34] resp. Nold,[35] ESD upřesnil, jaká z práv této ochrany požívají. V prvé řadě se zde jedná o práva, která lze nalézt v ústavních předpisech členských států. Těmto sekundují mezinárodní smlouvy na ochranu lidských práv. Zvláštní postavení je přitom přisouzeno právě EÚOLPS.[36] Je však třeba zdůraznit, že se v případě jak ústavních pořádků, tak mezinárodních smluv jedná, co se faktických účinků týče, pouze o prameny poznání práva, které nejsou právně závazné.[37] To však nic nemění na skutečnosti, že na základě rozhodovací praxe ESD byl vytvořen určitý standard ochrany základních práv, který musí členské státy respektovat.[38]

Tento standard našel záhy oporu i v samotném textu zakládajících smluv, konkr. v čl. 6 odst. 2 Smlouvy o Evropské unii z roku 1992.[39] V souladu s tímto ustanovením má Evropská unie[40] dbát základních práv zakotvených ve shora uvedených pramenech poznání práva, přičemž ESD byla přisouzena úloha „dozorového orgánu".[41] Z formulace citovaného článku však jasně vyplývá, že i přes zakotvení této úpravy přímo v textu smlouvy se na právně nezávazném charakteru zmiňovaných pramenů nic nemění. Tento stav přetrvává z důvodu chybějící právní závaznosti i po slavnostní

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[33] ESD, rozsudek ze dne 12.11.1969 ve věci 29/69 (Stauder), Sb. 1969, s. 419, bod 7.

[34] ESD, rozsudek ze dne 17.12.1970 ve věci 11/70 (Internationale Handelsgesellschaft), Sb. 1970, s. 1125, bod 4.

[35] ESD, rozsudek ze dne 14.05.1974 ve věci 4/73 (Nold), Sb. 1974, s. 491, bod 13.

[36] ESD, rozsudek ze dne 13.12.1979 ve věci (Hauer), Sb. 1979, s. 3727, bod 15; ESD, rozsudek ze dne 15.05.1986 ve věci C-222/84 (Johnston), Sb. 1986, s. 1651, bod 18; ESD, rozsudek ze dne 18.06.1991 ve věci C-260/89 (ERT), Sb. 1991, s. I-2925, bod. 41.

[37] Viz Theurer, N.: Das Verhältnis der EG zur Europäischen Menschenrechtskonvention: Eine Analyse des Gutachtens 2/94 des EuGH, 1. vydání, Bern: Stämpfli, 1998, s. 19 nebo Ehlers, D.: Die Grundrechte der Europäischen Union: Allgemeine Lehren, in: Ehlers, D. (Hrsg.), Europäische Grundrechte und Grundfreiheiten, 2. přepracované vydání, Berlin: De Gruyter Recht, 2005, s. 385.

[38] Viz Bleckmann, A.: Die Rechtsquellen des Europäischen Gemeinschaftsrechts, in: Neue Zeitschrift für Verwaltungsrecht, 1993, s. 825 an. či von Arnauld, A.: Normenhierarchien innerhalb des primären Gemeinschaftsrechts - Gedanken im Prozess der Konstitutionalisierung Europas, in: Europarecht, 2003, s. 203 an.

[39] Úřední věstník č. C 191 ze dne 29.07.1992, s. 1 an.

[40] Ke vztahu členských států a základních práv zaručených na komunitární úrovni viz Scheuing, D.: Zur Grundrechtsbindung der EU-Mitgliedstaaten, in: Europarecht, 2005, s. 163 či Schmahl, S.: Grundrechtsschutz im Dreieck von EU, EMRK und nationalem Verfassungsrecht, in: Europarecht, 2008, příloha 1, s. 11.

[41] Viz čl. 46 lit. d) Smlouvy o Evropské unii.

proklamaci Charty základních práv Evropské unie v Nice v roce 2000.[42] Změnu tak s největší pravděpodobností přinese až tolik očekávaná ratifikace Lisabonské smlouvy, která přisuzuje Listině základních práv Evropské unie stejnou právní sílu jako samotné smlouvě.[43] Listina by tak již nebyla pouhým pramenem poznání, nýbrž závazným pramenem práva.

3.1 HOSPODÁŘSKÁ PRÁVA

S ohledem na ekonomické kořeny Evropských společenství požívají hospodářská práva, zejména pak ochrana volné hospodářské soutěže opírající se o volný pohyb služeb, pracovních sil, zboží a kapitálu oproti tomu zcela jiného postavení. Někteří autoři v této souvislosti hovoří dokonce o příslušných ustanoveních zakladatelských dokumentů jako o „hospodářské ústavě“. [44] Tato zahrnuje kromě jiného i právo na svobodu volby a výkonu povolání, neboť tato představuje elementární základ realizace navazujících hospodářských práv. Tato skutečnost je poněkud s podivem, vezmeme-li v úvahu, že se dosud na komunitární úrovni nelze setkat s jednotnou a především jednoznačnou definicí toho, co vlastně tato svoboda představuje.[45] Nezbývá tak, než dát za pravdu Friedhelmu Hufenovi, který, aniž by blíže definoval samotný význam pojmu, vystihl jeho podstatu naprosto přesně, když pronesl, že „*pluralita svobodné volby a výkonu povolání znamená [hospodářskou] soutěž*“.[46] Povolání je přitom ve

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[42] Úřední věstník č. C 364 ze dne 18.12.2000, s. 1 an. České znění dokumentu je k dispozici v Úředním věstníku č. C 303 ze dne 14.12.2007, s. 1 an. V souvislosti s Chartou základních práv Evropské unie stojí za zmínku, že jí byl ESD, resp. Soudem první instance taktéž přisouzen status pramene poznání práva. Viz ESD, rozsudek ze dne 06.11.2003 ve věci C-101/01 (Bodil Lindqvist), Sb. 2003, s. I-1297, bod 35; Soud první instance, rozsudek ze dne 30.01.2002 ve věci T-54/99 (max.mobil Telekommunikation Service), Sb. 2002, s. II-313, body 48 a 57.

[43] Viz čl. 6 Smlouvy o Evropské unii ve znění Lisabonské smlouvy. Úřední věstník č. C 115 ze dne 09.05.2008, s. 13 an.

[44] Viz Nowak, C.: Unternehmerische Freiheit und Wettbewerbsfreiheit, in: Heselhaus / Nowak (Hrsg.), Handbuch der Europäischen Grundrechte, 1. vydání, Mnichov: C.H.Beck, 2006, s. 828 an.

[45] ESD ve svých rozhodnutích toliko poukázal na některé ze součástí této svobody, aniž by její rozsah upřesnil. Viz ESD, rozsudek ze dne 13.12.1979 ve věci 44/79 (Hauer), Sb. 1979, s. 3727, bod 7; ESD, rozsudek ze dne 13.12.1994 ve věci C-306/93 (Winzersekt), Sb. 1994, s. I-5555, bod 24. Vedle judikatury ESD se lze v literatuře setkat i s extenzivním výkladem, který pod svobodu volby a výkonu povolání subsumuje i smluvní svobodu či obecnou svobodu podnikání. Viz Nowak, C.: Unternehmerische Freiheit und Wettbewerbsfreiheit, in: Heselhaus / Nowak (Hrsg.), Handbuch der Europäischen Grundrechte, 1. vydání, Mnichov: C.H.Beck, 2006, s. 866 an. Jako určitý opěrný bod při určení obsahu zmíněné svobody může být text Charty základních svobod Evropské unie, jejíž čl. 15 upravuje právo svobodné volby povolání a právo pracovat. Jak však již bylo uvedeno výše v textu tohoto příspěvku, jedná se v případě Charty o právně nezávazný dokument.

[46] Hufen, F.: Berufsfreiheit - Erinnerung an ein Grundrecht, in: Neue juristische Wochenschrift, 1994, s. 2915.

smyslu stálé judikatury ESD chápáno jako ekonomická výdělečná činnost,[47] která je vykonávána za účelem uspokojení životních potřeb. Na výši odměny[48] či vázanosti pokyny třetích osob přitom nezáleží. Podmínkou však zůstává, aby se touto činností neuspokojovaly životní potřeby jen okrajově, tj. aby neměla pouze podřadný či zanedbatelný charakter.[49]

Jelikož je pojem pracovní, resp. ekonomické činnosti, tak jak ho vykládá ESD, relativně široký, lze pod něj subsumovat i činnost spojenou s televizním a rozhlasovým vysíláním. Že se tak i skutečně stalo, bude ilustrováno v následující části příspěvku.

3.2 SVOBODA TELEVIZNÍHO A ROZHLASOVÉHO VYSÍLÁNÍ

Zakládací smlouvy Evropských společenství, potažmo Evropské unie, neobsahují o svobodě rozhlasového a televizního vysílání žádnou zmínku. Není tak možné dovodit ani obsah tohoto pojmu, natož pak míru ochrany poskytované na komunitární úrovni. Určitým východiskem z této situace je aplikace již zmíněných pramenů poznání práva, o kterých bylo blíže pojednáno na jiném místě příspěvku. Tato skutečnost však nic nemění na tom, že pro případnou inspiraci těmito prameny poznání a jejich následnou praktickou aplikaci ESD, je nutné, aby byl splněn jeden zásadní předpoklad, a to příslušnost ESD k rozhodování v těchto záležitostech.

Smlouva o založení Evropského společenství (SES) nepropůjčuje orgánům Společenství žádné pravomoci pro vydávání závazných právních aktů v oblasti televizního a rozhlasového vysílání. Jejich kompetence jsou zredukovány toliko na zajištění aktivní podpory členských států (čl. 151 odst. 2 odrážka 4 SES). Jak již tolikrát v historii evropské integrace, i v případě televizního a rozhlasového vysílání nezůstalo i přes jasné znění SES pouze u právně nezávazných aktů.[50] Podnět k tomuto obratu dal ESD, který ve svém rozsudku ve věci Sacchi[51] judikoval, že „*televizní vysílání je nutno vnímat s ohledem na jejich charakter jako poskytování služeb*“, a proto se „*na vysílání televizních signálů, včetně těch, které mají reklamní*

[47] ESD, rozsudek ze dne 05.10.1988 ve věci 196/87 (Steymann), Sb. 1988, s. 6159, bod 10.

[48] ESD, rozsudek ze dne 23.03.1982 ve věci 53/81 (Levin), Sb. 1982, s. 1035, bod 16.

[49] Ibid, bod 17.

[50] Viz Směrnice Rady ze dne 03.10.1989 o koordinaci některých právních a správních předpisů členských států upravujících provozování televizního vysílání, Úřední věstník č. L 298 ze dne 17.10.1989, s. 23 an.

[51] ESD, rozsudek ze dne 30.04.1974 ve věci 155/73 (Sacchi), Sb. 1974, s. 409 an.

povahu […] vztahují pravidla Smlouvy týkající se pohybu služeb.“[52] Toto své stanovisko ESD ve své pozdější soudní praxi potvrdil.[53]

Ačkoliv ESD ve svých rozhodnutích ohledně pravomocí Evropských společenství v oblasti médií hovořil pouze o vysílání televizního signálu, lze s ohledem na úzkou vazbu mezi televizním a rozhlasovým vysíláním dospět k závěru, že rozhlasové vysílání spadá rovněž do kompetencí jejich orgánů.[54] Určitý rozdíl je však možné vypozorovat v míře těchto pravomocí.

S ohledem na ustálenou judikaturu ESD, co se televizního vysílání týče, a naopak chybějící obdobnou praxi v oblasti rozhlasového vysílání, je odpověď na otázku, která ze zmíněných oblastí je potenciálně více dotčena možnou komunitární úpravou, zcela jasná. Nezodpovězenou však i nadále zůstává otázka jasné hranice mezi pravomocemi orgánů Evropských společenství a členských států. S ohledem na „progresivní“ soudní praxi ESD, řídící se výkladovým pravidlem effet utile a zaštiťující se ochranou hospodářské soutěže (neboť audiovizuální vysílání je ve smyslu stávající judikatury ESD považováno za službu), však lze spíše očekávat, že nedojde-li rovnou na postupné rozšíření existujících pravomocí i na ostatní typy médií, pak budou současné pravomoci přinejmenším dále upřesňovány, což ve svém důsledku povede ke stejnému výsledku.

3.3 SVOBODA VOLBY A VÝKONU POVOLÁNÍ A SVOBODA TELEVIZNÍHO A ROZHLASOVÉHO VYSÍLÁNÍ

Obdobně jako v případě EÚOLPS lze vztah mezi svobodnou volbou a výkonem povolání a svobodou televizního a rozhlasového vysílání asi nejlépe ilustrovat na příkladu komerčních sdělení a současně pluralitě vysílacích stanic a jejich vzájemné konkurenci.

Komerční sdělení spadají dle konstantní judikatury ESD (viz výše) do oblasti volného pohybu služeb (čl. 49 an. SES), a je jim tak poskytována odpovídající právní ochrana. Kromě toho požívají ochrany z titulu obecné ochrany svobody projevu,[55] jehož součástí svoboda rozhlasového a televizního vysílání, v jehož rámci k odvysílání daného komerčního sdělení došlo, je. Je tak v podstatě ponecháno na úvaze ESD,[56] zda předmětný akt

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[52] Ibid, s. 432, bod 6.

[53] ESD, rozsudek ze dne 18.03.1980 ve věci 52/79 (Debauve), Sb. 1980, s. 833, bod 8; ESD, rozsudek ze dne 18.06.1991 ve věci C-260/89 (ERT), Sb. 1991, s. I 2925, bod 13.

[54] Viz Probst, P.-M., Art. 10 EMRK – Bedeutung für den Rundfunk in Europa, 1. vydání, Baden-Baden: Nomos, 1996, s. 63.

[55] ESD, rozsudek ze dne 26.06.1997 ve věci C-368/95 (Familiapress), Sb. 1997, s. I-3689, bod 25.

[56] ESD, rozsudek ze dne 18.06.1991 ve věci C-260/89 (ERT), Sb. 1991, s. I-2925, bod 41 an.

státu bude přezkoumávat co do souladu s požadavky na ochranu svobody volného pohybu služeb, nebo zda se přikloní k druhé z variant, tj. ke svobodě projevu a její ochraně. Vyloučena není ani třetí možnost, a to přezkum obou zmíněných svobod. Tento rejstřík možných kombinací dokládá i sama judikatura ESD.

ESD sice ve svém rozhodnutí ve věci TV10, jejímž předmětem bylo posouzení souladu národní úpravy podmínek pro přeshraniční televizní vysílání s komunitárním právem, založil svoji argumentaci pouze na výkladu ustanovení, týkajících se volného pohybu služeb, ačkoliv měl možnost vyjádřit se i k možnosti aplikace čl. 10 a čl. 14 EÚOLPS.[57] Tuto možnost využil až ve svém pozdějším rozhodnutí ve věci RTL Television,[58] ve kterém ESD přezkoumal zákonnost státního zásahu i s ohledem na čl. 10 EÚOLPS. Obdobně jako ESLP i ESD v tomto případě judikoval, že je potřeba ponechat členským státům určitý prostor pro volnou úvahu při posuzování oprávněnosti případného omezení svobody projevu.[59] ESD však na rozdíl od ESLP nestanovil jasná pravidla pro tuto diskreci, neboť ESD nerozlišuje mezi jednotlivými typy sdělení či vysílání s ohledem na jejich demokratizující prvek, což má za následek neexistenci diferenciace příslušných stupňů poskytované ochrany.[60] V tomto ohledu nezbývá než vyčkat, co přinese stále užší sbližování soudní praxe ESD a ESLP.

Zmíněný stav lze však do jisté míry ospravedlnit, vezmeme-li v úvahu primární cíle Evropských společenství (nejen) na poli volného pohybu služeb. Aby byla zajištěna svoboda jejich volného pohybu, je potřeba stanovit zejména jasná pravidla pro ty, jež dané služby nabízí, resp. kterým jsou určeny, jakož i pro vzájemnou interakci mezi těmito osobami. Řeč je o střetu nabídky a poptávky, o stanovení jasných pravidel soutěže mezi poskytovateli a odběrateli služeb.[61] Tato skutečnost se velkou měrou odráží i na poli svobody televizního či rozhlasového vysílání, resp. svobody volby a výkonu povolání. Průnik těchto dvou svobod lze nejlépe demonstrovat na příkladu střetu již zmiňované volné soutěže a monopolistického uspořádání televizního či rozhlasového vysílání. Tento střet souvisí na úrovni Evropských společenství právě s aplikací čl. 10 EÚOLPS na straně jedné a pravidel pro ochranu volné soutěže na straně druhé.

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[57] ESD, rozsudek ze dne 05.10.1994 ve věci C-23/93 (TV10 SA), Sb. 1994, s. I-4795, bod 20 an.

[58] ESD, rozsudek ze dne 23.10.2003 ve věci C-245/01 (RTL Television), Sb. 2003, s. I-12489.

[59] Ibid, bod 68 an. a bod 73.

[60] Viz Woods, L., Freedom of Expression in the European Union, in: European Public Law, 2006, s. 400.

[61] Viz Shiner, R. A., Freedom of Commercial Expression, Oxford University Press: Oxford, 2003, s 101.

Jak již bylo zmíněno výše, představuje jeden z primárních cílů Evropských společenství volná hospodářská soutěž. Tato snaha je s určitými "modifikacemi" patrná i v oblasti médií a veřejného vysílání. Uvedenou modifikaci je možno nalézt v případě veřejnoprávních monopolů. Dokladem toho budiž rozhodnutí ESD ve věci ERT, ve kterém se jednalo o národní úpravu vysílacích licencí, která byla napadena pro svoji údajnou diskriminační a protisoutěžní povahu. ESD se zde kupodivu i přes možnost aplikace „demokratizujícího" ustanovení čl. 10 EÚOLPS při posuzování případného rozporu mezi národní úpravou a předpisy Evropských společenství omezil na ekonomický aspekt celé záležitosti, tj. hodnocení z pohledu soutěžního práva. Výsledkem pak bylo stanovisko ESD, dle kterého není existence televizních (a potažmo i rozhlasových) monopolů v rozporu s předpisy komunitárního práva. Podmínkou však je, aby struktura a činnost takovéhoto monopolu nebyla v rozporu s předpisy na ochranu volného pohybu zboží a služeb, resp. předpisy soutěžního práva.[62] Tento právní názor však zcela zřejmě koliduje s názorem, který zastává ESLP.[63] Tento spatřuje na rozdíl od ESD v existenci veřejnoprávního monopolu jedno z nejmarkantnějších omezení svobody projevu. S ohledem na tuto skutečnost tak není možné si nepoložit otázku, zda a jakým způsobem bude v praxi v případě takto diametrálně rozdílných názorů nejvyšších soudních instancí daných právních řádů aplikována výhrada ESLP judikovaná v rozhodnutí ve věci Bosphorus?[64]

4. ZÁVĚR

Při posuzování podobností či naopak rozdílů míry ochrany a vztahu mezi svobodou volby a výkonu povolání a svobodou televizního a rozhlasového vysílání na úrovni Evropských společenství a v rámci EÚOLPS na úrovni Rady Evropy, je potřeba vzít v úvahu historické souvislosti a cíle, s nimiž byly tyto mezinárodní organizace založeny. Zatímco Rada Evropy usiluje o "*dosažení větší jednoty mezi jejími členy za účelem ochrany uskutečňování ideálů a zásad, které jsou jejich společným dědictvím, a usnadňování jejich hospodářského a společenského rozvoje*", a to prostřednictvím opatření "*ve věcech hospodářských, sociálních, kulturních, vědeckých, právních a správních a cestou dodržování a další realizace lidských práv a základních svobod*"[65], byly cíle Evropských společenství o poznání skromnější, zaměřené především na hospodářskou oblast.

I přesto došlo v průběhu koexistence těchto organizací k určitému sblížení, které lze přičíst vedle prolínání členské základny obou organizací i

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[62] ESD, rozsudek ze dne 18.06.1991 ve věci C-260/89 (ERT), Sb. 1991, s. I-2925, bod 12.

[63] ESLP, rozsudek ze dne 24.12.1993, (Informationsverein Lentia), Ser. A 276 (1993).

[64] ESLP, rozsudek ze dne 30.06.2005 (Bosphorus), 2005-VI.

[65] Viz čl. 1 Statutu Rady Evropy.

rozhodovací praxi příslušných soudních orgánů, zejména pak ESD, který EÚOLPS společně s ostatními veřejnoprávními smlouvami, jejichž předmětem je ochrana lidských práv, uznal za prameny poznání práva.

Toto sblížení se pozitivně odráží i v oblasti ochrany svobody volby a výkonu povolání spolu se svobodou televizního a rozhlasového vysílání. I přesto lze na základě judikatury ESD a ESLP vypozorovat v citovaných oblastech určité odlišnosti, zejména co se míry "demokratického" prvku týče.

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ENFORCEMENT OF ECONOMIC AND SOCIAL RIGHTS CONCERNING EMPLOYMENT AND OCCUPATION

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Abstract in original language
Příspěvek se zabývá vymahatelností hospodářských a sociálních práv souvisejících s výkonem práce. Skládá se ze tří hlavních částí. První část charakterizuje povahu hospodářských a sociálních práv, zejména jejich chápání jako tzv. pozitivních práv. Druhá část podává přehled úpravy hospodářských a sociálních práv v mezinárodních úmluvách. Důraz je kladen zejména na odlišný způsob vynutitelnosti těchto práv. Poslední část se zabývá zakotvením jednotlivých hospodářských a sociálních práv v ústavním pořádku České republiky a omezením jejich vynutitelnosti zákony, jež tato práva provádějí.

Key words in original language
Hospodářská práva; sociální práva; pozitivní práva; právo na práci; právo na zaměstnání; právo na bezpečné pracovní podmínky; právo na spravedlivou odměnu; právo na odborové sdružování; právo na stávku; právo na zvláštní pracovní podmínky; meze vymahatelnosti.

Abstract
The present contribution deals with the enforcement of economic and social rights relating to employment and occupation. It consists of three main parts. The first part is dedicated to characteristic features of social rights, especially to their consideration as positive rights. The second part deals with international conventions concerning economic and social rights. The different way of enforcement of such rights is emphasised. The last part analyses particular economic and social rights in the constitutional order of the Czech Republic and limitation of their enforcement by laws implementing related provisions.

Key words
Economic rights; social rights; positive rights; right to work; right to employment; right to safe working conditions; right to fair remuneration; right to association; right to strike; right to special working conditions; limitation of enforcement.

INTRODUCTION

Rights related to employment and occupation such as: right to work, right to association for protection of economic and social rights, right to trade union association, right to strike, right to health and safe working conditions, right to satisfying working conditions, right of employees to fair remuneration for work done, right of women, adolescents and persons with disabilities to

special working conditions or right of pregnant women and women after childbirth to protection in employment are stated in various international conventions or declarations. These rights are also included into constitutions or constitutions acts of many states. Most of the abovementioned rights are considered as social or economic rights. The present contribution is dedicated to enforcement of these rights. First, the characteristic features of economic and social rights are explained. Subsequently, the statement and enforcement of these rights in relevant international conventions are explained. Finally, the specific position of economic and social rights with respect to their enforcement in the Czech legal order is analysed.

1. CHARACTERISTIC FEATURES OF ECONOMIC AND SOCIAL RIGHTS

Economic and social rights together with civil and political rights are considered as a group of human rights. Human rights conventions often underline the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms.[1] However, there prevails different treatment between civil and political rights on the one hand, and economic, social and cultural rights one the other hand. This difference is very significant especially with respect to enforcement of economic and social rights.

The reasons for such difference consist in specific features of economic and social rights. Contrary to civil and political rights that have been set in constitutional provisions of some states since the second half of the 18th century, economic and social rights developed later. Their constitutional statement derives from the Russian revolution in 1917. Sometimes they are called human rights of second generation.

The key difference between the elevation of socio-economic rights and civil and political rights to a status of enforceability, in terms of potential intrusion into political policy, is alleged to be that of positive and negative effects. Socio-economic rights are positive rights requiring the state to expand resources to provide a remedy, whereas civil and political rights are negative rights, which simply require the state to refrain from unjust interference with individual liberty.[2] Civil and political rights are sometimes considered as freedoms from state. State is only required not to infringe them and to intervene only in the event of their infringement by third person. On the contrary, economic and social rights require an action from state. State takes measures to implement them, in particular passes laws,

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[1] See for example: Preamble of the Convention on the Rights of Persons with Disabilities, point c.

[2] Willes, E.: Aspirational Principles or Enforceable Rights – The Future for Socio-Economic Rights in National Law, American University International Law Review, 2007, Vol. 22, Issue 1, page 45.

decrees or regulations providing concrete rights and duties of individual. In addition, it is necessary that state expends certain amount of financial resources for realisation of particular economic or social rights. The exception is the right to association for the protection of social and economic interests and the right to trade union organisation that may be realised directly from the constitution. They do not require the existence of specific rules implementing them.

The standard of economic and social rights differs in various states according to their economic development, and social traditions. Moreover, it may differ in one state according to actual economic situation or policy of government. However, economic and social rights may not be isolated form civil and political rights. Their realisation creates material conditions for effective exercise of civil and political rights.

2. ECONOMIC AND SOCIAL RIGHTS IN THE INTERNATIONAL LAW

2.1 ECONOMIC AND SOCIAL RIGHTS IN THE SYSTEM OF UNITED NATIONS

The Universal Declaration of Human Rights adopted in 1948 did not make difference between civil and political rights on the one hand and economic, social and cultural rights one the other hand. Its Preamble provides that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights. This principle was recalled in number of human rights instruments adopted later.

The difference occurred later by adoption of two separate covenants on human rights, that means the International Covenant on Economic Social and Culture Rights, and the International Covenant on Civil and Political Rights, in 1966. The Czech Republic ratified both of these Covenants. The reasons for adoption of two separate conventions consist in inter alia different political and ideological attitudes between the states of Soviet bloc and the United States at the time of the Cold War. The difference in treatment between these groups of rights is significant especially with respect to the wording of the Covenants. Whereas in the International Covenant on Civil and Political Rights the rights are subjects of immediate obligation, in the International Covenant on Economic Social and Culture Rights they are to be achieved by the more intangible notion of progressive realisation [3] Moreover, different mechanism monitoring state compliance of the Covenants was established. These differences are not so significant in

[3] Willes, E.: Aspirational Principles or Enforceable Rights – The Future for Socio-Economic Rights in National Law, American University International Law Review, 2007, Vol. 22, Issue 1, page 38.

later human rights conventions relating to disadvantaged groups that contain both categories of rights.[4]

2.2 ECONOMIC AND SOCIAL RIGHTS IN THE SYSTEM OF COUNCIL OF EUROPE

In the system of Council of Europe two separate treaties were adopted as well. The civil and political rights are contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms adopted in 1950. The catalogue of social rights was adopted in 1961 in the form of the European Social Charter. The Czech Republic ratified this convention.

The system of protection of rights guaranteed by the European Social Charter differs from the system of protection of rights included in the European Convention for the Protection of Human Rights and Fundamental Freedoms and in Protocols to this Convention. First, an individual may not claim right stated by the European Social Charter before the European Court of Human Rights. The system of supervision of application of this treaty by the States that have ratified it is based on national reports submitted to the Committee of Social Rights. Secondly, the State may ratify only some rights included in the European Social Charter. The Article 20 states that each of the Contracting Parties undertakes to consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that part. However the State ratifying the European Social Charter is obliged to consider itself bound by at least five of the following articles of Part II of this Charter: Articles 1 (right to work), 5 (right to organise), 6 (right to bargain collectively), 12 (right to social security), 13 (right to social and medical assistance), 16 (right of the family to social, legal and economic protection) and 19 (right of migrant workers and their families to protection and assistance). In addition to these selected articles, the State ratifying the European Social Charter undertakes to consider itself bound by such a number of articles or numbered paragraphs of Part II of the Charter as it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than 10 articles or 45 numbered paragraphs.

In 1996 the revised version of the European Social Charter was adopted. It embodies in one treaty all rights guaranteed by the original European Social Charter its additional Protocol adopted in 1988 and adds new rights and amendments adopted by the Parties. It is supposed to gradually replace European Social Charter. The Czech Republic has not ratified this treaty yet.

[4] See Convention on the Rights of the Child or Convention on Rights of Persons with Disabilities.

3. ECONOMIC AND SOCIAL RIGHTS IN THE LEGAL ORDER OF THE CZECH REPUBLIC

In the Czech Republic the fundamental human rights are included in the Resolution of the Presidium of the Czech National Council of 16 December 1992 on the declaration of the Charter of Fundamental Rights and Freedoms (hereinafter the Charter) as a part of the constitutional order of the Czech Republic. Economic and social rights concerning employment and occupation are stated in the Chapter Four named Economic, Social and Cultural Rights. Most of these rights may be characterised by two features. First, the wording of the articles governing these rights requires that detailed provisions shall be stated by law. That means that the legislature shall approve laws précising particular social or economic right. Some of these rights are further elaborated in governmental decrees.

The second feature characterising economic and social rights, with the exception of the right to association for the protection of economic and social rights, the right to trade union association, right of pregnant women to protection in labour relations and right of pregnant women to suitable working conditions concerns their enforcement. According to the Article 41 (1) the rights specified in named Articles may be claimed only within the confines of the laws implementing these provisions. This provisions state a rule for interpretation of rights included in the named Articles of the Charter. The Article 41 (1) means that laws specifying particular economic or social right states not only detailed provisions concerning such right but also the limitation for its enforcement. The legislature may decide how to implement particular right by approving concrete rules. The individual is entitled to claim particular right depending on the act implementing such right. Laws and other regulations implementing economic and social rights may differ according to political or economic situation. In addition, the legislature may regulate the amount of financial support necessary or reasonable for ensuring this right. Such decision of legislature has significant impact on quality of some social rights. The Charter provides for following economic and social rights:

3.1 RIGHT TO WORK

The right to work is stated in the Article 26. The first paragraph provides that everybody has the right to the free choice of his profession and to the training to that profession, as well as to engage in commercial and economic activity. However, the second paragraph makes precise that conditions and limitations may be set by law upon the right to engage in certain professions or activities. The third paragraph provides that everybody has the right to acquire the means of her livelihood by work. The state shall provide an adequate level of material security to those citizens who are unable, through no fault of their own, to exercise the right, conditions shall be provided for by law. The forth paragraph enables the application of different statutory provisions to aliens.

The right to work is closely connected with the prohibition of forced labour provided in the Article 9 of the Charter. According to the first paragraph no one may be subjected to forced labour or service. Closed enumeration of exceptions from the prohibition of forced labour or office is contained in the second paragraph and includes:

a. Labour imposed in accordance with law upon persons serving a prison sentence or upon other persons serving penalties that take the place of the penalty of imprisonment,

b. Military service or some other service provided for by law in place of compulsory military service,

c. Service required on the basis of law in the event of natural disasters, accidents, or other danger threatening human life, health or property of significant value,

d. Conduct imposed by law for the protection of life, health or rights of others.

Right to work is understood as the right to perform any activity the purpose of which is to obtain means of livelihood. Such an activity may be performed in the name of the person and for his or her responsibility, which means in the form of self-employment, or in the name, according to the instruction and for the responsibility of someone else, which means in the form of dependant work. The later form of the right to work is understood as the right to employment.

The right to employment is further elaborated in labour law regulations, namely in the Labour Code (Act no. 262/2006 Coll., as amended) and Act on Employment (Act no. 435/2004 Coll., as amended). The theory of labour law recognizes three elements of this right: right to assistance when looking for an employment, right to protection of existing labour relationship and right to reasonable means in the event of loss of an employment.[5]

3.2 RIGHT TO ASSOCIATION FOR PROTECTION OF ECONOMIC AND SOCIAL INTERESTS

The right to associate with others for protection of economic and social interests is provided in the Article 27 of the Charter. Everyone is entitled to enjoy this right. However, the Article 44 gives the power to legislature to place restrictions upon the exercise of this right by members of security corps and members of the armed forces, insofar as such is related to the performance of their duties. Contrary to other social rights, the Charter does not require that law states detailed provisions. In addition, the enforcement of this right is not limited by confines of laws implementing it. This right is

[5] See. Galvas, M.: Pracovní právo, Brno, Masarykova univerzita 2004.

very similar to civil and political rights. The role of the state is not to infringe the exercise of this right.

The right to association including the right to association for protection of economic and social interests is further regulated by the Act on Civil Association (Act no. 83/1990 Coll., as amended) governing the establishment and position of trade union organisations and organisations of employers that are recognised as legal entities with full legal capacity.

3.3 RIGHT TO TRADE UNION ASSOCIATION

The right to trade union association may be considered as making precise the right to association for protection of economic and social interests. It is guaranteed by the Article 27 (2) of the Charter. Trade unions shall be established independently of the state. No limits may be placed upon the number of trade union organisations, nor may any of them be given preferential treatment in a particular enterprise or sector of industry.[6] However legislature may place restrictions upon the exercise of this right by members of security corps and members of the armed forces, insofar as such is related to the performance of their duties. The existence of law implementing the right to trade union association is not required and its exercise is not limited by confines of law implementing it.

The right to trade union association is ensured by the Labour Code and by the Act on Civil Association. It includes the right to established or not to establish a trade union organisation. That means that nobody shall be impended to establish a trade union organisation and nobody shall be forced to establish a trade union organisation. The right to trade union association also includes the right to enter or not to enter the existing trade union organisation. That means that everybody shall be free to become a member of a trade union organisation and nobody shall be forced to be a member of a trade union organisation. Furthermore, trade union organisations may associate with other trade unions at national or international level.

The principle of equal treatment with trade unions organisation is underlined in the section 24 (2) of the Labour Code providing that whereas two or more trade union organisations operate within the employer's undertaking, the employer shall negotiate the conclusion of the collective agreement with all such trade union organisations, unless the trade union organisations agree between themselves and with the employer otherwise, the trade union organisations shall act and negotiate the collective

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[6] The activities of trade union and the formation and activities of similar associations for the protection of economic and social interests may be limited by law in the case of measures necessary in a democratic society for the protection of the security of the state, public order or the rights and freedoms of others (Article 27 (3) of the Charter).

agreement jointly and in mutual consent with legal consequences for all employees. The original wording of this section contained the provision stating that where the trade union organisations failed to agree, the employer was entitled to conclude the collective bargaining agreement with one trade union organisation or more trade union organisations with the largest membership among the employees. This provision was repealed by the Constitutional Court on the matter of the fact that it was not in compliance with the Article 27 (2) of the Charter.[7]

3.4 RIGHT TO STRIKE

The right to strike is guaranteed by the Article 27 (4) of the Charter but only under the conditions provided for by law. Some groups or persons are excluded from the enjoyment of this right because the Article 27 (4) states that it does not appertain to judges, prosecutors, or members of the armed forces or security corps. In addition, the Article 44 enables to legislature to place restrictions upon the exercise of this right by persons who engage in professions essential for the protection of human life and health. The right to strike may be claimed only within the confines of the laws implementing the Article 27 (4).

More precise rules concerning the right to strike are contained in the Collective Bargaining Act (Act no. 2/1991 Coll., as amended). The right to strike provided in this law is very limited because it enables to strike only where collective labour dispute on conclusion of collective agreement is settled. In addition, the parties to such collective labour dispute are obliged to claim for the solution a mediator. Only where this instance of the dispute is not successful the trade union organisation may call on strike.

3.5 RIGHT OF EMPLOYEES TO SATISFYING WORKING CONDITIONS

The Article 28 of the Charter guarantees the right to satisfying working conditions. The Article 28 requires that person entitled to enjoy this right is in the position of an employee. That means that a natural person has to be a party of a labour relation. Only persons performing so called dependant work is entitled to conditions stated by the Labour Code and other labour law regulations.[8] Types of labour relations are stated by the Labour Code in

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[7] See Decision of the Constitutional Court of the Czech Republic repealing some provisions of the Labour Code, published in the Collection of Laws as 116/2008.

[8] Dependant work is defined in the section 2 (4) and (5) of the Labour Code and means exclusively personal performance of work by an employee for his employer within the relationship of the employer's superiority and his employee's subordination, according to the employer's instructions or according to the instructions given in the employer's name, for a wage, salary or other remuneration paid for work done within the working hours or

the section 3. According to this provision it is possible to establish an employment relationship or conclude an agreement on work performed outside an employment relationship. The Labour Code recognises two agreements on work performed outside an employment relationship: agreement on work performance and agreement on working activity. The Labour Code requires that natural person has to have specific legal capacity so as to be a party of any of these labour relationship. He has to have capacity to have rights and duties as an employee and the capacity to acquire such rights and take on such duties by his own acts-in-law. This capacity is acquired on the day when an individual reaches the age of 15 years. However, an employer may not agree with an individual to take up his employment on a day which proceeds the day when this individual completes compulsory school attendance. The Article 28 provides that detailed provisions concerning the right to satisfying conditions shall be stated by law.

The fundamental question with respect to the right to satisfying conditions is the notion of the term "working conditions." The theory of the labour law defines working conditions as all factors involving an employee during the performance of work.[9] The other question is which working conditions are satisfying. The term "satisfying working conditions" is quite general and vague. What is satisfying for an individual or group of employees need not be satisfying for another individual or group of employees.

The minimum standard of working conditions is the right to safe and health working conditions. The work performance should not endanger the lives and health of employees. Main purpose of the legal regulation is to prevent industrial injuries and occupational diseases. From this point of view the right to satisfying working conditions involves protection of health and safety at work including requirements for adjustment of workplace to the

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otherwise determined or agreed time, at the employer's workplace or at some other agreed place. at the employer's cost and at the employer's responsibility. Dependant work also refers to the cases where an employer (employment agency) who on the basis of a licence granted under Act on Employment temporary posts his employee for work performance to another employer according to the relevant clause in the employment contract or agreement on working activity whereby the employment agency undertakes to arrange for his employee temporary work performance with another employer (user) and the employee undertakes to carry out work according to the user's instructions with regard to the agreement to the employee's temporary posting by the employment agency to the user, as concluded between the employment agency and such user.

[9] Galvas, M., a kol. Pracovní právo, Brno, Masarykova univerzita, 2001, page. 267.

needs of employees, assessment of risks relating the work, elimination of such risks, suitable working equipment, personal protective equipment, duties of both parties of labour relation, staff training about these duties, reasonable limitation of working hours, schedule of working hours and safety breaks.

However, the term "satisfying working conditions" is larger than health and safe working conditions. Needs of employees in other areas should be satisfied as well. Satisfying working conditions may include for example equal treatment and non-discrimination in employment, protection against unlawful dismissal, vocational guidance, vocational training, possibility of promotion or social care of employees. The right to satisfying working condition is provided especially by the Labour Code, Act on Labour Inspection (Act no. 251/2005 Coll., as amended) and the Act on Ensuring Other Requirements relating to Health and Safety at Work (Act no 309/2006 Coll., as amended).

3.6 RIGHT OF EMPLOYEES TO FAIR REMUNERATION FOR WORK DONE

This right is guaranteed by the Article 28 of the Charter. Only employees are entitled to exercise this right. Detailed provisions shall be state by law. Rules for remuneration of work performed in labour relations are contained in the Labour Code and other labour law regulations. The right of employees to fair remuneration is ensured namely by the minimum standards of remuneration and the principle of equal pay for equal work or work of equal value.

The minimum standards of remuneration are ensured by the institute of minimum wages and guaranteed wages. The minimum wage is defined in the section 111 of the Labour Code as the minimum permissible amount of remuneration for work done in a labour relationship. A wage salary or remuneration pursuant to an agreement may not be lower than the minimum wage.[10] The Governmental Decree 567/2006 Coll., as amended, sets out the basic rate of the minimum wage and further rates of the minimum wage differentiated with a view to influences limiting to certain employee's possibility to exercise the work and conditions for minimum wage payment.

The principle of equal pay for equal work or work of equal value is recognised as one of the basic principles of labour law relations according to the section 13 of the Labour Code. Detailed provisions are contained in the section 110 of the Labour Code. All employees employed by one employer are entitled to receive equal wage, salary or remuneration pursuant to an agreement for the equal work or for work to which equal value has been

[10] For this purpose the wage or salary shall not include any premium payment for overtime work, work on public holidays, night work, work in arduous working environment and work on Saturdays and/or Sundays.

attributed. The equal work or for work to which equal value has been attributed is defined as work of the same or comparable complexity, responsibility, strenuousness which is performed in the same or comparable working conditions and which is of equal or comparable working efficiency and brings equal or comparable work results.

3.7 RIGHT OF WOMEN, ADOLESCENTS AND PERSONS WITH HEALTH PROBLEMS TO INCREASED PROTECTION OF THEIR HEALTH AT WORK

Some categories of employees are considered to be in weaker position and the need for their increased protection is recognised. The Article 29 (1) of the Charter guarantees to women, adolescents and persons with health problems to increased protection of their health at work. Detailed provisions shall be set by law. This right may be claimed only within the confines of the laws implementing the Article 28. With respect to women and adolescents detailed provisions are set by the Labour Code and by the Ordinance of the Ministry of Health no 88/2003 Coll. as amended. For the purpose of protection at work, an adolescent shall mean person who is less than 18 years of age. However, no special rules are provided for increased protection of health of persons with health problems.

3.8 RIGHT OF WOMEN, ADOLESCENTS AND PERSONS WITH HEALTH PROBLEMS TO SPECIAL WORKING CONDITIONS

Women, adolescents and persons with health problems have also the right to special working conditions. Detailed provisions shall be set by law and this right may be claimed only within the confines of the laws implementing the Article 28. Contrary to the right to satisfying working conditions guaranteed only to employees, the right to special working conditions is not limited by formation of a labour relation. The Chapter Four of the Labour Code named Special Working Conditions for some employees recognises special working conditions for female employees, employees-mothers, employees taking care of a child or another person. However, no special working conditions are stated for persons with health problems. The section 237 of the Labour Code only contains reference to Act on Employment with respect to employment of persons with disabilities.

3.9 RIGHT OF ADOLESCENTS AND PERSONS WITH HEALTH PROBLEMS TO SPECIAL PROTECTION IN LABOUR RELATIONS

The right of adolescents and persons with health problems to special protection in labour relations is stated in the Article 29 of the Charter. Detailed provisions are set by the Labour Code and it may be claimed only within the confines of the laws implementing these provisions. The present legal regulation does not contain provisions on special protection of these categories of employees. Both, adolescents and persons with health

problems are treated in the same way as other employees. There is the same regulation relating to establishment or termination of labour relationship.

3.10 RIGHT OF ADOLESCENTS AND PERSONS WITH HEALTH PROBLEMS TO ASSISTANRCE IN VOCATIONAL TRAINING

The other right guaranteed by the Article 29 (2) of the Charter is the right of adolescents and persons with health problems to assistance in vocational training. This right requires the existence of law stating detailed provision and may be claimed only within the confines of the laws implementing the Article 29 (2) of the Charter as well. The law that implements this provision of the Charter is the Act on Employment providing vocational rehabilitation and vocational guidance for persons with disabilities. Not all persons with health problems are entitled to enjoy such special assistance. The person with health problems must be recognised as a person with disability on conditions laid down in the section 67 of the Act on Employment.

3.11 RIGHT OF PREGNANT WOMEN TO PROTECTION IN LABOUR RELATIONS

The right of pregnant women to protection in labour relations is stated by the Article 32 (2) of the Charter. It may be considered as a component of the right to protection of parenthood. The Article 32 (6) states that detailed provision shall be set by law. In contrast to the right of adolescents and persons with health problem to special protection in labour relations, the enforcement of this right is not limited by the confines of the laws implementing it.

The increased protection of pregnant women in labour relations is implemented by the Labour Code stating specific provisions, in particular with respect to termination of an employment relationship with a pregnant woman. The section 55 (2) prohibits the immediate termination of an employment relationship by an employer with such women. In addition, the sections 53 and 54 of the Labour Code limit the reasons for termination of an employment relationship by the notice of termination by an employer.

3.12 RIGHT OF PREGNANT WOMEN TO SUITABLE WORKING CONDITIONS

The right of pregnant women to suitable working conditions is stated by the Article 32 (2) of the Charter as well. This right is implemented by the Labour Code and by the Ordinance of the Ministry of Health no 88/2003 Coll. as amended. Stated types of work and workplaces are prohibited for pregnant women. In the case that a pregnant woman performs work that is prohibited to pregnant women, an employer is obliged to transfer her to alternative work. Moreover, the Labour Code in the section 241 (3) states that employers may not assign overtime to pregnant women. The section 241 provides special rule concerning the business trips of pregnant employees

CONCLUSIONS

Economic, social and cultural rights in general, and economic and social rights relating to employment and occupation are treated in a different way than civil and political rights. This different treatment is significant especially with respect to the enforcement of these rights. Most of economic and social rights require the existence of legal regulations stating detailed provisions for their implementation. Furthermore, some of them may be effectively ensured only where financial support is provided. In the Czech Republic all economic and social rights relating to employment and occupation guaranteed by the Charter of Fundamental Rights and Freedoms, with the exception of the right to association for protection of economic and social interests, right to trade union association, right of pregnant women to protection in labour relations and right of pregnant women to suitable working conditions may be claimed only within the confines of the laws implementing related provisions of the Charter.

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CRIMINAL LAW IN EUROPE. IS IT THE SAME AS EUROPEAN CRIMINAL LAW?

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Abstract in original language
Wspólnota nie dysponuje obecnie kompetencjami z zakresu prawa karnego, poza możliwością podajmowania działań zgodnie z zasadą pomocniczości. Dlatego, nierealnym jest stworzenie jednolitego i kompleksowego europejskiego prawa karnego, które obowiązywałoby w każdym państwie członkowskim Unii. Aktualnie, proces harmonizacji prawa karnego polega na zbliżaniu ku sobie ustawodawstw karnych i nie jest oficjalnie rozumiane jako wstępny etap do całkowitego ujednolicenia prawa karnego na obszarze Unii, chociaż nie da się tego wykluczyć w przyszłości

Key words in original language
Europejskie prawo karne; Unia Europejska; rozwój; harmonizacja; ustawodawstwa karne; korpus przestępstw europejskich; europejski kodeks karny.

Abstract
European Community currently does not have competence in area of criminal law and procedure. It shall action only in accordance with the principal of subsidiarity. It's impossible to create nowadays one, unified and complex european criminal law, which would bind in every EU state. Actually, process of harmonization of criminal law is based on bringing closer of criminal statues and is not officially understood as a preliminary phase to absolute unification of criminal law in the EU area, although we cannot exclude it in the future.

Key words
European criminal law; European Community; development; harmonization; criminal statutes; european crimes corps; european criminal code.

Criminal law in Europe. Is that the same as European criminal law? In my point of view, definitely not. I would say that systems of the criminal law in European countries are some kind of mix of local legal traditions and elements taken from Roman, Germanin (and less from Common Law) and from the Enlightenment ideas.

In doctrine we find out different opinions whether exists such thing as „European criminal law".

The point is, that, in accordance with art. 5 of THETREATY ESTABLISHING THE EUROPEAN COMMUNITY: The Community

shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

Generally speaking, European Community does not have competence in area of criminal law and procedure. Exceptions are The Third Pillar and less The First Pillar. That suppose to confirm my argument, that, by now, we cannot say that there is something like European criminal law word for word. Despite this, dynamic and intensive development of The Third Pillar induce to ask a question: Is there any chance for making European criminal law in the future (doesn't matter - future nearer or further)?

For nowadays, the doctrine shows us three types of possible scenarios:

1. occurence of separate system of criminal law in the EU
2. complete harmonization of criminal law in every EU memberstate
3. occurence of the system of criminal law, which will be partially European, partially national

What I think is that, the first two scenarios are nowadays not possible and are not needed either. In the European legal area exists similar system of criminal law and jurisdiction, because it's based on common rules and similar systematics and axiology, which are catalogue of protected values. Despite this, by now it's almost impossible to harmonize criminal law in every memberstate of the whole European Union. It's proven eg. by the fact how difficult it was to create one Constitution for Europe.

In my point of view it's difficult, maybe even impossible nowadays, to create uniform and complex european criminal law, which would bind in every EU states. But there exists necessity of further EU memberstates criminal law harmonization.

Actually, process of harmonization of criminal law is based on bringing closer of criminal statutes in states that are EU members. The purpose of harmonization of the criminal legislation is to cause better co-operation in fighting against some crimes, such as serioulsy dangerous crimes with cross-border character.

It's hard to say about effects of the process of harmonization of criminal law in EU, because harmonization is still in action. Effect of harmonization of

crminal law is occurence so called: european crimes corps, which is made of several dozen of crimes, which are contained in the instruments of harmonization of criminal law - conventions, common actions and framework decisions.

Now, criminal law harmonization in the EU memberstates is not officially understood as preliminary phase to absolute unification of criminal law in EU area. We cannot exclude that the final phase of harmonization in the EU will be absolute criminal law unification and will exist one, unified criminal law in all area of the EU and one „european criminal code". Than perhaps we'll be able to say that criminal law in Europe is the same, or almost the same as European criminal law. As now, this scenario looks rather distant, but I cannot finally exclude that it would be possible in the future.

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LEGAL CERTAINTY IN THE CASE LAW OF COURT OF JUSTICE OF EROPEAN COMMUNITIES

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Abstract in original language
Příspěvek se zabývá problematikou dodržování zásady právní jistoty, zejména v podobě legitimních očekávání Soudním dvorem Evropských Společenství samým ve své judikatuře. Pozornost je věnována přehodnocení dosavadní judikatury, kvalitě odůvodnění změn a osudu rozhodnutí, jejichž postavení není Soudem dostatečně vymezeno.

Key words in original language
Evropský soudní dvůr, judikatura, závaznost, změny judikatury

Abstract
Contribution deals with the topic of principle of legal certainty, mainly principle of legitimate expectations within the case law of the Court of Justice and securing of those principles by the Court itself. Contribution is focused on previous case law reconsiderations, quality of justifications and destiny of the cases which postion is not clearly stated by the Court.

Key words
European Court of Justice, case law, binding force, reconsideration

1. INTRODUCTION

There is no doubt the principle of legal certainty belongs to the main principles governing the development of the EC law. General principle of legal certainty becomes specified in many forms of derived principles, e.g. respecting acquired rights, good faith, publicity or principle of legitimate expactations.

Protection of legitimate expectations means that law should be predicable and forseeable. Principle of legal certainty takes different variations in the ECJ case law, it may be invoked as a rule of interpretation, basis for an action in tort for damages or as a basis for annulement od EC measure.[1] There have been many cases dealing with the topic of res iudicata for example. This principle should apply not only to any Community or national authority applying EC law but also - and probably mainly - to the

[1] Kent, P. Law of the European Union. 4th ed. Longman law series, 2009, p. 81.

European Court of Justice.[2] What I would like to tackle in this article is the approach of the Court to securing this principle is observed not only by EC institutions and national authorities but also by the Court itself. Court set up some conditions and rules for other institutions and authorities when dealing with the principle of legal certainty but it seems to me it was not so precise to itself.

Court´s main job is to make sure that european legislation is interpreted and applied in the same way in all EU countries, so that the law is equal for everyone. But how does this role of such Supreme interpreter go in line together with quite frequent reconsiderations and changes of the Court´s existing case law?

2. CASE LAW RECONSIDERATION

Topic of case law reconsiderations is strongly connected with effect of Court´s case law but I have no intention to continue discussion about the inter partes or ega omnes effect of ECJ decisions, res iudicata, stare decisis or obiter dictum and ratio decidendi notions here. In my mind each author has its own opinion about the binding force of the ECJ case law and there is no need to try to produce another one. For the purpose of this article only one question from the abovementioned topics would be the most relevant: Is the Court itself bound by its decisions? Clear answer would be „no", but not everything is so clear especially when so many works are devoted to that. It is generally thought that ECJ is not bound by its own case law and there appear to be no decisions where ECJ would express any sense of obligation to follow its own previous case law. Interpretation of the Court must be observed but in fact it becomes binding only in particular case. There have been some trials to give the case law erga omnes effect like in International Chemical Corporation case[3] in which ECJ argued for the so called erga omnes effect of its judgements concerning the validity of EC legislation, special issue is represented also by doctrine acte clair or acte eclaire but generally there is no legal basis for bindingness of Court´s decision towards itself. The rationale to consider the past preliminary rulings of the ECJ to be binding can be related to the requirement of uniformity in the application and interpretation of EC law in Member States.[4] And uniformity could lead to legal certainty finally.
Court of course tries to be consistent in the decision it reaches. Thus in proceedings under Article 234 in which the Court is asked to rule on point it

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[2] Barde, P., Calinska, P. Protection of legitimate expectations. [online] Dostupný z: http://potionline.net/Items/enforcement_docs/The%20protection%20of%20legitimate%20expectations%20%28Calinska,%20Barde%29.pdf

[3] Judgment of the Court of 13 May 1981, Case 66/80, SpA International Chemical Corporation v Amministrazione delle finanze dello Stato.

[4] Raitio, J. The principle of legal certainty in EC law. Springer, 2003, p. 87.

has already dealt with it will, in the absence of any suggestion that the previous case law was wrongly decided simply repeat its earlier ruling.[5]

As Advocate General Trstenjak delivered in her 2007 opinion in case Internationaler Hilfsfonds e.V. v Commission of the European Communities, the binding authority of precedent is not an inherent feature of the Union's judicial system. Although, in the interest of legal certainty and the uniform interpretation of Community law, the Community Courts endeavour in principle to give a coherent interpretation to the law, the general structure of both the Community legal order and the judicial system means that the Community Courts are not bound by their previous decisions.[6]

Then AG Trstenjak cites work of former Court´s judge Colneric who refers to the Court of Justice's practice of citing its previous case law in the interest of legal certainty and uniform application of the law. In her view, it is nevertheless inevitable that the Court of Justice occasionally has to make corrections to its own case-law. However, that step is taken only if there are pressing reasons to do so. Nowadays the Court of Justice takes care to highlight clearly any changes to its case-law.[7]

But I must ask – does the Court really do so?

3. JUSTIFICATION STANDARD

As for example Czech Constitutional Court held – reconsideration of existing intepretation represents serious intervention into legal certainty and equality of all, who expect their case will be dealt with in a same way. It does not mean there is no space for change – but any change should be very exceptional and justifying the avoidance of principle of predictability. Existing case law should not be left unnoticed, but relevant authority should face its previous decision and explain properly the reason of change. Case law reconsideration must be exceptional, reserved and only in cases really justyfying violation of the principle of predictability od the Courts´ decision. Not to commit arbitrariness in decision-making and violate the principle of legal expectations the previous case law must be dealt with in the

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[5] Jacobs, F., Andenas, M. European community law in the English courts. Oxford University Press, 1998, p. 127.

[6] Opinion of Advocate General Trstenjak of 28 March 2007, Case C-331/05 P, Internationaler Hilfsfonds e. V. v Commission of the European Communities.
What is also interesting about this opinion is that as for the parts dealing with precedental character Advocate General Trstenjak refers only to academic works, no reference to case law is made.

[7] Colneric, N. Auslegung des Gemeinschaftsrechts und gemeinschaftsrechtskonforme Auslegung. *Zeitschrift* für europäisches Privatrecht, 2005, Vol. 2, p. 229.

justification of the new decision properly and Court must show what factors led him to submit a different new view.[8]
Let us have a look at Court´s justification when case law is beeing changed. Court of Justice mostly justifies its reconsiderations by fact that interpretation of Community law must be flexible and evolving, dynamic and it must follow Community and society developments.
Different types of justifications are presented in following part of this article and not always it is possible to say such justification is satisfying. Should not there be any more concrete or procedural standards when legal certainty of the involved parties is quite hardly violated in some cases?

3.1 AKRICH V METOCK

Metock case[9] had been delivered by the Court last year. This was quite emotional proceeding where Court concluded that his previous case of Akrich[10] from 2003 must be reconsidered. In Akrich the Court stated that third country national must be lawfully resident in a Member State when he moved with his union citizen spouse in order to benefit from Community right of residence. However, in Metock the Court came to completely opposite opinion although the situation was almost identical. Here the Irish legislation implementing so called residence Directive No. 2004/38/EC came before the Court. Irish legislation required a family member of a Union citizen to demonstrate that they had been lawfully resident in another Member State prior to their entry in Ireland. This requirement was in line with Akrich case, of course. But Court held such legislation was contrary to Community law at this time. What was the reason of such radical change?
There had been five years between these two decisions and Residence directive came in force meanwhile. But, was it enough for complete reconsideration? Akrich was a judgement of 2003, not very long before implementation of a Residence directive. Directive took as a source also case law of a Court and there was no sign of such prior lawful residence condition in the Directive. On the other hand this fact was used by the Court to say that Directive provides complete list of limits. Irish legislation also had as a source Court´s case law – Akrich case. Where is the legal certainty then, when a Member State – and it was not only Ireland - implements legislation completely in compliance with Court´s case law and after few years it is held unlawful.

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[8] Decision of Constitutional Court of the Czech republic of 25 February 2008, IV. ÚS 625/06.

[9] Judgment of the Court of 25 July 2008, Case C-127/08 Metock and the others v Minister for Justice, Equality and Law Reform.

[10] Judgment of the Court of 23 September 2003, Case C-109/01, Secretary of State for the Home Department v Hacene Akrich.

The obvious implication of Metock is that those Member States will now have to rescind these rules, and return to the more liberal rules which applied prior to the Akrich judgment. Those Member States, apparently joined by others, are reluctant to do this because of concerns about irregular immigration, this has also political and budgetary implications and such situation does not contribute to legal certainty among Union citizens and even non-residents at all.[11]

Another more important question arises when we are talking about Metock case - was the justification of the case law reconsideration precise?

In point 58 Court admits that in Akrich it held, in order to benefit from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-member country who is the spouse of a Union citizen must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated. *However, that conclusion must be reconsidered. The benefit of such rights cannot depend on the prior lawful residence of such a spouse in another Member State...* To be honest there had been some sign of opening the scope ven before, Court refers to its previous judgements of Case C-459/99 MRAX or Case C-157/03 Commission v Spain, but still it leaves position of Akrich unclear.

3.2 FUTURA V BOSAL

In case Futura[12] the question was raised whether the conditions set up by Luxembourg tax authorities concerning loss relief represent infringement of freedom of establishment. The Court generously stated that "the effectiveness of fiscal supervision is an overriding requirement of general interest capable of justifying a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty".[13] Luxembourg could therefore set a condition for the deduction of losses by a non-resident of an economic link to income earned of a non-resident in Luxembourg. This is so called application of "the fiscal principle of territoriality".

But as Advocate General Alber stated a few cases later, the fiscal principle of territoriality could not be relied on in case Bosal to substantiate cohesion of the system.[14] In Bosal an argument based on the principle of territoriality

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[11] Peers, S. Statewatch Analysis. The UK proposals on EU free movement law: an attack on the rule of law and EU fundamental freedoms. [online] Dostupný z: ww.statewatch.org/analyses

[12] Judgment of the Court of 15 May 1997, Case C-250/95, Futura Participations SA and Singer v Administration des contributions.

[13] Judgment of the Court of 15 May 1997, Case C-250/95, Futura Participations SA and Singer v Administration des contributions, point 31.

[14] Opinion of Advocate General Alber of 24 September 2002, Case C-168/01, Bosal Holding BV v Staatssecretaris van Financiën.

has also been relied upon by the Netherlands government in order to justify the difference in tax treatment under the 1969 Law. According to Advocate General Futura Participations involved a permanent establishment of a foreign company which was located in Luxembourg and subject to tax there. Under the Luxembourg rules, the carrying forward of losses upon taxation in Luxembourg was subject to the condition that those losses should be related to the profit made by the permanent establishment itself, which was not case in Bosal also according to Court.

The Court therefore rejected using the principle in Bosal although it provided no sign in its justification why the costs of financing a branch may be allocated to the correct jusrisdiction as in Futura whereas the exact same costs of financing of the exact same investment but just in the legal form of subsidiary must be allocated tot he incorrect one as in Bosal. Doubts about relations between those two judgements thus remain.[15]

3.3 BACHMANN V DANNER

Case of Mr. Bachmann[16], a German national employed in Belgium, dealt with refusal od the deduction from his total occupational income of contributions paid in Germany pursuant to sickness and invalidity insurance contracts and a life assurance contract concluded prior to his arrival in Belgium. In case Bachmann the Court accepted that the measures there in issue were proportionate in that it was not possible to ensure the coherence of the Belgian system by less restrictive measures. In Bachmann the cohesion was expressed by a connection between deductibility and liability to tax.

Although the Court was very clear in explaining the thinking behind the acceptance of the cohesion of a tax system as justification, since this judgment, in fact every party have unsuccessfully invoked this justification in different circumstances where no direct link was found by the ECJ. Thus, the Court found no direct link in Baars case[17] and rejected such link also in

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[15] Terra, B., Wattel, P. European Tax Law. Springer, 2002, p. 132.

[16] Judgment of the Court of 28 January 1992, Case C-204/90, Hanns-Martin Bachmann v Belgian State.

[17] Judgment of the Court of 13 April 2000, Case C-251/98, C. Baars and Inspecteur der Belastingdienst Particulieren/Ondernemingen Gorinchem, point 37 and following:

The Court of Justice has held that the need to safeguard a tax system's cohesion may justify rules that are liable to restrict the fundamental freedoms (Case C-204/90 Bachmann [1992] ECR I-249 and Case C-300/90 Commission v Belgium [1992] ECR-305). However, that is not the case here.

First, there is no double taxation of profits, even in economic terms, because the tax at issue in the main proceedings is not charged on the profits distributed to shareholders in the form of dividends but on the assets of the shareholders through the value of their holdings in the capital of a company. Whether or not the company makes a profit does not in any event affect liability to wealth tax.

Danner case. On the other hand Danner case represents at the same time the confirmation of Bachmann being a good law.

In Danner case the Finnish rules became in question. Finnish authorities were aware of the judgements in Bachmann or Commission v Belgium but they were uncertain whether according to those judgments overtly discriminatory rules might be justified in order to preserve fiscal coherence. This is clear example of uncertainty left by ECJ judgements even on important issues.[18] Such type of uncertainty can cause governments, companies and citizens substantial economic damage, of course.

The reason of such uncertainty was caused mainly by the fact that in previous cases Court successfully avoided stating whether the rules in issue were discriminatory, and has examined grounds of justification not expressly mentioned in the Treaty. Right Bachmann is the example of that line of cases. In both judgments the discriminatory nature of the measures in issue as regards freedom to provide services was neither examined nor even mentioned and the measures were held to be justified by the need to preserve the coherence of the Belgian tax system, a justification not expressly mentioned in the Treaty and not previously recognised by the case-law.[19]

But what the Court stated in Danner case, it again rejected tax coherence stating only that *there is no direct connection between the deductibility of insurance contributions and the taxation of sums payable by insurers.*[20]

Except for this brief explanation at the same time the Court held: *A Member State is therefore in a position to check whether contributions have actually been paid by one of its taxpayers to an institution coming under the authority of another Member State. In addition, there is nothing to prevent the tax authorities concerned from requiring the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for deducting contributions provided for in the legislation at*

Second, in Bachmann and Commission v Belgium, cited above, there was a direct link between the deductibility of pension and life assurance contributions and the taxation of the sums received under those insurance contracts, and it was necessary to preserve that link in order to safeguard the cohesion of the tax system in question. There is, however, no such link in the present case, which concerns two separate taxes levied on different taxpayers. It is therefore irrelevant, for the purposes of granting shareholders a tax allowance in respect of the wealth tax, that companies established in the Netherlands are subject to corporation tax in the Netherlands and that companies established in another Member State are not.

[18] Opinion of Advocate General Alber of 21 March 2002, Case C-136/00, Rolf Dieter Danner, point 39.

[19] Opinion of Advocate General Alber of 21 March 2002, Case C-136/00, Rolf Dieter Danner, point 36.

[20] Judgment of the Court of 3 October 2002, Case C-136/00, Rolf Dieter Danner.

issue have been met and, consequently, whether to allow the deduction requested...[21]

So, as Multari say, it seems the concept of coherence of the tax system is a potentially valid justification of a restriction whenever a direct link reflecting a complementary relation between a tax advantage and a tax liability can be found. Another recent case, Krankenheim judgment,[22] can be seen as supporting consistency of ECJ in approaching the coherence of the tax system as justification where properly invoked.[23]

3.4 EMMOTT V FANTASK

Another example of diverging case law is representedy by case Emmott and Fantask. To begin this issue it is possible to refer to Advocate General Ruiz-Jarabo Colomer opinion in case C-30/02 where he states it is not contrary to Community law for a Member State to resist actions for repayment of charges levied in infringement of a directive by relying on a time-limit under national law which is reckoned from the date of payment of the charges in question even though, at that date, the directive in question had not yet been properly transposed into national law. At the same time Advocate General states that only the judgment in Case Emmott[24] maintained the opposite view although other later judgments have abandoned it.

It may sound Emmott is the exception but in fact this had been the „previous case law“ which was replaced. Emmott says that where an individual could not start national proceedings due to bad implementation of a Directive by Member State, national terms should not begin before correct transposition. Emmott case was delivered in 1991, the other diverging cases, case C-338/91 Steenhorst Neerings and case C-410/92 Johnson followed later.

Fantask judgement was next one of those that reversed Emmott decision because of its broad and generous scope which was critised by Advocate general Jacobs in his opinion in Fantask.

The applicants and the Commission in case Fantask considered that on the basis of Emmott a Member State may not rely on a limitation period under national law as long as the Directive is not properly transposed into national law. But Court held ...*as was confirmed by the judgment in Case C-410/92...*

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[21] Judgment of the Court of 3 October 2002, Case C-136/00, Rolf Dieter Danner, point 50.
[22] Judgment of the Court of 23 October 2008, Case C-157/07 Finanzamt für Körperschaften III in Berlin v Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH.
[23] Multari, D.A. Loss recapture rule and coherence of the tax system: the Bachmann theorem in the recent. Krankenheim case. [online] Dostupný z: ials.sas.ac.uk/postgrad/courses/docs/MA_Tax_Working_papers/

[24] Judgment of the Court of 25 July 1991, Case C-208/90, Theresa Emmott v Minister for Social Welfare and Attorney General.

it is clear from Case C-338/91 (Emmott) that the solution adopted in Emmott was justified by the particular circumstances of that case, in which the time-bar had the result of depriving the applicant of any opportunity whatever to rely on her right to equal treatment under a Community directive.[25] So again the justification of the non-application of previous case law is based only on the fact that circumstances of the cases differ.

4. ANY IMPROVEMENT POSSIBLE?

There are of course more cases that can be analyzed, just when we look at the old example of Keck case compared to casses Dassonville and Cassis de Dijon and what the justification of the Court was reconsideration of the previous case law in Keck was. In point 14 of its judgement the Court stated: *In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter*.[26]

The reasons were therefore purely political in that case and Court departed from its existing case law quite decently. It stated that it considered it necessary to re-exaimne and clarify its case law on this matter and concluded contrary to watt has previously been decided. However the Court did not make clear precisely what it was overruling. The effect of its judgement was therefore to leave the status of its previous decision unclear.

The same we can say about the cases mentioned above. What happen to that case law that becomes obsolete? It the Court does not state clearly it cannot be used any more or when it can be used it may happen it rises from the dead even when it is not expected. I also understand that the Court sometimes regrets what it had done but if there is no clear status of the case law it may lead to arbitrariness at any moment.

For example above mentioned Fantask case is the one of quite vague and brief justification which does not bring much legal certainty. There is also question to what extent reasons of political, spcial or economical changed should play role in case law changes.

Of course, one must differ between reconsiderations which completely change previous case law and those that can be really realted to the specific circumstances of the case. Some reconsiderations are ven necessary to make celarer previous statements but as I wrote above change of the case law is of

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[25] Judgment of the Court of 25 July 1991, Case C-208/90, Theresa Emmott v Minister for Social Welfare and Attorney General, point 26.

[26] Judgment of the Court of 24 November 1993, Joined cases C-267/91 and C-268/91, Bernard Keck and Daniel Mithouard, point 14.

a high importance whoch probably could deserve some special procedural standard, eg. decisions should be made by certain number of judges in plenum, some strucutre of decision can be set to make clear what and why is being overruled or whyt does the previous law still remains to be a good law. Although it is almost impossible to affect wide range of circumstances that may occur, still some effort can be made to reach uniform intepretation that can be relied on both by authorities or instiituions and citizens.

5. CONCLUSION

To summarize, I see two main problems when Court departs from ehat has previously been decide – at first the role of ECJ as producer of uniform interpretation of EC law contrasting with the second role of Court deciding cases binding only inter partes. Next problem represents frequent uncertainty about the relationship between the diverging judgements.

With the emerging body of law falling under Court´s jurisdictions according to the Lisbon treaty more such situations may arise and I think we deserve more legal certainty from Court itself.

Court always says that community law must be flexible and evolving , dynamical and must fit to the evolution of community and society. Also the intepretation cannot be static and decisions of the Court must by dynamic – but when we say dynamic, does not it rather mean they could be used, there is gap between the role as federator of intepretations and decision maker in inter partes cases – and this is not easy to overlap

Of course, being aware of case law and adhering to it, and at the same time realizing its transient quality, is very challenging. It is not easy to differentiate between case law which still applies to present conditions and case law which does not. Clearly, therefore, decision making requires a great deal of judicial acumen and background knowledge.[27]

To finalize, as advocate general Toth stated in his huge study[28] the difficulty of theorizing any issue about Community law is the fact ignorong that Community law as a new legal order of a sui genesis type with Court of Justice exercising a unique jurisdiction, requires sui genesis solutions. The role of the Court is very hard without any doubt, but does this prevent us to desire a bit more of legal certainty for twenty-seven or even more Member States and millions of Union citizens?

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[27] Raitio, J. The principle of legal certainty in EC law. Springer, 2003, p. 86.

[28] Toth A.G. The Authority of Judgements of the European Court of Justice: Binding Force and Legal Effects. Yearbook of European Law, 1984.

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THE HIERARCHY OF THE NORMS IN THE INTERNATIONAL LAW SYSTEM

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Abstract
In the international law system hierarchy of the norms is recognized and accepted; without being put on the doubt sign the equality of the international law sources; such as are covered by the article 38 from the International Court of Justice Statute (C.I.J.); preeminence of a source to another being excluded. International law was consolidate in a hierarchy in top of which are situated imperative norms – jus cogens – of nature to validate the contrary rules; regardless of the formal source in which them find their expression.

Key words
Hierarchy of norms; hierarchy of the law sources; public international order; imperative norms; jus cogens

1. GENERAL INTERNATIONAL LAW

Public international law is fundamentally different by the intern law and default by any component branch of that. In the development of the public international law doesn't exist superior authorities of the states with legislative powers. The regulations imposing conduct rules in the international society and having like receiver. The states but others subjects of international law also are result of a process which develops under the base of some principles totally different from the intern legislative system.

Usually in the intern law legislative power belongs to the parliament invested with special powers of development of the laws applied into a given territory and to a given population having an obligatory character.

In the international law the states or the groups of states are the ones which o the base of the express free will agreement develop law rules; rules destined to the same states; to which are imposed certain conduct rules in the international society.

An organized structure on the top of the states with legislative powers doesn't exist. Precisely why it is affirmed that „in the international juridical order the state is in the same time author but also receiver (subject) of the law rules"1

[1] Raluca Miga-Beşteliu, Public International law, Ed. All Beck Bucureşti 1997, pag.4

International public law is regarded mostly like an ensemble of rules including the specific elements. What imposes an emphasis on defining the public international law is his character of unitary normative system. International law represents also a complex of juridical rules created initially like a customary law and later like a conventional law with specificity well determinate2.

Like unitary normative system; international law was consolidated under the influence of the political action; in time; within its being centralizing phenomena which allows us today to speak about a general international law.

Undoubted centralizing grade of the international normative system is lower comparative with the one of the state intern system. General rules instead; keep their importance also in the international system; the rules developed by the regional subsystems being in accordance with the general international law.

General international law it is consist of those rules which regulates fundamentals material such as politically-juridical organization of the system and also the fundamental rights of the juridical order subjects. Also; those rules are characterized through stability in time; their modification imposing special procedures.

2. THE HIERARCHY OF THE LAW SOURCES AND THE HIERARCHY OF THE RULES IN THE INTERNATIONAL JURIDICAL SYSTEM.

Considering that the authority of the O.N.U. Book such as the International Court of Justice Statute and in mainly universal vocation of .ON.U.; we report in the field of international law sources; to enumerate form the article 38 of the C.I.J. Statute; according which the main sources of international law are the treaty; the custom and the law general principles (art. 38 lit.a;b) to which are added the auxiliary means of determination of law rules; namely sentences and international law doctrine.

In the article 38 from the C.I.J. Statute can't be surprised a hierarchy of the international law sources. That's why the doctrine has promoted the idea of equality between the main international law sources; being said like example that "an international treaty doesn't have a priori a superior value over the one of a unilateral document or over a customary rule".3

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[2] Hans Kelsen – Theorie pur du droit, Paris, Dalloz 1962, pag. 425

[3] Philippe Blancher – Droit des relationes internationales, Ed. Lexis-Nexis Paris 2006, pag.9

Regarding the law sources can be concluded that in the positive international law doesn't exist a recognizing rule of the formal source preeminence over another; here not being an hierarchy of the formal sources. Totally different is the situation regarding the international law rules.

Any rule of international law which implies the obligation to respect certain conduct rule establish through the will agreement of the states will be respected regardless the ways which express her. An international rule can be analyzed after the importance of the domain but also after the scale of the will agreement necessary to his adoption. Or; from that point of view; the doctrine promoted the idea of the existing of a hierarchy between different categories of norms belonging to the international law. The existence of that hierarchy implies the deepen of some aspect related by the relation between the provisions of the U.N. Charter and the dispositions of others treaties; as that between the general treaties and the bilateral or regional ones; also will be taken in view the rapport treaty-custom and the statute and the importance to the jus cogens norms.

International concerns for peace and security in relations between states has based the idea of the rule of the UN Charter provisions on treaties concluded by various subjects of international law.

Article 103 of the UN Charter emphasizes that "in case of conflict between the obligations of members under this charter natiunilro united and obligations under any international agreement; obligations under the Charter shall prevail". This article was inspired by Article 20 of the League of Nations Covenant which contained the provision that: This pact repeals all obligations and agreements inconsistent with its provisions. Primary role of regulations contained in the UN Charter in relation to those contained in any other international agreement is in one of the strongest arguments in promoting the idea of the existence of a hierarchy among many categories of rules of international law.

Hierarchy of norms of international law; so commented but finally accepted in theory but is supported by conventional plan and agreement of will of international community members who promoting the interests of the entire humanity have created the premises of the International Public Order; which currently presents a complex and dynamic configuration whose existence is recognized and accepted as a guarantee of balance in the conduct of international relations. It is currently regarded as the "formation of new rules of international law; development and prediction of existing regulatory process is a complex contribution of all the ad states; using the

many means by which legal; the spring meant to achieve and will express agreement on the regulation of various issues and areas of cooperation4".

3. PUBLIC INTERNATIONAL ORDER.

Accepting the existence of a hierarchy between the rules of international law and recognizing the role and importance of public order established by the international community is to remember that this order has been established and are consolidated in those rules-- meaning principles and rules-- arising from proper and essential values of the Humanity and which is presented "like an amount of principles and rules of which applying would be so important for the international community in his ensemble; that any unilateral action or agreement which would be contrary to those principles or rules would be witout juridical force".5

It is obvious that through that configuration of the international public order; the rules hierarchy in the international law is undeniable; knowing that the main rules defends the most important values of the international community in his ensemble; all the states having a juridical interest of protect those values.

In the hierarchy of the international rules was formed an ensemble of rules with strict obligatory character; in which application doesn't admit any derogation and which in rapport with the all International community impose the respecting of some obligations with erga omnes character. Taking in view that any international rule is obligatory; that distinct category is consecrated in the public international law through the term imperative rules; what suppose near the strict obligatorily the categorical interdiction of any derogation6. This it is the reason for which it's considered that the object of a treaty is illicit if is contrary to a rule of imperative nature7. That ensemble of rules has based in the international law the concept of jus cogens; of which importance and resonance in the international law system doesn't delayed to be recognized both in doctrine and with prudence (sometimes objectify justified) in the international jurisdiction. Regarding the place in the imperative rules hierarchy was said that "the term of jus cogens signifies the imperative law; a rule of jus cogens

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[4] Dumitra Popescu, Adrian Nastase, Florian Coman – Public International law, Casa de Editura si Presa „Sansa" SRL, Bucuresti, 1994, pag. 46

[5] H. Mosler – The international Society as a Legal Community, RCADI 1974 –IV, pag. 34

[6] Dumitra Popescu – Public International Law, Ed. Universitatii Titu Maiorescu 2005, pag. 47

[7] Grigore Geamanu – Public International Law volume II, Ed. Didactica si Pedagogica, Bucuresti, 1983, pag.153

occupies for that reason the highest hierarchic position over the all others rules and principles"8.

Initially the concept of jus cogens belonged to the national law; the reason which was at the base of his apparition being the protecting of intern public order9.

Jus cogens was constitute in time like an ensemble of rules which doesn't admit any kind of derogation between particulars; any violation of such rule being equivalent with the put in danger of the internal public order. Consequential; any convention concluded without respecting the exigencies imposed by a rule of jus cogens will be without effects; being declared invalid.

The notion of jus cogens will be taken by the international law from the intern law; his evolution in the international domain from the origins and till the moment of the consecration of the concept through the codification accomplished by the Convention from Viena to the treaty right from the year 1969; scrolling in time over several centuries.

4. IMPERATIVE NORMS - JUS COGENS – IN THE HIERARCHY OF THE INTERNATIONAL NORMATIVE SYSTEM.

The adoption in 1969 of the Convention from Viena to the treaty rights has represented the accomplished of a marked objective in the development process of the international law.

The importance of that Convention is more highlighted; if we take considering the historical context in which took place both the project preparation by the Commission of International law and the negotiations from the Conference from Viena. Negotiators; delegates from the part of some states belonging of antagonistic social-politic systems; have managed beyond the said different positions; to elaborate a juridical regime for the most important source of the international law – the treaty – that instrument with fundamental role in the conduct of international relations.

The Convention also has the merit to include the first formal recognition of the concept of jus cogens initiating the process of its progressive development in international law system.

Consecration to plan conventional concept of mandatory rules of general international law as defined in Article 53 of the Convention is not the result of inspiration of the moment and no short term effect of factors in the

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[8] Cherif Bassiouni – Reprimer les crimes Internationaux: jus cogens et obligatio erga onmes – Comite International de la Croix-Rouge – Reunion d'experts Geneva 1997 pag. 31

[9] Joe Verhoeven – Droit International Public, Ed. Larcier 2000, pag. 338

process of promoting the interests of some Member of the International Communion. Over domestic law; the concept of mandatory rules has come a period of evolution in international law; its development is supported both by doctrine and practice International Member. Relationship of mutual influence; as the company confirmed if the international high society at a time rules and the hierarchy problem depending the importance of regulatory relations and the international role in determining public policy.

Those views; expressed in the doctrine; which support equality between the main sources of international law as they are set out in Article 38 of the Statute par.1 International Court of Justice remain valid but without excluding the possibility of establishing a hierarchy between different categories of international rules.

There are so all norms of international law in a separate category of rules whose specificity separates them in terms of authority; mandatory rules; from which there can be no derogation. Recognized in a conventional plan this category of rules circumscribing the concept of jus cogens

Any rule of international law developed on the basis of freely expressed will of the Agreement obliges parties to a certain conduct. They were so binding; and their violation may attract penalties under.

Therefore in order to emphasize the specificity; both the Vienna Convention of 1969; and literature and Romanian foreign but use the notion of mandatory rules that are characterized by what belongs to why international law is generally recognized and accepted by the Community International and from a whole or not allowed any derogation. Any treaty in conflict with mandatory rules is a void and room effects cease. Mandatory rules occupy a position of major importance in the international regulatory system; they influence the configuration and consolidation of public policy at the International Society.

On the other hand; we can not ignore the doubts expressed by a large part of the doctrine of international law or in connection with the possibility to identify the mandatory standards or about their effectiveness; some opinions even sustunand these rules would endanger safety and stability of treaties.

But the majority view emphasizes the positive impact of mandatory rules in international law and practice also confirmed the international tribunals.

International instances such as the International Criminal Tribunal for former Yugoslavia10; the European Court of Human Rights11; International

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[10] The case Anto Furundzija, convicted of TPIY for torture; international norms which incriminates the torture being considered norms of jus cogens

[11] Al Adsani v. United Kingdom Court of Human Rights Application no. 35763/97, 21 November 2001, www.echr.org

Court of Justice12 pronounced sentences that was invoked the concept of jus cogens;emphasizing the difference between the obligations of a State against another State of any State and the International Community towards; the finally having a erga omnes character; them being regulated through imperative norms.

The development of the concept jus cogens in the public international law is closely related to the evolution of the international society and is the result of the interdependent complexes put on the job of Humanity and of the common patrimony values of that.

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[12] Constantly CIJ has statute that is about an obligation erga omnes then when a state assumes an obligation reported to the ensemble of the international community.

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PERSONAL DATA PROTECTION AS TOPICAL EU LAW PROBLEM

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Abstract in original language
V minulosti převážně platilo, že právo duševního vlastnictví podporuje ochranu soukromí. Kupříkladu autorské právo chrání soukromí autora a skutečných osob, které jsou rozpoznatelné v literárním příběhu, tím, že zamezuje volné distribuci díla. V současnosti můžeme vidět změny v tomto vztahu. Běžně ochrana soukromí omezuje svobodu projevu. V našich souvislostech je ale určující, že příliš snadný přístup ke komunikačním údajům týkajícím se připojení k internetu, může znamenat ohrožení svobody projevu.

Key words in original language
Ochrana soukromí, ochrana osobních údajů, ochrana duševního vlastnictví, Listina základních práv Evropské unie, Úmluva o ochraně lidských práv a základních svobod, směrnice 2006/24/ES, uchovávání údajů, Malone v. Spojené království, Klass v. Spolková republika Německo, Promusicae, LSG.

Abstract
In the past, it was predominantly true that the intellectual property laws were supporting the protection of privacy. For example, copyright protects the privacy of the author and the actual people who are recognizable in the literary story by preventing the free distribution of works. Nowadays, we can see changes in this relation. Normally, the protection of privacy interferes with the freedom of expression. But in our context, the too easy access to Internet traffic data could mean a threat to the freedom of expression.

Key words
Privacy protection, personal data protection, protection of intellectual property, Charter of Fundamental Rights of the European Union, Convention for the Protection of Human Rights and Fundamental Freedoms, Directive 2006/24/EC, data retention, Malone v United Kingdom, Klass v Federal Republic of Germany, Promusicae, LSG.

1. INTRODUCTION

In the past, it was predominantly true that the intellectual property laws were supporting the protection of privacy. For example, copyright protects the privacy of the author and the actual people who are recognizable in the literary story by preventing the free distribution of works.

Nowadays, we can see changes in this relation.

James Whitman said: "American privacy protections are at their conceptual core, protections against the state, while European privacy protections are, at their conceptual core, protections against the media and the general public."[1]

We do not leave out the efforts of States to intensify control over their citizens which is justified by the fight against the phenomena such as terrorism and organized crime, or unwelcomed media attention to celebrities.

But we have to stress that the most active private players in the field of attempts to gain access to personal data are those associated with the issue of intellectual property rights. These various organizations fight in particular against illegal software copying and distribution or infringement of copyright in musical works (hereinafter referred to as "representatives of right holders").

This is because the electronic data can be easily spread around the world and – even if the unit price of illegally used intellectual property rights can be small – the sum at stake is substantial.

Nowadays, there is a tension between the intellectual property rights and the personal data protection. Owners of the intellectual property go by the Francis Bacon's paraphrased statement: Knowledge is wealth. Personal data protection makes it more difficult.

Organized interests of the owners of intellectual property rights are clearly visible at all levels of decision-making: the sectoral organization WIPO, the WTO, the European Union institutions, even national legislative processes. Every day we see their more or less open presence in the media space.

They also use the court proceedings with the growing vehemence.[2]

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[1] *Whitman, J. Q. Human dignity in Europe and the United States: the social foundations, p. 121. In: Nolte, G. (ed.) European and US Constitutionalism. Cambridge: Cambridge University Press, 2005.*

[2] *See Virgin Records America, Inc v. Thomas, Available Case Documents. On line http://news.justia.com/cases/featured/minnesota/mndce/0:2006cv01497/82850/*

2. INTELLECTUAL PROPERTY RIGHTS PROTECTION THROUGH CRIMINAL JUSTICE AND DATA RETENTION DIRECTIVE

Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (hereinafter referred to as the "DRD") is one of the most controversial parts of EU law, precisely in view of its attachment to privacy.

This directive wants to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law (Art. 1, paragraph 1 DRD).

It shall not apply to the content of electronic communications, including information consulted using an electronic communications network. (Article 1, paragraph 2 DRD).

The DRD is applicable in the field of protection of intellectual property if the (perceived or real) offense has a criminal dimension.

This criticized directive refers to Article 95 of the Treaty establishing the European Community. Ireland submitted that the choice of Article 95 TEC as the legal basis for the Directive is fundamentally flawed.

The Irish government filed its case in the European Court of Justice on 6 July 2006 as C-301/06.

On 2nd February 2009 The European Court of Justice in issued that the DRD: "regulates operations which are independent of the implementation of any police and judicial cooperation in criminal matters. It harmonizes neither the issue of access to data by the competent national law-enforcement authorities nor that relating to the use and exchange of those data between those authorities. Those matters, which fall, in principle, within the area covered by Title VI of the EU Treaty, have been excluded from the provisions of that directive, as is stated, in particular, in recital 25 in the preamble to, and Article 4 of, Directive 2006/24/EC."

The Court summarized that in light of its substantive content, Directive 2006/24/EC relates predominantly to the functioning of the internal market.

In other words, the European Court of Justice gave emphasis on the fact that the addressee of the obligations, market participants, i.e. "service providers", and it put into the background that the data are intended for security forces.

But this is in terms of the standard scheme of regulation rather controversial. For example the obligation of a company to release proof to the court (which is comparable) in criminal proceedings, is ranked in the criminal procedure and not in the company law or the public economic law.

The decision does not consider whether the DRD is in breach of fundamental rights.

As the European Court of Human Rights stated in Malone v United Kingdom, the records of metering contain information, in particular the numbers dialed, which is an integral element in the communications made by telephone. Consequently, release of that information to the police without the consent of the subscriber also amounts, in the opinion of the Court, to an interference with a right guaranteed by Article 8.[3]

The Lisbon Treaty has acknowledged the Charter of Fundamental Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms as a reference framework.

Sometimes it appears that the Convention No. 108 for the Protection of Individuals with regard to automatic processing of personal data should be applied by the European Court of Human Rights. Rolv Ryssdal, former President of the European Court of Human Rights, advocated that the Court should not ignore the fundamental principles of Convention No. 108. They constitute a sectoral implementation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms in the context of automatic processing of personal data and they can help with the interpretation of those obligations.[4]

Therefore the DRD has to succeed in the test of proportionality, which consists of the criteria of suitability, necessity and importance of the conflicting rights.

The DRD refers to constitutional values (values of primary EU Law), i.e. public order and safety. According to case law on the fundamental freedoms the argumentation by the public order and safety can be applied only if there is a genuine and sufficiently serious threat affecting one of the fundamental interests of society. See, for example, Case of 29 April 2004 Orfanopoulos and Oliveri (C-482/01 and C-493/01, ECR I 5257, paragraph

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[3] *See Malone v United Kingdom (Application No 8691/79) ((1984) 7 EHRR 14; Series A No 82, paragraph 84).*

[4] *Ryssdal, R. Data Protection and the European Convention on Human Rights, in Data Protection, Human Rights and Democratic Values, Proceedings of the 13th Conference of Data Protection Commissioners held 2–4 October 1991 in Strasbourg, Strasbourg: CoE, 1992, p. 42.*

66), to the free movement of persons and of 14 March 2000, Eglise de Scientology (C-54/99, ECR I 1335, paragraph 17), to the free movement of capital.

The DRD is suitable for its purpose since there is no doubt that electronic communications are eligible to be a tool for criminal activities. But this does not mean that it can not be circumvented, and quite easily.

The DRD may be considered necessary if its purpose can be achieved by alternative means of regulation which limit the constitutionally protected values in smaller extent. This legislative solution is sustainable, because data can not be effectively required later without retention.

With regard to the proportionality in the strict sense, it is necessary to state that there were some critical calculations:

„Suppose there will be an obligation to retain all traffic data for 36 (in fact most 24) months, while an evaluation shows that only 2% of these data are being demanded for inquiries in criminal cases. Of that 2%, it turns out, only 10% proves to be really necessary as proof in the case, be it as direct evidence, or as a trace to such evidence. In that case, only 0.2% of all stored data are necessary for law enforcement. In that case, 99.8% of all these data would be stored on behalf of the useful 0.2%. Let us, for the sake of this example, continue to suppose that half of the 2% of data would be requested within the first week, and 9/10 within the first month. In that case during 35 (in fact most 23) months data would be stored on behalf of the 0.02% that would be useful in a criminal court case.“[5]

The statistics held in accordance with article 10 of the DRD could allow a verification of these considerations.

The fact that the proportion of usable data will be near to zero, of course, suggests that the proportionality test is not fulfilled. On the other hand, we can shorten a retention time but other adjustments go against the principle of non-interception of the content of communication (Article 1, paragraph 2 DRD).

The content remains inaccessible only in certain cases. If the requiring authority lawfully found the content of communications, provision incorporated in the article 1 paragraph 2, has not practical implications.

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[5] *Invasive, Illusory, Illegal, and Illegitimate: Privacy International and EDRi Response to the Consultation on a Framework Decision on Data Retention. On line www.privacyinternational.org/issues/terrorism/rpt/responsetoretention.html*

But it is already comparable to the wiretapping (and not only the metering).

The DRD does not address the question of how the communication party learns that the data were transmitted to the police. This can not be harmonized on the basis of Article 95 EC.

In connection with the wiretapping, there is a general obligation to provide information (with exceptions for particularly serious situations) based on the case law of the European Court of Human Rights, specifically the judgement of Klass v Federal Republic of Germany, which states: The Court points out that where a State institutes secret surveillance of the existence of which remains unknown to the persons being controlled, with the effect that the surveillance remains unchallengeable, Article 8 could to a large extent be reduced to a nullity. It is possible in such a situation for an individual to be treated in a manner contrary to Article 8 (art. 8), or even to be deprived of the right granted by that Article (art. 8), without his being aware of it and therefore without being able to obtain a remedy either at the national level or before the Convention institutions.[6]

Some member states have experienced delays in transposition of the DRD (Austria, Greece, Ireland, the Netherlands, Poland and Sweden). In relation to the procedures of the European Commission and the European Court of Justice, there will be the possibility to evaluate this directive from the perspectives of the protection and promotion of European human rights standards.

The European Court of Human Rights is self-restrained to the legal acts of the European Union. His criticism of procedures under the DRD would oblige Member States to choose between the breach of the DRD and the Convention. But it might later lead to a change of the DRD.

The mere availability of data raises other people's (which are unauthorized according to the original intention of the legislature) efforts to gain access to them.

3. CIVIL PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

In the recent past, under the preliminary ruling procedure the European Court of Justice issued two decisions, which interpret the obligation to surrender internet traffic data to representatives of right holders: judgement of 29 January 2008 Promusicae (C-275/06, no. ECR. I p.

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[6] *Klass v Federal Republic of Germany (Application No 5029/71) ((1979-80) 2 EHRR 214, paragraph 36).*

271) and judgement of 19 February 2009 LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v. Tele2 Telecommunication GmbH (C-557/07).

In the main proceedings Productores de Música de España (Promusicae), a non-profit-making organization of producers and publishers of musical and audiovisual recordings, requested against Telefónica de España SAU, the disclosure of informations identifying the users who have allegedly violated copyright by "providing access in shared files of personal computers to phonograms in which the members of Promusicae held the exploitation rights". Promusicae wanted to bring civil proceedings against these users.

Telefónica refused to release such data with reference to Article 12 of Law 34/2002 on information society services and electronic commerce which stated: "The data shall be retained for use in the context of a criminal investigation or to safeguard public security and national defense, and shall be made available to the courts or the public prosecutor at their request."

The national court found that in Spain the copyright infringement was a crime only if it was committed for profit.

In accordance with the Advocate General's opinion the European Court of Justice ruled that:

European directives "do not require the Member States to lay down an obligation to communicate personal data in order to Ensure effective protection of copyright in the context of civil proceedings, in a situation in which a non-profit-making organization of producers and publishers of musical and audiovisual recordings has brought proceedings seeking an order that a provider of internet access services to the organization disclose the identities and physical addresses of certain subscribers, so as to enable civil proceedings to be brought for infringement of copyright."

Similarly, as to Articles 41, 42 and 47 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) ... "do not contain provisions which require those directives to be interpreted as compelling the Member States to lay down an obligation to communicate personal data in the context of civil proceedings".

The European Court of Justice emphasized that "However, Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the

other general principles of Community law, such as the principle of proportionality." (see paragraphs 60, 70, operative part)

The European Court of Justice dealt with the legal framework before the transposition of the DRD and it did not comment the Advocate General's opinion which stated that: "It is already doubtful whether that exception (incorporated in the article 6(2) of Directive 2002/58) allows any storage at all of particulars concerning the persons to whom and times when a dynamic IP address was assigned. That information is not normally needed for the purpose of billing the access provider's charges."[7]

States have been allowed a relatively wide margin of appreciation with respect to the formulation of criteria which are relevant for determining when the internet traffic data can be disclosed and the privacy protection will not be infringed. There should be included among others for example: the amount of damages, the profitability of infringement of intellectual property, its organization and length of duration, respectively the degree of probability that the infringement occurred.

As long as the representative of right holders does not identify the alleged offenders, he can not determine the total amount of damage caused by a single offender's repeated violations of intellectual property rights. If dynamic IP addresses are used, the access provider assigns randomly to its customers an address from its quota of addresses every time they access the Internet.

The focus of this examination would remain on the service providers (the telecommunications companies). They are at risk to make a mistake in this fragmented field and suffer the consequences. There is a topic for discussion, whether the national authorities for the protection of personal data should decide on the uncovering of the data.

The order of 19 February 2009 LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v. Tele2 Telecommunication GmbH, (C-557/07) is based on similar factual and legal circumstances.

LSG is a collecting society which "enforces as trustee the rights of recorded music producers in their worldwide recordings and the rights of the recording artists in respect of the exploitation of those recordings in Austria". Tele2 is an Internet access provider which assigns to its clients (dynamic) IP addresses.

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[7] *Opinion of Advocate General delivered on 18 July 2007. Productores de Música de España (Promusicae) v Telefónica de España SAU. Case C-275/06. On line http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006C0275:EN:NOT*

Tele2 refused to disclose the requested informations about its clients.

Tele2 claimed that it is not an intermediary within the meaning of Paragraph 81(1a) of the Austrian Federal Law on Copyright or Article 8(3) of Directive 2001/29, because "as Internet access provider, it indeed enables the user to access the Internet, but it exercises no control, whether de iure or de facto, over the services which the user makes use of". It also stressed that the personal data protection should prevail over the right to information and the copyright.

The European Court of Justice referred in respect of the balancing conflicting rights to the judgement Promusicae.

Furthermore, the European Court of Justice established that "Access providers which merely provide users with Internet access, without offering other services such as email, FTP or file-sharing services or exercising any control, whether de iure or de facto, over the services which users make use of, must be regarded as 'intermediaries' within the meaning of Article 8(3) of Directive 2001/29".

These conclusions do not harm the service providers, since they will not be held responsible for infractions of the rules by its clients.

4. CONCLUSIONS

The requirements of representatives of right holders are partially contradictory. They seek the enforcement of privacy rights in favor of people from the entertainment industry which they represent and who are dependent on publicity. At the same time they want the public to give up the right to privacy for their economic interests.

If there is consensus that intellectual property rights should be protected legally (although they refer to trivial content), procedural mechanisms to enable their enforcement must be created.

If the presumed infringement of intellectual property rights has a specified criminal dimension, the DRD will be applicable. This act is widely criticized. So far it has not been verified for compliance with the standards of human rights laid down in the documents of the Council of Europe and the European Union.

Representatives of right holders are in more difficult situations where the offense is civil and not criminal. In these cases, the law of a Member State can exclude an obligation of the service provider to disclose Internet traffic data for use in court proceedings.

If the law of a Member State authorizes the disclosure of those data, the personal data protection (within the meaning of the Charter of

Fundamental Rights of the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms) has to be respected.

Representatives of right holders are seeking more effective ways to support their interests. A proposal of the incorporation of the right to cut off users from the Internet without judicial involvement was rejected in France. Later it was promoted into the forthcoming Telecoms Reform Package. This legislative idea was also withdrawn from it.

To some extent the DRD is based on the presumption of guilt too. But here it is important that the procedures referring to the DRD is not out of the full judicial review. The European Court of Justice has left a relatively large space for the theoretical, legislative and judicial considerations regarding the conflict of intellectual property rights and the personal data protection.

Normally, the protection of privacy interferes with the freedom of expression. But in our context, the too easy access to Internet traffic data could mean a threat to the freedom of expression.

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LEGAL BASIS FOR THE ESTABLISHMENT OF INTERNATIONAL AND HYBRID CRIMINAL COURTS AND ITS IMPACT ON ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW

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Abstract in original language
Cílem příspěvku je poukázat na to, jak může způsob založení a právní základ soudu ovlivnit vynucování mezinárodního trestního práva, a to v kontextu nároku na imunitu hlavy státu v trestním stíhání. Příspěvek se zaměřuje na případ Charlese Taylora, nyní již bývalého prezidenta Libérie. Taylor je první africkou hlavou státu, která byla ve funkci obviněna ze spáchání zločinů podle mezinárodního práva na mezinárodní úrovni. Případ Taylor ilustruje střet dvou zájmů v soudobém mezinárodním právu: vzrůstající tendenci potrestat pachatele nejzávažnějších činů a (nedotknutelnou) oblast imunit vysokých státních představitelů.

Key words in original language
Mezinárodní trestní soudy a tribunály, smíšené (hybridní) trestní soudy, vynucování mezinárodního trestního práva, zločiny podle mezinárodního práva, imunita hlavy státu.

Abstract
The aim of this paper is to illustrate how the legal basis of the court may affect enforcement of international law in the context of immunities. This paper will focus on the case of Charles Taylor before the Special Court for Sierra Leone ('SCSL'). Taylor was only the second Head of State in history after Slobodan Milošević, and the first African head of state to be indicted for crimes under international law at the international level. The Taylor case well illustrates collision of the two interests in contemporary international law: the growing need for international accountability for crimes under international law and a system of immunities deriving its origins, as most often claimed, from principle of sovereign equality of States. The main focus of this paper is the legal basis of the Special Court for Sierra Leone (SCSL), deeper analysis of personal and functional immunities available to Taylor will not form part of this paper.

Key words
International Criminal Courts and Tribunals; Hybrid Criminal Courts, Enforcement of International Criminal Law, Crimes under International Law, Immunity of a Head of State.

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1. INTRODUCTION

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[1]

Under traditional international law governed by the concept of state sovereignty, any alleged responsibility for international wrongdoings used to be attributed to the state alone. Indeed, the role of an individual in traditional international law was marginalized. This position of an individual in international law began to change from the 20th century. Responsibility of individuals for breaches of international law started to be addressed in a relatively new branch of international law: international criminal law.

International criminal law qualifies certain types of conduct as crimes under international law[2] incurring individual criminal responsibility. In this context, the 20th century witnessed development of various international and hybrid judicial mechanisms for prosecution of individuals who commit these crimes. What if these individuals happen to be heads of state?

The principle of individual criminal responsibility for crimes under international law is firmly established.[3] However, the enforcement of this principle can, in some circumstances, be frustrated by operation of another well established principle, immunity of a Head of State based largely on the notions of sovereign equality of states.[4]

Traditionally, heads of states were not subject to the jurisdiction of national courts for whatever acts they may committed and there were no

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[1] The Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg Trial Proceedings, Vol. 22, p. 466, available at http://avalon.law.yale.edu/imt/judlawch.asp (last accessed 3 June 2009).

[2] The term crimes under international law will be used interchangeably with the terms international crimes and 'core' crimes. These crimes include: war crimes, crimes against humanity and genocide. The crime of aggression is left aside for the purposes of this paper.

[3] The submission that international law was not construed to punish individuals and is therefore concerned only with acts of States was rejected already by the Nuremberg Tribunal ('Tribunal'). In this respect the Tribunal also refused the opinion that individuals who carried out acts of State are not responsible due to the protection provided by the doctrine of the State sovereignty. *See* also R. Cryer, H. Frimain, D. Robinson, *An Introduction to International Criminal Law and Procedure*, Cambridge (2008).

[4] C. Damgaard, *Individual Criminal Responsibility for Core International Crimes (Selected Pertinent Issues)*, Springer (2008), pp. 263-357.

international courts which would have jurisdiction over heads of state.[5] Until recently, the immunity of high ranking state officials who engaged in commission of such crimes was absolute, based on traditional rules safeguarding the sovereignty of states.[6]

Nevertheless, the interests of the international community in the maintenance of effective and smooth functioning of international relations between states are being increasingly confronted with the interests of bringing alleged perpetrators of international crimes to justice. These two interests are fulfilling different functions of international law.[7] Which interest should prevail if the accused is a Head of State?

It is apparent that judgments of the last years of both international and national courts in the context of immunity have turned on whichever of these two divergent interests prevails for judges.[8] Different approaches adopted by judges well characterize this tension of interests and the outcome of such prosecution depends to a large extent on the legal basis of the respective court (i.e. national versus international court) and on the status of the high ranking official (i.e. former or incumbent official).[9]

Various cases regarding the issue of the immunity of high ranking officials have recently reached both national and international courts. Following list of cases serves as an illustration of the increasing frequency in attempts to institute prosecutions for international crimes.[10] Main examples include (a)

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[5] A. Watts, 'The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers', *Recueil des Cours de l'Académie de droit international*, III (1994).

[6] A. Cassese, 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality', in: C. Romano, A. Nollkaemper and J. Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Cambodia and Kosovo*, Oxford University Press (2004).

[7] As regards the origin and function of international law in general, Koskenniemi suggests that "international law fundamentally is a European tradition derived from a desire to rationalize society through law." He however adds that "the fact that international law is a European language does not even slightly stand in the way of its being capable of expressing something universal." In: M. Koskenniemi, 'International Law in Europe: Beetween Tradition and Renewal', 16 *European Journal of International Law* 113,114 (2005). See also M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001).

[8] Chatham House, 'Immunity for Dictators?' *A Summary of Discussion at the International Law Programme*, Discussion Group at Chatham House (9 September 2004).

[9] R. Cryer, 'A 'Special Court' for Sierra Leone?', 50 *International and Comparative Law Quarterly* 435 (2001).

[10] This list is not meant to be exhaustive.

former or incumbent presidents: Manuel Noriega11 (Panama), Augusto Pinochet12 (Chile), Slobodan Milošević[13] (the Federal Republic of Yugoslavia), Hissene Habre[14] (Chad), Muammar Qaddafi15 (Libya), Fidel Castro (Cuba), Mengistu Haile Mariam[16] (Ethiopia), Charles Taylor[17](Liberia), Saddam Hussein[18](Iraq) and very recently Omar Al Bashir[19](Sudan); (b) other high ranking officials: Abdulaye Yerodia Ndombasi[20] (Minister for Foreign Affairs of the Democratic Republic of the Congo) or Jean Kambanda[21] (Prime Minister of Rwanda).

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11 United States v. Noriega, 746 F.Supp. 1506, 1511 (S.D.Fla.1990), and The United States v Manuel Antonio Noriega, United States Court of Appeals, Eleventh Circuit, Nos.92-4687; 96-4471, (7 July 1997).

12 *R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, (2000) 1 A.C. 61 (H.L. 1998) (Pinochet I); *R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, (2000) 1 A.C. 119 (H.L. 1999) (Pinochet II); *R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, (2000) 1 A.C. 147 (H.L. 1999) (Pinochet III).

[13] *Prosecutor v Slobodan Milosevic* (IT-99-37-PT), Decision on Preliminary Motions, ICTY, 8 November 2001.

[14] Cour de Cassation du Senegal (Premiere chambre statuant en matiere penale), Aff. Habre, Arret n. 14, (20 March 2001).

15 Chambre Criminelle, Frech Supreme Court, Criminal Division, Paris, Arret n. 1414, Mar. 13, 2001, Gaz. Pal. (2001), 2, somm.

[16] Ethiopian Court held Mengistu Haile Mariam quilty of acts of genocide and Mariam was given a life sentence *in absentia* on December 2006, later changed to death penalty. The case number was not made available to the author. For more information *see* http://www.justiceinperspective.org.za/index.php?option=com_content&task=view&id=14&Itemid=43 (last accessed 10 August 2009).

[17] *Prosecutor v. Charles Taylor* (SCSL-2003-01-I), Decision on Immunity from Jurisdiction, SCSL, 31 May 2004.

[18] No English translation of the judgment available to the author. For more information *see* 'Iraq Tribunal Issues Verdict in First Hussein Trial', International Center for Transitional Justice, 5 November 2006.

[19] *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09), Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC, 4 March 2009.

[20] *Case Concerning the Arrest Warrant of 11 April 2000* (D.R.C. v. Belg.), 14 February 2002, I.C.J. 21, (hereinafter 'the *Yerodia* case'). See J. Wouters, 'The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks', 16 *Leiden Journal of Intenational Law* 253 (2003); S. Wirth, 'Immunity for Core Crimes? The ICJ's judgement in the Congo v. Belgium Case', 13 European Journal of International Law 877 (2002).

[21] *Prosecutor v. Kambanda* (ICTR 97-23-S), Judgment and Sentence, ICTR, 4 September 1998.

This paper will focus on the case of Charles Taylor before the Special Court for Sierra Leone ('SCSL'). Taylor was only the second Head of State in history after Slobodan Milošević, and the first African head of state to be indicted for crimes under international law at the international level. The Taylor case well illustrates collision of the two above mentioned interests in contemporary international law: the growing need for international accountability for crimes under international law and a system of immunities deriving its origins, as most often claimed, from principle of sovereign equality of States.

The case is a fascinating one, and contains many points of major legal interest. This paper explores only some of the implications the case might have in international law. The central issue of this paper is whether Taylor as a president of Liberia at the time of issuance of the indictment was entitled to claim immunity before the SCSL in the light of the fact that the legal basis of the SCSL had been a bilateral treaty between the United Nations and Sierra Leone, to which Liberia was not a party.[22] This legal issue is important also from the practical perspective for similar cases which may arise before other courts. The topicality of this issue can be especially seen in the increased activities of the first permanent criminal court - the International Criminal Court ('ICC').

The same questions in the context of immunities of high ranking officers of third states not parties to the Rome Statute (the legal basis for the ICC) may appear particularly in the situation when there is no referral by the Security Council under Chapter VII of the UN Charter.[23] Even in the situation where there is actually a referral by the Security Council, as is the case with the current President of Sudan, Al-Bashir, some authors argue that there must be explicit removal of immunity in the respective Resolution adopted under Chapter VII powers in order to deny immunity ratione personae to a serving President of a state which is not a party to the Rome Statute.[24]

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[22] Chatham House, *supra* note 8.

[23] The ICC has jurisdiction over (a) nationals of states parties (b) individuals accused of committing a crime on the territory of a state party (c) cases referred by the Security Council. Under Article 13(b) of the Rome Statute, the Security Council acting under Chapter VII, can refer a specific situation "in which one or more of such crimes appears to have been committed" to the Prosecutor. This mechanism can trigger the jurisdiction of the ICC without consent of the concerned State (which is not a party to the Rome Statute). For deeper discussion see, V. Gowlland-Debbas, 'The Relationship between the Security Council and the International Criminal Court', Graduate Institute of International Studies, *Weltpolitik* (2001), available at http://www.globalpolicy.org/intljustice/icc/crisis/2001relationship.htm (last accessed 17 February 2008).

[24] S. M. H. Nouwen, 'Special Court for Sierra Leone and the Immunity of Taylor: The Arrest Warrant Case Continued', *Leiden Journal of International Law*, 18 (2005), pp. 645–669.

As this brief outline already indicates, legal basis of the court is crucial for its functioning in many areas. Legal basis of the court has impact in areas such as application of international legal standards both in terms of adequate human rights guarantees[25] and international criminal law, (compulsory) cooperation of other states and international organizations with the court including extradition proceedings[26] and interrelated issue of immunities. The aim of this paper is to illustrate how the legal basis of the court may affect enforcement of international law in the context of immunities. The main focus of this paper is the legal basis of the SCSL, deeper analysis of personal and functional immunities available to Taylor will not form part of this paper.[27]

First, various judicial mechanisms for prosecuting violations of international criminal law will be introduced and a definition of international, national and internationalized court will be offered. Second, an explanation as to why does the legal basis matter will be provided in the part titled 'International v. National Courts Practice with Respect to Immunity of Head of States'. Third, the SCSL's Decision on Immunity from Jurisdiction[28] in the Taylor case will be introduced. Fourth, critical analysis of the SCSL's decision will follow, including examination of binding effects of two main

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[25] *See* e.g. *Report by Fédération Internationale des Ligues des Droits de l'Homme (FIDH)*, 'Iraq : Trial of Saddam Hussein : FIDH and HRDOI call for fair trial and victim's Rights to be guaranteed' (19 October 2005). Compare also with situation in Kosovo. Cassese observes that there were significant problems in Kosovo as regards relationship between local laws and international human rights standards. Cassese noted that there was "a lack of clarity among local judges as to whether international human rights standards were supreme law in Kosovo." Cassese, *supra* note 6, p. 8.

[26] For example the former President of Ethiopia, Mariam, is in exile in Zimbabwe, which still refuses to extradite him. The prevailing view as regards extradition proceedings is that in the absence of an extradition treaty, there is no international obligation to extradite such person. According to the UN report 'there is a growing trend, however, to recognize the duty to extradite or prosecute, in particular with certain crimes', 11th *UN Congress Committee on Crime Prevention and Criminal Justice*, I BKK/CP/15 (para 3), 21 April 2005, Bangkok, Thailand.

[27] For analysis of immunities available to Taylor, *see* S. M. H. Nouwen, 'Special Court for Sierra Leone and the Immunity of Taylor: The Arrest Warrant Case Continued', *Leiden Journal of International Law 18* (2005); K. Novotna, 'Relationship between Crimes under International Law and Immunities: Coexistence or Exclusion? Charles Taylor Case', *Human Rights and International Humanitarian Law*, New Delhi, Satyam Law International (forthcoming in 2010). For analysis of immunities in general *see* e.g. I. Bantekas, 'Head of Sate Immunity in the Light of Multiple Legal Regimes and Non-Self-Contained Systems Theories: Theoretical Analysis of ICC Third Party Jurisdiction Against the Background of the 2003 Iraq War', 10 *Journal of Conflict & Security Law* 21 (2005), H. Fox, *The Law of State Immunity* (Preface to Paperback Edition), Oxford University Press (2004).

[28] *Prosecutor v. Taylor* (SCSL-2003-01-I), Decision on Immunity from Jurisdiction, 31 May 2004, E. Denza, E, *Diplomatic Law* (Commentary on the Vienna Convention on Diplomatic Relations), 3d edition, Oxford (2008).

legal instruments: SC Resolution 1315 (2000) and the Agreement between the UN and Sierra Leone. This paper concludes by finding that the SCSL did not appreciate its special 'hybrid' legal basis and therefore failed to properly assess what are the implications of its legal basis for the rules of international law on incumbent head of state immunity.

2. JUDICIAL MECHANISMS FOR PROSECUTING VIOLATIONS OF INTERNATIONAL CRIMINAL LAW

This all began with the establishment of the Nuremberg and Tokyo tribunals more than a half a century ago.[29] The beginning of the 1990s then witnessed a new evolution of various mechanisms for prosecuting violations of international criminal law, starting in 1993 with the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and followed by the International Criminal Tribunal for Rwanda (ICTR) in 1994.[30] In 1998, the Rome Statute for the ICC was adopted.[31]

At the same time, other models referred to as 'hybrid', 'mixed' or 'internationalised' courts came into being.[32] Examples include: the Extraordinary Chambers in the courts of Cambodia[33], the Regulation 64 Panels in the courts of Kosovo[34], the District Court of Dili in East Timor[35]

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[29] The International Military Tribunal for the Far East was established by the military order as opposed to the Nuremberg Tribunal, which was established by treaty.

[30] UN Security Council Resolutions 808, 827 (1993) and 955 (1994) respectively.

[31] Rome Statute of the ICC, U.N. Doc. A/CONF.183/9, available at http://untreaty.un.org/cod/icc/statute/romefra.htm (last accessed 5 September 2009).

[32] For an overview of some practical and legal problems internationalized courts might face, as well as the advantages and disadvantages of such courts, *see* Cassese, *supra* note 6.

[33] Also referred to as 'Extraordinary Chambers of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea'. *See* General Assembly Resolution 57/228 A, 187 December 2002. Orentlicher uses the term 'court, established under Cambodian law but operating with substantial international participation', D. Orentlicher, 'The Future of Universal Jurisdiction in the New Architecture of Transitional Justice', in: S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes* (2003), at 219.

[34] Prior to Kosovo's independence, the United Nations (UN) deployed UNMIK, which was established within the legal framework of the UN Security Council Resolution 1244 (UNSCR 1244). UNSCR 1244, which was adopted under the Chapter VII powers, decided on the deployment of international civil administration (UNMIK) and international security force (KFOR) presences under UN auspices. For an overview of the current situation in Kosovo, including the role of EULEX mission, *see* K. Novotna, Kosovo's Post-Independence - Test for the EU's Common Foreign and Security Policy. What Role Has the EULEX Mission to Play in Kosovo? COFOLA 2009: the Conference Proceedings, 1. Edition, Brno: Masaryk University (2009).

[35] UNTAET, Resolution No. 2000/15, 6 June 2000.

and to some extent also the Iraqi Special Tribunal[36], the Special Public Prosecutor's Office in Ethiopia[37] or the War Crimes Chamber in the State Court of Bosnia and Herzegovina.[38]

These various judicial mechanisms dealing with crimes under international law are characterised by different legal regimes and applicable law. On the one hand, national courts will apply primarily or only domestic criminal law into which crimes under international law might or might not be incorporated.[39] On the other hand, purely international judicial bodies will apply usually only international law. These can be either treaty-based such as the ICC and the SCSL or resolution-based (Resolution adopted under Chapter VII powers of the UN Security Council) such as the ICTY and the ICTR. These courts and tribunals are limited by their Statutes.[40] Last but not least, we have a newly emerging trend of so-called hybrid or mixed courts which further complicate the picture. The qualification of the exact legal basis of hybrid courts especially is not always clear cut.

Hence, it is useful to start the discussion by defining the terms 'international' court, 'national' court and 'hybrid/mixed/internationalized' court.[41] The term 'international criminal court' is frequently used in academic literature and jurisprudence, but without much attention given to the explanation of this term.[42] At the same time, it is necessary to emphasize that the definition of what constitutes an international court as opposed to national or hybrid court may vary significantly depending on factors taken

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[36] Also named 'Iraqi High Court' or 'Supreme Iraqi Criminal Tribunal'.

[37] Officially named 'Office of the Special Prosecutor: The Special Prosecution Process of War Criminals and Human Rights Violators in Ethiopia'. *See* also *Law, Rulings and Reports*, 'Ethiopia: Proclamation Establishing the Office of the Special Prosecutor, Proclamation 22/1992 (8 August 1992)', available at http://www.usip.org/files/resources/Ethiopia-Charter.pdf (last accessed 17 November 2009).

[38] The High Representative in Bosnia and Herzegovina promulgated the *Law on the Court of Bosnia and Herzegovina* on 12 November 2000. The Parliament of Bosnia and Herzegovina adopted this law on 3 July 2002.

[39] E.g. Special Tribunal for Lebanon. As regards the Ethiopian Special Public Prosecutor's Office, there was a discussion "whether to use international law standing alone or as codified in the Ethiopian Penal Code and whether to use any non-international law-based sections of the Penal Code". In: International Human Rights Law Group, Ethiopia in Transition: A Report on the Judiciary and the Legal Profession 1 (1994).

[40] Bantekas *supra* note 27.

[41]Damgaard *supra* note 4.

[42] *Ibid*.

into account, on the purposes of this identification and on those who are in charge of identification.

There is no universally accepted definition of an international criminal court in international law and the recent jurisprudence considering this issue has not proved particularly insightful.[43] International Court of Justice (ICJ) in the Yerodia case for example simply stated that in 'certain international courts' (ICTY, ICTR, ICC) an incumbent or former Minister of Foreign Affairs could be subject to criminal prosecution'. The ICJ however did provide any further guidance as to what it means by phrase 'certain international courts'[44]. Does it exclude some other international courts?

Nevertheless, the ICJ in the Yerodia case held that an international court is a court that is established by two or more states or by a Security Council resolution under Chapter VII mandate of the United Nations Charter.45 Though the ICJ did not mention the following possibility, it is submitted that a state and an international organization can also establish an international tribunal (as in the case of the Special Court for Sierra Leone).

Damgaard points to the following factors as important for indication of international nature of the court (a) international court is not part of the judiciary of one single State (b) it applies international criminal law, the fact that it also applies domestic law does not disqualify it being international (c) its jurisdiction ratione materiae and ratione personae is international (d) its decisions are binding.[46] The first three factors are easy to approve. It is however not clear how does the binding nature of a decision contributes to the international character of the respective court.

A hybrid court, according to e.g. the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, is one that has mixed jurisdiction and composition.47 This means that the court may have the jurisdictional privileges of applying both municipal and international law and may also have both local and foreign prosecutors and judges participate in its judicial process.48 Nevertheless, it is submitted that the mixed

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[43] *Ibid*.

[44] *Ibid* (emphasis added).

45 See *supra* note 20, para 61.

[46] Damgaard *supra* note 4 at p. 333.

47 *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone* (S/2000/915), 4 October 2000, para. 9.

48 D. Orentlicher, 'International Justice Can Indeed Be Local', *Washington Post*, 21 December 2003.

composition and jurisdiction does not of itself identify/determine the legal basis of the court.[49] Such a description and judicial arrangement can be indeed described as a mixed judicial system. However, the legal basis of any court is rather determined by its constitutive instrument and authority of the body establishing the court.

There is no bar to have local judges, prosecutors and other personnel participating in proceedings of the court whose legal basis is e.g. an international treaty or resolution and which is therefore by its essence international. Equally, the fact that the legislative authorities of a particular state decide to include into the personnel composition of its national court non-nationals of that state does not, according to the ICTY, make that court any less a 'national court'.[50]

The War Crimes Chamber of the State Court of Bosnia and Herzegovina can serve as a useful example. The Defence in Stankovic 51 submitted that the War Crimes Chamber of the State Court is incapable of characterization as a 'national court.' It was assumed that to be a national court it must be composed of judges who are nationals of the State concerned. However, the ICTY held that no authority is offered for this proposition.[52]

The view of the Referral Bench[53] of the ICTY was that in the relevant context, which is Article 9(1)54 of the Statute of the Tribunal, there is no

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[49] For a different view, *see* the Separate Opinion of Judge Robertson in the *Kondewa* case, where he stated that "[...] the Special Court [...] is not accurately described in the Secretary-General's report as a court of 'mixed jurisdiction and composition'[...] is in reality an international court onto which a few national elements have been grafted.", in: *Prosecutor v. Kondewa* (SCSL-2004-14-AR72(E)), Decision on Preliminary Motion on Lack of Jurisdiction: Establishment of Special Court Violates Constitution Sierra Leone, (25 May 2004), para. 15.

[50] *Prosecutor v. Stankovic* (IT-96-23/2-PT), Decision on referral of case under rule 11*bis*, Partly Confidential and Ex Parte (17 may 2005), para 26.

51 *Ibid.*

[52] *Ibid*.

[53] The establishment of the War Crimes Chamber of the State Court of Bosnia and Herzegovina ('WCCh') enabled cases to be transferred from the ICTY to national judicial authorities. For a case to be referred to the WCCh pursuant to Rule 11*bis* of the ICTY Rules of Procedure and Evidence, the Referral Bench must be fully satisfied that the accused would be tried in accordance with international standards and that neither the level of responsibility of the accused nor the gravity of the crimes alleged in the indictment were factors that would make a referral to the national authorities inappropriate. According to Rule 11*bis* a referral may be made to a State: (a) in which the crimes were committed; (b) the accused was arrested; (c) or which has jurisdiction and is willing and adequately prepared to accept the case.

54 Article 9(1) of the ICTY Statute reads as follows: "The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations

apparent justification for giving to the phrase 'national court' any meaning other than the normal connotation, which is 'a court of or pertaining to a nation'.[55] The ICTY stated that the State Court of Bosnia and Herzegovina, of which the War Crimes Chamber is a component, is a court which has been established pursuant to the statutory law of Bosnia and Herzegovina. It is thus a court of Bosnia and Herzegovina, a 'national court.'[56]

Despite the conclusions made above, the qualification of the exact legal basis of hybrid courts is admittedly not straightforward; there exist considerable uncertainty and diverse views on this topic. For example, Nouwen considers Extraordinary Chambers in the courts of Cambodia, the Regulation 64 Panels in the courts of Kosovo and the District Court of Dili in East Timor as all being part of the domestic system and their legal status that of a domestic court. Ambach on the other hand suggests that the Regulation 64 Panels in the courts of Kosovo and the District Court of Dili in East Timor were set up by the UN Administration, and therefore are by nature international.[57]

In cases of Kosovo and East Timor, it was indeed the UN who promulgated regulations on the establishment of the panels. The authority to promulgate these regulations came from the SC Resolution adopted under Chapter VII powers. Accordingly, one could argue that the SC Resolution provided indirect legal basis. Nonetheless, it should be recognised that SC Resolution did not in fact established these courts, but rather "granted the UN administration the authority to promulgate domestic laws. The regulations establishing these courts should be considered as domestic instruments."[58]

Terminological and conceptual difficulties of hybrid courts lay exactly in their combined/hybrid nature. On the one hand, if hybrid courts are implemented into the domestic judicial structure of the forum state, they cannot be considered "as international institutions since they lack

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of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991."

[55] *Supra* note 50.

[56] *Ibid.*

[57] P. Ambach, 'The Overlapping Jurisdictions between the International Criminal Court and Hybrid International Tribunals', Bofaxe, No. 298E (2006),

available at http://www.ifhv.rub.de/imperia/md/content/publications/bofaxe/2006/x298e.pdf (last accessed 7 May 2007).

[58] S.M.H. Nouwen, ''Hybrid courts', The hybrid category of a new type of international crimes courts', 2 *Utrecht Law Review* 2, December, (2006).

international legal personality".[59] On the other hand, some of them cannot be qualified as national courts "since apart from having a considerable amount of international personnel and exercising jurisdiction over international crimes"[60], they are established by an international treaty with the UN.[61]

It needs to be borne in mind that these so-called hybrid courts have each a very different legal basis. Yet, they are ultimately established either under national law or international law.[62] Accordingly, Nouwen suggests that "the manner of establishment is what distinguishes these courts from one another, not what unites them."[63]

The presented views already indicate the uncertainty with regard to finding the origins of their legal basis. This uncertainty may negatively affect the functioning of these courts in many areas, including the area of immunities, as we shall see below.

3. WHY DOES THE LEGAL BASIS MATTER? INTERNATIONAL V. NATIONAL COURTS PRACTICE WITH RESPECT TO IMMUNITY OF HEAD OF STATES

The entitlement to immunity for core crimes does not have uniform application within different legal regimes and in front of various judicial bodies.[64] It is therefore necessary to clarify the respective terminology and categorization in order to subsequently determine the SCSL's legal basis for the purposes of lifting immunities to a serving head of state of a country other than Sierra Leone. The premise which will guide the following discussion is that the legal basis of the judicial bodies is crucial for effective functioning of courts.

As regards the practice of national courts, scholarly opinions vary significantly. The most important factor appears to be whether the senior official is serving or former one. Most of the legal scholars suggest that the

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[59] *Ibid.*

[60] Ambach, *supra* note 57.

[61] E.g. the SCSL or the Special Tribunal for Lebanon.

[62] Nouwen is opposing calling hybrid courts 'hybrid' because of their hybrid roots as it, according to her, 'only confuses the picture'. Nouwen, *supra* note 58.

[63] *Ibid*.

[64] I. Bantekas, 'Head of Sate Immunity in the Light of Multiple Legal Regimes and Non-Self-Contained Systems Theories: Theoretical Analysis of ICC Third Party Jurisdiction Against the Background of the 2003 Iraq War', 10 *Journal of Conflict & Security Law* 21 (2005).

operating principle in general international law is that a serving head of state is entitled to absolute immunity from the jurisdiction of national courts, unless it has been waived by the State concerned. This appears to be the dominant view, but it is not the only view.[65]

Some argue that the discussion about the legal nature of various courts and tribunals, national or international, would not have been necessary if the question of whether immunity applies to serving officials depended on factors other than the nature of the tribunals, for example, on the nature of the crime. In their opinion the focus should be made on the nature of the crime rather than the nature of the respective tribunal. 66

This might be a relevant argument if one argues that crimes under international law remain crimes under international law regardless of whether they are prosecuted before international or national courts. In other words, international law remains to be equally applicable be it before international or national courts. Nevertheless, two counter-arguments can be raised in this respect.

Firstly and most importantly, it is submitted that the relevant State practice and opinio iuris do not yet confirm this argument, specially with respect to prosecution of crimes under international law committed by serving Heads of State or senior state officials before national courts. Serving officials such as Yerodia Ndombasi, Fidel Castro and Muammar Qaddaffi were all said to enjoy immunity before national courts. Arguably were Augusto Pinochet still incumbent president, he would have enjoyed immunity as well. Thus, there is as yet no single case of indicting, prosecuting and convicting a serving Head of State in before national courts.

And why do not State practice and opinio iuris confirm the above argument about the nature of the crime under international law prevailing over the nature of the tribunals and courts? In order to be able to prosecute crimes under international law before national courts, the state concerned has to have jurisdiction to start with. Usually the courts pursuing the prosecution are courts other than courts of the state of the accused. Therefore, on which basis do they assert jurisdiction if crimes are not committed on their territory, and the accused is not a national of that state? Here comes into play universal jurisdiction, which is by no means indisputable.67 In the

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[65] For different views see P. Sands, 'Immunities before international courts', Guest Lecture Serious of the Office of the Prosecutor (18 November 2003); A. Cassesse, 'Why May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case', *European Journal of International Law* 13 (2002), pp. 853-875.

66 See S. M. H. Nouwen, 'Special Court for Sierra Leone and the Immunity of Taylor: The Arrest Warrant Case Continued', *Leiden Journal of International Law*, 18 (2005), pp. 645–669.

67 As Schabas puts it: "The exercise of universal jurisdiction reminds us of Mark Twain's famous comment about the weather: Everyone talks about it, but nobody does anything

view of the shortage of a direct international authority, it is difficult to establish the current international law relating to immunities before national courts.

Many scholars and non-governmental organizations regard universal jurisdiction as uncontroversial and undisputable. It is often regarded as "one of the magic bullets in the campaign against impunity."68 Still, nobody has been imprisoned recently as a result of the exercise of universal jurisdiction. States rarely initiate prosecution regardless of the seriousness of international crimes unless there is either territorial or personal nexus, or a treaty obligation to prosecute or extradite.69

It is not the aim of this paper to deal with universal jurisdiction in detail.70 Moreover, the consideration of this problem is not strictly necessary to answering the question of Taylor's immunities before the SCSL if the international nature of the SCSL is accepted.

As regards the practice of international courts, amicus curiae invited by the SCSL stated that "in respect of the jurisdictional immunities of serving heads of state both international law and practice has generally distinguished between proceedings before national and international courts. As regards the international courts and tribunals which have been established, practice has been consistent, in that no serving head of state has been recognised as being entitled to rely on jurisdictional immunities."71

It is respectfully submitted that the argument that immunity can never be pleaded before international tribunals is an oversimplification of the issue. It is certainly true that there is a significant difference between proceedings before international as opposed to national courts in the context of immunities. Nonetheless, there is no general rule in international law which would provide for immunities only before national courts, would it be so, there will be little need for international courts and tribunals to justify in their Statutes derogation from immunities.

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about it.". In: L. Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives,* New York, Oxford University Press (2004).

68 *Ibid.*

69 *Ibid.*

70 For deep survey and analysis of universal jurisdiction *see* Reydams, *supra* note 67.

71 See Sands *supra* note 65. Moreover, it can be argued that this 'consistent' practice is supported only by one example of *international* court, i.e. the ICTY with respect to indicting then president of the Federal Republic of Yugoslavia Slobodan Milosevic. Yet, at the time of the decision, Milosevic was already a former Head of State. At least to the author's knowledge, there is no other example of what is referred to as a consistent practice.

Immunities should serve to prevent foreign states from interference into the affairs of other states and from exercising jurisdiction over another state.[72] As long as the state concerned has not consented to the exercise of the jurisdiction, there is, according to Akande, no difference whether the exercise of this jurisdiction is done unilaterally by a foreign state or through some collective judicial body.[73] He adds that to claim nonexistence of immunities before international tribunals without the consent by the relevant state will allow a subversion of the policy underpinning international law immunities.[74]

Judge Shahabuddeen equally argued in his Dissenting opinion in Krstic that there has to be some indication in the establishing instrument of the international tribunal which allows for abrogation of immunities existing otherwise under international customary law:

In my view, [...] there is no substance in the suggested automaticity of disappearance of the immunity just because of the establishment of international criminal courts [...].International criminal courts are established by States acting together, whether directly or indirectly as in the case of the Tribunal, which was established by the Security Council on behalf of States members of the United Nations. There is no basis for suggesting that by merely acting together to establish such a court States signify an intention to waive their individual functional immunities. A presumption of continuance of their immunities as these exist under international law is only offset where some element in the decision to establish such a court shows that they agreed otherwise.[75]

The proposition that immunities do not apply before international tribunals depends on the following factors which have to be considered: (i) The manner of the court's establishment and identification of the exact legal basis for denying immunity. In other words, does the Statute of that international court deny immunity to a Head of State? (ii) The establishing instrument of the court must bind the concerned state.[76]

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[72] D. Akande, 'International law Immunities and the International Criminal Court', *American Journal of International Law* 7, (2004).

[73] *Ibid*.

[74] *Ibid*.

[75] *Prosecutor v Krstic* (IT-98-33-T), Judgment, Dissenting Opinion of Judge Shahabuddeen, (17 September 2003), paras. 11-12 (emphasis added).

[76] Chatham House *supra* note 8.

4. INTRODUCTION OF THE SPECIAL COURT FOR SIERRA LEONE

The SCSL is one of the latest versions of the judicial mechanisms to address crimes under international law. The SCSL was established in 2002 with the mandate to try those bearing 'the greatest responsibility'[77] for the crimes committed during the conflict in that country. The seat of the SCSL was deliberately chosen in Freetown, so that justice be not only done, but be seen to done, by and for the people of Sierra Leone. Proceedings are therefore taking place directly in the country where the crimes occurred in contrast with the proceedings before the ICTR and the ICTY taking place in Tanzania (Arusha) and The Netherlands (The Hague) respectively.

One of those accused of bearing 'the greatest responsibility' is Charles Taylor. Taylor was elected President of Liberia in 1997. The Indictment against Taylor was approved by the SCSL in March 2003. Taylor remained Head of State until August 2003. His tenure of office covered most of the period the SCSL has temporal jurisdiction pursuant to its mandate to try those primarily responsible for the war crimes and crimes against humanity committed in Sierra Leone since 30 November 1996.[78]

Taylor was only the second head of State[79] to be indicted while in office. The Indictment initially included 17 counts in which Taylor was accused of planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of crimes such as terrorizing the civilian population and collective punishments, unlawful killings, physical and in particular sexual violence, use of child soldiers, abductions and forced labour, looting and burning and attacks on peacekeepers.80 The Indictment claims, inter alia, that Taylor was acting with intent to gain access to the mineral wealth of Sierra Leone, in particular the diamond wealth and to destabilize the state.[81]

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[77] *See* Article 1(1) of the SCSL Statute: "1. The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear *the greatest responsibility* for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."(emphasis added).

[78] K. Novotna, 'No Impunity for Charles Taylor' (David Davies Prize Winning Article), *Aberystwyth Journal of World Affairs* 2 (2004), p. 90.

[79]First Head of State indicted while still in office was Slobodan Milosevic, President of the former Federal Republic of Yugoslavia.

80 *Prosecutor v. Taylor* (SCSL-2003-01-I), Indictment, 7 March 2003. The Indictment was amended on 16 March 2006, reducing the number of counts to 11.

[81] *Ibid*.

The SCSL is a novel and unique mechanism which represents a development of a new legal basis. It is the first time in a history when the court has been established by the agreement between UN and a state. Accordingly, the issues brought by the Defence counsel for Taylor in the motion[82] challenging the jurisdiction of the SCSL turned to a large extent on the process of the establishment of the SCSL, its legal basis and implications of this legal basis for its international jurisdictional reach, i.e. issues which will be examined next.

4.1 THE SCSL'S DECISION ON IMMUNITY FROM JURISDICTION

Head of State who commits murder and other grave crimes is chargeable with all the evils, all the horrors, of the war; all the effusions of blood, the desolation of families, the rapine, the violence, the revenge, the burnings, are his works and his crimes. He is guilty towards the enemy, of attacking, oppressing, massacring them without cause, guilty towards his people, of drawing them into acts of injustice, exposing their lives without necessity, without reason, towards that part of his subjects whom the war ruins, or who are great sufferers by it, of losing their lives, their fortune, or their health. Lastly, he is guilty towards all mankind, of disturbing their quiet, and setting a pernicious example.[83]

In determining its legal basis, the SCSL in its Decision on Immunity from Jurisdiction[84] focused on reviewing two main instruments. Firstly, the SCSL identified Resolution 1315 (2000) of the UN Security Council authorizing the Secretary General to negotiate an agreement on the Statute with the Government of Sierra Leone. Secondly, the SCSL pointed towards the report of the Secretary-General submitted to the Security Council pursuant to this resolution.

Referring to Resolution 1315, the Appeals Chamber of the SCSL (Appeals Chamber) noted that the SCSL is given an international mandate and is part of the international justice machinery. It further stated that the SCSL is not part of the domestic judicial system of Sierra Leone. The SCSL proceeded to address the availability of immunities for an incumbent Head of State. The SCSL first cited the relevant provision of its Statute, Article 6 (2), which lays down the rule that "[t]he official position of any accused persons, whether as Head of State or Government or as a responsible

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[82] *Prosecutor v. Taylor* (SCSL-2003-01-I), Decision on Immunity from Jurisdiction, 31 May 2004.

[83] E. de Vattel, quoted in: Q. Wright, 'The Legal Liability of the Kaiser', (1919) 13 *American. Political Science Review* 20, p .126.

[84] *Prosecutor v. Taylor* (SCSL-2003-01-I), Decision on Immunity from Jurisdiction, 31 May 2004.

Government official, shall not relieve such a person of criminal responsibility nor mitigate punishment".

The SCSL identified and cited the relevant provisions of the Charter of the International Military Tribunal in Nuremberg and the International Law Commission's 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal' and articles in the Statutes of the ICTY, the ICTR and the ICC. Based on these precedents, the Appeals Chamber concluded that "[t]he nature of the Tribunals has always been a relevant consideration in the question whether there is an exception to the principle of immunity".85

The SCSL then focused on the decision of the ICJ in Yerodia, in which the ICJ upheld the personal immunity of the incumbent Minister for Foreign Affair of the Republic of Congo, Yerodia Ndombasi. The SCSL approved this decision while stating that the ICJ had on the other hand confirmed the withdrawal of such immunities in relation to 'certain international criminal courts'. The SCSL provided the following rationale for the distinction to be made between international and domestic courts: "the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community." 86

The SCSL stated that the irrelevance of immunities before international criminal courts and tribunals is in any case an established rule of international law and that Article 6(2) of the SCSL Statute does not violate any jus cogens norms. The SCSL therefore concluded that personal immunity of Taylor could not constitute a bar to the jurisdiction of the SCSL.

The Appeals Chamber ended its analysis by noting that as Taylor stepped down as Head of State prior to this decision, "[t]he immunity ratione personae which he claimed had ceased to attach to him. Even if he had succeeded in his application the consequence would have been to compel the Prosecutor to issue a fresh warrant".87

In the context of its powers to The Appeals Chamber came to the conclusion that:

Although the SCSL was established by treaty, unlike the ICTY and ICTR, which were each established by resolution of the Security Council in its exercise of powers by virtue of Chapter VII of the UN Charter, it was clear

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85 *Ibid*., para. 49.

86 *Ibid*., para. 51.

87 *Ibid*., para. 59.

that the power of the Security Council to enter into an agreement for the establishment of the SCSL was derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Articles 39 and 41. These powers are wide enough to empower the Security Council to initiate, as it did by Resolution 1315 (2000), the establishment of the SCSL by Agreement with Sierra Leone.[88]

The Appeals Chamber stated that Article 39 empowers the Security Council to determine the existence of any threat to the peace and emphasized that the Security Council in its Resolution 1315 (200) indeed reiterated that the situation in Sierra Leone continued to constitute a threat to international peace and security in the region.[89] The Appeals Chamber continued that much issue had been made of the absence of Chapter VII powers in the SCSL. In the Appeals Chamber view, a proper understanding of those powers shows that the absence of the so-called Chapter VII powers does not by itself define the legal status of the SCSL.[90] The Appeals Chamber stated that:

it is manifest from the first sentence of Article 41, read disjunctively, that (i) The Security Council is empowered to 'decide what measures not involving the use of armed force are to be employed to give effect to its decision;' and (ii) it may (at its discretion) call upon the members of the United Nations to apply such measures.91

The conclusion was that the decisions referred to are decisions pursuant to Article 39. On the basis of its reasoning, the Appeals Chamber underlined that where the Security Council decides to establish a court as a measure to maintain or restore international peace and security, it may or may not, at the same time, contemporaneously, call upon the members of the United Nations to lend their cooperation to such court as a matter of obligation.92 The SCSL pointed out that in carrying out its duties under its responsibility for the maintenance of international peace and security, the Security Council acts on behalf of the members of the United Nations. In this regard the Appeals Chamber held:

the Agreement between the United Nations and Sierra Leone is thus an agreement between all members of the United Nations and Sierra Leone.

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[88] Ibid., para. 37.

[89] *Ibid.*

[90] *Ibid*., para. 38.

91 *Ibid.*

92 *Ibid.*

This fact makes the Agreement an expression of the will of the international community. The Special Court established in such circumstances is truly international.93

The Appeals Chamber reaffirmed that the SCSL is not a national court of Sierra Leone and is not part of the judicial system of Sierra Leone, while determining its own legal basis in a mere six paragraphs, it came to the conclusion that the SCSL is indeed an international criminal court.

4.2 ANALYSIS: BINDING EFFECTS OF RESOLUTION 1315 AND AGREEMENT

4.2.1 LEGAL SIGNIFICANCE OF THE LACK OF SO-CALLED CHAPTER VII POWERS

The considerable attention given below to binding effects of Resolution 1315 is justified by the fact that the SCSL attempted to establish its legal basis under Chapter VII powers. If it had been indeed the case, it would have had important implications for immunity afforded by contemporary international law to, at the time of the issuance of indictment, an incumbent Head of State.[94] This part will however reveal some shortcomings and inconsistencies in the SCSL's reasoning and prove that the SCSL's findings were not correct in this respect.

Arguments of the SCSL relating to the bindings effects of Resolution 1315 were not very convincing. Some of them were rather confusing and even contradictory. The following conclusions of the SCSL can serve as an illustration of this contradiction. Firstly, the SCSL underlined that where the Security Council decides to establish a court as a measure to maintain or restore international peace and security, it may or may not, at the same time, call upon the members of the United Nations to lend their cooperation to such court as a matter of obligation.[95]

By invoking the terminology of Chapter VII and terminology used in resolutions establishing the ICTY and ICTR, i.e. by using the phrase 'as a measure to maintain or restore international peace and security', the SCSL clearly tried to bring its establishment under the umbrella of Chapter VII powers, despite the fact that the language of Resolution 1315 does not support this conclusion.

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93 *Ibid.*

[94] In short, it is suggested that a right to claim immunity (as a part of customary international law) preexists also before international courts and can be thus lost only under certain circumstances.

[95] *Prosecutor v. Taylor*, para. 38.

Secondly, the SCSL at the same time admitted that it was lacking Chapter VII powers by stating that the lack of Chapter VII powers "does not by itself define the legal status of the Special Court."[96] Similarly, in his amicus curiae submission Sands stated that despite the fact that Resolution 1315 was not adopted under Chapter VII, it however reiterated that the situation in Sierra Leone continues to constitute a threat to international peace and security in the region.[97]

Regarding the SCSL's status as an international criminal tribunal, the SCSL in its decision focused on the UN's involvement with the establishment of the SCSL. The main attention of the SCSL was given to the authority of the Security Council to enter into an agreement with the Government of Sierra Leone in order to establish the SCSL. According to the SCSL, this authority could emanate from: (1) the general purposes of the UN as expressed in Article 1 of the Charter,[98] as well as (2) the specific powers under Article 39 and 41 to undertake appropriate measures to maintain or restore international peace and security.[99]

When examining the Resolution 1315, the SCSL concentrated on the second scenario, i.e. on the Security Council's specific powers under Article 39 and 41. The Resolution 1315 authorized the UN Secretary-General to negotiate the establishment of the SCSL, while reaffirming in the preamble that the situation in Sierra Leone continued to constitute a threat to international peace and security.100 Does the mere reaffirmation in the preamble that the situation in Sierra Leone continued to constitute a threat to peace suffice to imply the binding effect of this Resolution?

As opposed to the resolutions establishing the ICTY and the ICTR, which specifically invoked Article 41 of the Chapter VII of the UN Charter, the Security Council did not expressly state that it was acting under Chapter VII when authorizing the Secretary-General to conclude an agreement with the Government of Sierra Leone. Even though the Security Council does not have to expressly refer to Chapter VII when taking mandatory measures, it

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[96] *Ibid.*

[97] P. Sands; D. Orentlicher, 'Submissions of the Amicus Curiae on Head of State Immunity in the case of the Prosecutor v. Charles Ghankay Taylor' (SCSL-2003-01-I), available at http://www.icccpi.int/library/organs/otp/Sands.pdf (last accessed 22 February 2008).

[98] Article 1 states that one of the main purposes of the UN is to maintain international peace and security.

[99] *Prosecutor v. Taylor*, para. 37.

100 C. Jalloh, 'Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone', *ASIL Insights* (2004), available at http://www.asil.org/insigh145.cfm (last accessed 4 May 2008).

has become standard practice for the SC to state that it is 'acting under Chapter VII of the Charter'.[101]

At the same time it is however true that the SC often determined the existence of a threat to peace without a reference to Chapter VII and thus left the legal basis in doubt.102 Accordingly, it may be argued that the Resolution 1315 could serve as another example of leaving its legal basis unclear. The SC reiterated that the situation in Sierra Leone continues to constitute a threat to international peace and security. But it did so only in a preamble, not in the operative part.

Simma suggests that "unless other factors indicate that action under Chapter VII is envisaged, such resolutions should, according to the general rule, be interpreted narrowly."103 Simma concludes that resolutions that cannot be considered as adopted under Chapter VII do not create binding effects for member States.[104] It is submitted that there were no other factors indicating any intention to adopt Resolution 1315 under Chapter VII (except the terminology similar with Article 39). Racsmany suggests that "instead of using classical Chapter VII verbs such as 'demands', or the imperative 'shall', the language falls even short of 'calling upon' states to undertake certain measures."105

In order to further support the above conclusions, one can further point to the request of the President of the SCSL to the Security Council to grant the SCSL Chapter VII powers, which has never occurred.106 There would certainly be no need for this request should the Resolution 1315 be already adopted under Chapter VII powers. There would also be little need to arrange any subsequent cooperation agreements as envisaged in paragraph 8 of the Resolution 1315.[107] In subsequent resolutions regarding the situation

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[101] B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2002), at p. 727.

102 See e.g., SC Res 502 (1982) ('breach of the peace', Falkland conflict), SC Res 393 (1976) (Zambia, 'armed conflict' by South Africa), SC Res.1227 (1999) (Eritrea and Ethiopia).

103 Simma, *supra* note 101, p. 727.

[104] *Ibid.*, p. 455.

105 Z. Deen-Racsmany, 'Prosecutor v. Taylor : The Status of the Special Court for Sierra Leone and Its Implications for Immunity', Leiden Journal of International Law, 18 (2005), quoting from P. C. Szasz, 'The Security Council Starts Legislating', 96 *American Journal of International Law* 901, p. 902.

106 *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone* (S/2000/915), 4 October 2000, para. 10. *See* also Press Release of the SCSL (11 June 2003), available at www.sc-sl.org (last accessed 18 October 2009).

[107] "Requests the Secretary-General to include recommendations on the following: (a) any additional agreements that may be required for the provision of the international assistance

in Sierra Leone, the Security Council has called upon all states to 'cooperate fully' with the SCSL but has not resorted to Chapter VII mandatory procedure.108

The SCSL's conclusions that Chapter VII powers are not determinative of its legal basis (i.e. whether it is an international or a national court) were certainly correct. Still, the SCSL was nevertheless trying to imply the binding nature of Resolution 1315(2000). Why, if the international legal basis of the SCSL can be clearly shown by the fact that the SCSL was established by international agreement?

It is suggested that proving the binding effects of Resolution 1315 either under Chapter VII or under other provisions of UN Charter (e.g. Article 25 in connection with Chapter VI) would have crucial implications with respect to issues such as (obligatory) cooperation of states other than Sierra Leone with the SCSL or, more importantly for our purposes, withdrawal of immunities of serving head of state should the agreement be found unsatisfactory in regulating these issues.[109] It seems that the SCSL was trying to 'cure' shortcomings of a merely bilateral agreement by trying to imply binding effects of Resolution 1315 in order to justify the denial of immunity of a Head of State of another country.

4.2.2 NO NEED FOR CHAPTER VII POWERS?

The above conclusion that Resolution 1315 was not adopted under Chapter VII powers is further supported by the argument that, at least initially, there was no need for Chapter VII powers. The Security Council can define its involvement in any matter either under Chapter VI or Chapter VII. Involvement under Chapter VII powers allows the Security Council to 'intervene' in the respective state without the consent of that state. It is submitted that, in the case of Sierra Leone, there was actually no need to impose measures under Chapter VII.

The SCSL's establishment was initiated by the President of Sierra Leone. Hence, the Security Council's involvement was based on the invitation and request for international assistance and help from the UN by Sierra Leone itself. The government of Sierra Leone was willing to cede jurisdiction to the SCSL, although its original request was limited to assistance in

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which will be necessary for the establishment and functioning of the special court", para. 8 of Resolution 1315.

108 Security Council Resolutions 1478 (2003), 1508 (2003).

[109] The agreement and its binding effects will be dealt with in the Chapter 4.3.

conducting trials of the RUF.[110] The establishment of the SCSL was thus clearly consensual.[111]

It is the first time that a court has been established on the basis of an agreement between the UN and a member state. Accordingly, there was no need for Chapter VII powers in a sense of imposing the establishment of the SCSL on Sierra Leone, as the situation differed significantly from the situations in the former Yugoslavia or Rwanda, where the two ad hoc tribunals were established without the consent, or even against the will, of the respective countries.

During the proceedings before the SCSL's Appeals Chamber, the Prosecutor stated that "Chapter VII powers were needed in the case of Yugoslavia and Rwanda because there was no agreement with the States concerned. Here, in Sierra Leone, that is not the case."[112] Thus, the SCSL is a similar creation, but one which is in the Prosecutor's view is actually more democratic, because Sierra Leone has explicitly agreed to its establishment. It was nevertheless acknowledged by both the Prosecutor and the Defence in the Fofana case113 that the SCSL may not enjoy all of the consequences which could flow if it had been established by the Security Council acting under Chapter VII.[114]

While pointing to Chapter VII as the legal basis for concluding the agreement between the UN and Sierra Leone, the SCSL did not elaborate any further on the first scenario, i.e. how (or if) the general purposes of the

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[110] However, the SCSL itself did not approve the delegation of jurisdiction because it would arguably diminish its claim to its international nature. According to the SCSL "the establishment of the Special Court did not involve a transfer of jurisdiction of sovereignty by Sierra Leone…the judicial power exercised by the Special Court is not that of Sierra Leone, but that of the Special Court itself reflecting the interests of the international community", in: *Prosecutor v. Gbao* (SCSL-04-15-AR72(E)), Decision on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court (25 May 2004), para. 6.

[111] It can be however argued that the fact that Sierra Leone requested the help with establishment of the SCSL and therefore was certainly willing to cooperate in all respects does not mean that other state will be willing to voluntarily cooperate as well. Especially when it comes to requests for arrest and extradition of incumbent Head of State of another country.

[112] *Report on proceedings before the Appeals Chamber of the Special Court for Sierra Leone* (1 November 2003), available online at http://www.specialcourt.org/documents/WhatHappening/ReportAppealHearings01NOV03.html (last accessed 8 April 2008).

113 *Prosecutor v. Fofana* (SCSL-2004-14-AR72(E)), Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone (25 May 2004).

[114] Chapter VII powers are relevant e.g. to the enforceability against third States of acts of the SCSL.

UN as expressed in Article 1 of the Charter of the SC applied to its establishment.

Article 1 states that one of the main purposes of the UN is to maintain international peace and security. Decisions taken under other Articles may be regarded, according to Simma, as "implementing such purposes and principles."[115] In his view, international peace and security can be promoted and achieved through various policies or measures. This can include (1) measures of collective security taken under Chapter VII and (2) adjustment or settlement of international disputes or situations under Chapter VI. Thus, Article 1 identifies another path to maintain international peace and security.[116]

Since international peace and security can be achieved through various policies or measures, there is no need for the UN Charter to anticipate all possibilities to be used. The UN Charter for example also originally did not anticipate peacekeeping missions.[117] Despite the fact the UN Charter does not explicitly mention peacekeeping, it was suggested that it can be implied from the UN's primary purpose as stated in Article 1, i.e. the primary purpose of the UN being to maintain international peace and security.[118] The UN therefore must possess powers and means in order to be able to fulfil its primary purpose.[119] Construing the powers of the UN in the Charter too strictly could prevent the UN from acting. The Charter as a flexible legal and political document allows for many possible approaches and interpretations, depending upon the given international situation.[120]

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[115] Simma *supra* note 101.

[116] *Ibid.*

[117] The UN Charter neither explicitly mentions nor authorizes peacekeeping. As the former UN Under Secretary-General for Political Affairs stated, "[t]he technique of peace-keeping is a distinctive innovation by the United Nations. The Charter does not mention it. It was discovered, like penicillin. We came across it, while looking for something else, during an investigation of the guerrilla fighting in northern Greece in 1947." In: B. Urquhart, 'The United Nations, Collective Security, and International Peacekeeping', quoting from A. K. Henrikson (ed.), *Negotiating World Order: The Artisanship and Architecture of Global Diplomacy* 59, p. 62 (1986).

[118] J. P. Bialke, 'United Nations peace operations: applicable norms and the application of the law of armed conflict', *Air Force Law Review* (2001).

[119] "[T]he Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to it in the course of its duties," see *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11), para. 182.

[120] M. R. Berdal, 'The Security Council, Peacekeeping and Internal Conflict after the Cold War', 7 *Duke Journal of Comparative and International Law* 71, 73 (1996).

There was consensus among many policymakers that peace could be jeopardized if certain individuals and factions were not neutralized. The peacekeeping mission in Sierra Leone was at that time the largest in history and the international community was already investing huge financial resources. The international community and the government of Sierra Leone both sought to stabilize the country. In this context, the study conducted by No Peace Without Justice Initiative noted that "the government wanted the RUF leadership tried without the instability that would result from national trials. The international community wanted to prosecute those responsible for attacks on UN peacekeepers. While the evaluation criteria have since changed to encompass notions of legacy and promoting the rule of law, the Special Court was originally conceptualized as central to redressing security concerns."[121]

Maintaining peace and security was therefore one of the main motivations for establishing the SCSL.[122] The Security Council's role in establishing the SCSL could be thus also justified under the general powers of the Security Council under Article 1 and their subsequent implementation through Chapter VI.123

It is submitted that none of the two mentioned sources of authorization for the Security Council should be disputed. The power of the Security Council to enter into an agreement for the establishment of the SCSL was clearly derived from the Charter of the United Nations. There is no reason why the Security Council could not base its authority to act either (1) on the basis of the general purposes of the UN as expressed in Article 1 of the Charter or (2) on the basis of the specific powers under Article 39 and 41 to undertake appropriate measures to maintain or restore international peace and security.

What can be subject to criticism is nevertheless the attempt of the SCSL to imply the binding effect of Resolution 1315 based allegedly on specific powers of the Security Council under Articles 39 and 41. Resolution 1315 contains just recommendations with respect to the subject matter jurisdiction

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[121] No Peace Without Justice Conflict Mapping in Sierra Leone: Violations of International Humanitarian Law from 1991 to 2002 (10 March 2004), p. 14, available at http://www.ictj.org/static/Prosecutions/Sierra.study.pdf.

[122] *Ibid.* This holds true especially for the United Kingdom, which led the military operations in Sierra Leone.

123 In the *Namibia Advisory Opinion* the ICJ noted that "Article 24 of the UN Charter vests in the Security Council the necessary authority to take action such as that taken in the present case (i.e. the adoption of Resolution 276 (1970)). The reference in paragraph 2 of this Article to *specific powers* of the Security Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1". See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (SouthWest Africa) Notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, [1971] ICJ Rep. 14, pp. 52–3, para. 110.

and personal jurisdiction of the SCSL and requests for the Secretary-General to negotiate an agreement with the Government of Sierra Leone, to submit a report to the Security Council on the implementation of this resolution or to address in his report the questions of the temporal jurisdiction of the special court and other issues pertaining to the establishment of the SCSL. Resolution 1315 should be rather viewed as another path to promote and maintain international peace and security via adjustment or settlement of international disputes or situations under Chapter VI (emphasis added).[124]

While concluding that Resolution 1315 was not adopted under Chapter VII, the question can still be raised as to its binding effects. In other words, can resolutions adopted under Chapter VI in general, and Resolution 1315 in particular, be nevertheless still binding on the member states? The opinions vary, which might be one of the reasons why the SCSL did not wish to enter into this discussion and instead tried to bring adoption of Resolution 1315 under Chapter VII powers. However, the prevailing view is that under certain specific circumstances, some resolutions even if not adopted under Chapter VII, can still have binding legal effects.

Article 25 of the UN Charter provides that members of the United Nations "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." It is submitted that Article 25 of the UN Charter does not necessarily apply only to decisions taken under Chapter VII (i.e. decisions on enforcement measures). According to Simma "if one followed such a narrow interpretation of Art. 25, the whole system set up for the maintenance of peace would be weakened, and it would clearly run counter to the overall concept of the Charter. Furthermore, Art. 25 would be unnecessary as the binding effect of decisions taken under Chapter VII could already be achieved on the basis of Art. 48 and Art 49."[125]

To further support this view, one can refer to the ICJ's Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia.[126] In this Advisory Opinion, the ICJ held that "the decisions made

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[124] Chapter VI actions usually rest in providing assistance to a state in order to help the state to maintain peace and order, however do not include the possibility of enforcement as opposed to actions under Chapter VII powers. Racsmany for example suggests that the establishment of the SCSL "is better compared to classical, consensual peacekeeping operations. These are generally considered as falling under Chapter VI or between Chapters VI and VII of the UN Charter. Their legal basis is in any case commonly located outside of Chapter VII." See Z. Racsmany, Z. Deen-Racsmany, 'Prosecutor v. Taylor : The Status of the Special Court for Sierra Leone and Its Implications for Immunity', *Leiden Journal of International Law*, 18 (2005), p.308.

[125] Simma, *supra* note 101, p. 458.

[126] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (for a full citation see *supra* note 123). Compare with statement of Sir Hartley Shawcross in

by the Security Council […] were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24[127] and 25. The decisions are consequently binding on all States Members of the United Nations which are thus under obligation to accept and carry them out."[128] By adopting this contextual approach, the ICJ further stated:

It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council…The language of a resolution of the Security Council should be carefully analyzed before a conclusion can be made as to its binding effect. In view of the nature of the powers of Article 25, the question is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provision invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.[129]

Nonetheless, even if this contextual approach would be adopted and applied to Resolution 1315, it can be still concluded that in the light of interpretation of all circumstances (i.e. language and terms of the resolution, content, purpose, the discussions leading to its adoption, the Charter provision

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the ICJ *Corfu Channel* case, where he asserted that recommendations "under Chapter VI of the Charter, relating to methods of settling disputes which endanger peace, are binding." He contested the applicability of Article 25 only to Chapter VII, by stating "that position, in my submission, is completely untenable. [Even] if one were to disregard […] the preparatory work and the commentaries, one could not find in the Charter itself a shred of support for the view that Article 25 is limited in its application to Chapter VII of the Charter", See *Corfu Channel Case*, Prelim. Objections, Pleadings Vol. III, (1949) I.C.J.Rep, 72, pp. 76-77.

[127] In the *Fofana* case, the SCSL held that Article 24(1) may be invoked as the direct basis for action of the United Nations, i.e. for the establishment of the Agreement pursuant to the Resolution 1315 (2000). The SCSL further stated that Article 24(2), which refers to the specific powers granted to the Security Council is not exhaustive and must be read as fulfilling the function of closing the gaps. It was argued by the Prosecutor that if the Security Council can establish an international tribunal under Article 41, there is no reason why it could not take the same action under Article 24 of the Charter when the state affected has consented. *Prosecutor v. Fofana* (SCSL-2004-14-AR72(E)), Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone (25 May 2004).

[128] See *supra* note 123, p. 53, para. 115.

[129] *Ibid.*

invoked etc.), Resolution 1315 was not intended to have binding effects. Resolution 1315 contains mere recommendations regarding the subject matter jurisdiction and personal jurisdiction of the SCSL and requests for the Secretary-General to negotiate an agreement with the Government of Sierra Leone.

Relevant findings can be summarized as follows:

1. Proving that Resolution 1315 was indeed adopted under Chaper VII would have crucial implications for withdrawal of immunities of serving head of state should the agreement be found unsatisfactory in regulating these issues.

2. It is however suggested that Resolution 1315, which recommended the establishment of the SCSL, was not adopted under Chapter VII powers despite the attempt of the SCSL to prove otherwise.

3. There are some doctrinal opinions[130] and advisory opinions of the ICJ[131] suggesting that the resolution can be still binding under certain circumstances even if not adopted under Chapter VII powers, it is however not a case in the context of Resolution 1315. There was no intention of the SC to adopt this resolution as binding for reasons provided above.

Moreover, the SCSL was not even established by the SC Resolution (as oppose to the ICTY and ICTR ad hoc tribunals). The SCSL was established by a bilateral agreement pursuant to Resolution 1315. For the reasons given, it is not possible to imply binding effects of the Resolution 1315 for the purposes of denying immunity to high ranking state officials as was in the case of the establishment of the ICTY and ICTR. The SCSL should instead direct its attention to the binding effects of agreement establishing the court. This issue will be addressed next.

4.2.3 AGREEMENT BETWEEN THE UN AND THE REPUBLIC OF SIERRA LEONE AND ITS BINDING EFFECTS

Apart from Resolution 1315, attention needs to be given to the Agreement which actually establishes the SCSL.[132] Analysis of the agreement is the

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[130] *See* e.g. Simma *supra* note 101, p. 458.

[131] See *supra* note 123.

[132] The SCSL justified the fact the SCSL is treaty-based by referring to Article 2(1)(a) in connection with Article 31(1) of the Vienna Convention on the Law of the Treaties between States and International Organizations (The 1986 Vienna Convention) and provided a modified version of Article 2(1) by defining international treaty as "an international agreement governed by international law and concluded in written form…between one or more states (in this instance Sierra Leone) and one or more international organizations (the United Nations).

next important step in order to identify for whom the agreement creates obligations under international law, i.e. who is a party to the agreement and thus bound by its provisions. While focusing on the binding effects of Resolution 135, the SCSL did not pay much attention to the Agreement as such.

The SCSL adopted arguments and conclusions of both of the invited amici curiae.[133] According to one amicus curiae, Orentlicher, the Security Council by authorizing the Secretary-General to negotiate an agreement with Sierra Leone was not only carrying out its responsibility to maintain peace and security, but "in doing so, it was acting on behalf of all Members of the United Nations".134

Subsequently, the SCSL developed this argument further by stating that since the Security Council was acting "on behalf of all Members of the United Nations", the agreement is to be regarded as "between all members of the United Nations and Sierra Leone".[135] According to the SCSL "this fact makes the Agreement an expression of the will of the international community".136 However, it is rather disputable to assert, as the SCSL did, that only by virtue of the fact that states are members of the UN, they are therefore parties to the Agreement and accordingly are bound by its provisions.

Both state practise and scholarly opinions[137] show that the conclusion of the SCSL was not correct. For example Article 17 of the SCSL Statute states "the Government shall cooperate with all organs of the Special Court at all stages of the proceedings". Article 17 therefore addresses obligation to cooperate only for the government of Sierra Leone. Are third states also obliged to cooperate with the SCSL? If so, on what legal basis?

It is suggested that the Agreement cannot be interpreted so broadly. For example Damgaard claims that such consequences of UN membership were not envisaged when the UN Charter was adopted and further suggests that if the agreement was between all the UN member states and Sierra Leone, then such member states would assume obligations under such

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[133] See *supra* note 97.

134 *Ibid*., para. 12.

[135] *Prosecutor v. Taylor*, para. 38.

136 *Ibid*.

[137] See e.g. "Since the Special Court was set up by treaty between Sierra Leone and the United Nations; no other state is party to this treaty and hence is not bound by it", in: H. Fox, *The Law of State Immunity* (Preface to Paperback Edition), Oxford University Press (2004), p. 23.

agreement.[138] However, no state expressed that it feels bound by this agreement. In fact, many states acted otherwise.[139]

The SCSL itself approved the limitation of the SCSL when it stated that: "[w]hile acknowledging that the ICTY and ICTR have Chapter VII powers of the UN Charter ensuring that there is an obligation on all UN members to cooperate, in the case of the Special Court, as the Agreement is between the UN and Sierra Leone, its primacy is limited to Sierra Leone alone, as also the obligation to co-operate with the Special Court."[140]

Under these circumstances it is hard to maintain the position that the agreement is to be regarded as 'between all members of the United Nations and Sierra Leone'. Becoming a party to a treaty 'by interpretation' does not respect principles of State sovereignty.[141] Furthermore, the UN possesses separate legal personality and such as "is more than a sum of its members and the organization occupies a position in certain respects in detachment from its members."[142] As a general matter, member states are not bound by treaties concluded by the UN by the virtue of membership alone.

At this point it is useful to reiterate what led the SCSL's to emphasize the role and involvement of the Security Council in the establishment of the SCSL. As already indicated in the previous chapter, the SCSL did so arguably in order to imply binding effects of the Resolution and therefore by

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[138] Damgaard, *supra* note 4.

[139] Examples include: Ghana's failure to arrest Taylor. Nigeria's refusal to extradite Taylor. Moreover, Liberia initiated proceedings against Sierra Leone before the ICJ. Liberia referred to the Yeordia case and argue dthat the SCSL is not an international court that could deny immunity to its President. Liberia requested the ICJ to declare that "the issue of the indictment and the arrest warrant of 7 March 2003 and its international circulation, failed to respect the immunity from a criminal jurisdiction and the inviolability of a Head of State which an incumbent President of the Republic of Liberia enjoys under international law." Nevertheless, Sierra Leone did not accept the jurisdiction of the ICJ pursuant to article 36(2) of the ICJ Statute. *See* 'Liberia applies to the International Court of Justice in a dispute with Sierra Leone concerning an international arrest warrant issued by the Special Court for Sierra Leone against the Liberian President', ICJ Press Release No. 2003/26 (5 August 2003), available at http://www.icj-cij.org/icjwww/ipresscom/iprlast.html (last accessed 26 July 2008).

[140] *Prosecutor v. Norman, Fofana and Kondewa* (SCSL-04-14-PT), Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of the Accused Fofana, (3 March 2004), para. 69.

[141] *See* also the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986 (Convention). Article 34 of the Convention provides that a treaty does not create either obligations or rights for a third state without the consent of that State.

[142] *Reparation of Injuries Suffered in The Service of the United Nations*, I.C.J. Reports, 1949, p. 174.

implication also binding effects of the Agreement for all member states of the UN. It is nevertheless suggested that individual member states remain third parties and are thus not bound by bilateral agreement (pacta tertiis nec nocent nec prosunt).

An alternative approach, which was suggested by the Secretary-General in his Report, would be the conclusion of a multilateral treaty by all UN member states. On the one hand, this approach would allow the treaty to be opened for signature and ratification by all member states.[143] The advantage of this approach would be the possibility of a detailed examination and elaboration of all issues relevant to the establishment of the international tribunal. States participating in the negotiation and conclusion of the treaty could then fully exercise their sovereign will, in particular whether they wish to become parties to the treaty or not.[144]

On the other hand, this approach will admittedly require considerable time to establish the treaty and subsequently to achieve the required number of ratifications for entry into force.[145] Even then, there could be no guarantee that ratifications will be received from those States which should be parties to the treaty if it is to be truly effective.[146] Therefore, what sounds as legally more elegant approach, might prove unfeasible from the practical point of view.

The following statements well illustrate the divergence of views on the way of establishment of the SCSL. In the Fofana case, applicant argued that the UN illegally delegated its powers in this respect and suggested that "the situation may have been different if the court had been set up by the agreement involving a wide group of concerned states."[147] In contrast, Judge Robertson expressed his views on the establishment of the SCSL through bilateral treaty by stating "it cannot in my judgement make any meaningful difference that the Security Council has chosen to authorise the Secretary-General to establish the Court with a similar purpose148 by agreement with a single state (a state where peace need to be restored) rather than by unilateral action or by action in agreement with many states... multilateral agreement would presumably make it more difficult for the Security

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[143] Report *supra* note 112.

[144] *Ibid.*

[145] *Ibid.*

[146] *Ibid.*

[147] *Prosecutor v. Fofana*, (SCSL-04-14-PT), Defence Reply to The Prosecution Response to the Preliminary Defence Motion on the Lack of Personal Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone (30 November 2003), para. 7.

148 By 'a Court with the similar purpose' is meant the ICTY.

Council to e.g. terminate a court, since it would need the agreement of a number of states rather than one."149

It is respectfully submitted that there is a 'meaningful difference' in establishing the court by bilateral or multilateral treaty. The SCSL's legal basis is certainly international regardless of the number of parties to the treaty, i.e. whether it is established by bilateral or multilateral treaty.[150] The difference lies in the fact that the bilateral agreement is arguably binding only on Sierra Leone, it does not bind any other state. This conclusion has important consequences for the purposes of denying immunity of an incumbent head of state of a third country not party to the treaty.

4.2.4 HYBRID NATURE OF THE SCSL NOT RECOGNISED

The SCSL was often referred to as a 'hybrid court'.151 Some refer to its hybrid nature due to the fact that under the SCSL Statute, not only crimes under international law, but also certain crimes under Sierra Leonean law can be prosecuted and punished. The mixed composition of both internationals and Sierra Leoneans within the SCSL was often emphasized as another sign of the SCSL's hybrid nature. However, as already noted above[152], the law applied by the Court and the nationality of the staff do not determine the legal nature of the Court.153

The hybrid nature of the SCSL was also emphasized by Richard Holbrooke who has been an active supporter of the establishment of the SCSL in the SC. After Resolution 1315 (2000) was passed, Holbrook described the proposed character of the SCSL in the following way "This court is going to be of a hybrid nature […]. We have not asked the United Nations to set up another international war crimes tribunal such as the ones that exist for Rwanda and Yugoslavia, but rather we have asked the Secretary-General to

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149 *Prosecutor v. Kallon, Norman and Kamara* (SCSL 2004-14-AR72(E)), Decision on Constitutionality and Lack of Jurisdiction, (13 March 2004), Separate Opinion of Judge Robertson, para. 5.

150 The Secretary-General rightly held that the legal nature of the SCSL, as with any other legal entity, is determined by its constitutive instrument. Since the constitutive instrument is an agreement between a state - Sierra Leone - and an international organization - the UN - the legal nature of the SCSL is international.

151 See e.g. S. Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice', (2001) 14 *Criminal Law Forum*, p. 231, describing the SCSL as a 'new species of tribunal' (internationalised domestic tribunals).

152 *See* Chapter 2.

153 *See* differently Cryer, who argues that the applicable law also determines the legal nature of a court. R. Cryer, 'A "Special Court" for Sierra Leone', (2001) 50 *International and Comparative Law Quarterly*, p. 437.

work with the Sierra Leone Government for what I would call a mixed court, although the actual phrase of this resolution is "Special Court.""[154]

At the beginning, Resolution 1315 anticipated the possibility for the SCSL to share the Appeals Chamber of the ICTY and the ICTR. However, according to UN Assistant Secretary-General Office of Legal affairs Zachlin "the judges in those two courts were very apprehensive of the legal efficacy of such an arrangement given the different nature of the two court systems." He explained that the judges "felt that it would be very difficult for an appeals chamber of the Yugoslavia and Rwanda Tribunals to be sitting as an appeals chamber for a Sierra Leone Court which has its own statute and which is operating on the basis of its own jurisdictional provisions. And they felt very uncomfortable with that. And it seems to us that this was a very legitimate point."[155]

5. CONCLUSION

The approach of the SCSL in Taylor case consisted of two main findings: the SCSL first held that it is an international court. Subsequently, the SCSL decided that as the consequence of its international legal basis, Article 6 of the Statute of the SCSL denying immunity can be invoked against Taylor. Therefore, the SCSL denied immunity ratione personae to the president of Liberia while still in the office. While such a decision may be welcomed, the legal reasoning on the basis of which the SCSL arrived at the conclusion was subjected to criticism. The validity of the SCSL approach in its decision was critically examined in order to find out whether its approach complies with the current state of international law with respect to immunities for crimes under international law.

While this paper approved the international legal basis of the SCSL, the legal reasoning on the basis of which the SCSL arrived at the conclusion to deny immunity to Taylor was found disputable. More elaborate reasoning and judicial clarification of contentious issues were needed, bearing in mind that until the establishment of the SCSL, it had never been considered that the legal basis of an international criminal court could be an agreement between the UN and one or more states.

The SCSL's legal nature, even if international due to its constitutive instrument, is to a large extent different from the two ad hoc tribunals

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[154] Statement by US Ambassador Richard Holbrooke to the media, following adoption of UN Security Council Resolution concerning the establishment of a Special Court in Sierra Leone at August 14, 2000.<http://www.sierra-leone.org/specialcourt081400.html> (accessed September, 2007) (emphasis added).

[155] Press Briefing by the UN Assistant Secretary-General Office of Legal Affairs, Ralph Zacklin, (September 2000), New York, available at www.sierra-leone.org/specialcourt0900.html > (last accessed 16 March 2008).

(ICTY and ICTR) or the ICC. It can not be simply concluded that the SCSL is an international court through an attempt to compare it with the ICTY, ICTR and ICC. The SCSL is indeed international as for its legal basis. Nevertheless, it is proposed that the question is not simply whether the court is international as for its legal basis, but rather whether the court's international legal basis allows for abrogation of immunities.[156]

By attempting to fit itself into a category of 'certain international criminal courts', a phrase used by the ICJ in the Yerodia case, the SCSL limited its legal argumentation to the finding that it is indeed an international court with powers to deny immunity to serving Heads of State. Yet, the mere fact that the legal basis of a certain judicial body is characterized as international does not automatically mean that any Head of State should be denied immunity before such a court.

Not all immunities are irrelevant before any court that may be characterized as 'international'. As for the immunity ratione personae, this immunity constitutes a general rule of customary international law and is therefore relevant not only before domestic courts, but also before international courts "unless the status and nature of the international court justifies a different conclusion. Any exception to this general rule, which remains so far fully applicable before domestic courts, must be legally justified in the case of international courts."[157]

The proposition that immunities ratione personae do not apply before international tribunals depends on the manner of the court's establishment as well as identification of the exact legal basis for denying immunity. In addition, the establishing instrument of the court must bind the concerned state.[158] The legal basis for exception to immunity can be either a Security Council Chapter VII resolution or an international treaty binding the concerned state.

Accordingly, explicit exception to immunity in the Rome Statute of the ICC applies only to contracting parties. On the other hand, lasting entitlement to immunities ratione personae granted by customary international law to incumbent Heads of State of non-state parties before the ICC reflects the current state of law on immunities.[159] By analogy, the agreement between Sierra Leone and the UN establishing the SCSL cannot, without more or of

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[156] See e.g. the discussion in Chatham House, one of the questions raised was "Could state A get around the obligation to provide immunity to the head of state B, by entering into a treaty with state C to set up an "international" court?", *supra* note 5. See also, Damgaard, *supra* note 4.

[157] Cassese *supra* note 65.

[158] Akande *supra* note 72.

[159] *Ibid.*

itself, take away from the incumbent President of another country the immunity ratione personae granted under customary international law.

The SCSL was labelled a 'treaty-based sui generis court of mixed jurisdiction and composition'.160 The SCSL is indeed Sierra Leone specific including the consequences attached to such a nature. Many of the legal choices made were intended to address the specificities of the Sierra Leonean conflict. As such, the SCSL has a unique place in international criminal justice system.161 Nevertheless, the analysis of the SCSL's legal basis also revealed new legal issues and challenges, including the question of denying immunity to the incumbent Head of State of the country not party to a treaty which established the court.

Some argue that the manner in which the SCSL was established was completely unrelated to the issue of immunity: instead, the initial desire was to separate the proceedings from domestic criminal law and the legal system of Sierra Leone.[162] This may well be so. It can even explain some of the difficulties with which the SCSL was confronted. Unfortunately, it does not justify in some respects unfounded reasoning of the SCSL in the Taylor case.

Do these findings suggest that Taylor should be completely immune from the exercise of jurisdiction by the SCSL? No, they rather propose that there is a serious legal issue to be discussed in the context of immunities available to a serving Head of State by the SCSL.[163] The central conclusion of this paper is therefore a finding that a classification of a judicial body as an international criminal court does not automatically mean that a state official has no immunity from prosecution before that body.[164]

Any constitutive instruments of international criminal tribunals should preferably anticipate main problems and try to address principal issues such as jurisdiction and immunities beforehand in order to avoid the uncertainty, which often makes the court to adopt too creative reasoning, which is hard to justify even by employing a teleological interpretation of certain provisions. This may be a lesson to be learned for establishing a similar forum for the prosecution of international crimes elsewhere.

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160 Report, *supra* note 112 , para. 9.

161 *Ibid*.

[162] Chatham *supra* note 8.

[163] Examination of immunities *ratione materiae* and *ratione personae* goes beyond the scope of this paper. For a detailed analysis of immunities available to Taylor, *see* e.g. Nouwen, Novotna, *supra* note 27.

[164] *See* Damgaard, *supra* note 4.

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THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract in original language
The paper analyses basic issues regarding the execution of judgments of the European Court of Human Rights. It sets out both the conditions and the procedure concerning the execution of judgments as well as the obligations which form the subject-matter of the execution. In the conclusion it highlights that the enforcement of judgments is one of the keys to improving the European human rights system, and that effective functioning of the human rights protection system depends to a great extent on execution of the Court's judgments.

Key words in original language
Execution; Judgments; Human rights.

I. The obligation to execute judgments of the European Court of Human Rights

The High Contracting Parties (hereinafter 'the states') to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'the Convention') - have an obligation to *secure to everyone within their jurisdiction the rights and freedoms defined in Section I* of the Convention (Article 1). It follows that securing rights and freedoms is primarily the responsibility of the Parties and the Court's role is subsidiary. This undertaking entails certain obligations for respondent states. The responsibility of a state which failed to fulfil this obligation is threefold. The state subsequently has the obligation:

1) to put an end to the violation, which concerns cases of a continuing violation,
2) to make reparation, which entails the adoption of individual measures (with first, the application of the principle of *restitutio in integrum*, and second, in cases where *restitutio in integrum* proves to be impossible to apply, the payment of compensation),
3) not to repeat the violation, which entails the adoption of general measures (such as cases where the Court impugned legislative provisions or cases where similar violations cannot be avoided in the future without a legislative amendment).

Execution of the Court's judgments is an integral part of the Convention system. The effectiveness of the process of execution has an impact on the Court's authority. The Court's excessive caseload has two main reasons. First, a large number of manifestly ill-founded applications which are

declared inadmissible (more than 90% of all applications) and a large number of repetitive cases. It goes without saying that rapid and adequate execution has an effect on both the influx of new cases and on the number of repetitive applications.

II. Supervision of the execution of judgments

The task of supervising the execution of judgments of the Court is entrusted to the Committee of Ministers (the executive organ of the Council of Europe). The basic provision governing the execution process is Article 46 par. 1 and 2 of the Convention which reads as follows:

1. *The High Contracting Parties undertake to abide by the final judgment of the Court in any*

case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

The Committee of Ministers has on many occasions stated that the obligation to abide by the judgments of the Court is unconditional. A state cannot rely on the specificities of its domestic legal system to justify failure to comply wit the obligation under the Convention. The content of states' undertaking "to abide by the final judgment of the Court" is contained in the Rules of Procedure of the Committee of Ministers[1]. Pursuant to Rule 6 (2) in the supervision of the execution of judgments process the Committee of Ministers examines:

a) whether any just satisfaction awarded by the Court has been paid, including as the case may be, default interest; and

b) if required, and taking into account the discretion of the High Contracting Party concerned to choose the means necessary to comply with the judgment, whether:

i. individual measures have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention;

ii. general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations.

[1] Currently called "Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements".

It follows that there are three types of obligations that can be implied from a judgment of the Court incumbent on the state – just satisfaction, individual measures and general measures.

In the case of *Scozzari and Giunta*[2] the Court, sitting in the Grand Chamber, drew up the obligation of states to take general measures (to prevent further violations) and individual measures (to bestow remedies to the applicant) as follows:

"… a judgment in which the Court finds a breach imposes on the respondent state a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects (see, *mutatis mutandis*, the Papamichalopoulos and Others v. Greece (*Article 50*) judgment of 31 October 1995, Series A no. 330-B, pp. 58-59, § 34). Furthermore, subject to monitoring by the Committee of Ministers, the respondent state remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment."

It is a general practice that the states themselves identify the measures to be taken, whether individual or general, under the supervision of the Committee of Ministers (with the opportunity to find guidance in the Committee of Ministers' practice and relevant recommendations, and in the practice of other states). The guiding principle is the principle of subsidiarity. The states have freedom in the choice of the individual and general measures, however, this freedom is accompanied by the Committee of Ministers monitoring powers. The Committee supervises the choices made and ensures that the measures taken are appropriate and that they meet the requirements in the Court's judgment. The Committee of Ministers exercises its supervisory control with the right to issue interim resolutions or adopt decisions to express concern and to make suggestions with respect to the execution (in the form of press releases, decisions, interim resolutions, or declarations of the Chair).

The Court itself may in its judgments provide guidance regarding execution measures, or even directly order that a certain measure be taken. Although the Court developed this practice in some cases concerning property, e.g. *Papamichalopoulos and others* judgment of 31 October 1995, many years ago, the cases in which the Court directly ordered certain measures to be taken are a recent practice - the first cases appeared only in 2004 and 2005.[3]

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[2] Judgment of 13 July 2000, (§ 249).

[3] *Assanidze v. Georgia*, judgment of 8 April 2004; *Ilascu v. Moldova and the Russian federation*, judgment of 13 May 2005.

In these cases the Court ordered the release of applicants who were being arbitrarily detained. The Court provides recommendations as to general measures in the ´pilot judgments´[4] where it examines the causes of systemic problems that cause an influx of new applications.

III. Just satisfaction

The payment of just satisfaction (compensation in the form of a sum of money) may be awarded by the Court under Article 41[5] of the Convention. It covers pecuniary and non-pecuniary damage and/or costs and expenses. The obligation to pay just satisfaction is stated in the judgment. The detailed conditions (e.g. currency, deadlines, default interests) regarding the payment of just satisfaction are usually set out in the judgments of the Court. These elements of the payment cannot be unilaterally altered and are binding on the state. It should be noted that as concerns default interest, this interest serves only to maintain the value of the just satisfaction, it is not a penalty. There is no obligation to pay default interest provided that the sum is put at the applicant's disposal within the time limit. Since 2000 the Court has made increasingly frequent use of the euro as the single reference currency.

However, the negative consequences resulting from the violation of the rights guaranteed by the Convention can not always be remedied by the payment of just satisfaction. Therefore, depending on the circumstances of the case, the respondent state may also be required to take individual measures or general measures.

IV. Individual measures

Individual measures concern the applicants and relate to the obligation to rectify the consequences suffered by them due to the violations established by the Court in view of achieving *restitutio in integrum* as far as possible. Individual measures come into play in cases where the consequences of the violation would not be adequately remedied by awarding just satisfaction or by a simple statement of a violation. The purpose of these means of redress is to achieve *restitutio in integrum* as far as possible. The individual measures always depend on the nature of the violation and the situation of the applicant. Depending on the circumstances of the case, the actions may involve for example the reopening of unfair proceedings, the enforcement of a domestic judgment not yet enforced, destruction of documents containing information obtained in breach of the right to privacy (*Amann v. Switzerland*), or the introduction of a new legislation giving access to the Court (*The Holy Monasteries v. Greece*).

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[4] e.g. *Hutten-Czapska v. Poland* [GC] judgment of 19 June 2006.

[5] *If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.*

Re-opening of proceedings in the national courts may prove to be an effective means in redressing the adverse consequences in cases of unfair national proceedings or in rectifying a decision of a national court which is incompatible with the Convention. The Committee of Ministers issued a recommendation[6] in which it invited the states to ensure that there are adequate possibilities for achieving *restitutio in integrum* at national level. It invited the states *to ensure that there exist at national level adequate possibilities to achieve, as far as possible, restitutio in integrum* and *adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention.*

In the Czech Republic the Czech Constitutional Court Act provides for reopening of proceedings in criminal matters in cases where an international court finds infringement of human rights or fundamental freedoms by a public authority (§ 119(1)).

V. General measures

The purpose of general measures is either to prevent similar violations to occur in the future or to put an end to continuing violations. In some cases the violation is the result of the lack of national legislation, incompatibility between national legislation and the Convention, or the way in which the national courts interpret the legislation and the Convention. In such cases it is necessary to amend the existing legislation, introduce new legislation or to change judicial practice.

Therefore, general measures may include the obligation to review legislation and/or judicial practice, improve administrative procedures, or even to make constitutional changes in order to prevent similar violations. Within the system of general measures, the importance of effective remedies is more and more frequently raised. The Committee of Ministers regards at the efficiency of domestic remedies, where either the Court's judgment or the Committee of Ministers' examination reveals important systemic or structural problems.[7]

For example, in the *Hutten-Czapska* case, which involved a violation of the applicant's right of property due to limitations on use of property by landlords, and in particular the rent control scheme, the Committee of Ministers stated that further information was awaited on the development of domestic courts' case-law concerning the definition of "decent profit" … as well as other measures to prevent new, similar violations ". It also required the Polish government to clarify "the scope of the notion of "basic rent" and its introduction into the legislative framework". The Committee of Ministers

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[6] Recommendation Rec (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights and Explanatory memorandum.

[7] Recommendation (2004) 6 on the improvement of domestic remedies.

further pointed out that "the violation found was the result of a structural problem linked to a malfunctioning of national legislation and that the respondent state must secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords and the general interest of the community in accordance with the principles of the protection of property rights under the ECHR".

VI. The procedure of the execution supervision

The procedure of the execution supervision of the Committee of Ministers is enshrined primarily in the Rules adopted by the Committee of Ministers for the application of Article 46 par. 2 of the Convention (adopted on 10 May 2006).

Final judgments of the Court, in which the Court finds a violation of the Convention or in which a friendly settlement is accepted, are submitted to the Committee of Ministers for examination (at human rights meetings). Once the Court finds a violation of a right enshrined in the Convention and awards the applicant just satisfaction under Article 41 of the Convention, then the state, whose government is to pay the sum awarded, must answer to the Committee for its execution. Likewise, cases where violation was found but no compensation was awarded are also called for supervision as measures to prevent further violations need to be taken. According to the Court's case-law, the execution of judgments should be considered as an integral part of the trial for the purposes of Article 6 of the Convention.[8] Provided that the judgment of the Court is precise, it is self-executing in the domestic legal system and directly applicable by domestic courts. However, the Court lacks power to determine which measures need to be taken in order to execute the judgment and leaves the choice of the means to the state.[9]

Once the Court's final judgment has been transmitted to the Committee of Ministers, it appears on its agenda. Cases are normally placed on the agenda of the Committee of Ministers 3-6 months after the judgment has become final. The supervision of execution of judgments takes place at special human rights meetings. The Committee invites the respondent state to inform it of the measures taken (payment of just satisfaction, individual or general measures) so as to abide by the judgment. The Committee then examines the information submitted by the respondent state. The deliberations of the Committee of Ministers are private (Article 21 of the Statute of the Council of Europe). The cases are examined primarily on the basis of information submitted by the governments, regard being had to the communications made by the applicant regarding individual measures, as well as to non-governmental organizations and national human rights institutions.

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[8] *Hornsby v. Greece*, 19 March 1997, § 40.

[9] *Scordino v. Italy* [GC], 29 March 2006, § 233.

The cases where the execution of judgments proceeds smoothly are normally examined without debate. The criteria which are considered in decisions on holding or not holding a debate are as follows:

a) the applicant's situation because of the violation warrants special supervision,

b) the case marks a new departure in case-law,

c) the case discloses a potential systemic problem which is anticipated to give rise to similar cases in the future.

In the process of examination of cases the Committee of Ministers may take various actions to facilitate execution of judgments – it may adopt interim resolutions or insist that the responded state put forward certain reforms or take other measures in conformity with the judgment. The Committee of Ministers does not strike the judgment off the lists of cases by virtue of a final resolution until the respondent state has adopted measures that would be satisfactory. Until then the Committee of Ministers requires the state to provide explanations or to take an action.

The Committee of Ministers requires a written proof that just satisfaction and any default interest have been paid to the applicant. It may also require adoption of individual non-pecuniary measures in order to achieve *restitutio in integrum*, or evidence that the government has adopted general measures needed to prevent further violations. In cases where the situation has not improved, it may ask the respondent state to take further measures. This practice also applies in cases where a friendly settlement has been reached.

When the Committee of Ministers finds that the state has taken all the measures necessary to fulfil the obligations set out in the judgment, it ends the examination and adopts a final resolution. The Committee of Ministers may require the respondent state to present a written report on the measures adopted. If difficulties arise in executing the judgment, the Committee of Ministers may exert its powers and by way of a dialogue persuade the state to take appropriate action in order to comply with the judgment. Only as the last resort, and rare in practice, the Committee of Ministers exerts political and diplomatic pressure to compel the state to fulfil the requirements stipulated in the judgment.

In cases where the state objects or delays taking the necessary measures, the Committee of Ministers may either adopt interim resolutions or threaten to apply Article 8 of the Statute of the Council of Europe. The practice of interim resolutions was first introduced in the *Ben Yaacoub*[10] case. There are various forms of interim resolutions:

[10] *Ben Yaacoub v. Belgium*, judgment of 27 November 1987, Series A no. 127-A.

a) invitation of the state to comply with the judgment and stating that no measures have been adopted[11],

b) encouragement of the state to adopt measures in the future and commenting on the state of progress (the most common type of resolution),

c) threatening the state with more serious measures (exceptional type of resolution).[12]

At the extreme, a state can be excluded from the Council of Europe where it refuses to execute a judgment. Under Article 8 of the Statute of the Council of Europe "any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee my decide that it has ceased to be a member of the Council as from such date as the Committee may determine." If a state continues to fail to execute a judgment, it could be interpreted as a serious violation of the principles of the rule of law and of human rights and fundamental freedoms within the meaning of Article 3 of the Statute of the Council of Europe. The first case in which the Committee of Ministers threatened of exclusion was *Loizidou v. Turkey*. In reality, however, this measure has never been used.

The willingness of the states to execute the judgments of the Court depends rather on their political aims and interests than on the prospects of possible sanctions. In reality, it is rather late executions, the delays of which have been constantly increasing, than non-compliance with judgments that raises difficulties. It is not common that the states would systematically refuse to execute judgments. While the habitual reasons for non-compliance are intricate national legislative procedures and reforms, political reasons are not common (one of the exceptions is the pending case of *Cyprus v. Turkey*[13]). The Parliamentary Assembly of the Council of Europe summed up the problems of execution of judgments as follows: "The problems of implementation are at least seven-fold: political reasons; reasons to do with the reforms required; practical reasons relating to national legislative procedures; budgetary reasons; reasons to do with public opinion;

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[11] In the case of *Matthews v the United Kingdom* the Committee of Ministers in its interim resolution ResDH (2001) 79 stated that "… no adequate measures have yet been presented with a view to preventing new similar violations in the future; urges the United Kingdom to take the necessary measures to secure the rights …".

[12] It was adopted, for instance, in the case of *Loizidou v. Turkey*. The Committee of Ministers stated that "… declares the Committee's resolve to ensure, with all means available to the Organisation, Turkey's compliance with its obligations under this judgment; calls upon the authorities of the member states to take such action as they deem appropriate to this end."

[13] *Cyprus v. Turkey*, judgment of 10 May 2001.

judgments drafted in a casuistical or unclear manner; reasons relating to interference with obligation deriving from other institutions."[14]

There have also been numerous delays in payments of just satisfaction. The delays in executing judgments correspond to an ever increasing workload of the Committee of Ministers, which has almost quadrupled from 2000 up to today. The major challenge is a prompt implementation of general measures so that repetitive cases are avoided.

VII. Protocols No. 14 and 14bis

The enormous growth of litigation before the Court (on 1 January 2009 there were about 97 000 pending cases compared to 65 000 as of 1 January 2004) over the past ten years has posed a threat to the effective functioning of the Court. The prospect of a continuing increase in the workload of the Court and consequently the Committee of Ministers' supervision of the execution of judgments necessitated adoption of certain measures to preserve the system in the future. At the same time, it was vital that the principal and unique features of the Convention system – the judicial character of supervision and the right of individual application[15] - would not be affected by the reform measures.

The necessary reform process, which begun in 2001, resulted in the adoption of a new protocol to the Convention, Protocol No. 14, opened for signature in May 2004. The purpose of the Protocol is to guarantee the long-term efficiency of the Court and to reduce the Court's excessive caseload giving the Court the procedural means and flexibility and allowing it to concentrate on the most important cases. Protocol No. 14 does not make radical changes to the control system established by the Convention. The changes relate more to the functioning than to the structure of the system. The Protocol No. 14, which will enter into force once all State Parties to the Convention have ratified it, has not yet come into force due to resistance from the part of the Russian Federation. In the meantime, in order to provide a temporary solution to the Court's enormous caseload, Protocol 14bis was adopted and open for signature in May 2009. It does not require ratification by all the State Parties to Convention. Intended to be only a provisional measure pending entry into force of Protocol No. 14, the scope of Protocol 14bis is limited to those procedural measures contained in Protocol No. 14 that would increase the Court's case-processing capacity in the most immediate manner pending entry into force of Protocol No. 14. It is the introduction of the single-judge formation to deal with plainly inadmissible applications and the extended competence of three-judge committees to handle clearly well-founded and repetitive cases deriving from structural or systemic defects. Protocol 14bis thus does not explicitly touch on the system

[14] Resolution 1226 (2000).

[15] Any person claiming to be the victim of a breach of the rights and freedoms protected by the Convention may refer the matter to the Court.

of execution of judgments of the Court. Protocol No. 14bis would cease to exist once Protocol No. 14 to the Convention enters into force.

The state of affairs, however, changed on 23 September 2009 when the Russian Federation's State Duma adopted (with 353 votes in favor and 17 against) a statement to resume the question of ratification of Protocol No. 14 to the Convention. Thus, the ratification of Protocol No. 14 by the Russian Federation, which would enable the entry into force of Protocol No. 14, has approached reality.

VIII. Changes brought by Protocol No. 14 in respect of the execution of judgments

In May 2006 the Ministers' Deputies adopted the new *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements*. Some major changes in the rules were introduced in relation to the adoption of Protocol No. 14. The changes concern the following: the introduction of priority treatment of judgments revealing an underlying systemic problem (Rule 4[16]), the Committee of Ministers' obligation to adopt an annual report on its activities which shall be made public (Rule 5[17]), the referral of a case to the Court for interpretation of a judgments (Rule 10[18]), and the referral of a case to the Court for infringement proceedings when a state refuses to abide by a final

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[16] 1. *The Committee of Ministers shall give priority to supervision of the execution of judgments in which the Court has identified what it considers a systemic problem in accordance with Resolution Res (2004) 3 of the Committee of Ministers on judgments revealing an underlying systemic problem.*

2. The priority given to cases under the first paragraph of this Rule shall not be to the detriment of the priority to be given to other important cases, notably cases where the violation established has caused grave consequences for the injured party.

[17] *The Committee of Ministers shall adopt an annual report on its activities under Article 46, paragraphs 2 to 5, and Article 39, paragraph 4, of the Convention, which shall be made public and transmitted to the Court and to the Secretary General, the Parliamentary Assembly and the Commissioner for human Rights of the Council of Europe.*

[18] *1. When in accordance with Article 46, paragraph 3, of the Convention, the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.*

2. A referral decision may be taken at any time during the Committee of Ministers' supervision of the execution of the judgments.

3. A referral decision shall take the form of an interim resolution. It shall be reasoned and reflect the different views within the Committee of Ministers, in particular that of the High Contracting party concerned.

4. If need be, the Committee of Ministers shall be represented before the Court by its Chair, unless the Committee decides upon another form of representation ...

judgment (Rule 11[19]). Both the referral decision and the decision resulting from the infringement proceedings shall take the form of a reasoned interim resolution.

It follows that by virtue of Protocol No. 14 the Committee of Ministers has two new remedies before the Court: a) referral to the Court in the event of a problem of interpretation of a judgment, b) referral to the Court for a state's failure to execute a judgment.

The lack of clarity of judgments often makes their execution difficult. Difficulties sometimes arise due to disagreement as to the interpretation of judgments. Therefore, the new Article 46 par. 3[20] of the Convention allows the Committee of Ministers to refer a case to the Court by a two thirds majority vote when it "considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment". There is no time-limit as the need for interpretation of a judgment may arise a long time after the date on which the judgment was delivered. This procedure shall apply to that sort of cases where the Court has not subsequently clarified its case-law or where it has not indicated the general measures to be taken. The Court gives an interpretation of a judgment and does not rule on the measures already taken by the state to comply with the final judgment. The required qualified majority vote shows that the Committee of Ministers should use this provision seldom with regard to eventual over-burdening of the Court.

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[19] *1. When, in accordance with Article 46, paragraph 4, of the Convention, the Committee of ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation.*

2. Infringement proceedings should be brought only in exceptional circumstances. They shall not be initiated unless formal notice of the Committee's intention to bring such proceedings has been given to the High Contracting Party concerned. Such formal notice shall be given ultimately six months before the lodging of proceedings, unless the Committee decides otherwise, and shall take the form of an interim resolution. This resolution shall be adopted by a majority vote of two-thirds of the representatives entitled to sit on the Committee.

3. The referral decision of the matter to the Court shall take the form of an interim resolution. It shall be reasoned and concisely reflect the views of the High Contracting Party concerned.

4. The Committee of Ministers shall be represented before the Court by its Chair unless the Committee decides upon another form of representation …

[20] *If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.*

The most important provision, according to the explanatory report, introduced by Protocol No. 14 is Article 46 par. 4[21] and 5[22] which provides for infringement proceedings in the Court against any state which refuses to comply with a final judgment. This supplies the Committee of Ministers with an additional means of applying political pressure. In fact, and as states the explanatory report to Protocol No. 14, in the event of persistent resistance from a state, the Committee of Ministers can dispose of either interim measures or "heavy weapons" (ultimate measures) such as Articles 3[23] and 8[24] of the Statute of the Council of Europe (suspension of voting rights in the Committee of Ministers, or even expulsion from the Council of Europe). Infringement proceedings may thus fill out the gap of missing intermediate measures. In cases where a continuing infringement is established by the Committee of Ministers, a decision to instigate infringement proceedings before the Court, sitting in the Grand Chamber, shall be taken in the form of a reasoned interim resolution issued no sooner than 6 months after a notice to comply is served on the affected state. The Committee of Ministers' decision requires a qualified majority of two thirds of the representatives entitled to sit on the Committee. The party to the proceedings is neither the applicants nor the respondent state, but only the Committee which is represented before the Court by its Chair. The Court renders a decision in which it rules whether the state has taken the measures required by the judgment that found the violation. The question of violation decided already in the Court's first judgment is not reopened. The Court finds either a state's failure to comply with the judgment (payment of just satisfaction, individual measures, general measures) and sends the case back

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[21] *If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.*

[22] *If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.*

[23] *Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all*

persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively

in the realization of the aim of the Council as specified in Chapter I.

[24] *Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.*

to the Committee of Ministers, or no such failure which obliges the Committee of Ministers to close the case. The purpose of the infringement proceedings is to obtain a ruling from the Court as to whether the state has failed to fulfil its obligation under Article 46 par. 1 of the Convention. The political pressure exerted by those proceedings in the Grand Chamber and by the judgment is considered to be sufficient to secure execution of the Court's initial judgment by the infringing state. Although the Committee of Ministers should bring infringement proceedings only in exceptional circumstances, the new provisions of Article 46 bring another possibility to exert pressure on the infringing state to execute the Court's judgment by the mere existence of the procedure and the threat of using it.

IX. Conclusion

Enforcement of judgments is regarded as one of the keys to improving the European human rights system. Effective functioning of the human rights protection system depends to a great extent on execution of the Court's judgments. Speedy and adequate execution has an effect on both the number of applications submitted to the Court and on the number of repetitive applications.

The obligation to execute a judgment is binding on the states. As regards the payment of just satisfaction, the Court usually lays down with considerable detail the execution conditions in its judgments. It is usually not so as regards the other execution measures, whether individual or general. By virtue of the principle of subsidiarity, the states have freedom of choice as regards the measures to be taken in order to meet their obligations. This freedom, however, is not limitless and falls under scrutiny of the Committee of Ministers within the framework of its supervision of execution.

In the supervision of execution the Council of Europe has adopted an approach of persuasion and co-ordination of the national and the Council of Europe competent bodies. In cases of unwillingness of the states to comply with their obligation to abide by the judgments of the Court, the Committee of Ministers may exert political and diplomatic pressure. The ultimate measures that may be applied are suspension of voting rights in the Committee of Ministers, or expulsion from the Council of Europe. With the entry into force of Protocol No. 14 to the Convention the Committee of Ministers would dispose of another means of applying political pressure - the right to instigate infringement proceedings before the Court against a state which refuses to comply with a final judgment of the Court.

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MEZINÁRODNÍ TRESTNÍ SOUDNICTVÍ

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Abstract in original language
Příspěvek se zabývá mezinárodním trestním soudnictvím, jeho dlouholetou tradicí, současnou situací i jeho přínosem pro svět skrze ochranu základních lidských práv a svobod. Najdeme zde i definici důležitých mezinárodních pojmů jako je genocida, zločiny proti lidskosti, válečné zločiny, agrese a popis struktury a fungování takových institucí mezinárodního soudnictví jako je Mezinárodní trestní soud, Mezinárodní trestní tribunál pro bývalou Jugoslávii, Mezinárodní trestní tribunál pro Rwandu a mnoho dalších.

Key words in original language
Genocida; Zločiny proti lidskosti; Válečné zločiny; Agrese; Mezinárodní trestní soud; Mezinárodní trestní tribunál pro bývalou Jugoslávii; Mezinárodní trestní tribunál pro Rwandu

Abstract
Report deal with an international criminal justice, its long-term tradition, present circumstances and its value for world through protection of fundamental rights and freedoms as well. We can find therein a definition of importent international notions like genocide, crimes against humanity, war crimes, crime of aggression and function description and structure of these institution of international justice such as International Criminal Court (ICC), International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and many other.

Key words
Genocida; Crimes against humanity; War crimes; Crime of aggression; International Criminal Court; International Criminal Tribunal for the former Yugoslavia; International Criminal Tribunal for Rwanda.

HISTORIE MEZINÁRODNÍHO TRESTNÍHO SOUDNICTVÍ

Vznik mezinárodního trestního soudnictví spadá do první poloviny 20. století, kdy hrůzy obou světových válek zasáhly celé národy a ovlivnili životy miliónů lidí na celém světě. Myšlenka postavit vůdce nacistického Německa před mezinárodní soud se objevila již za první světové války, když Spojenci projevili snahu potrestat zločiny a zločince první světové války. Versailleská Mírová smlouva z roku 1919 dokonce obsahovala ustanovení, články 227 až 230, na základě kterého uznala německá vláda právo spojenců potrestat válečné zločince a dobrovolně jim odevzdá obžalované z řad svých vlastních občanů. Spojencům šlo zejména o německého císaře Viléma II., který měl být souzen jako hlavní německý válečný zločinec.Ten ale nalezl útočiště v Nizozemí, které ho odmítlo vydat

a protože chyběl dostatečný politický tlak a zájem, k odsouzení Viléma II. nakonec nedošlo. Navíc spojenci se nakonec vzdali i původního plánu potrestat svými soudy ostatní německé válečné zločince a souhlasili se zrušením příslušných článků mírové smlouvy. Ostatní obvinění byli nakonec souzeni v Německu a jen malý počet z nich byl nakonec odsouzen k nepřiměřeně nízkým trestům. Můžeme tedy říci, že tento pokus o potrestání zločinů a zločinců první světové války ztroskotal a skončil spíše rozčarovaním pro ty, kteří očekávali potrestání odpovědných osob za hrůzy a utrpení první světové války.

V roce 1928 byl podepsán Briand-Kellogův pakt, kterým došlo k opuštění války jako způsobu řešení problému, i když válka ještě nebyla výslovně prohlášena za mezinárodní zločin. Ani toto však nezabránilo vypuknutí druhé světové války.

Už během II. světové války spojenci několikrát prohlásili, že svoji chybu z roku 1918 a 1919 už znovu opakovat nebudou. A i když ne všechny státy se plně ztotožňovali s myšlenkou mezinárodního trestního soudu byla dne 8.8. 1945 v Londýně podepsána Dohoda o stíhání a potrestání hlavních zločinců Evropských zemí Osy, která byla sjednaná mezi vládou SSSR, USA, Velkou Británií a Severního Irska a prozatímní vládou Francie. V souladu se závěry Postupimské konference uzavřely členské státy protihitlerovské koalice Dohodu o zřízení Mezinárodního vojenského tribunálu k soudu s hlavními válečnými zločinci hitlerovského Německa.

Za sídlo tohoto vojenského tribunálu byl z politických i morálních důvodů vybrán Norimberk neboť zde dříve probíhaly nacistické slavnostní stranické sjezdy a byly zde také vyhlášeny norimberské zákony. V Norimberku se však konal proces výhradně s nejvlivnějšími a německými zločinci a proti dalším Němcům byly vedeny další procesy a to mimo jiné např. v Československu, Itálii, Francii, Austrálii, Japonsku a mnoha dalších.

Připomeňme si alespoň jeden z nich a to Mezinárodní vojenský tribunál pro Dálný východ se sídlem v Tokiu, který se konal v letech 1946-1948 a byl ještě rozsáhlejší než proces konaný v Norimberku. Jeho protokoly čítaly skoro 50.000 stran a na jeho závěru bylo vyneseno 7 rozsudků smrti.

NORIMBERSKÝ PROCES

Proces proti Göringovi a jeho druhům, jak byl proces původně nazýván, začal 20.listopadu 1945 v 10 hodin 30 minut. Je to první mezinárodní soud národů nad zločiny proti míru a proti lidskosti, který důsledně, v rámci svých možností, vykonal mezinárodní spravedlnost.[1] Trval 218 jednacích

[1] EČER, B. Norimberský soud. vyd. Praha: Nakladatelství ORBIS, 1946. s.380

dnů. Soud se sešel 138krát, projednal 38 000 výpovědí, protokol soudu čítá skoro 17 000 stran a bylo předloženo víc jak 4 000 dokumentů.

Soud se skládal ze čtyř soudců jmenovaných čtyřmi vítěznými velmocemi (soudce Geoffrey Lawrence, generální prokurátor Francis Biddle, Henri Donnedieu de Vabres a generálmajor Jola T. Nikitčenko), čtyř hlavních žalobců, kteří podobně jako soudci zastupovali 4 velmoci (Robert Jackson, sir Hartley Shawcross, François de Menthon, generál Roman Ruděnko), 21 obžalovaných, dalších 70 zástupců obžaloby, 22 obhájců, 40-45 tlumočníků, asi 150-200 žurnalistů. Diváci, ani norimberští občané, nebyli do sálu vpuštění.

Obžalovaní byli nejen jednotlivci (Martin Bormann , Karl Dönitz, Hans Frank, Wilhelm Frick, Hans Fritzsche, Walter Funk, Hermann Göring, Rudolf Hess, Alfred Jodl, Ernst Kaltenbrunner, Wilhelm Keitel, Robert Ley, Konstantin von Neurath, Franz von Papen, Erich Raeder, Joachim von Ribbentrop, Alfred Rosenberg, Fritz Sauckel, Hjalmar Schacht, Baldur von Schirach, Arthur Seyss-Inquart, Albert Speer a Julius Streicher),ale i organizace (říšská vláda, SA a generální štáb wehrmachtu, sbor vůdců NSDAP, SS, SD a gestapo).

Článek 6 Charty soudu, ujednané 8.srpna 1945, stanovil zločiny patřící do pravomoci tribunálu, jedná se o zločiny proti míru, válečné zločiny, zločiny proti lidskosti a spiknutí čili společný plán k nim.

Spiknutí: obžalovaní sledovali společný plán na dobytí neomezené moci a shodovali se v provádění dalších zločinů.

Zločiny proti míru: to jest osnování, příprava, podněcování nebo podniknutí útočné války nebo války porušující mezinárodní smlouvy, dohody nebo záruky, anebo účast na společenském plánu nebo spiknutí ku provedení čehokoli .

Válečné zločiny: to jest porušení zákonů války nebo válečných zvyklostí. Takové porušení bude v sobě zahrnovat vraždu, zlé nakládání, nebo deportaci civilního obyvatelstva z obsaženého území nebo v něm k otrocké práci, nebo pro jakýkoliv jiný účel, vraždu válečných zajatců nebo osob na moři nebo zlé nakládání s nimi, zabíjení rukojmí, plenění veřejného nebo soukromého majetku, svévolné ničení měst a vesnic, nebo pustošení neodůvodněné vojenskou nutností, nebude však na ně omezeno.

Zločiny proti lidskosti: Ze začátku se spojenci chtěli omezit na trestání německých válečných zločinců jen na případy, kdy byly porušeny tzv. “zákony a obyčeje války”. Nevěděli si však rady s tou částí jednotné německé zločinnosti proti lidskosti, která nebyla těmito normami válečného práva postižena. Němci páchali zločiny s úmyslem zotročit nebo vyhubit cizí národy a rasy a vyvražďovali v Německu i mimo Německo celé vrstvy národů z důvodů rasových, náboženských, národních nebo politických. Tyto zločiny možno označit za zločiny proti humanitě, tj. proti lidskosti nebo

lidstvu jako celku. Tyto zločiny z části nebyly vůbec zločiny válečnými, neboť byly páchány dávno před válkou, bez jakékoliv souvislosti s válkou a bez formálního porušení "zákonů a obyčejů války". Proto nakonec byly zločiny proti lidskosti definovány jako vražda, vyhlazování, zotročení, deportace nebo jiné nelidské činy spáchané proti kterémukoliv civilnímu obyvatelstvu před válkou nebo za války, nebo pronásledování z důvodů politických, rasových nebo náboženských při páchání nebo ve spojení s jakýmkoliv zločinem, který patří do pravomoci tribunálu ať s porušením nebo nikoliv, domácího práva státu, kde byl spáchán.

Díky tomu, že bylo Chartou soudu prohlášeno za zločin a jako zločin trestáno připravování a rozpoutání útočné války a také díky tomu, že do Charty byli zařazeny zvlášť vyčleněné zločiny proti lidskosti, stala se Charta soudu a rozsudek Norimberského tribunálu mezníkem ve vývoji mezinárodního práva. V následujících letech vznikly další mezinárodní trestní tribunály a soudy čerpající více či méně z Mezinárodního vojenského tribunálu v Norimberku a proto můžeme říci, že je jeho role v dějinách mezinárodního trestního práva a soudnictví nezastupitelná.

MEZINÁRODNÍ TRESTNÍ TRIBUNÁL PRO BÝVALOU JUGOSLÁVII

Konflikt, který probíhal v letech 1991 až 1995 na území bývalé Jugoslávie, představoval nejhorší krveprolití v Evropě od konce 2.světové války. Počáteční podcenění konfliktu, váhání a zjevná neschopnost dohodnout se na společném postupu značně zdiskreditovalo mezinárodní společenství států v očích veřejnosti. Nakonec po několika rezolucích ve kterých Rada bezpečnosti OSN vyjádřila své znepokojení nad zjevným porušováním mezinárodního humanitárního práva, rozhodla v rezoluci 827 (1993) o zřízení Mezinárodního tribunálu pro bývalou Jugoslávii.

Článek 1 Statutu Mezinárodního tribunálu pro bývalou Jugoslávii obecně stanovil jeho pravomoc "stíhat osoby odpovědné za vážná porušení mezinárodního humanitárního práva, spáchaná na území bývalé Jugoslávie od r. 1991, v souladu s ustanoveními tohoto Statutu. Důležitá jsou ustanovení Statutu určující jeho příslušnost ratione materie. Patří sem čtyři kategorie zločinů podle mezinárodního práva, definované v článcích 2 až 5 Statutu. Jejich členění se poněkud liší od norimberských kategorií, ale i od návrhu Kodexu zločinů proti míru a bezpečnosti a konečně i Statutu Mezinárodního trestního soudu. Hlavní rozdíl spočívá v rozdělení válečných zločinů do dvou samostatných kategorií. Mezinárodního tribunálu pro bývalou Jugoslávii a potvrdil princip individuální trestní odpovědnosti. Tribunál má podle článku 6 soudní pravomoc pouze nad fyzickými osobami, tedy s vyloučením právnických osob. Oficiální postavení popř. státní funkce obviněné osoby, ji nezbavuje trestní odpovědnosti, ani není ani polehčující okolností. Skutečnost, že zločin spáchal podřízený, nezbavuje jeho nadřízeného trestní odpovědnosti, pokud tento věděl nebo měl možnost vědět, že podřízený hodlá spáchat nebo spáchal takový čin, a přesto nepřijal nezbytná a rozumná opatření k prevenci či represi. Konečně ani

skutečnost, že obviněná osoba jednala na rozkaz vlády nebo nadřízeného, nezbavuje trestní odpovědnosti, ale může být považována za polehčující okolnost.[2]

Za jedno z nejdůležitějších ustanovení je třeba považovat článek 9, který stanovil při konkurenční jurisdikci Mezinárodního tribunálu a vnitrostátních soudů prioritu Mezinárodního tribunálu.

Pokud jde o organizaci a složení Mezinárodního tribunálu, tvoří je především senáty složené z 11 nezávislých soudců, volených na čtyřleté období Valným shromážděním z užšího seznamu vybraného Radou Bezpečnosti OSN. Soudci zasedají v tříčlenných soudních senátech a pětičlenném odvolacím senátu. Dalším samostatným orgánem Tribunálu je prokurátor jmenovaný Radou bezpečnosti, který řídí Úřad prokurátora, složený z potřebného počtu kvalifikovaných zaměstnanců. Posledním orgánem je Kancelář, která zajišťuje administrativní služby Tribunálu. Náklady na činnost Mezinárodního tribunálu pro bývalou Jugoslávii jsou hrazeny z řádného rozpočtu OSN. Jeho sídlem je nizozemský Haag.

Mezi nejznámější patří případ Tadić, ve kterém byla projednávána sama kompetence soudu, a případ Blaškić, ve kterém byla diskutována pravomoc tribunálu vůči státům při získávání důkazů.

MEZINÁRODNÍ TRESTNÍ TRIBUNÁL PRO RWANDU

Druhým ad hoc zřízeným tribunálem je Mezinárodní trestní tribunál pro Rwandu. Byl zřízen necelý rok po svém předchůdci Mezinárodním trestním tribunálem pro bývalou Jugoslávii, a to na základě rezoluce Rady bezpečnosti OSN 995 (z 8.11.1994), s výlučným úkolem "soudit osoby odpovědné z činů genocidy a dalších závažných porušení mezinárodního humanitárního práva, spáchaných na území Rwandy, a rwandské občany odpovědné z takových činů a porušení spáchaných na území sousedních států mezi 1. lednem a 31. prosincem 1994." Rada bezpečnosti tak reagovala na masové vraždění, k němuž došlo v roce 1994 během ozbrojených střetů v občanské válce ze strany extremistů z kmene Hutů, posílených prezidentskou gardou, vojskem a policií, proti menšinovým Tutsiům i umírněných Hutům. Tyto činy byly páchány nejen na vlastním území Rwandy, ale i na území sousedních států, kam se mnohé oběti prchaly. Konflikt si vyžádal přes půl milionu mrtvých a na 2 miliony uprchlíků. Statut Mezinárodního tribunálu pro Rwandu vykazuje mnohé

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[2] Statute of the International Tribunal for the former Yugoslavia z ŠTURMA, P. Mezinárodní trestní soud a stíhání zločinů podle mezinárodního práva. Praha: Karolinum, 2002, s.309

shodné znaky se svou starší předlohou (Statut tribunálu pro bývalou Jugoslávii), ale zároveň i některé podstatné odlišnosti. Stejný je způsob vzniku, časově a místně omezená jurisdikce obou tribunálů a obdobná je i dokonce organizační struktura, rozdílné je ovšem vymezení zločinů, které je tribunál oprávněn trestat[3].

Mimo tyto dva mezinárodní trestní tribunály, které by si jistě zasluhovaly větší prostor a detailnější rozbor v mém článku, existovaly později i další mezinárodní soudy, tribunály či senáty zabývající se mimo jiné porušováním mezinárodního humanitárního či válečného práva, jako např. Zvláštní soud pro Sierra Leone, Zvláštní soudní panely na Východním Timuru, Mimořádné soudní senáty v Kambodži nebo Irácký zvláštní soud pro zločiny proti lidskosti. Nejdůležitější ze všech je ale Mezinárodní trestní soud v Haagu, k jehož vzniku jsme celé dvacáté století směřovali.

MEZINÁRODNÍ TRESTNÍ SOUD

Jak již bylo zmíněno výše, první návrhy na vytvoření stálého mezinárodního trestního soudu byly již v meziválečném období, reálně však mezinárodní společenství přistoupilo k vytvoření takového soudního orgánu až po skončení studené války, umocněno zkušenostmi z první poloviny devadesátých let 20. století. Jako způsob ustavení soudu nebyla zvolena rezoluce Rady bezpečnosti OSN, nýbrž otevřená multilaterální mezinárodní smlouva Římský statut Mezinárodního trestního soudu. Přestože toto představuje určitý zásah do státní suverenity, státy se mohou svobodně rozhodnout, zda tuto mezinárodní smlouvu ratifikovat a tím přijmout jurisdikci soudu.

Římský statut zřizuje Mezinárodní trestní soud, který je stálou institucí a je nadán jurisdikcí nad osobami, které se dopustí nejzávažnějších zločinů, kterými je dotčeno mezinárodní společenství jako celek a jež jsou uvedeny ve Statutu, přičemž jeho jurisdikce je komplementární vůči národním trestním jurisdikcím. Soud má sídlo v Haagu, v případě potřeby ale může zasedat i mimo území Nizozemí. Soud je nadán mezinárodněprávní subjektivitou.

V rámci úpravy věcné příslušnosti Soudu pak taxativně vyjmenovává a dále konkretizuje jednotlivé zločiny, které pod jeho jurisdikci spadají a také upravuje časovou, územní a osobní příslušnost Soudu. Rovněž je zde zakotvena právní zásada ne bis in idem. Následně Statut upravuje obecné

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[3] Statute of the International Tribunal for Rwanda z ŠTURMA, P. Mezinárodní trestní soud a stíhání zločinů podle mezinárodního práva. Praha: Karolinum, 2002, s.309

zásady jako nullum crimen sine lege, nulla poena sine lege, in dubio pro reo, zákaz retroaktivity a zákaz použití analogie v neprospěch obviněného a individuální trestní odpovědnost. Zločiny spadající do jurisdikce Soudu jsou nepromlčitelné a subjektivní stránka je obecně stanovena tak, že jednání pachatele musí být úmyslné a vědomé. Článek 26 upravuje zákaz zohledňování veřejné funkce. Orgány soudu jsou předsednictvo, odvolací úsek, projednací úsek, přípravný úsek, úřad žalobce a kancelář. Smluvní strany Statutu se zavazují, že budou poskytovat plnou součinnost při vyšetřování a stíhání zločinů spadajících do jurisdikce Soudu. Soud může rovněž vyzvat stát, který není smluvní stranou Statutu, aby poskytl pomoc na základě ad hoc ujednání. Trest odnětí svobody bude vykonán ve státě určeném Soudem ze seznamu států, které Soud uvědomily o své ochotě přijímat odsouzené. Výdaje Soudu a Shromáždění smluvních stran, včetně jeho Výboru a podřízených orgánů, jsou hrazeny z prostředků Soudu. Ty jsou tvořeny z vyměřených příspěvků smluvních stran a prostředků poskytnutých OSN[4].

Jurisdikce Soudu je omezena na nejzávažnější zločiny, kterými je dotčeno mezinárodní společenství jako celek. Skutkové podstaty těchto zločinů Statut v rámci úpravy své věcné působnosti taxativně definuje genocidu, zločiny proti lidskosti, válečné zločiny a akt agrese.

Relativně nejsnadnější bylo zařazení zločinů genocidy v článku 6, jehož definice byla převzata z čl. II Úmluvy o zabránění a trestání zločinů genocidia z roku 1948.Pro účely tohoto Statutu se „genocidou“ rozumí kterýkoli z níže uvedených skutků, spáchaných s úmyslem zničit úplně nebo částečně některou národní, etnickou, rasovou nebo náboženskou skupinu jako takovou“. To znamená, že pachatel musí mít úmysl zničit (úplně nebo alespoň částečně) jednu ze čtyř chráněných skupin.

Složitějším úkolem se však ukázaly být definice dalších zločinů. Článek 7 Statutu Mezinárodního trestního tribunálu obsahuje vymezení „zločinů proti lidskosti“ Tento zločin může být spáchán i bez souvislosti s ozbrojeným konfliktem, ale kterýkoli z uvedených činů musí být spáchán „jako součást rozsáhlého nebo systematického útoku zaměřeného proti civilnímu obyvatelstvu, při vědomí existence takového útoku. V tomto Statutu je také poprvé obsaženo ucelené a dostatečně přesné vymezení činů, které představují zločin proti lidskosti. Jedná se například o vraždu, vyhlazování, zotročování, deportaci nebo násilný přesun obyvatelstva, zbavení svobody při porušení základních pravidel mezinárodního práva, mučení, znásilnění,

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[4] ŠTURMA, P. Mezinárodní trestní soud a stíhání zločinů podle mezinárodního práva. Praha: Karolinum, 2002, s.309

sexuální otroctví, nucenou prostituci, nucené těhotenství a sterilizaci a mnoho dalších[5].

Další kategorii chování, na kterou se vztahuje příslušnost Soudu, jsou válečné zločiny, zejména pokud jsou páchány jako součást plánu či politiky nebo jsou páchány v širokém měřítku. Jde o nejkomplexnější shrnutí současného obyčejového mezinárodního práva válečného a v převážné většině je i výčtem kogentních pravidel v této oblasti. Zároveň Statut kvalifikoval porušování humanitárních pravidel v rámci vnitřního ozbrojeného konfliktu jako mezinárodně postižitelný válečný zločin.

Jako nejproblematičtější se jevila definice zločin agrese, neboť v samotném Statutu v článku 5 je příslušnost Soudu vůči tomuto zločinu omezena do doby, kdy revizní konference přijme definici tohoto zločinu. Komise pro mezinárodní právo sice zařadila zločin agrese do svého návrhu Statutu, ale nepokusila se vypracovat použitelnou definici toho zločinu, protože již v Přípravném výboru se ukázaly hluboké rozpory mezi delegacemi a bylo jasné, že zatím nejsme schopni vytvořit jednu definici tohoto zločinu, která by vyhovovala všem.

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ENFORCEMENT OF CONSUMER RIGHTS IN THE EC BEFORE COURTS[1]

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Abstract in original language
Příspěvek se věnuje soudnímu vymáhání práv spotřebitelů v ES. Představuje a zkoumá možnosti individuálního i kolektivního vymáhání, přičemž zvláštní pozornost je věnována směrnici o žalobách na zdržení se jednání v oblasti ochrany zájmů spotřebitelů (Úřední věstník L 166, 11. 6. 1998) a nařízení o spolupráci mezi vnitrostátními orgány orgány příslušnými pro vymáhání dodržování zákonů na ochranu zájmů spotřebitele ("nařízení o spolupráci v oblasti ochrany spotřebitele", Úřední věstník L 164, 9. 12. 2004).

Key words in original language
Ochrana spotřebitele; Evropské společenství; individuální vymáhání; kolektivní vymáhání; soudnictví.

Abstract
The paper deals with judicial enforcement of consumer rights in the European Community. Possibilities of individual as well as collective enforcement are presented and examined with special regard to the directive on injuctions for the protection of consumer interests (OJ L 166, 11. 6. 1998) and the regulation on cooperation between national authorities responsible for the enforcement of consumer laws ("Regulation on consumer protection cooperation", OJ L 164, 9. 12. 2004).

Key words
Consumer protection; European Community; individual enforcement; collective enforcement; judiciary.

INTRODUCTION

When dealing with enforcement of consumer rights in the EC (no matter whether the enforcement takes place before courts or by means of alternative dispute resolution), it is necessary to define rights which should be subject to enforcement. Generally, basic “catalogue” of consumer rights includes right to protection of health and safety, right to protection of

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ecenomic interests, right to compensation of damage, right to information and education and right to representation (right to be heard).[2] Consumer rights can be thus divided into two groups – one of them being economic rights of consumers, the other ones rights to protection of health and safety.

Effective enforcement of consumer rights in the EC is constantly being slowed down by the fact that there is no Community legislation creating single framework of enforcement of consumer rights. Most directives on consumer protection[3] define individual consumer rights and possibilities of their enforcement or redress, but the enforcement is then realized by means of national legislation. The same applies to the most famous Community instruments of enforcement of consumer rights, namely the directive on injuctions for the protection of consumer interests[4] and the regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation).[5] The question therefore is: can consumers in the EC enforce their rights before courts effectively?

There have been many attempts to answer the above mentioned question. In this paper, we will try to discuss the matter, too, while the state of EC means on enforcement of consumer rights will be presented and analysed.

1. LEGAL SOURCES OF CONSUMER PROTECTION AND CONSUMER RIGHTS ENFORCEMENT

1.1 CONSUMER PROTECTION IN PRIMARY LAW DE LEGE LATA AND DE LEGE FERENDA

The source of current EC consumer protection lies in art. 153 Treaty establishing the European Community (TEC) which lays down basis for the protection of consumers in the EC. However, the provision of art. 153 TEC only contains general competence of the Community – or more precisely said the shared competence with the member states - and means of EC consumer protection and in no way refers to procedural apects of consumer protection.[6] Nowhere in the Treaty (treaties) can we find provisions for

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[2] Reich, N. – Micklitz, H.-W.: Europäisches Verbraucherrecht, Baden-Baden : Nomos Verlagsgesellschaft, 2003, 4. Auflage, 1268 p., ISBN 978-3-8329-0041-0, p. 16.

[3] E.g. directive 93/13/EEC on unfair terms in consumer contracts („unfair contract terms directive“) or directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market („infair commercial practices directive“).

[4] Directive 98/27/EC.

[5] Regulation 2006/2004/EC.

[6] The whole provision of art. 153 TEC reads as follows: *1. In order to promote interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic safety of consumers, as well as promoting their right to information, education and to organize themselves in order to safeguard their interests. 2. Consumer protection interests shall be taken into account in defining and implementing other Community policie and activities. 3. The Community shall*

consumer rights enforcement. The reason for this is quite simple – lack of competence. Procedural law is in the powers of the member states, with the exception of some aspects of judicial cooperation in civil or commercial matters stated in art. 65 TEC.[7] However, these provisions cannot be applied to consumer protection because they rule areas of civil and commercial judicial protection and even so have quite a restricted effect. Therefore, there is no exclusive power of the Community to regulate issues of consumer rights enforcement and as a result, the options of consumers to virtually fight for their rights differ across Europe.

The same applies to provisions of the Treaty on the functioning of the European Union (TFEU) or the Charter of fundamental rights of the EU. Article 12 TFEU establishes duty to take high level of consumer protection into account when proposing and implementing other EU policies and activities.[8] It is obvious that provision of art. 12 TFEU is of quite a general character and its practical impact on consumer protection in practice or especially on the possibilities of judicial enforcement should not be exagerrated. The wording of art. 169 TFEU is practically the same as that of art. 153 TEC,[9] i. e. it leaves the main responsibility for consumer protection

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contribute to the attainment of the objectives reffered to in paragraph 1 through: a) measures adopted pursuant to Article 95 in the context of the completion of the internal market; b) measures which support, supplement and monitor the policy pursued by the Member States. 4. The Council, acting in accordance with the procedure reffered to in Article 251 and after consulting the Economic and Social Committee, shall adopt measures referred to in paragraph 3 (b). 5 *measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them*.

[7] Provision of art. 65 TEC read as follows: *Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include: (a) improving and simplifying: — the system for cross-border service of judicial and extrajudicial documents, — cooperation in the taking of evidence, — the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases; (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction; (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.*

[8] Exact wording of Art. 12 TFEU reads: *Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.*

[9] The whole provision of art. 169 SFEU reads as follows: *1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests. 2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through: (a) measures adopted pursuant to Article 114 in the context of the completion of the internal market; (b) measures which support, supplement and monitor the policy pursued by the Member States. 3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b). 4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State*

on the member states while the EU is supposed to *cotribute to the protection of health, safety and economic interests of consumers, as well as to support of their right to information, education and right to associate to protect their interests*. As far as Charter of fundamental rights is concerned, its art. 38 states that *Union policies shall ensure a high level of consumer protection*. However, this provision can in no way be interpreted as a right, but merely as a principle of EU law and therefore as unable to establish basis for consumer rights enforcement.

1.2 CONSUMER RIGHTS PROTECTION AND ENFORCEMENT IN SECONDARY LAW

Various individual and to some extent also collective consumer rights stem from directives on consumer protection; however, as directives are unable to constitute direct effect, consumers must rely on provisions of national law which not only grants them rights, but also sets means of their protection. Needless to say that only in cases of wrongful or late implementation consumers could rely directly on provisions of directives – but even in that case more conditions, especially the requirement for a sufficiently clear provision establishing some kind of consumer rights, would have to be fulfilled. It is not too difficult to imagine a directive on consumer protection which contains such precisely defined rights that can be relied on even without an action from the member states – in my opinion a good example is directive on general product safety[10] which in art. 3 obliges producers to place only safe products on the market while it at the same time lays down quite precise description of a safety product.[11] As such, provision of art. 3

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from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.

[10] 2001/95/EC

[11] The whole provision of art. 3 reads: *1. Producers shall be obliged to place only safe products on the market. 2. A product shall be deemed safe, as far as the aspects covered by the relevant national legislation are concerned, when, in the absence of specific Community provisions governing the safety of the product in question, it conforms to the specific rules of national law of the Member State in whose territory the product is marketed, such rules being drawn up in conformity with the Treaty, and in particular Articles 28 and 30 thereof, and laying down the health and safety requirements which the product must satisfy in order to be marketed. A product shall be presumed safe as far as the risks and risk categories covered by relevant national standards are concerned when it conforms to voluntary national standards transposing European standards, the references of which have been published by the Commission in the Official Journal of the European Communities in accordance with Article 4. The Member States shall publish the references of such national standards. 3. In circumstances other than those referred to in paragraph 2, the conformity of a product to the general safety requirement shall be assessed by taking into account the following elements in particular, where they exist: (a) voluntary national standards transposing relevant European standards other than those referred to in paragraph 2; (b) the standards drawn up in the Member State in which the product is marketed; (c) Commission recommendations setting guidelines on product safety assessment; (d) product safety codes of good practice in force in the sector concerned; (e) the state of the art and technology; (f) reasonable consumer expectations concerning safety. 4. Conformity of a product with the criteria designed to ensure the general safety requirement, in particular*

could seem as having direct effect, but we shall bear in mind one of general principles of EC law, i. e. that directives cannot impose obligations upon individuals. Therefore, as mentioned above, cases when consumers can rely directly on provisions of Community legislation, do not – also due to the duty of the member states to implement directives properly and in time – occur very often and actually should be considered as exceptions.

Two pieces of secondary legislation aim directly on the enforcement of consumer rights – directive 98/27/EC on injuctions for the protection of consumer interests and regulation 2006/2004/EC on cooperation between national authorities responsible for the enforcment of consumer laws ("CPC regulation"). Both the directive and the regulation seek to protect collective consumer interests and can be therefore regarded as means of collective protection of consumer rights.

The aim of directive 98/27/EC (hereinafter referred to as "directive") is according to its art. 1 *approximation of laws, regulations and administrative provisions of the member states relating to actions for an injuction in the sense of art. 2 in order to protect collective interests of consumers included in the directives listed in the annex.*[12] This aim shall be reached by several steps. First of all, each member state designates courts or administrative bodies entitled to rule on proceedings which shall stop or prohibit the infringement, ensure that possible continuing effects of the infringement are eliminated and possibly ensure some kind of redress to the damaged party. At the same time, the above mentioned proceedings shall be initiated by qualified entities (i. e. organisations on consumer protection, consumer associations etc.) entitled to bring an action before courts or administrative bodies. Member states are also obliged to enable access to their judicial or administrative proceedings to qualified entities from other member states. As a result of the directive, a list of qualified entities entitled to defend consumers before courts all across the EC is created and published in the Official Journal.

Ideally, in practice the directive should lead to more confident and informed consumers and thus – whenever there occurs an infringement of rights of consumers protected by one of the directives in the annex (implemented quite naturally in the law of the member states) – to more proceedings across Europe. Undoubtedly, the list of qualified entities published in the Official Journal helps consumers learn which bodies can defend their rights before courts, no matter where they are. On the other hand, the same problems which were causing insufficient level of consumer protection

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the provisions mentioned in paragraphs 2 or 3, shall not bar the competent authorities of the Member States from taking appropriate measures to impose restrictions on its being placed on the market or to require its withdrawal from the market or recall where there is evidence that, despite such conformity, it is dangerous.

[12] Current list of directives to which directive 98/27/EC applies includes 14 directives – for precise information see the annex to driective 98/27/EC.

before the directive still persist – especially in the field of cross-border infringements qualified bodies do not use the chance to protect consumers´ rights abroad. One of the main reasons are the costs of proceedings and limited impact of the rulings of courts of one member state in other member states or even on other cases in the member state itself. The European Commission informed in the report on the application of the directive[13] that the Office of Fair Trading (Great Britain) was the only qualified body from all over the EC which filed several actions abroad. To sum up, the impact of the directive is – due to reasons stated above - not as high as the Commission rather optimisticly expected. This state of affairs will in my opinion continue as it is extremely difficult for consumers´ organisations to participate in proceedings abroad, not only due to costs, but mainly due to insufficient knowledge of "foreign", i. e. different law. As there is lacking EC (EU) competence in the field of civil procedural law (which will be lacking also in the future, or at least so it seems from the Lisbon treaty), the only possible way how to increase the activity of bodies on protection of collective consumer interests is to create a detailed information network which would provide consumers as well as consumers´ organisations and associations with information on relevant national law.

The second means of collective enforcement of consumer rights, the so-called CPC regulation 2006/2004 (hereinafter referred to as "regulation") aims at cooperation between national authorities responsible for the enforcement of consumer protection laws. Ratie materiae of the regulation is to a great extent similar to the one of directive 98/27/EC. Similarly to the directive, the annex of the regulation lists directives and regulations on consumer protection which shall be – within the meaning of the regulation – regarded as "laws on consumer protection"[14] and thus subject to enforcement in accordance with the regulation. However, even though most of the directives are mentioned in the 98/27/EC as well as in the regulation, the list is not identical which can cause troubles in case when a consumer association brings an action before court in one member state and such court cannot require cooperation from a court or public authority of a different member state because the case does not fall within the scope of the regulation. As a result, the directive and the regulation are not hundred per cent linked together which leads to restricted application of one or another legal instrument. It is then a little surprising that the Commission which is well aware of this fact is not going to propose an amendment of neither the directive nor the regulation.[15]

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[13] Report from the Commission concerning the application of Directive 98/27/EC of the European Parliament and the Council on injuctions for the protection of consumers´ interests, available online at: http://ec.europa.eu/consumers/enforcement/docs/report_inj_en.pdf , pp. 5 - 8.

[14] For detailed list, see the annex of regulation 2006/2004/EC.

[15] See Report from the Commission concerning the application of Directive 98/27/EC of the European Parliament and the Council on injuctions for the protection of consumers´

As far as practical functioning of the cooperation between public authorities is concerned, the regulation lays down conditions under which responsible authorities exchange information and realise enforcement measures if asked so by an authority from another member state. It also obliges the member states to cooperate not only with each other, but also with the Commission in the field of mutual exchange of information. As a result, a network of responsible bodies was created and according to the Commission, good mutual cooperation and assistance have developed – there were total 317 requests for mutual assistance in 2007 and 384 requests in 2008.[16] It seems that the desired effect of the regulation – enhancement of cooperation between responsible national authorities and thus stronger and better enforcement of consumer rights in the EC before courts – has been reached. The absence of a closer linkage to the injuctions directive nevertheless prevents effective cooperation not only between public authorities themselves, but in a wider sense also between consumer associations and public authorities.

CONCLUSION

The aim of this paper was to present and analyse means of enforcement of consumer rights before courts in the European Community. It proved that core problem which prevents from effective enforcement is lack of competence of the Community (or – in close future – of the European Union). Absenting powers in the field of civil procedural law together with shared competence in the field of consumer protection (and resulting harmonisation of consumer acquis by directives) directly cause several phenomena which together make enforcement of consumer rights in the EC difficult. First of all, individual enforcement lies entirely in the hands of member states which undoubtedly discourages consumers from one member state to sue elsewhere. Secondly, means of collective enforcement are insufficient because injuctions directive is not completely linked with the CPC regulation and so far no amendments are on the horizon. It seems that the only way how to improve current state of affairs while maintaining powers where they are is to create a public database of material as well as procedural legislation on consumer protection of all member states and hope that consumers and their associations will feel informed and confident enough to defend their rights all over the EC.

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[16] Enforcement package, on-line text, MEMO/09/312, Brussels 2. 7. 2009, available online at: http://ec.europa.eu/consumers/docs/consumer_enforcement_package_MEMO_en.pdf, p. 6.

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BASIC RULES OF PROTECTION IN THE COPYRIGHT AND INTELLECTUAL PROPERTY LAW. THE NATURE OF THE GRANTED RIGHTS IN THE FIELD OF INTELLECTUAL PROPERTY

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Abstract
Copyright generally refers to the right granted for the protection of literary, dramatic, musical and artistic works, as well as other other works resulting from the author's own intellectual creation. Related rights are those granted for the protection of performers, producers, broadcasters etc. In some laws, however, the term copyright is used to cover both the rights of authors and some or all of the related rights. In recent years it has become usual to refer to certain categories of rights as sui generis rights. These are rights which may be regarded as different in nature from copyright and related rights, though dealing with intellectual property in products and requiring a distinct sui generis protection. The protection provided by copyright, related rights and sui generis rights is to be distinguished from that available under laws concerning patents, trade marks, industrial designs and trade secrets and other forms of intellectual property. Patents are monopolies granted for the protection of inventions and new methods of manufacture. Patent protection depends on registration and other formalities, and is valid for a shorter period than copyright. Nevertheless, there can be an overlap between patent and copyright protection, for instance in regard to protection of computer programs or inventions related to such programs. Manufacture of an article may infringe a patent, even when the maker did not know of the patent's existence. Copyright of a work, however, is not infringed by a similar work, if the latter was created without any use of the pre-existing work. Trade marks are marks applied to goods or services in order to indicate origin. There are special rules as to what may be used as a trade mark, but no considerations of artistic quality apply. Sometimes a picture or other representation used as a trade mark will itself be subject to copyright protection, when the necessary criteria for such protection is fulfilled. Industrial designs are generally considered to be those designs used in the industrial manufacture of articles, in quantity. Some industrial designs are for purely functional objects. Other industrial designs have both functional and artistic aspects, for instance when a design for mass-produced metal lamps contains aspects that make the lamp attractive from the artistic point of view. The overlap between protection of industrial designs and copyright in artistic works is one of the most difficult areas of law in the field of intellectual property. Trade secrets are protected by the law relating to confidential information. Other forms of protection are available under laws relating to unfair competition, contracts and tortious acts, preventing prejudice to businesses by use of unlawful means. The unauthorised use of a

copyright work may well involve breach of one or more of these separate forms of protection. Copyright, related rights, sui generis rights, patents, trade marks, trade secrets etc. may be protected by civil remedies or criminal sanctions.

Key words
Copyright; Intellectual Property; Trade Marks; Patents; Legal Protection.

1. GENERAL CONCEPTS

With a view to a global approach article 2 of the Stockholm Convention regarding the establishment of the World Intellectual Property Organisation[1] defines the concept of intellectual property as representing the sum of rights over the creations of the mind such as: the rights regarding literary, artistic and scientific works, performances of performing artists, phonograms and radio broadcasts, inventions from all the field of human activity, scientific discoveries, industrial designs and models, trademarks, manufacturer and service marks, commercial names and denominations, protection against unfair competition as well as any other rights related to intellectual activity in the industrial, scientific, literary and artistic field[2].

This concept is often criticised due to the fact that by using the word property we unjustly emphasise the material characteristic of the relations from this field in the detriment of their wealth and complexity. Similarly, the word intellectual emphasises a supposed non-material characteristic of goods that defines the nature of the relations in this field. This happens under the circumstances in which the nature of the relations that interest us cannot always be considered non-material goods[3]. Obviously, the concept intellectual property can have various meanings for different people. On the

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[1] The convention for the establishment of the World Intellectual Property Organisation (WIPO) was adopted and signed at the diplomatic Conference for Intellectual Property that took place in Stockhom between the 11th of June and the 14th of July 1967; a Romanian delegation also attended the conference. The World Intellectual Property Organisation was established with a view to promoting industrial and literary-artistic property throughout the world. Another goal was to set up new ways of administrative collaboration between the associations for intellectual property based on the principle of financial autonomy of each union and on the right of each union to participare in solving common problems. Later on WIPO was recognised as a specialised institution of the United Nations Organisation being active and having valuable initiatives in the field of intellectual rights protection. Romania ratified the Stockholm Convention through Decree no. 1175 from the 28th of December 1986, published in the official bulletin No 1 from the 6th of January 1969 v. Roş, V., Bogdan, D., Spineanu-Matei, O. (2003) - *Dreptul proprietăţii intelectuale, Dreptul proprietăţii industriale, Mărcile şi indicaţiile geografice, (Intellectual Property Law, Industrial Property Law, Trademarks and Geographic Indications),* All Beck publishing house, Bucharest, p.1.

[2] Romințan, C. R., Drăgan, J. (2004) – *Mic dicționar de proprietate intelectuală, dreptul de autor și drepturile conexe*, (*Small dictionarz of intellectual property, copyright and related right*) Lumina Lex publishing house, Bucharest.

[3] Franceschelli, R. (1973) – *Trattato di diritto Industriale. Parte Generale,* (*Treaty of Industrial Rights*) vol. I – II, DOTT. A. GIUFFRE EDITORE, Milan, p. 11-12.

one hand, some people believe that it is part of human rights deriving from the natural right which supports the creations of the human mind by protecting the authors in relation to the users. On the other hand, for others it represents a commercial monopoly established for a better regulation of the market exploitation of the authors' creations. In between these two opposite approaches there are two other concepts each with its own philosophy and legal justification. The analysis concerning the placement of intellectual property in the normative system is not dependant on the national level, that is it should not be restricted to the national level as it encompasses worldwide cultural, political and commercial relations. Irrespective of how this concept is perceived there is always one common aspect which refers to the creations of the mind and the means through which these are shared with the general public[4].

As national barriers disappear, the differences between the normative systems also diminish and the need to adopt common measures rises. In the past the national legal systems were solely responsible for the regulation of relations in the fields of intellectual property and sometimes reference was made to other systems. Today however, due to the new discoveries in the field of technology the whole approach has to change refocusing on an international one. This implies an assessment of the various law systems, respectively of both common law and civil law, assessment that should lead to adopting harmonized solutions basing on the traditional approach of each of these systems.

In order to comprehend the concept of the normative system we must focus on the meaning of the concept of norm, that is legal norm, because the system bares the meaning of structure in the present study. As one author[5] observed regarding the legal norm there are numerous definitions and the authors have difficulties in agreeing upon a single one. Consequently, the legal norm is defined as a rule of conduct set up or recognised by the public authority; its implementation is ensured by the legal consciousness and, where necessary, by the coercive force of the state or by the general,

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[4] Literature states that the term "*intellectual property*" has its origin in a mistranslation of a word from Ehnglish into French because of the fact that the first revolutionary decrees from France by which authors and inventers were acknowledged exclusive rights. These decrees reflects the influences of the English and American legal system where the word property is used. The French translation is *propriété* although the French view on property corresponds to the English *ownership*; in the circumstances in which the Anglo-American law the concept of *property* is more encompassing and includes even personal rights, thus dismissing an essential diferenece between the Anglo-Amercian property and the one according to Napoleon's code (art.544 with the Romanian Civil Code correspondent art. 480). The Anglo-American legal system refers to a temporary right whereas the French legal system recognises it as a permanent rigth v. Roş, V., Bogdan, D., Spineanu-Matei, O. (2005) - *Dreptul de autor şi drepturile conexe, Tratat,(Copyright and related rights,Treaty)* Ed. All Beck, Bucureşti, p.1.

[5] Mihai, G. C. (2008) – *Teoria dreptului (Theory of right)*, 3rd edition, C. H. Beck publishing house, Bucharest, p. 61.

impersonal, repeatable prescribed rule of conduct, rule of public authority that must be complied with. Similarly, as a social rule of conduct edited and sanctioned by the state. Its obedience is ensured as a last resort by the coercive force of the state. Similarly, as a category of social norms set up or acknowledged by the state compulsory for the relations between the subjects of law and applied under warranty of public force in case of breach. Similarly, as a rule of social behaviour enforced by the power of the state by which citizens are obliged to do what is fair and forbidden to do what is unfair; and last but not least, as a rule of human conduct. In this way society can coerce its members directly or indirectly to behave in a certain way by applying an exterior, public, organised, more or less intense pressure. To sum up, the normative system relating to the intellectual property field represents nothing but the structure of legal norms pertaining to the same field.

The field of intellectual property[6] comprises: copyright, related rights, sui generis rights, patents, marks, industrial designs as well as the protection granted by means of special laws[7]. By copyright one can understand the right acknowledge by law of the author of a literary, artistic, musical or scientific creation as well as other creations resulting from the intellectual activity of the author. Related rights represent the rights enjoyed by performing artists for their performances, recording sound record producers for their own records, radio broadcast and TV for their own broadcastings. Sui generis rights differ in nature from author's and related rights despite

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[6] The denomination adopted for this new category of rights and for the new discipline, deemed traditional and accepted as such, has often been criticised. On the one hand, this is due to the fact that the institutions (numerous) that form the new branch of law and its object of study are not always concerned with intellectual creations, creations of the spirit (this is the case of trademarks and geographic indications and of unfair competition). On the other hand, even in those cases where the protected object is respresented by such creations their legal systems differ nor only from the property system of the common law but also from one creation category to another; the distinctions being considerably large at times v. Roş, V., Bogdan, D., Spineanu-Matei, O. (2005) - *Dreptul de autor şi drepturile conexe, Tratat, (Copyright and related rights,Treaty)* All Beck publishing house, Bucharest, p. 2.

[7] The legal system of the intellectual creation set up between the 15th and the 18th century does not distinguish between the literary and artistic property (the object of which consists in protecting creations of the intellect materialized in art works) and patent right (the object of which was protecting the inventions with industrial characteristics for application) up until the end of the 18th century. The limit between the two categories of rights would only become clear at the beginning of the 20th century. Thus, the French law concerning patents dating back to 1791 did not mention inventors but "authors of useful discoveries". The term "author" was used both for inventors and for creators as we know them today. The distinction between these two categories of authors was made by taking into account the utility of their creations: in the case of inventor authors the industrial application, while in the case of proper authors the exclusively artistic utility of their creations. However, the American constitution adopted in 1787 already makes this distinction through art. 1 section 8 clause 8 by empowering the congress to promote "the progress of science and useful arts granting the authors and inventors an exclusive right over their creations and inventions" v. Roş, V., Bogdan, D., Spineanu-Matei, O. (2005) - *Dreptul de autor şi drepturile conexe, Tratat,(Copyright and related rights,Treaty)* All Beck publishing house, Bucharest, p.5 - 6.

the fact that they refer to a product pertaining to the field of intellectual property which require a different protection, sui generis due to the new technologies. Sui generis usually refer to data basis[8]. Patents represent real monopolies granted for the protection of inventions and new methods of production. The protection acquired by means of patents depends on registration and other formalities and is granted for a shorter period than the one corresponding to copyright, usually 20 years instead of life-long validity + 50 or 70 years, the period of validity granted to copyright. Notwithstanding, there can be an overlap between the protection granted by means of patents and the one granted by means of copyright which is the case in certain countries for computer programmes or inventions related to this programmes. The creator of an asset may breach an existing patent even without knowing of its existence. In the case of copyright it is not breached in the circumstances in which the creator of a similar work does not use a pre-existing creation. Trademarks are marks applied to goods and services with a view to indicate origin. In certain cases a picture or another type of representation used as a commercial brand may constitute the object of protection granted by copyright if and when the requirements imposed by these are fulfilled. Industrial designs are generally perceived as being those designs used in the industrial production of goods in certain quantities. Some industrial designs have an exclusively functional purpose as is the case with the components of an engine. Other industrial designs have not only a functional aspect but also an artistic one; therefore the overlapping between the protection granted to industrial designs and the one to artistic creations by means of copyright is one of the most troublesome in the field of intellectual property. Other forms of protection are granted by means of legal provisions referring to unfair competition. Also to be included in the field of intellectual property are: geographic names employed in order to distinguish between similar products by using the name of the place where it has been produced. Champagne and Cognac are the most suggestive examples. The protection granted by means of copyright does not coincide with the one granted to geographic names. The same applies in the case of protection granted to types of species.

The national legal system represents a unitary ensemble in the form of a structured, homogenous system. Within the unity of the legal system, the legal norms that compose it are classified following various criteria in certain subsystems, i.e. in legal institutions and legal branches. As no legal norm can exist independently in the sphere of the remaining norms, neither can legal institutions nor branches exist as completely separate norm groups. Most of the authors argue that at the basis of the division of the legal system and branches lies the character of the social relations governed by a group of legal norms. In other words branch division starts from the object of legal ruling. The distinctive and unitary character, the specific features of the

[8] Tafforeau, P. (2004) – *Droit de la propriété intelectuelle. Propriété litéraire et artistique. Propriété industrielle. Droit international*, Gualino éditeur, Paris, p. 29.

social relations belonging to a certain field of activity deem it necessary and possible to be governed by a particular category of norms.

Alongside the main criterion of dividing the legal system in branches the one related to object ruling another specific criterion coexists, the one referring to method where the state acts upon certain social relations. If the object ruling is the objective criterion for the establishment of legal branches then the method represents the subjective criterion determined by the volition of the law-maker. The legal branch can be defined as a set of legal norms organically intertwined which govern social relations characterized by the same feature, the use of the same method or complex of methods.

By its very definition as a sub-ensemble of a system none of the legal branches exist separately. At times a branch may constitute the common right for another or several other branches which means that its rules apply to the latter if there are no special rulings for the respective domain and if the norms resorted to are comparable to the principles and specificities of the social relations governed by the legal branch where the norms find application. Moreover, certain public institutions, due to their importance, are concerned with almost all legal branches. A classic example is property right. In other cases although it constitutes the specific object of a legal branch some social relations are additionally protected by applying rules from other branches also due to general interest, for instance such a protective function is carried out by the provisions of criminal or administrative law. The connection between the legal branches is evident in the content of legal relations also known as related. These are only some of the causes that objectively determine the multiple connections between legal branches.[9]

2. THE SCOPE OF THE STUDY

For these reasons, the present study firstly aims at determining the rules, the fundamental mechanisms of legal protection for the works contained within the intellectual property area from the point of view of the basis of protection, such as the nature of the guaranteed rights, the criteria for protection, the conditions for granting protection and, last but not least, the structure of the protection, respectively the way in which laws are structured linguistically and legally. This carries a particular significance from the exclusive point of view of copyright and less from the one of industrial property.

The analysis is at the same time an auxiliary in establishing the relation between the national and the international right as well as the relation

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[9] Ţiclea, A. (2007) – *Tratat de dreptul muncii,(Labour Law Treaty) 2nd edition,* Universul Juridic publishing house, Bucharest, p. 58.

between the national and the EU right and not lastly, in establishing the common right in the field of intellectual property. In Romania, for instance, this aspect was significant even previous to the new civil code as well as subsequent to it. Establishing the structure of the legal regulations in the field of intellectual property is essential, irrespective of their formal, international, regional or national origin in relation to the creation, especially due to the fact that an intellectual creation can benefit from multiple types of protection mainly due to the coexistence of regional, national and international systems of protection corresponding to each category of intellectual creation. Multiple types of protection are addressed particularly due to the fact that a certain intellectual creation, provided it fulfils a number of conditions, may constitute an object for specific protection systems corresponding to several categories of intellectual creations. To be more precise, the creation protected by the trade mark system can benefit from the specific protection granted to industrial designs and models, but in certain cases also from the protection system related to intellectual property. The same applies to inventions.

3. FUNDAMENTAL RULES OF LEGAL PROTECTION GRANTED TO CREATIONS IN THE FIELD OF INTELLECTUAL PROPERTY

3.1 INTRODUCTION

When speaking about establishing the fundamental rules of legal protection granted to works in the field of intellectual property we must address two fundamental criteria, the first being the basis of the protection, i.e. the nature of the guaranteed rights, the protection criteria, respectively the conditions to benefit from protection, and the second being the structure of the protection, i.e. the way in which the laws are structured linguistically and legally, taking into account that the last criterion is relevant exclusively in the field of intellectual property and less in the industrial one. This is a consequence of the fact that the protection of intellectual property does not require any previous formalities whereas the protection of industrial property entails undergoing a procedure of registration and verification of the existence of content-related and formal conditions as well as the existence of the title of protection.[10] Actually, the way in which the laws are structured linguistically and legally carries a great significance in the field of intellectual property protection, due to the fact that, in this case, the protection does not require any previous formalities. However, in the field of industrial protection it bears little significance due to the fact that here it entails undergoing a procedure of registration and verification of the existence of content-related and formal conditions as well as the existence of the title of protection. In the field of industrial property the criteria for protection carry a great importance, respectively the conditions for granting legal protection to the creations belonging to this area, which will also be

[10] Ligia Dănilă (2008) – *Dreptul de autor şi dreptul de proprietate industrială (Copyright and Intellectual property right),* C. H. Beck publishing house, Bucharest, p. 1.

analysed for the area of intellectual property. The nature of the guaranteed rights will, at the same time, be analysed separately, in both the fields of intellectual and industrial property.

3.2 THE NATURE OF THE GRANTED RIGHTS IN THE FIELD OF INTELLECTUAL PROPERTY

In order to establish the nature of the granted rights in the field of intellectual property, we must first determine and describe the different theories and explanations regarding the origin and the nature of copyright[11], related rights and sui generis rights, including the justification behind granting these rights, all this having a say in the legal regulations regarding the conflict of interest and of rights as well as the procedure to solve these conflicts. The subsequent analysis aims to identify the different categories of rights pertaining to this field, the historic source of these rights, the classification of these rights in the various regulation systems, the justification for granting these rights to certain categories of holders, including their effects, the possible conflicts of interest and the solving methods.

The phrase copyright refers to both the copyright acknowledged by the English common law for the limited publication of his work and to the right acknowledged by the British system, by means of various regulations, the oldest one dating back to 1710, followed by the ones in 1842, 1911, 1956,

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[11] Initially unprotected by special norms when copyright was mistaken for the right on the manuscript, a right that with the object of certain privilege after the invention of printing, "the least questionable property", according to the laws of the French revolution, a "kind of property", "incorporable, exclusive and opposable property right", are only a few of the qualifications that copyright has been given throughout its history in order to justify the protection granted to creations and authors. At present, the qualification preponderant for these rights is the one stated by Edmond Picard in 1877 according to which inventors' rights and authors' rights form a distinct category, the one of intellectual rights, which possess a complex content, regarding intellectual rights as property rights only a conventional way. The theory of intellectual rights as complex rights composed of moral and patrimonial rights has developed, as previously shown, into variants: monist and dualist. The monist or unitary theory does not deny the complex character of copyright but claims that the personality of the author and his creation are tightly linked thus making it impossible to separate the moral from the patrimonial rights or to establish a hierarchy between them. In this approach moral rights represent elements of copyright enjoying the same value and duration as patrimonial rights. Based on this connection the monist system allows the transmission of copyright in its entirety heirs or to persons designated by the author, these enjoying the same absolute moral rights as the author himself. The dualist theory states that moral and patrimonial rights which together compose the content of copyright exist distinctively and are governed by different regulations. It also underlines that the dominant aspect of copyright relies in the moral right. Moral rights outlive patrimonial rights and exert a great permanent influence on them. Moral rights do not lose their validity once the creation was published, on the contrary they continue to be linked to the creation and, obviously, to the author exerting to same extent their influence even after the death of the author or its becoming a public asset v. Roş, V.; Bogdan, D.; Spineanu-Matei, O. (2005) - *Dreptul de autor şi drepturile conexe. Tratat*, (*Copyright and related rights. Treaty*) All Beck publishing house, Bucharest, p. 194 - 195.

1988, including the acknowledged right of the author in the United States' legal system in 1976, as well as the right granted to authors by the French, the German and the Romanian legal system[12]. However, irrespective of the legal system that states it, the copyright must be defined and analysed in relation to its beneficiary, i.e. the holder, and the object of protection, respectively the creations that are protected by means of acknowledging this right. For this reason, distinction needs to be made between the protection granted to the author of the creation and the protection granted to the holder of a related right, i.e. the holder of a sui generis right. We need to have the same consideration for the fact that when granting protection to each holder, be it the author, the holder of a related right or the holder of a sui generis right, a series of rights are granted which are mostly exclusive but also partly less exclusive.

Substantial information regarding the nature of the right can be inferred from the historic analysis of this right. Such an analysis can emphasise either a constant development from origins to present or significant changes that alter the classification and the purpose of the acknowledgement of the rights. The literature analyses the nature of the copyright as follows[13]: (1) as a property right, in this approach the copyright is derived from the natural right (hence the term of intellectual property); (2) as a monopoly right, in this approach the copyright is an acknowledged monopoly exclusively related to carrying out certain economic activities; (3) as a personality right, in this approach the copyright being a right of personality, i.e. the creation of the author is an outcome of his personality, thus, if the personality of the individual must be protected, so does its work, an outcome of this personality; (4) as a sui generis right, i.e. acknowledgment of the copyright with a view to protecting his work is sui generis, respectively a right that possesses a particular legal nature, uncharacteristic for other rights.

This classification must not be subject to a rigid analysis, due to the fact that it is influenced by the various definitions that it permits. Thus, the right of property can be considered a monopoly, the same way that a monopoly can be considered to have a sui generis nature. In case we try to determine the legal nature of copyright by viewing it as a property right, we must consider the fact that the term property allows for various interpretations and that various legal systems interpret the term differently. More precisely, certain assets may be the object of property in some legal systems, whereas in others they may not. Furthermore, we also witness in this case the interdependency between the terms referring to property and monopoly. As previously mentioned, property may also be analysed as a form of monopoly.

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[12] Sterling, J.A.L. (2003) - *World Copyright Law*, Second Edition, Sweet & Maxwell Publications, London, p. 40.
[13] Sterling, J.A.L. (2003) - *World Copyright Law*, Second Edition, Sweet & Maxwell Publications, London, p. 45;
Colombet, C. (1997) - *Propriété littéraire et artistique et droits voisins*, 8e édition, Editions Dalloz, Paris, p. 12.

The origin of the property theory related to copyright is present also in the writings of John Locke and is further developed by numerous writers, including Diderot. Basically, this approach sees the literary and artistic property as a particular application of personality, maybe with a few exceptions. Diderot argued that either the author is the owner of his creation or nobody is the owner of his own assets. Lamartine considered the copyright to be the holiest property. In 1880, the Court of Causation stated in the Masson case[14] that literary and artistic essentially movable property possesses the same characteristic and must have the same nature as any type of property, except for the limited public interest affecting its duration. Such a property is movable not only where its principal value is concerned but also regarding its products and must, therefore, contribute to the community assets[15].

The statement that copyright is a monopoly makes no distinction depending on the type of monopoly considered, i.e. market monopoly characteristic to a certain circumstance or legal monopoly characteristic to a certain legal circumstance. Additionally as the sale of goods that do not entail any right related to intellectual property cannot be analysed in the same way in which sale of different goods, for instance books, incorporate certain materials where rights exist irrespective of the object by means of which they are presented to the public. Thus, it is of utmost importance to highlight the fact that in 1887 the Court of Causation sensitive to the idea that, if copyright is exclusively classified a type of property, it will be included in the legal system of corporal property therefore leading to the lack of protection of

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[14] Colombet, C. (1997) - *Propriété littéraire et artistique et droits voisins*, 8e édition, Editions Dalloz, Paris, p. 12.

[15] The division of "intellectual property" from common law property, an extremely important step in the evolution of the discilpine, did not take place earlier than the 19th century. It was then that they rightly observed that the result of intellectual creation cannot be equated to the goods that constitue the property object in common law. The rules of common law analysed in order to provide solutions for the protection of intellectual creations have proven unsatisfactory. From this necessary distinction to setting up an adequate terminology for this new institution and for the new legal branch about to be established it only took one step and this was taken by Edmond Picard, who, in an article dating back to 1883, entitled „Embriologie juridique", suggested to substitute the "the highly criticisable intellectual property" with "intellectual rights" as a distinctive category related to 1) rights corresponding to persons (state and capacity), 2) obligations and 3) real rights. Thus, In France, by means of a ruling form the 25th of July 1887 of the Court Of Causation it was retained that "copyright and the monopoly they provide are unjustly designated either in common language or in legal language as «property». Far from being a property like the one defined and regulated for the movable and immovable assets in the Civil Code copyright provide holders with the exclusive privilege of a temporary exploitation: this monopoly of exploitation comprises the right to reproduce and sale of copies of the creations and is regulated by law also constituting the object on international conventions same as the right that results from inventions, industrial designs and models or trademarks and which represents what is known as «industrial property v. Roş, V., Bogdan, D., Spineanu-Matei, O. (2005) - *Dreptul de autor şi drepturile conexe, Tratat (Copyright and Related Rights. Treaty),* All Beck publishing house, Bucharest, p.3.

moral rights, forfeits the term property and replaces it with monopoly and exclusive rights[16].

The theory according to which copyright is a personality right stems from Immanuel Kant and since the origin of copyright is associated with the personality of the author the concept of moral right becomes more and more present in this matter.

In what concerns the sui generis right, it has its own nature which does not present any legal connection to other specific rights. The legal concept of sui generis has been analysed in two contexts: firstly, as an explanation to the nature of copyright and secondly, as a description of the right that must be thus distinguished from the copyright and other related rights.

As we analyse the classifications pertaining to the national legal system we must highlight the fact that in certain national systems the law resorts to the legal classification of rights, whereas in other cases it makes no distinction regarding it, the classification being thus inferred or resulting from the legal theories applicable to the respective countries. Furthermore, it is of great importance to distinguish between the existing classifications in certain national laws and the classifications adopted in certain countries by the body of literature. Art L.111-1 of the French code states the fact that the author of an intellectual creation enjoys the incorporal, exclusive and all-opposing property right arising from the mere creation of it. This right basically includes attributes of an intellectual, moral but also economic order in the system set up by the French Code. Based on this legal provision the courts in France attempted to identify the mark of the author's personality with a view to determine the existence, respectively non-existence, of the protection granted by the code. Subsequent to the invention of computer programmes, the Court of Causation adopted a much more flexible approach dismissing the mark of the author's personality and referring to the intellectual contribution, i.e. apport intellectuel. This approach maintains the fundamental connection between the individual and his work but the personality of the author as a determining criterion in the mechanism of granting protection is removed[17]. The German law states that the copyright protects the author in its personal and intellectual relations where the creation and its usage are concerned. German jurisprudence from the 20th century acknowledges the copyright as a combination of both material elements and immaterial elements without separating property and personality. This is the Monist theory. In the Romanian legal system there is a traditional approach that considers copyright a complex right. Thus, the Law regarding the Press from 1862 acknowledged writers, song writers and creators of artistic creation the right to enjoy the right to reproduce, sell or

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[16] Colombet, C. (1997) - *Propriété littéraire et artistique et droits voisins*, 8e édition, Editions Dalloz, Paris, p. 12.
[17] Sterling, J.A.L. (2003) - *World Copyright Law*, Second Edition, Sweet & Maxwell Publications, London, p. 53.

cede their creations throughout their whole lives, while publishing, reproduction or imitation of a creation is only possible with prior consent of the author. In other words, the Romanian law-maker from 1962 did not combine copyright with property right but adhered to the dualist thesis of copyright. This thesis was shared and developed in our countries literature by professors Aurelian Ionaşcu, Constantin Stătescu, Francisc Deak, Stanciu Cărpenaru şi Yolanda Eminescu[18]. Decree no. 321 from 1956 states the content of copyright without offering an explicit classification of the right in moral and patrimonial rights. Law 8/1996 ended the controversy relating to the nature of copyright by stating in art 1 that this right is linked to the author's person and bears moral and patrimonial attributes[19]. In other words the law-maker adopted the classification of copyright as a complex right encompassing both moral and patrimonial rights[20].

With a view to identifying the nature of guaranteed rights, respectively recognised, it is imperious that existing classifications in international and regional instruments be studied. Therefore art 1 of the Berne Convention for the protection of literary and artistic creations refers to the set up the union for protecting authors' rights related to literary and artistic creations. At the same time, the convention refers to granting exclusive rights to the authors.

The nature of these rights granted by the member states is not explicitly specified although it is obvious that both civil rights and any other remedies at the states disposition are taken into consideration. To be more precise the convention leaves it for the member states to define according to their own legal system the legal nature of the acknowledged rights. The convention

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[18] Classifying copyright as a complex right is adopted in all European countries, especially after, as a result of the Convention of Rome from 1928, it has been adopted also in the text of the Berne Convention (revision which entered into force at the 1st August 1931). The United States' signatory the Berne Convention in 1988 represented an important step in generalizing this concept of the nature of copyright and would lead to diminution up to the total removal of the differences between the two main systems of protection of copyright: the continental, which provides prevalence to moral rights, and the *copyright*, where moral rights are, if not completely ignored, acknowledged, baring a reduced significance and not based on special laws but by applying the rules of common law in the field of personality rights v. Roş, V.; Bogdan, D.; Spineanu-Matei, O. (2005) - *Dreptul de autor şi drepturile conexe. Tratat (Author's Right and Related Right). Treaty*, All Beck publishing house, Bucharest, p. 195.

[19] The creative activity of man is materialized in the creation over which he is granted absolute rights ehich constitues a regulation object in the frame of intellectual property. The modern view on copyright shared currently by most legal systems renders this right with a complex content comprising two categories of prerogatives: the first is the capacity reserved for the author to enjoy all immaterial benefits which bring glory, fame, respect and for which his **moral rights** are acknowledged. The second category is the right to financial gain from the usage of his creation for himself and for his descendants wherefor his **patrimonial rights** are acknowledged v. Roş, V.; Bogdan, D.; Spineanu-Matei, O. (2005) - *Dreptul de autor şi drepturile conexe. Tratat (Author's Right and Related Right). Treaty*, All Beck publishing house, Bucharest, p., p. 194.

[20] v. Roş, V.; Bogdan, D.; Spineanu-Matei, O. (2005) - *Dreptul de autor şi drepturile conexe. Tratat (Author's Right and Related Right Treaty)*, All Beck publishing house, Bucharest, p., p. 195.

acknowledges the existence of a category of economic rights different from the known category of moral rights.

The universal convention of copyright adopted in Geneva in 1952 emphasis the protection of copyright. Art. 4 states the fact that the rights referred to in art 1, that is copyright, including the base rights which ensure the economic interests of the authors including the exclusive right to authorise, produce, publish and broadcast the creations. Art 5 guarantees an exclusive right referring to the translation of the creation. Notwithstanding, the definition of the legal nature of the acknowledged rights is left for the signatory states, the same as in the case of the Berne Convention.

Section I of part two of the TRIPS[21] agreement is called copyright and related rights. Articles 9(2), 10(2) and 11 refer to protecting copyright. Despite all these, there is no distinct or separate classification of copyright and related right. The distinction between the two results from the analysis and overlapping of these provisions. The Stockholm Convention from 14 July 1967 does the same regarding the establishment of the World Intellectual Property Organisation which in art. 2, refers to the protection of copyright while in art. 5 it mentions copyright without specifically providing a classification of copyright. However, this classification results from an analysis of the provisions of the convention.

Directive no. 91/250/CEE from 14 May 1991 regarding the protection of computer programmes forces member states to protect computer programmes by means of copyright, as well as literary works as understood in the Berne Convention. Directive no. 92/100/CEE from 19 November 1992 regarding the rental and lending right and some related rights in the field of intellectual property refers to the creations in the field of copyright and from other similar fields in the context of the previsions referring to rental and lending rights. Directive no. 93/83 from 27 September 1993 regarding the coordination of certain rules concerning copyright and related rights applicable to satellite broadcasting and cable retransmission refers in art. 7 to the copyright to authorize share his creation with the public via satellite. Art. 5 of the same directive states the fact that protecting related rights with not affect in any way the protection of copyright. Art. 8(1) refers to the holders of copyright and related rights as well as to broadcasting operators via satellite and cable retransmission. Directive no. 93/98 from 29th of October 1993 regarding the harmonisation of the protected duration of the copyright and of related rights refers in art. 1(4) to the acknowledgement of the copyright over collective creations as well as the expiry of the protection granted by means of copyright in art.4. Basically, to conclude, all these directives of the Council of the European Union the word copyright is used in the English version to describe the right granted to

[21] Agreement referingl to the aspects of intelectual property rights relating to trade signed on the 15th of April 1994, known as TRIPS – Trade - Relates Aspects of Intellectual Property Rights

authors over original creations. In French, German and other languages the phrase copyright (droit d'auteur, urhebereht) is used for the same term. The NAFTA agreement refers in art. 1705 (1)(3) to copyright and related rights without defining these concepts in any way.

From these classifications we can draw the conclusion that in the continental system the classification of copyright, respectively its analysis in a more or less intense relation to the personality of the author, highlights the importance of protection granted by means of human rights with all that this entails. In the common law systems the historic evolution of the copyright concept indicates a much more pragmatic approach closely linked to the concept of advantages to society and reward to the author. The same system brings forth more arguments against the prevalence of copyright. All debates regarding the classification of the rights in this fields take place on a different level between the two systems, the continental and common law, the continental emphasising the inherent character of this fundamental right, whereas common law emphasis the protection of the creation in light of the economic theories referring to market goods.

The rights granted to persons who present creations to the public without being their authors subscribe to the category of related rights or neighbouring rights[22]. Numerous creations do not reach the public except through the intervention of other persons who execute, interpret, direct, record and broadcast by means of phonograms, videograms, scenic performance, radio or television. Performing artists, producers of phonograms and radio broadcasting organisms have claimed the statute of protective creations for their creations and the programmes that they broadcast. In their capacity of authors the protective measures are relatively recent, at least in relation to the protection granted to creation authors and imposed particularly by the development of the modern means to communicate creations.

From a certain perspective the performing artist takes the place, i.e. provides the interface between the author of the creation and the person who records the performance or presents it to the public by broadcasting it. The issue whether the performing artists should enjoy any rights similar to those of the copyright has been a subject of enduring debate. On the one hand, it is claimed that the performing artists does not create anything, or better said, it does not create but presents the creation of another person in his own particular style. For this reason the performing artist would not be entitled to any rights of the same nature as the one acknowledged for the author. On the other hand, it is claimed that the performer can many a time be as creative as the author of the creation he presents thus transforming a mediocre creation into a memorable performance. As a rule, it is an undeniable fact that as the performing artist through his own performance

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[22] Sterling, J.A.L. (2003) - *World Copyright Law*, Second Edition, Sweet & Maxwell Publications, London, p. 70.

creates a new creation will obtain the status of author. For instance, when inserting an improvisation in his own performance in a totally different from the original creation[23].

The debates generally underline the situation in which by performing no note or word is added to what was previously written. The tendency in national laws was to offer a different status to the contribution of the performing artist compared to the author and even if he is granted protection this should be different and even diminished in comparison to the one granted to the author. This partially undeniable importance of some records in spreading intellectual creations, the literature has reported hostile opinions regarding their qualification as protected creations in the field of copyright. In order to support this view it has been shown that some record producers carry out a highly significant industrial action for the development of literary and musical culture but that in these cases it does not reflects an intellectual creation. Recordings are the result of mechanical operations where the skills of the technicians who perform them are reflected only in preparing the best conditions to carry out the recordings.

The issue of phonogram protection has been permanently been resolved simultaneous with the adoption in 1961 of the Rome Convention for the protection of performing artists, phonogram producers and broadcasting organisms and especially after the adoption in 1971 of the Geneva Convention for the phonogram producers against unauthorised reproduction of their phonograms. Thus, phonograms and their producers are protected in the majority of states by special norms but also in the frame of copyright. However, art.3 of the Geneva Convention does not enforce protection of phonograms in the frame of copyright leaving it to the national laws to choose whether to protect them by granting them a copyright or a specific right by means of laws regarding unlawful competition or by criminal sanctions[24].

Basically, phonogram producers are granted protection in the continental system by means of a related right while in common law by granting them a

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[23] The performer is same as the creator an artist, his creation is not an initial creation (primary) but a follo-up creation (secondary) meant to make the initial creation understandible and accessible. The initial creation is presented under a graphic form and provided the secondary creation is a qualitative one it can result in enhancing the beauty of the initial creation. This is remarkable because the importance of the performer's role is at times equal, at times superior even to the importance of the author's role. The performance not pertaining to the initial creation can however not be detached from the secondary creation thus implying a necessary incorporation to the latter. This connection possesses such a profound character that its interpretation or performance displays the special virtue of being able to compromise or to render brilliance to the pre-existing creation v. Roş, V., Bogdan, D., Spineanu-Matei, O. (2005) - *Dreptul de autor şi drepturile conexe, Tratat,(Copyright and related rights)*. All Beck publishing, Bucharest, p.464.

[24] Roş, V.; Bogdan, D.; Spineanu-Matei, O. (2005) - *Dreptul de autor şi drepturile conexe. Tratat*, (*Copyright and Related Rights. Treaty*) All Beck publishing house, Bucharest, p. 468-469.

copyright, with the distinction that in the United Kingdom the phonogram does not have to be an original one in order to enjoy protection whereas in the United States it has to be an original one.

The rights of broadcasting organisms are granted protection in continental systems by means of a related right whereas in the United Kingdom they are granted a copyright, with the distinction that also in this case the creation, respectively the programme that they broadcast, does not have to be an original one in order to enjoy protection. In the United States the broadcasting organisms are granted protection by means of a sui generis right and by acknowledging a copyright for the programmes that have as subject original creations. Several states as well as several directives of the Council grant producers of videograms related rights distinctive from the right acknowledged through transfer of cinematographic creations from their authors.

In respect to publishers' rights such related rights are acknowledged as a result of the investment and expertise in the graphic and electronic production of the editions. This protection is regulated in several national laws.

As we analyse the classifications made in this field by the national laws we have to mention that the rights of performing artists and of phonogram and videogram producers and of broadcasting organisms are as previously shown classified in the continental systems as related or neighbouring rights. In the common law system, respectively in the copyright system, performing artists can be acknowledged a separate right distinctive from the acknowledged copyright. In the United Kingdom of Great Britain and in all countries of the Commonwealth phonogram producers and broadcasting organisms have rights pertaining to the copyright category acknowledged.

In the United States audio recordings if and when they are original are protected by means of copyright[25]. In Romania, art. 92 of law 8/1996 states that rights related to copyright do not affect copyright and that, no provision belonging to title 2 of the law (which regulates related rights) must not be interpreted as a limitation to exercising copyright.

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[25] The word «*copyright*» shows a tendency to replace in common language the phrase «copyright». Actually, the word copyright has a different meaning and content and the body of literature admits that the phrase is not translatable. Protection in the copyright system is characterized by the fact that it **concerns exclusively pecuniary rights of authors, ignoring their moral rights**. In the copyright system the right arises through the existence of a copy of an object whereas in the continental system of copyright the right arises from the intellectual effort, from the activity carried out by an author, a creator. According to some authors what differentiates between the two systems of protection is the fact that in the continental system of copyright the protection focuses on the author whereas in the copyright system the focus is on the creation. v. Roş, V., Bogdan, D., Spineanu-Matei, O. (2005) - *Dreptul de autor şi drepturile conexe, Tratat,* (*Copyright and related rights. Treaty*) All Beck publishing house, Bucharest, p.551.

The terminology adopted in order to denote these rights attempts, respectively hints at, the pre-emption of copyright over related rights. Nevertheless, this tendency to establish a hierarchy is contrary to the interests of authors and those of performing artists that would eventually understand they depend on each other[26]. Therefore, France rejected his hierarchy as it was considered harmful for the partnership that needs to exist between the holders of the two categories of rights. In these circumstances, it is highly significant to mention French jurisprudence in the Furtwangler case[27], litigation initiated in 1956 and indisputably resolved 1964. The French courts thus retaining that the talent and the genius of the performer entails the same enriching elements as does the novelist, the playwright and the composer and, on this grounds, the judges in the aforementioned ruling concluded that "the artist's performance is a creation and the performer enjoys copyright"[28].

In respect to the classification of related rights at an international level it must emphasised that the rule of coexistence between copyright and related right was stated in art.1 of the Rome Convention which provides that "the protection granted under this convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works". Consequently, no provision of this Convention may be interpreted as prejudice in such protection. Indeed the Rome Convention does not provide a clear classification of rights granted to performing artists as it refers only to granting protection and acknowledgment of rights. The way in which these rights are incorporated into the national legal systems depends on the signatory states. A similar protection mechanism to the one set up by the

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[26] Roş, V.; Bogdan, D.; Spineanu-Matei, O. (2005) – *Dreptul de autor şi drepturile conexe. Tratat*, (*Copyright and Related Rights. Treaty*) All Beck publishing house, Bucharest, p. 463.

[27] The philarmonic orchestra of Vienna recorded for broadcasting during 1939-1945 several pieces of classical opera, among which Beethoven's third symphony directed by W. Furtwangler. The recording was seized by the enemeny during the Berlin seige according to the Potsdam agreemnet. Later on it was sold to an American company which produced phonograms. This recording was subsequently employed in order to produce disks, some of which were also distributed in France. W. Furtwangler lodged a complaint with the Court of Seine pursued by his descendents requesting the prohibition of the sale of the recording using his name, as he did not consent to its distribution under his name. The Court ruled in favour and obliged the defendant to erase the name Furtwangler from the disk. Later on new action was introduced requesting the withdrawal of the disks from the markets using as an argument the capacity of the orchestra director as a performer and thus breaching his moral right. The Court of Seine by means of a ruling confirmed by the Court of Appeal in Paris decided that the performing artist may forbid any unauthorised performance, that the German broadcast obtained from Furtwangler only the right to broadcast the recording but not the one to reproduce it by manufacturing disks and that the rightful successor could not obtain more rights than the German broadcast so that the unauthorised producers of the disk caused a prejudice which they are liable for v. Roş, V., Bogdan, D., Spineanu-Matei, O. (2005) - *Dreptul de autor şi drepturile conexe, Tratat,* (*Copyright and related rights. Treaty*) All Beck publishing house, Bucharest, p.463.

[28] Eminescu, I. (1997) – *Dreptul de autor (Copyright)*, Lumina Lex publishing house, Bucharest, p. 94.

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, adopted in Rome on the 26th October 1961, is to be found also in the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms, adopted in Geneva on the 29th October 1971. Romania adhered to the Rome Convention by means of Law no. 76 from 1998[29] and to the Geneva Convention by means of Law no. 78 from 1998[30].

This convention refers to the protection of producers against certain crimes (for instance, duplication without previous agreement or consent), however the way in which the convention is implemented depends on the national laws of each signatory state. What the convention essentially accomplishes is the acknowledgment of a copyright or of another specific right by protecting against unfair competition, respectively by protecting criminal law instruments. The TRIPS Agreement, more precisely in title section 1 of part 2, refers to "copyright and related rights" thus distinguishing between granted rights, which are acknowledged to authors of literary, scientific and artistic works according to the Berne Convention for the Protection of Literary and Artistic Works, and the rights of performers, phonogram producers and broadcast organisation included in the category of related rights. The World Intellectual Property Organisation Performances and Phonograms Treaty adopted in Geneva on the 20th December 1996 at the diplomatic conference of WIPO referring to certain aspects of copyright and related rights that came into force on the 20th May 2002 mentions the protection of beneficiaries and their rights but does not classify their rights as being neighbouring or related to copyright.

Directive no. 92/100/CEE from the 19th November 1992 referring to rental and lending rights on certain rights related to copyright in the field of intellectual property protection[31] makes reference to various rights related to copyright in the field of intellectual property protection. Art. 6, 7, 8 and 9 address the regulation of certain rights denominated as rights related to copyright. Therefore, this directive distinguishes between rights acknowledged to authors of literary and artistic works on the one hand, and rights acknowledged to performers on the other hand. This distinction can also be observed in directive no. 83/93 from the 27th September 1993 concerning the coordination of certain rules regarding copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission[32] as in directive no. 98/93 from the 29th October 1993

[29] published in *Official Monitor* no. 148 from 14.04.1998.
[30] published in *Offical Monitor* no. 156 from 17.04.1998.
[31] published in *The Official Journal of the European Union* no. L 346/27.11.1992, p. 0061-0066.
[32] published in *The Official Journal of the European Union* no. L 248/06.10.1993, p. 0015-0021.

concerning harmonizing the term of protection of copyright and certain related rights[33].

From the analysis of this classification one can draw the conclusion that the distinction between copyright and the rights related to it cannot have extremely obvious effects. Nevertheless, it should be mentioned that, on the one side copyright is perceived at least within continental systems, civil law systems, as tightly linked to the personality of the author, therefore he is automatically granted the protection specific to these rights. On the other hand, where related rights of producers are classified based on the protection of investment and organisational talents, the concept of personality is absent, therefore the protection mechanism relies on economic and commercial aspects. The very same situation applies to broadcasting mechanisms. These classifications of related rights also include the performers, thus subjecting them to the same exceptions, limitations, restrictions of the term of protection as are holders of copyright. The reason behind these classifications is to an extent a historical one, but often leads to a series of anomalies. For instance, the question arises naturally as to why the work of an author needs protection throughout his lifespan plus a considerable period after his death whereas the performance of a performer is only protected for a limited period during his life although it is very likely that his performance will be the object of an unauthorised use beyond this period of protection.

In respect to sui generis rights it must be emphasised that recently the phrase sui generis, i.e. the rights which possess a specific nature, was applied to categories of rights acknowledged in relation to certain productions which are viewed differently than the productions protected by means of copyright and related right. For this reason the possibility and the desire to grant a certain protection by means of sui generis rights instead of copyright or related rights causes much controversy. Mainly, the rights in this field which fall under the classification sui generis include the right over pictures, material and information, which are not original, however national legal systems may grant a related right in this field. Two such examples are rights acknowledged to producers of databases. The information contained in technical, legal, financial and commercial databases etc. is the result of a high expenditure related to the collection, coding, valorisation and protection of these rights. The rights granted and acknowledged to authors of such databases reward this effort enjoying protection taking into consideration the investment and their utility.

Furthermore, previous to the establishment of the protection system by means of acknowledging a sui generis right in this field databases represented and were protected as applications of compilations displaying the same originality issues but on a different scale. Their protection by

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[33] published in *The Official Journal of the European Union* no. L 290/24.11.1993, p. 0009-0013.

means of copyright was accepted based on economic grounds in order to protect the investments and to cover expenses. However, it has been observed that a strict application of the principles governing copyright will inevitably lead to losing protection granted by copyright in the case of most databases if not all of them. This was due to the fact that selection of material and data included in the database did not always bear the trademark of the author's personality as databases have a tendency to exhaustive, i.e. together all information referring to a certain area, a certain subject. The attempt to protect the database by means of copyright triggered either a reassessment of the essential principles applied in this field, respectively a new definition of originality, or the granting of a rather theoretical protection. Faced with these shortcomings the solution was to regulate distinctively by granting databases a sui generis right.

In any case, in this field, we should not disregard the persons in connection to the databases: the author of each work included in the database, the person, who selected and laid out the material as it appears in the database, as well as the person who invested in the production of the database. The first two persons can enjoy the protection granted by copyright, at least to the extent to which we deal with an original creation whereas the author of the database, the last person, can enjoy a sui generis right according to the directive no. 96/9/CEE on the legal protection of databases[34]. From this reason it must be emphasised that the sui generis right of database producers stem from this directive. Taking into consideration the fact that, this directive classifies the right of database producers as a sui generis right, so will each of the national legal systems when transposing the directive. More precisely, in those cases where the directive generates direct effects the classification from the directive will be applied, as for the rest of cases the classification of the right acknowledged to database producers may vary.

Consequently, the French legal system transposed directive no.96/9/CEE regarding the legal protection of databases into its internal system by the law adopted on the 1st of July 1998. According to this law "the person, who initiates and takes on the risks of corresponding investment benefits from the protection of the database content when its establishment, evaluation and presentation reflect a substantial financial, material or human investment". Thus, the object of protection of this law is the financial, material or human investment and not a simple data compilation. Art. 112-3 of the French intellectual property code defines the database as" a collection of works, of data or of other independent elements laid out in a systematic or methodical manner and individually accessible through electronic means or any other means." In Romania Law no.285/2004, following the pattern of the aforementioned directive, introduced in title 2 of Law no.8/1996 a new chapter 6 entitled "sui generis rights of database producers". According to art 122 point 1 paragraph 2 "by database we understand the collection of

[34] published in *The Offical Journal of the European Union* no. L 77/20 from 1st April 1996, p. 0028-0035.

works, of data or of other independent elements, protected or not by copyright or related rights, laid out in a systematic or methodical manner and individually accessible through electronic means or any other means".

Also worth mentioning is the fact that directive 96/9/CEE regarding the legal protection of database locates the right of database in chapter 3 subtitle sui generis right. As a consequence of the classification in the field of sui generis rights it stands out that there is apparently no grounds for which sui generis rights should hold a less significant status than the one acknowledged to copyright and related right. Nonetheless, sui generis rights are acknowledged for a shorter period than the one corresponding to copyright. Moreover, in this field the arguments for acknowledging this right are far closer to the case of inventions and industrial designs, thus leading to the application of a protective regime for a limited period of years, and not for the duration corresponding to the lifespan of the author plus a certain period of time. In the field of sui generis rights the effects of directive no. 87/54/CEE from the 16th December 1986 on the legal protection of topographies of semiconductor products[35] carry a crucial significance as law-makers acknowledge that even in the case of topographies of semiconductor products we are dealing with a sui generis right established in the favour of their producers[36].

In order to determine the protection in the field of industrial property, respectively the nature of the rights guaranteed in this area, we must take into consideration the fact that the works, the creations which constitute the object of protection in this field represent, similar to the other creations protected under the umbrella term intellectual property, products of human creating activity, respectively the result of rational thinking, knowledge and activity, of human capacity to come up with and notice concepts and to operate with abstract notions[37]. Industrial property first and foremost

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[35] published in *The Official Journal of the European Union* no. L 024/27.01.1987, p. 0036-0040.

[36] Sterling, J.A.L. (2003) - *World Copyright Law*, Second Edition, Sweet & Maxwell Publications, London, p. 79.

[37] In category of "intellectual rights" comprises copyright and related rights as well as "industrial property rights". In turn the latter are divided in three categories: the first has as object the rights related to the rights of authors of industrial designs and models, technical creations patented as inventions, the protection of new species of plants and animals, the protection of the topographies of integrated circuits and the protection of confidential information; the second has as object the distinctive signs which include trademarks, geographic indications, commercial names and companies; the third related to unfair competition additionally annexed to new creations and distinctive signs and which is the object of study of a separate discipline. The main idea that leads to the establishment of intellectual protection and to the creation of a new legal branch is that these spiritual products cannot be protected against their use by other persons in the way that material goods are protecting by mere possession. Once the product of intellectual creation is made available to the public its creator can no longer exert control over the use of his work. v. Roş, V.; Spineanu-Matei, O.; Bogdan, D. (2003) – *Dreptul proprietăţii intelectuale. Dreptul proprietăţii industriale, mărcile şi indicaţiile geografice*, (*Intellectual Property*

protects intellectual and content-related creations applicable industrially, also known as "utility creations". When specifying the object of protection, the Paris Convention from 1883 concerning Industrial Property Protection and the Stockholm Convention for the Establishment of the World Intellectual Property Organisation added to these creations trademarks, geographic indications, commercial names as well as protection against unfair competition, the TRIPS agreement, including confidential information[38].

Similarly, the French literature, when analysing industrial property makes a subdivision into larger fields: the right of industrial creations and the right of distinctive signs[39]. Basically, the field of industrial creations includes protection granted to industrial designs and models, to utility industrial creations and inventions, to new types of plants, to invention through utility models and to topographies of semiconductor products[40], whereas the right of distinctive signs comprises the protection of marks, geographical indications, commercial names, emblems and domain names[41].

For this reasons, with a view to identify the nature of the rights guaranteed in the field of industrial property we shall focus our analysis on the legal nature of the inventor's right and on the legal nature of the right on marks while comparing them to the other intellectual property rights especially to the protection granted by copyright. The issue regarding the legal nature of the right to mark was the object of heated dispute. The dispute tackled even the inclusion of the marks in industrial property although none of the European or international legal systems took this into consideration maintaining marks within industrial property. Paul Robier was the first to contest the right to client. Similarly, the right to mark was considered an exclusive right of exploitation, a right to client, a personality right, a monopoly right and even a competition right.

Currently however, there is less focus on the qualification of right to mark, but more a detailed analysis of the content of this right with a view to identifying the effects that have real consequences of the right to mark. At

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Right. Industrial Property Right, Trademarks and Geographical Indications)All Beck publishing house, Bucharest, p. 5.

[38] Roş, V.; Spineanu-Matei, O.; Bogdan, D. (2003) – *Dreptul proprietății intelectuale. Dreptul proprietății industriale, mărcile şi indicațiile geografice*, (*Intellectual Property Right. Industrial Property Right, Trademarks and Geographical Indications*) All Beck publishing house, Bucharest, p. 27.

[39] Chavanne, A.; Burst, J.-J. (2006) - *Droit de la propriété intellectuelle*, 6[e] édition, Editions Dalloz, Paris, edition completed by Jacques Azéma and Jean Cristophe Galloux, p. 79 and p. 737.

[40] Dănilă, L. (2008) – *Dreptul de autor şi dreptul de proprietate industrială*, (*Copyright and Industrial Property right*) C. H. Beck publishing house, Bucharest, p. 237, 254, 275, 277, 285.

[41] Dănilă, L. (2008) – *Dreptul de autor şi dreptul de proprietate industrială*, (*Copyright and Industrial Property right*) C. H. Beck publishing house, Bucharest, p. 185, 225, 230, 233 and 234.

the beginning of the last century, the right to mark was viewed as a genuine property right and it still is, as explicitly shown by some legal systems. Thus, Thierry van Innis argued that "the right to mark is to be analysed as a genuine property right" [42]. At the same time, in the French Intellectual Property Code, art. 713-1 it is stated that "mark registration offers holders a property right over this mark with the products that it designates." The Romanian law-maker has been more reserved avoiding to explicitly qualify the right on marks as a property right, however in art 35. of Law 84/1998 it states that "registering a mark offers its holder an exclusive right over the mark." The legal systems in Belgium, Luxemburg and the Netherlands acted similarly; their uniform law on mark qualifies the right to mark as an exclusive right. Obviously this qualification did not prevent the literature from considering the right to marks as a property right supporting this view with the following arguments: the right to mark combines all the attributes of a classical property right: usus, fructus and abusus. In virtue of the rights acknowledged by the law the holder of the mark is the only one capable of disposing and ceasing it as he pleases. He is also the sole beneficiary of the financial gains resulting from the exploitation of the mark, exploitation which may be done personally or under licence agreement. It is also worth mentioning the fact that the holder of the mark may abandon it or may adopt an attitude leading to the loss of the mark. Secondly, even if the right to mark is subject to certain time and space limitations specific to its nature, these limitations can also be found in the case of other classical property rights which do not affect the essence of the right. Baring these arguments in mind, we also need to consider international regulations in the field of the legal nature of the rights of distinctive signs. The Paris Convention for the protection of industrial property includes marks in the category of industrial property goods. In the preamble of the TRIPS Agreement the signatory states acknowledge the fact that "intellectual property rights are private rights".

In the Romanian legal system the right to mark is obtained by registering the sign chosen by the applicant, registration which grants the holder an exclusive right over it. However, registration of the sign is preceded by a pre-registration on the side of the applicant which is sufficient in order to obtain the right over this sign, but in the attributive system this represents only the first phase in obtaining the right. Through the registration of the sign the applicant acquires an exclusive usage right which limits the usage of this sign in relation to the product or service that it designates. Nevertheless, the right to mark remains even in the attributive system a mere pre-reservation right thus bringing benefit to the first person to register it. This is due to the fact that if this sign is free, i.e. available, and all other

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[42] Innis, Thierry v. (1997) – *Les signes distinctifs*, Editions Bruylant, Bruxelles, p. 329, quote from Roş, V.; Spineanu-Matei, O.; Bogdan, D. (2003) – *Dreptul proprietăţii intelectuale, dreptul proprietăţii industriale, mărcile şi indicaţiile geografice*, (*Intellectual Property Right. Industrial Property Right, Trademarks and Geographical Indications*) All Beck publishing house, p. 24.

basic conditions for its registration as a mark are met, the administrative authority can deny the issuing of the registration certificate. The right to mark granted by registration has a particular character also in relation to other industrial property rights due to the fact that its object and function are not to grant a monopoly over a distinctive name but to facilitate commerce and to ensure costumers' protection.

The right to mark does not protect the sign itself since commerce is protected and not the mark. What is relevant in this analysis is the fact that choosing a mark does not imply any act of intellectual creation and does not suppose any novelty, originality or inventive activity. Therefore, it is not included in the category of rights deriving from utility creations or new creations as some authors call them: inventions, industrial designs and models. As previously mentioned the right to mark belongs to the category of distinctive signs, a subcategory, in case it can be called like that, of industrial property right. In case a similar sign comprises an original graphic or verbal creation it is susceptible of protection also under copyright. If it belongs to a third person it can be registered as a mark only if the patrimonial rights have been transmitted to the applicant of the mark registration by the author of the creation through a written cession agreement according to art.42 of the Romanian Copyright Law 8/1996.

In the case of distinctive signs the legal nature of the right must be determined considering the fact that we are dealing with a way of respecting each competitor's rights over the distinctive signs of his activity in relation to the other competitors. Therefore, the object of protection represents the prevention of direct competitors from using the holder's sign, thus also eliminating confusion among consumers. For this reason the holder of the distinctive sign is acknowledged the right to use it for his products and services and to maintain his clients. Unlike the invention patent mark registration protection does not grant a right of unlimited exclusive exploitation. The protection covers a range of product categories; the probability may arise different products carry the same sign without it constituting a breach of right to mark.

Furthermore, the right over distinctive signs holds an advantage in relation to the right over invention, respectively it can be extended for an unlimited duration, extension which can be granted at the request of the holder who in his turn can thus strengthen his position in relation to its direct competitors. In the case of inventions after the expiry date of the patent it becomes a public asset or can be used by anyone without any restriction. In the field of inventions, the most relevant area in new creations, creators or their successors are granted protection over their creations. The protection of patented inventions by means of a patent generates an exploitation monopoly in favour of the patent holder granting him the right to forbid anyone from exploiting the invention without his approval.

As regards industrial creations an important aspect is that the right of exclusive exploitation of an invention is an absolute right which allows the

holder to forbid anyone from using the invention without this approval. In comparison to this, the right over distinctive signs is a relative one. It is not opposable erga omnes as a right but only to direct competitors of the holder of the mark[43]. In an attempt to justify the protection granted to inventions the natural right of the inventor over the product or the intellectual creation has repeatedly come up. Other authors argue that the patent can play the role of a reward. The most frequent justification remains the public benefit that granting exploitation monopoly to the patent holder entails[44].

Over time numerous theories, very similar to the already existing theories in the field of copyright, have been elaborated regarding the legal nature of the subjective right of the inventor: property right, sui generis right, right to client, inventor's personality right. As in the case of copyright it has been argued that the subjective right of the inventor would be a personal non-patrimonial right which has patrimonial consequences[45]. Another approach claims that the subjective right of the inventor is not a proper right affecting an incorporal good destined for industrial usage since establishing its legal nature equates with establishing the legal nature of the exploitation right which is a proper right[46].

However, irrespective of the theory we embrace, we need to keep in mind that the inventor becomes the holder of moral as well as patrimonial rights, moral rights even if not explicitly regulated by the law can be easily deduced, i.e. the right to public disclosure of the invention, the right to acknowledgement of the author of the inventions, the right to name, the right to the issue of a protective title or to mentioning the name in the patent, the right to the issue of a copy of the patent of invention. In case of the patrimonial rights of the patents holder we need to mention the fact that they do not differ considerably from one legal system to another including the following patrimonial rights: the right to priority, the exclusive right to exploitation of the invention and the temporary right to exclusive exploitation of the invention. The right to priority is regulated in the Romanian legal system in art. 17 of Law 64 from 1991 which states that the establishment of the national regulatory deposit of the invention ensures a

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[43] Roş, V.; Spineanu-Matei, O.; Bogdan, D. (2003) – *Dreptul proprietăţii intelectuale, dreptul proprietăţii industriale, mărcile şi indicaţiile geografice*, (*Intellectual Property Right. Industrial Property Right, Trademarks and Geographical Indications*) All Beck publishing house, p. 26.

[44] Bentley L., Sherman B. (2002) – *Intellectual Property Law*, Oxford University Press, Oxford, p. 313, quoted by Olteanu G. (2008) – *Dreptul proprietăţii intelectuale*, (*Intellectual Property Right*) second edition, C. H. Beck publishing, p. 172-173.

[45] Ionaşcu, A. (1961) – *Dreptul de autor în legislaţie, Revista Justiţia Nouă, no. 6/1961*,(Copyright in current law, New Justice Magazine) quoted from *Olteanu, G. (2008) – Dreptul proprietăţii intelectuale*, (*Intellectual Property Right*) second edition, C. H. Beck publishing, p. 173.

[46] Mihai, L. (2002) - *Invenţia. Condiţiile de fond ale brevetării. Drepturi,* (*The Invention. Content-related conditions affecting patents. Rights*)Universul Juridic publishing house, Bucharest, p. 96.

right to priority over any deposit related to the same invention established at a later date or with a known later date of priority.

In the same field of new creations or utility creations, as French literature calls them, it is important to highlight the fact that from industrial designs and models arise not only moral rights but also patrimonial rights. In this respect moral rights are: to decide if, how and when the work is to be released to the public, to claim the acknowledgment of the capacity of the author, to decide on the name assigned to the work when released to the public, to claim respect for the integrity of the work and to oppose any modification as well as any alteration brought to the work that may cause prejudice to its honour or reputation and to withdraw the work and, if necessary, offering compensation the holders of exploitation rights prejudiced by the withdrawal. Patrimonial rights include: the right to decide whether to use or exploit the work, the right to decide in what way to use or exploit the work, the right to consent to others' using the work or to distinctive and exclusive authorisation rights, as well as to resale royalty. The field of industrial designs and models presents a similar context to distinctive signs when encompassing an original graphic or verbal creation. As previously mentioned there is a cumulus of protection, the author of industrial designs and models thus enjoys rights arising not only from his capacity of author but also rights arising from the registration of the industrial model and design with the Romanian Patent Office (OSIM). If we attempt to analyse the legal nature of the acknowledged rights, of the patrimonial rights of authors of new creations, respectively utility creations, we must bear in mind that both moral and patrimonial rights arise, the moral patrimonial rights borrow from the nature of the non-patrimonial rights of the creators of works in the field of copyright, whereas the patrimonial rights fall under the specific rules in the field of industrial property. Therefore, after expiry of the validity the creation becomes a public asset, so that it can be used by anyone without any restriction with the exception of the case where we have a cumulus of protection granted by copyright.

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THE EUROPEAN EVIDENCE WARRANT

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Abstract
This article deals with the European Evidence Warrant – an order issued by a competent authority in one member state that must be directly recognized and enforced by a competent authority in another member state. The purpose of this legal instrument is obtaining of objects, documents and data for use in proceedings in criminal matters.

Firstly, the reasons that prompted the European Union to take action in this field are explained. Legal European standards, pertaining to procurement and transfer of evidence are presented and discussed. Secondly, the definition and the scope of the EEW are outlined. Thirdly, formal procedures relating to recognition and execution of an EEW, as well as safeguards and grounds for non-recognition and non-execution, are explicated. The principle of double criminality is described, rules pertaining to the deadlines are presented, and the possibility of legal remedies is addressed. Lastly, future prospects in this field and are summarized and conclusions are provided.

Key words
European Evidence Warrant; Judicial cooperation; Mutual assistance; Mutual recognition; EU Justice and Home Affairs; European Criminal Procedure Law.

1. BACKGROUND

The disappearance of internal borders within the European Union – enabling free circulation of people and goods – has led to promotion of mobility and faster economic growth. Removing border checks, on the other hand, has also given a boost to cross-border crime. With the rapidly advancing information technology, it is easier today, more than ever before, for a criminal to commit a serious crime in any given country without even being physically present there. These reasons, as well as the terrorist attacks in the USA, Spain and the UK in 2001, 2004 and 2005 respectively, prompted EU member states to enhance their mutual cooperation in criminal matters in order to ensure safety and security for their citizens. A simplified and accelerated procedure for procurement and transmission of evidence between the member states of the EU will undoubtedly play a major role in fighting crimes with cross-border element.

1.1 COUNCIL OF EUROPE

The Convention on mutual assistance in criminal matters[1] from 1959 is the first European multilateral instrument governing cooperation in the field of criminal law. It addresses, inter alia, requests for procurement and transmission of evidence between the signatory countries. It was supplemented by the First Protocol of 1977 and once again by the Second Protocol of 2001. All EU member states have ratified the Convention together with its First Protocol, while the Second Protocol has been ratified by 10 out of 27 member states. Although it plays a central role in relation to mutual assistance in criminal matters in Europe, the Convention has significant shortcomings. An official request for obtaining evidence lodged by the requesting country is not legally binding on the requested country. Article 2 states that the requested party may refuse a request if it considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests. Every country is free to define its essential interests and consequently, its courts or justice ministry are free to decide on how to proceed with the request. Furthermore, the Convention neither specifies a form in which the request shall be made nor it prescribes deadlines within which the requested country is required to respond. It must be therefore concluded that the decision whether or when to act upon a foreign country request, depends solely on the will of the requested country. This fact renders the Convention an unreliable instrument for fighting cross-border crime.

1.2 EUROPEAN UNION

In 1999, at a special EU Presidency meeting held in Tampere in relation to the creation of an area of freedom, security and justice in the EU,[2] it was stressed that mutual recognition shall become the cornerstone of judicial cooperation between the member states. The principle of mutual recognition in criminal matters means that a judicial decision issued by a competent authority in one member state will be directly recognized and enforced by a competent authority in another member state. Therefore, judicial decisions should become orders – and not requests like in the case of mutual assistance principle – that will have legal binding force upon the country receiving it. Thus, the requesting country becomes an issuing country and the requested country becomes an executing country. It is stated in the Tampere Presidency Conclusions that the principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one member state's authorities should be admissible before the courts of other member states, taking into account the standards that apply there.

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[1] Council of Europe, *European Convention on mutual assistance in criminal matters*, 20.4.1959. Available at: http://conventions.coe.int/Treaty/en/Treaties/Word/030.doc

[2] European Council, *Presidency Conclusions*, 15-16 October, 1999, Tampere. Available at: http://www.europarl.europa.eu/summits/tam_en.htm

In 2000, the Convention on mutual assistance in criminal matters between the member states of the EU[3] was signed. Together with its First Protocol of 2001,[4] they supplement the provisions of the Council of Europe Convention from 1959. Certain criteria, under which mutual assistance must be granted, are laid down. The Convention provides for spontaneous exchange of information (i.e. without prior request). It opens up the possibility for direct mutual assistance and communications between judicial authorities instead of circulating requests through a designated central authority. The Convention entered into force in 2005 but is not ratified by all EU member states.

In 2001, the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters[5] was adopted. One of its aims is to ensure that evidence is admissible, to prevent its disappearance and to facilitate the enforcement of search and seizure orders, so that evidence can be quickly secured in a criminal case.

In 2002, the European Arrest Warrant[6] became the first instrument to implement the principle of mutual recognition in the field of criminal law. Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property and evidence[7] was adopted soon after. With respect to evidence, it deals with freezing orders issued under the mutual recognition principle, while the mutual assistance principle applies to the procedure for transfer of evidence. Adopting measures in the form of Framework Decisions or Decisions has an advantage over Conventions as it does not require formal ratification by parliaments of member states. Ratification of Conventions by national parliaments has

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[3] Official Journal of the European Communities C 197, 12.07.2000.

[4] Official Journal of the European Communities C 326/1, 21.11.2001.

[5] Official Journal of the European Communities C 12/10, 15.1.2001. Available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:012:0010:0022:EN:PDF

[6] Official Journal of the European Communities L 90/1, 18.7.2002. *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)*, Available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:EN:PDF

[7] Official Journal of the European Communities L 196/45, 2.8.2003. Available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:196:0045:0045:EN:PDF

proven slow and partially ineffective. Action by national parliaments is still required when it comes to implementation of EU Decisions into national law. This process is, unlike with the case of Conventions, mandatory and takes less time.

In 2005, the Hague Programme with a view of further straightening freedom, security and justice in the EU[8] was adopted. In relation to procurement and transmission of evidence it states that the gathering and admissibility of evidence, conflicts of jurisdiction and the ne bis in idem principle should be completed and further attention should be given to additional proposals in that context. It calls upon the Council of the EU to adopt the proposal prepared by the EU Commission in 2003[9] in the form of Framework Decision on the European Evidence Warrant by the end of 2005. The Action Plan implementing the Hague Programme[10] foresees an adoption of a universal instrument that would replace all the existing legal instruments in the area of cross-border procurement of evidence.

In 2008, a new mutual recognition instrument was adopted in the form of a European Evidence Warrant (EEW).[11] It provides for a simplified and accelerated procedure for procurement and transmission of evidence between the member states of the European Union. The Framework Decision entered into force in 2009. Member states are required to transpose it into their national laws by the beginning of 2011. This new legal document is expected to result in quicker and more effective judicial cooperation in the EU. Its aim to contribute to speedier trials is in line with Article 6 of the European Convention for the Protection of Human Rights

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[8] European Council, *Presidency Conclusions*, 4-5 November, 2004, Brussels. Available at: http://ec.europa.eu/justice_home/news/information_dossiers/the_hague_priorities/doc/hague_programme_en.pdf

[9] European Commission, *Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters*, COM(2003) 688 final, 14.11.2003, Brussels. Available at: www.statewatch.org/news/2004/mar/com-2003-688.pdf

[10] Council of the European Union, European Commission, Action *Plan implementing the Hague Programme*, 9778/2/05 REV 2, 10.6.2005, Brussels. Available at: http://ec.europa.eu/justice_home/doc_centre/doc/action_plan_jai_207_en.pdf

[11] Official Journal of the European Communities L 350/72. 30.12.2008, *Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters*, Available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:350:0072:0092:EN:PDF

and Fundamental Freedoms[12] in relation to trial within reasonable time. The EEW will coexist in tandem with the mutual assistance procedures, at least for a transitional time, until the mutual recognition regime completely replaces the mutual assistance principle.

2. DEFINITION AND SCOPE

Article 1 and 2 of the Framework Decision provide definitions in relation to the EEW, issuing state and authority, and executing state and authority. The EEW is defined as a judicial decision issued by a competent authority of a member state with a view to obtaining objects, documents and data from another member state for use in proceedings in criminal matters, or where administrative or other type of decision punishable under national law may give rise to proceedings before a court having jurisdiction in criminal matters. The EEW must be executed on the basis of the principle of mutual recognition. It is issued in a standard form (included in an Annex to the Framework Decision) and must be translated into an official language of the executing state.

An issuing state is the member state where the EEW was issued while issuing authority means a judge, a court, an investigating magistrate, a public prosecutor or any other judicial authority defined by the issuing state as a competent authority. There is no possibility for the police, custom, border or administrative authorities to issue an EEW. An executing state is the member state in whose territory the objects, documents or data are located or, in the case of electronic data, directly accessible under its national law. Executing authority is a competent authority that can recognize or execute an EEW.

Article 7 of the Framework Decision stipulates that the EEW may be issued only if both of these conditions are met:

a. obtaining the objects, documents or data sought is necessary and proportionate for the purpose of criminal proceedings or other types of proceedings that can give rise to criminal proceedings; and

b. the objects, documents or data can be obtained under the law of the issuing State in a comparable case if they were available on the territory of the issuing State, even though different procedural measures might be used.

Gathering evidence can include obtaining objects, documents or data from a third party, from a search of premises, historical data on the use of any

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[12] Council of Europe, 4.11.1950. Available at: http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf

services (including financial transactions), historical records of statements, interviews and hearings, and other records, including the results of special investigative techniques.

Article 4 states that an EEW can not be issued for the purpose of requiring the executing state to:

a. conduct interviews, take statements or initiate other types of hearings involving suspects, witnesses, experts or any other party;

b. carry out bodily examinations or obtain bodily material or biometric data directly from the body of any person, including DNA samples or fingerprints;

c. obtain information in real time such as through the interception of communications, covert surveillance or monitoring of bank accounts;

d. conduct analysis of existing objects, documents or data; and

e. obtain communications data retained by providers of a publicly available electronic communications service or a public communications network.

However, if the above mentioned objects, documents or data are already in the possession of the executing authority, the issuing state can order the executing state to transmit them. This solution opens up the possibility for police interviews or statements conducted in the past to be transmitted, but it does not allow the persons interrogated (suspects, witnesses or experts) to change or alter their statements. It is therefore questionable if such evidence can be effectively used in the courts of the issuing state.

3. PROCEDURES AND SAFEGUARDS

The Framework Decision on the EEW prescribes the formal procedure under which the EEW may be issued. It deals with the formalities relating to recognition and execution of an EEW which are to be followed by both the issuing and the executing state. Safeguards are also prescribed and the grounds for non-recognition and non-execution are consequently listed. It furthermore addresses cases falling under the principle of double criminality and sets deadlines for recognition, execution and transfer of evidence.

According to Article 8, the transmission of an EEW shall take place directly between competent authorities of the issuing and the executing state. Each member state may designate one (or more than one) central authority to assist the competent authorities. Any competent issuing authority can use

the secure telecommunications system of the European Judicial Network[13] if it so wishes.

Protection of personal data is provided by the Council of Europe Convention for the protection of individuals with regard to the automatic processing of personal data.[14] Additional protection is also afforded by the Convention on mutual assistance in criminal matters between the member states of the EU (Article 23).

3.1 RECOGNITION AND EXECUTION

Article 11 stipulates that the executing authority must, without further scrutiny, recognize an EEW, and take the necessary measures without delay for its execution in the same way as that authority would obtain the objects, documents or data under its domestic law in relation to the procedure of obtaining evidence. Each member state must ensure:

a. that any measures which would be available in a similar domestic case in the executing state are also available for the purpose of the execution of the EEW; and

b. that measures, including search or seizure, are available for the purpose of the execution of the EEW.

If the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and the EEW has not been validated by one of those authorities in the issuing state, the executing authority may, in the specific case, decide that no search or seizure may be carried out for the purpose of the execution of the EEW. Before so deciding, the executing authority is obliged to consult the competent authority of the issuing state.

3.2 GROUNDS FOR NON-RECOGNITION AND NON-EXECUTION

Article 13 provides that recognition or execution of the EEW may be refused in the executing state:

a. if its execution would infringe the ne bis in idem principle;[15]

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[13] Network of EU national contact points for the facilitation of judicial co-operation in criminal matters.

[14] Council of Europe, European Treaty Series - No. 108, 28.1.1981. Available at: http://*conventions.coe.int/Treaty/en/Treaties/Word/108.doc*

[15] Right not to be tried or punished twice in criminal proceedings for the same criminal offence.

b. if, in double criminality cases (see below) the EEW relates to acts which would not constitute an offence under the law of the executing state;

c. if it is not possible to execute the EEW by any of the measures available to the executing authority in the specific case;

d. if there is an immunity or privilege under the law of the executing state which makes it impossible to execute the EEW;[16]

e. if the issuing authority has not been validated as a competent authority;

f. if the EEW relates to criminal offences which:

   i. under the law of the executing state are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory; or

   ii. were committed outside the territory of the issuing state, and the law of the executing State does not permit legal proceedings to be taken in respect of such offences where they are committed outside that state's territory;

g. if, in a specific case, its execution would harm essential national security interests, jeopardize the source of the information or involve the use of classified information relating to specific intelligence activities; or

h. if the form provided for in the Annex is incomplete or manifestly incorrect and has not been completed or corrected within a reasonable deadline set by the executing authority.

Recognition and execution may also be rejected if the executing authority objectively believes that an EEW was issued for the purpose of prosecuting or punishing a person on account of his or her sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions, or that the person's position may be prejudiced for any of these reasons. Such a request would be in contradiction to Article 6 of the Treaty on the European

[16] No universal definition of *immunity* or *privilege* exists in the EU. The definition of these terms is left to national laws of every member state separately.

Union[17] and would infringe the provisions of the Charter of Fundamental Rights of the European Union[18] (see Chapter VI).

3.3 DOUBLE CRIMINALITY

The principle of double criminality stipulates that the alleged crime for which the EEW was issued must be criminal in both the issuing and the executing states. Article 14 provides that the recognition or execution of the EEW shall not be subject to verification of double criminality unless it is necessary to carry out a search or seizure. If it is necessary to carry out a search or seizure for the execution of the EEW, offences punishable in the issuing state by a custodial sentence or a detention order for a maximum period of at least three years, shall not be subject to verification of double criminality under any circumstances. These offences are:

- participation in a criminal organization	- swindling
- terrorism	- racketeering and extortion
- trafficking in human beings	- counterfeiting and piracy of products
- corruption	- forgery of means of payment
- fraud	- murder, grievous bodily injury
- laundering of the proceeds of crime	- organized or armed robbery
- counterfeiting currency	- trafficking in stolen vehicles
- computer-related crime	- rape
- environmental crime	- arson
- forgery of administrative documents and trafficking therein	- crimes within the jurisdiction of the International Criminal Court
- illicit trade in human organs and tissue	- unlawful seizure of aircraft/ships

[17] Official Journal of the European Communities C 191 29.07.1992. Available at:

http://eur-lex.europa.eu/en/treaties/dat/11992M/tif/JOC_1992_191__1_EN_0001.pdf

[18] Official Journal of the European Communities C 364/1. 18.12.2000. Available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf

- racism and xenophobia	- sabotage
- illicit trafficking in nuclear or radioactive materials	- illicit trafficking in hormonal substances and other growth promoters
- kidnapping, illegal restraint and hostage-taking	- illicit trafficking in cultural goods, including antiques and works of art
- sexual exploitation of children and child pornography	- facilitation of unauthorized entry and residence
- illicit trafficking in weapons, munitions and explosives	- illicit trafficking in narcotic drugs and psychotropic substances

The Framework Decision opens up the possibility for further offences to be added to the list should the Council and Parliament consider this necessary. It is stated in the Framework Decision that the condition of double criminality will be further examined by the Council in 2014. If the Council (after obtaining consent by the Parliament) so decides, the principle of double criminality might be completely abolished. In such case, a competent authority in one member state will be allowed to order a competent authority in another member state to provide evidence even though the offence for which the evidence is required is not a crime in the executing state.

Abortion is one example which can illustrate the principle of double criminality in this context. Although a small number of member states criminalize abortion, under the current legal framework, it will not be possible for them to issue an EEW and request search and seizure of evidence in connection to abortion from a member state that considers abortion legal. Issuing an EEW for all type of criminal offences will become possible only if the principle of dual criminality is abolished in the future.

At the time of the negotiations in relation to the Framework Decision on the EEW, the Netherlands feared that it might get swamped by evidence warrants in relation to purchase of drugs. Germany on the other hand was worried about the lack of definitions for six particular crimes (terrorism, sabotage, extortion, racism and xenophobia, racketeering, and computer crime) which are not subject to verification of double criminality. In order to reassure the Netherlands, one more ground for non-recognition was added stating that an EEW might be refused if the alleged offence was committed wholly or for a major or essential part on the territory of the executing state. Germany secured a five years opt-out for the mentioned crimes and will be free to decide whether they are criminal offences under German law.

3.4 DEADLINES FOR RECOGNITION, EXECUTION AND TRANSFER

Article 15 of the Framwork Decision on the EEW prescribes the deadlines for recognition and execution of an EEW as well as for the transfer of the requested evidence. If the competent authority of the executing state decides to refuse recognition or execution of an EEW it must, no later than 30 days after the receipt of the EEW, inform the authority of the issuing state. If, on the other hand, an EEW was recognized and accepted, the executing authority must take possession of the objects, documents or data and transfer them without delay, no later than 60 days after the receipt of the EEW. If, in a specific case, there are justified reasons for delaying the transfer of the evidence, the executing authority is obliged to inform the issuing authority giving the reasons for the delay and the estimated time needed for the action to be taken. When transferring the objects, documents or data obtained, the executing authority is supposed to indicate whether it requires them to be returned to the executing State as soon as they are no longer required by the issuing State.

3.5 LEGAL REMEDIES

Article 18 deals with the legal remedies. Member states must put in place the necessary arrangements to ensure that all interested parties, including bona fide third parties, have legal remedies against the recognition and execution of an EEW in order to preserve their legitimate interests. The action is to be brought before a court in the executing state in accordance with the law of that state. The substantive reasons for issuing the EEW may be challenged only in an action brought before a court in the issuing state. If the action is brought in the executing state, the judicial authority of the issuing state must be informed thereof and of the grounds of the action, so that it can submit the arguments that it deems necessary. It shall also be informed of the outcome of the action. The executing state may suspend the transfer of objects, documents and data pending the outcome of a legal remedy.

4. FUTURE PROSPECTS AND CONCLUSIONS

In June 2009, the European Commission circulated a Communication titled "An area of freedom, security and justice serving the citizen"[19] to the Council and Parliament. In the view of the Commission the Union is establishing a comprehensive system for obtaining evidence in cross-border cases. It calls for a "real" European evidence warrant to replace all the existing legal instruments in this field. It envisages further regulation of the

[19] European Commission, COM (2009) 262 final, 10.6.2009. Available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0262:FIN:EN:PDF

procurement and transfer of evidence including electronic evidence, court videoconferencing and scientific evidence.

In November 2009, the Commission published a Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility.[20] According to the text, the fact that procurement and transfer of evidence is regulated both by mutual recognition and mutual assistance principles could result in confusion between practitioners who might not use the most appropriate instrument for the evidence sought. The best solution would therefore be adoption of a single instrument which would replace the existing legal regime for procurement of evidence. This new instrument would be based solely on the principle of mutual recognition principle and would cover all types of evidence. This practically means abolishment of the dual criminality rule and a possibility to request evidence that does not already exist. Taking of statements from suspects, witnesses and experts in real time, or ordering real time interception of communications or monitoring of bank accounts would also become possible.

The EEW offers a simplified and accelerated procedure for procurement and transmission of evidence between the member states of the EU. It has a potential to assist the fight against crimes with cross-border element. This legal instrument will coexist in tandem with the mutual assistance procedures, at least for a transitional time, until the mutual recognition regime completely replaces the mutual assistance principle. It is regrettable that, at this stage, it does not cover taking of statements from suspects, witnesses and experts as they play an important role in criminal procedure cases. High level of trust between the member states will be required for proper implementation of the Framwork Decision on the EEW. The risk that some states might be trusted more than others, depending on the quality of their judicial system and the prevalence of the rule of law, is a real one and practice might prove that not all of the member states will benefit equally from the EEW.

It might be argued, on the other hand, that the EEW erodes state sovereignty in the sphere of criminal law by allowing judicial orders issued by other states' authorities to be considered as legal and binding by domestic authorities. Without the possibility to scrutinize an EEW issued by another member state, the executing state might be compelled to lower its level of legal protection in order to satisfy a request. Regarding double criminality cases, the executing state will be obliged to provide evidence for offences that are not considered criminal under its national law. If the double criminality rule is abolished, authorities of the executing state will have to

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[20] European Commission COM(2009) 624 final, 11.11.2009, Available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0624:FIN:EN:PDF

conduct search and seizure even for those offences that are not punishable in their state. The procedure of obtaining such evidence, although illegal in the executing state, will become legal following a request by another EU member state. This brings up the question of legal certainty and the protection of constitutional rights of the citizens in the executing state.

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THE JUDICIAL DOCTRINE OF FUNDAMENTAL RIGHTS IN THE LIGHT OF THE KADI CASE

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Abstract in original language
Abstract
The contribution deals with the latest significant judgment of Luxembourg Court related to the human rights protection. The author follows the example of two diametric different judgments of the Court of First Instance and European Court of Justice related to the development of the judicial doctrine of fundamental rights at the level of EC/EU.

Taking into the account the arguments in the opinion of General Advocate Poiares Maduro and ratio decidendi of the Court of Justice it is possible to consider that Solange method was used by the Court, which was inspired by the approach of the German Constitutional Court in International Handelsgesellschaft (so called Solange case).

Key words
European Court of Justice; Court of First Instance; fight against the international terrorism; Resolution of the United Nations Security Council; Sanctions Committee; Judicial doctrine of fundamental rights; procedural safeguards of human rights.

1. INTRODUCTORY OUTPOINTS

The Judgment of the European Court of Justice in the joint cases Yassin Abdullah Kadi and Al Barakaat International Foundation versus Council of European Union and Commission of European Communities[1] was declared by Grand Chamber on the 3rd of September 2008 and immediately became the object of the enormous attention from the side of the wide public.

This case is remarkable and outstanding in many respects and can be evaluated from the different points of view and inside various dimensions:

1. concerning the relationship of European and International law in general

2. concerning the acceptation of the authority of the Resolutions of the United Nations Security Council for the another international organization

[1] Judgment of ECJ in Joined cases C-402/05 and C 415/05 Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission, ECR (2008)

3. from the point if view of efficiency of the measures of the international fight against terrorism

4. from the point of view of the European Union's common foreign and security policy (CFSP)

This contribution will deal with another aspect of this case, especially its importance for further development of the Judicial doctrine of fundamental rights and future direction of human rights protection in the European Union area. Despite the fact that at the very beginning of the European integration the ECJ refused to solve cases with human rights dimension and referred them to the national courts of the member states, starting with the Stunder Case (1969)[2], the court has created a wide and extensive corpus of cases which formulates concrete rights, as well as determines the conditions for their realization. This judicial doctrine gathers from 3 main sources of its inspiration:

1. constitutional traditions of the Member states

2. international treaties in the field of human rights

3. case-law of the European Court of Human Rights[3].

The Kadi case enriches this list by one more source of inspiration, as will be proved further.

2. SOME INFORMATION ABOUT THE BACKGROUND OF THE CASE

Appellants Yassin Abdullah Kadi (citizen of Saudi Arabia) and Al Barakaat International Foundation (with residence in Sweden) lodged appeals against the judgments of the Court of the First instance of 21st September 2005 in the cases T-315/01 Kadi and case T-306/01 Al Barakaat v. Council and Commission. In both judgments the Court of First Instance dismissed an application for annulment of Council Regulation No 881/2002 of May 27th 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Queda network and the Taliban. The contested regulation reflected 3 resolutions of

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[2] Judgment of ECJ 29/69 Stauder v. Ulm, ECR (1969), 419

[3] Siskova, N.: Actual Issues of the Creation of Constitutionalism in the Field of Human Rights at the EU level and its Prospects in the list of the relevant rights formulated by the Court; Siskova, N.: Dimenze ochrany lidských práv v Evropské unii, second edition, Linde, Prague, 2009, p. 90-93

Siskova, N., ed.: The process of Constitutionalisation of the EU and Related Issues, Europe Law Publishing, Groningen, 2008, p. 8

the United Nations Security Council[4], which provide, inter alia, that all the States are to take measures to freeze the funds and other financial assets of individuals and entities associated with Bin Laden, the Al-Queda and the Taliban, as designated by a Committee of the Security Council composed of all its members (so called Sanctions Committee). The Sanctions Committee under these Resolutions obtained the competence to issue the list of the persons and entities that were to be subjected to the freezing of funds. The names of appellants were added to the list by the Sanctions Committee on the 17th October and 9th November 2001. The mentioned list including the names of appellants was taken over by the Council and attached to the Regulation 881/2002 in the form of Supplement No 1.

Kadi who was very well situated businessman and Al Barakaat which was a rich legal person, after putting on the mentioned list became without any financial means.

Al Barakaat Foundation before the Court of First Instance put forward three grounds of annulment:

1. alleged that Council was incompetent to adopt the contested regulation
2. alleged infringement of Article 249 and
3. alleged breach of their fundamental rights.

Mr. Kadi put these grounds for annulment inter alia:

1. for infringement of the right to be heard
2. for infringement of the right to respect property and principle of proportionality
3. for infringement of effective judicial review

3. RACIONE DECIDENDI OF THE JUDGMENT OF THE ECJ

Concerning the alleged infringement of the fundamental rights, the Court of First Instance in its judgment decided to examine firstly the relationship between the international legal order represented by the acts of the United Nations in this case and the national legal order, respectively of the Community legal order. In this respect the Court of First Instance declared that the Security Council resolutions adopted under Chapter VII of the UN Charter prevail over the rules of the Community law. The Court essentially found that Community law recognises that Security Council resolutions take precedence over the Treaty.

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[4] Resolutions 1267/1999 (5), 1333(2000) (6) and 1390 (2002) (7) of the United Nations Security Council

Secondly the Court of First Instance declared that it had neither authority nor power to review, even indirectly, the Security Council Resolutions in order to assess their conformity with fundamental rights as protected by Community legal order, in so far as those rights formed part of the principle of jus cogens.

On the contrary, the European Court of Justice declared that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, thus constituting a condition of lawfulness of the Community acts, and measures incompatible with the respect for human rights are not acceptable in the Community.

According to the opinion of Advocate General Poiares Maduro the Court of First Instance made an error when concluded that it has no power to review the Regulation in the light of fundamental rights as the general principle of the Community Law. "The fact that the measures are intended to suppress international terrorism should not inhibit the Court from fulfilling its duty to preserve the rule of law." "There is no reason for the Court to depart in the present case from its usual interpretation of fundamental rights... The only novel question is whether the concrete needs raised by the prevention of international terrorism justify restrictions on the fundamental rights of the appellant that would otherwise not be acceptable."

Advocate Maduro underlines the specific features of this case as follows: "The problem facing the appellant is that its financial interests within the Community have been frozen for several years without limit of time and in conditions where there appear to be no measures and without adequate means for appellants to challenge the assertion that it is involved in supporting terrorism. The indefinite freezing of someone´s assets constitutes a far-reaching interference with the peaceful enjoyment of property. The consequences for the person or entity concern are potentially devastating."

Later on General Advocate stressed the necessity to have procedural guaranties which require the authorities to justify such measures and demonstrate their proportionality, not merely in the abstract, but in the concrete circumstances of the given case. "The Commission rightly points out that the prevention of international terrorism may justify restrictions on the right to property. However, that doesn´t ipso facto relieve the authorities of the requirement to demonstrate that those restrictions are justified in respect of the person or entity concerned. Procedural safeguards are necessary precisely to ensure that it is indeed in this case. In the absence of those safeguards, the freezing of assets for an indefinite period of time infringes the right to property."

Other two rights, which are mentioned by the appellants, both the right to be heard and right to effective judicial review constitute fundamental rights that form the part of the general principles of Community law. In the present cases the Community institutions had not afforded any opportunity to the

appellant to make known his views on whether the sanction against him are justified and whether they should be kept in force. The existence of the delisting procedure at the level of the United Nations offers no consolation in this respect, as it creates a matter of purely intergovernmental consultation.

This de-listing procedure does not provide even minimal access to the information on which the decision was based to include the petitioners in the list. In fact, access to such information is denied regardless of any substantiated claim to the need to protect its confidentiality. In that sense, respect for the right to be heard is directly relevant to ensuring the right to effective judicial review. Procedural safeguards at the administrative level can never remove the need for subsequent judicial review. Yet, the absence of such administrative safeguards has significant adverse affect on the appellant's right to effective judicial protection.

In Poiares Maduro´s opinion, the right to effective judicial protection holds a prominent place in the firmament of fundamental rights and that is why it is unacceptable in a democratic society to impair the very essence of that right. As a result of this denial, there is a real possibility that the sanctions taken against the appellant within the community law may be disproportional or even misdirected, and might remain in place indefinitely. The Court has no way of knowing whether that is the case in reality, but the mere existence of that possibility is anathema in a society that respects the rule of law.

Later on, the General Advocate gave one more persuasive argument and the reason for the annulment of the contested Regulation. In particular he pointed out that the decision whether or not to remove a person from the United Nations Sanctions list remains within the full discretion of Sanction Committee – a diplomatic organ. In those circumstances, it must be held that the right to judicial review by an independent tribunal has not been secured at the level of the United Nations. As a consequence, the Community institutions cannot dispense with proper judicial review proceedings when implementing Security Council resolutions in question within the Community legal order.

The European Court of Justice shared the opinion of Advocate General Maduro concerning the fact that the contested Regulation infringes the rights of the appellants to be heard, the right to judicial review and the right to property is well founded. So it set aside the judgments of the Court of First Instance and annulled the Council Regulation as so far as it concerns Mr. Kadi and Al Barakaat International Foundation.

4. THE SIGNIFICANCE OF THE JUDGMENT FOR THE DOCTRINE OF FUNDAMENTAL RIGHTS.

As it was mentioned before, the Kadi case raised a huge wave of reactions on the side of jurisprudence. Although the references were in most cases very positive, some negative responses were also heard.

Especially the famous author in the field of European Law, Grainne de Burca, in her analysis, which was prepared immediately after the declaration of the judgment, pointed out several negative implications. In this respect she states that "the robustly pluralist approach of the ECJ to the relationship between EU law and International law in Kadi represents a sharp departure from the traditional embrace of international law by European Union. It is an approach which carries certain costs for EU and international legal order in the message its sends to the court of the other states and organizations contemplating the authority of the Security Council resolutions. ECJ approach carries the risk of undermining the image the EU as a virtuous international actor which maintains a distinctive commitment to international law and institutions."[5]

Without prejudice to all these negative implications in the field of international law and policy, it must be stressed the enormous importance of this judgment for further development of the Judicial doctrine of fundamental rights.

The Court in the Kadi case formulated de facto the supremacy principle of fundamental rights over the acts of all international organizations (United Nations included). Moreover, the Court reserved its power to review the legality of the acts of other international organizations concerning their conformity with the level of the human rights protection guaranteed by the Community law. It is quite obvious that the approach of the German Constitutional Court in the International Handelsgesellschaft case was taken into consideration by the ECJ, and it is even possible to suppose that the Solange method[6] was used in the Kadi case.

From this point of view one more source of inspiration for the Court can be indicated: the rationes decidendi of the jurisprudence of the Constitutional Courts of the member states.

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[5] De Burea, G.: The EU, the European Court of Justice and the International Legal order after Kadi, Harvard International Law Journal, Vol. 1, No 51, 2009

[6] see Nikolaos Lavranos: Towards a Solange-Method between international courts and tribunals? in Broude, T., Shany, Y.: The Shifting Allocation of Authority in International Law, Hart Publishing, Oxford, 2008

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CASE-LAW OF THE EUROPEAN COURT OF JUSTICE IN CRIMINAL MATTERS

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Abstract in original language
Práce se zaměří na judikaturu ESD v trestních věcech. Bude pracovat s hypotézou, že ESD podporuje při řešení sporů institucí v oblasti trestního práva spíše nadnárodní instituce na úkor mezivládní Rady EU. Na úvod práce stručně vymezí pojem institucionálních sporů v EU ve sféře trestního práva. Poté přistoupí k zevrubnějšímu rozboru vybraných klíčových rozsudků ESD v této oblasti. Nakonec dospěje k závěru, zda skutečně platí, že ESD podporuje v předmětných sporech institucí spíše nadnárodní instituce, respektive poukáže na limity takové „podpory".

Key words in original language
Evropský soudní dvůr; spory institucí; řízení o neplatnost; řízení o předběžné otázce.

Abstract
This paper will focus on the case-law of the ECJ in criminal matters. It will elaborate on the hypothesis that the ECJ, while resolving disputes among Union institutions, supports supranational institutions to the expense of the intergovernmental EU Council. Firstly, the term of institutional disputes within the sphere of criminal law will be briefly introduced. Thereafter, more in-depth analysis of the crucial judgments of the ECJ in this area will follow. Finally, the conclusions will be drawn as to whether the ECJ supports the supranational institutions, respectively the limits of such a support will be stressed.

Key words
European Court of Justice; institutional disputes; the annulment procedure; the preliminary ruling procedure.

1. INTRODUCTION

In this paper I will focus on the case-law of the European Court of Justice (ECJ) in criminal matters. However, I will not elaborate on the whole and broad area of the case-law, which relates to the criminal law and goes back to the 1980s or even 1970s, but I will rather limit this paper to the more recent case-law, respectively four "leading" cases, involving institutional disputes among Union institutions, both the clear and disguised ones. These disputes will be demonstrated on two cases within the annulment procedure (of the Union acts) in the case of clear institutional disputes and on other

two cases within the preliminary ruling procedure in the case of disguised institutional disputes.

The aim of this paper, will be to prove the hypothesis, asserting that the ECJ, while resolving such disputes, is ready to support rather supranational institutions like the European Commission (Commission) and European Parliament (EP) to the expense of the intergovernmental Council of the European Union (Council), representing the will and interests of the Member States. In this respect, on the one hand the legal techniques used (i.e. the prevailing methods of interpretation such as teleological and effet utile line of reasoning) by the ECJ, resulting from its position and role within the EU legal framework, justifying such a "support" will be emphasized, on the other hand the limits of such a "support" will be stressed as well. Finally, also perspectives of the ECJ jurisprudence within the criminal area in the "lisabonised" world will be sketched briefly at the very end of this paper.

2. THE ROLE OF THE ECJ IN INSTITUTIONAL DISPUTES WITHIN THE ARE OF CRIMINAL LAW

Since its establishment in 1951, resp. 1957 the ECJ has been playing a huge role in the process of the European integration. In spite of the fact that its role traditionally focused on the case-law pursuing the establishment, resp. maintaining the functioning of the internal market, inter alia by assuring the removal of any forbidden obstacles thereof, its jurisprudence gradually stretched to other areas as well, including the area of the criminal law. Firstly, even at the times, where there was no european criminal law competence of whatsever, it became apparent through the case-law of the ECJ that the criminal law of the Member States is not entirely immune from the influence of the european law and operation of its leading principles, such as the prohibition of discrimination and forbidden restrictions on the exercise of the rights to free movement (which might result in duty not to criminalize) or the requirement for effective and equivalent protection (which might result on the other hand in de facto duty to criminalize).[1]

Later on with the entry into of force of the Maastricht Treaty, respectively the Amsterdam Treaty, which brought a kind of genuine EU criminal law competence (at least as regards certain aspects of substantive criminal law but also as regards the field of judicial cooperation in criminal matters as such) the role of the ECJ in the field of criminal law was furthermore substantially enhanced. The ECJ acquired inter alia the competence to rule on the legality of the acts (among which the harmonising framework decisions were deemed to be probably the most important ones) adopted in

[1] See, Kmec, J.: Evropské trestní právo. Mechanismy europeizace trestního práva a vytváření skutečného evropského trestního práva, Praha: C.H.Beck, 2006, s. 110-117, 102 - 109.

the framework of the so-called annulment procedure within the sphere of judicial cooperation in criminal matters according to article 35(6)TEU, largely inspired by art. 230 TEC (whereby, however, naturally the acts at stake differed as well as those entitled to instigate such a procedure). The ECJ was granted also power to rule within the preliminary ruling procedure on the validity and interpretation of the enumerated acts, including the framework decisions, as provide for in art. 35 (1) TEU. This competence was inspired by art. 234 TEC. However, it was limited in comparison to the "Community preliminary ruling procedure". Within the context of the "Union third pillar", the preliminary rulings competence of the ECJ and its scope was made conditional upon the declaration of the respective Member States according to art. 35(2,3) TEU.

Both of the above mentioned procedures might serve as a basis for further analysis of institutional disputes which occured within the EU criminal law sphere. These disputes might be divided into two categories. The first might be represented by so-called clear institutional disputes. The second by the so-called disguised institutional disputes. While the former can be identified from the cases within the annulment procedure, where the Union institutions stand and "fight" directly against each other, the latter - so-called disguised institutional disputes - might by revealed from the cases within the preliminary ruling procedures, whereby Union institutions - typically the Commission - and Member States, which might be regarded as representing the will of the Council, only intervene, respectively submit their observations.

2.1 THE ROLE OF THE ECJ IN CLEAR INSTITUTIONAL DISPUTES

2.1.1 ENVIRONMENTAL CRIMES CASE

On 27 January 2003 the Council adopted the framework decision on the protection of the environment through criminal law. On 15 April 2003 the Commission, supported by the EP, brought an application for annulment of this framework decision against the Council, which was supported by 11 Member States. On 13 September the ECJ delivered its judgment in this case.[2] The ECJ annuled the challenged framework decision. The supranational institutions represented by the Commission and the EP could celebrate a victory. The Council on the other hand was a loser in this "battle." Which arguments were brought in front of the ECJ by both sides and what was the reasoning of the ECJ, while resolving this dispute?

The Commission challenged the Council´s choice of art. 34 TEU, in conj. with art. 29 and 31(e) TEU, as the legal basis for the framework decision at

[2] See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes," 13.9.2005.

stake, respectively its articles 1 - 7 (the Commission admitted, however, that such a challenge should not be applicable to jurisdictional or extradition issues as such).[3] The Commission argued that there was a Community competence under art. 175 TEC (representing EC environmental competence) to require Member States to prescribe criminal penalties for infringements of Community environmental-protection legislation, if this were to be recognised as necessary for ensuring effectiveness of that legislation.[4] And because this was the case according to the Commission and bearing in mind the aim and content of the challenged legislation, which was in the view of the Commission the protection of the environment, the instrument should had been adopted under art 175 TEC. The EP fully supported the stance of the Commission.[5] In this respect, one must be fully aware of the motivation of the former, which has no co-legislative competence under the "third pillar" of the EU by contrast to its fully fledged legislative prerogatives within the Community competences (at least as a rule in most of the areas, including the environmental competence according to art. 175(1) TEC).

On the other side of the barricade there were completely opposite arguments of the Council. The Council asserted that there was no explicit Community competence in criminal matters at all and similarly no such competence could be implied in any case either, given the considerable significance of criminal law for the sovereignty of the Member States.[6] More importantly, the Council also pointed to the fact, that any criminal law regulation, including the harmonisation of substantive criminal law, was meant to be restricted to the EU third pillar.[7] The Council finally stressed that the aim and content primarily focused on a kind of criminal law harmonisation. At any rate, the Council was of the view that the sole fact that the environmental protection might be well regarded as an objective of the challenged instrument cannot serve as a basis for the Community implied criminal law competence.[8]

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[3] See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes," 13.9.2005, point 18.

[4] See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes," 13.9.2005, point 19.

[5] See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes," 13.9.2005, point 25.

[6] See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes," 13.9.2005, points 26, 27.

[7] See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes," 13.9.2005, point 29.

[8] See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes," 13.9.2005, point 34.

The ECJ followed the below sketched line of reasoning, when resolving the dispute put in front if it. At the very beginning, the ECJ emphasized that according to art. 47 TEU nothing in the TEU is to affect the TEC.[9] As a result, the ECJ assumed the task to check, whether art. 175 TEC could have been a proper legal basis in this case, as the Commission and the EP argued. In this respect the ECJ firstly scrutinized, whether the content and aim of the challenged instrument was the protection of the environment. And it held in affirmative.[10] Secondly, the ECJ ruled on the implied competence to criminal regulation within the field at stake. In this regard, the ECJ stated that as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence.[11] However, the ECJ did not stop here, but went further on to hold that the Community legislature is not prevented to adopt measures which relate to the criminal law of the member states 1) which it considers necessary in order to ensure that the rules which it lays down (on environmental protection) are fully effective and 2) where the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure (for combating serious offences).[12] Also in this respect the ECJ held that the requirement for the criminal-law measure to be necessary and essential was fulfilled in this case and therefore the challenged instrument should had been adopted under art. 175 TEC and not under art. 34 TEU (in conj. with art. 29 a 31(e) TEU). Consequently, the ECJ annulled the framework decision, basically on the ground of forbidden interference with art. 47 TEU, respectively art. 175 TEC.[13]

In my view, the ECJ in this case clearly "backed" the supranational perspective, which was suggested by the Commission, to the expense of the intergovernmental perspective, represented by the Council. In fact, the ECJ followed and confirmed the main arguments of the Commission, especially those relating to the need for ensurance of the effectiveness of adopted "first pillar" rules through criminal law. The ECJ also clearly stressed the importance of art. 47 TEU, whereby in my view a kind of "in dubio pro communataire" doctrine was established, resting on the idea, that wherever within the Community pillar the competence, even the implied one, might

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[9] See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes," 13.9.2005, point 38.

[10] See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes," 13.9.2005, points 46, 47, 51.

[11] See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes," 13.9.2005, point 47.

[12] See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes," 13.9.2005, point 48.

[13] See, Judgment of the Court (Grand Chamber), Case C-176/03, Commission v. Council, „Environmental crimes," 13.9.2005, point 53.

be inferred, there is no place for any competence within the EU third pillar. This pronounced supremacy among pillars seems to me somehow problematic and not entirely persuasive, especially in connection with a very broad and extensive ECJ approach towards the Community implied competences, as introduced in the analysed case. Furthermore, in my opinion, the arguments raised by the Council were not also properly settled, especially as regards the Council's assertion, that the exercise of the (substantive) criminal law competence should be possible only within the "Union third pillar" (following this logic: where the explicit powers were granted in the third pillar, there should be no place for implied powers on the same subject to be inferred elsewhere within the first pillar).[14] Finally, as regards the requirement of necessity of the criminal law regulation, the ECJ seems to grant a great leeway for legislator in this respect, without resorting to any objective and genuine test of such a necessity.[15] In principle the political appraisal of such a necessity by the legislator seems to be sufficient. To sum up the ECJ in my view showed in this case a great tendency to support the supranational institutions, represented by the Commission and the EP, to the expense of the intergovernmental Council. More specifically, the ECJ showed, while interpreting, that the explicit rules adopted as well as the historic or even actual intentions of the drafters of the challenged instrument might not be decisive at all, but rather teleological interpretation focused on the ensurance of the effectivity of the rules adopted might prevail. However, the ECJ did not specifically elaborated more deeply on the nature, extent, scope and intensity of the criminal law regulation in the first pillar. In this respect, three main questions remained unresolved. Which criminal measures might be adopted? Do these relate only to the definition of the criminal offenses, setting of the framework criminal penalties and liability of both natural and legal persons, even within the phase of instigation, aiding, abetting of the particular offence or are there also other measures, which might be validly adopted in the first pillar either (investigation, prosecution, jurisdictional, extradition questions)? Which areas of Community law might form the basis for the implied criminal competence? Should the implied criminal competence in this respect restrict only to the competence in environmental protection, because of its cross-cutting nature and because such protection constitutes

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[14] See in this respect, Bříza, P., Švarc, M. Komunitarizace trestního práva v Lisabonské smlouvě a její (případná) reflexe v právním řádu ČR. Trestněprávní revue, Nakladatelství C.H.Beck, Praha, 2009, č. 6, s. 162, whereby the view is defended that the list in art. 31(e) is not an exclusive but rather demonstrative one. However, see also: Tobler, Ch. Case C-176/03, Commission v. Council, judgment of the Grand Chamber of 13 September 2005, Common Market Law Review, 2006, No. 43, p. 844, footnote 23, referring to: Weyembergh, A.: Approximation of criminal laws, the constitutional treaty and the Hague programme. Common Market Law Review, 2005, No. 24, p. 1569.

[15] See, critically in this respect, Tobler, Ch. Case C-176/03, Commission v. Council, judgment of the Grand Chamber of 13 September 2005, Common Market Law Review, 2006, No. 43, p. 850.

and essential objective of the Community as such. Or should such competence stretch further to (at least) all other harmonised Community areas (such as intellectual property policy area or transport policy area etc.)? And finally - should the criminal law regulation within the first pillar be very limited or is there a room for a more intensive and deeper regulation, involving e.g. the type and level of the criminal penalties prescribed? Another case of the ECJ on Ship-source pollution shed some light on these issues.

2.1.2 SHIP-SOURCE POLLUTION CASE

On 12 July 2005 - at the time before the delivery of the above referred judgement - the Council adopted framework decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution. On 8 December 2005 the Commission, obviously encouraged by the ECJ ruling on Environmental Crimes Case, raised application for annulment of that framework decision according to art. 35(6) TEU against the Council. While the Commission was supported in this action - not surprisingly - again by the EP (however there was a slight difference among these two supranational institutions as regards the breath of measures allowed to be adopted under the first pillar, where the EP seemingly employed a more cautious stance[16]), the Council was backed by 19 Member States, the vast majority of 25 EU Member States at that time. The judgment in this case was delivered by the ECJ on 23 September 2007.[17] The challenged framework decision was again annulled. However, the ECJ was also ready to set some clear limits to the Community criminal competence. Specifically, the ECJ explicitly ruled that there is no Community criminal competence as regards the determination of the type and level of criminal penalties to be imposed, which sharply contrasted to the submissions of the Commission in this respect.[18] Such stance of the ECJ - which I highly appreciate - seemingly reflected underlying reasons, such as inter alia the full respect for the coherence of national systems of criminal sanctioning, which were well elaborated within the Opinion to this case by the advocate general (AG) Mazák (as well as AG Colomer in the Environmental Crimes Case).[19]

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[16] See, Judgment of the Court (Grand Chamber), Case C-440/05, Commission v. Council, „Ship-source pollution," 23.10.2007, point 41 compared to point 31.

[17] See, Judgment of the Court (Grand Chamber), Case C-440/05, Commission v. Council, „Ship-source pollution," 23.10.2007.

[18] See, Judgment of the Court (Grand Chamber), Case C-440/05, Commission v. Council, „Ship-source pollution," 23.10.2007, points 70, 71.

[19] See, Opinion of the Advocate General Mazák to the Judgment of the Court (Grand Chamber), Case C-440/05, Commission v. Council, „Ship-source pollution," 23.10.2007, especially points 106, 107, 108.

On the other hand, it must be stressed that in all other aspects the ECJ upheld or even expanded, rather than limited, its former "Environmental crimes Case precedent". The ECJ mainly confirmed again the predominant role of art. 47 TEU, respectively implied community criminal competence (although limited, as shown above), when necessary and essential for ensuring the effectiveness of the community rules adopted.[20] In this specific case, the ECJ furthermore accepted that such a criminal law regulation could had been adopted also within the area of transport policy, respectively maritime safety policy, although the link to the protection of environment in this context was also emphasized.[21] As a result, one could probably believe that such a regulation was allowed in other harmonised areas of community law as well, such as areas like intellectual property law, competition law or illegal immigration.[22]

2.1.3 INTERIM CONLUSIONS

Both of the above analysed cases in my view prove a great tendency of the ECJ to support the supranational institutions, represented by the Commission and the EP, to the expense of the intergovernmental Council. The ECJ showed readiness to annul the Union acts, if these were to encroach upon the Community competences, which might be even extensively inferred as implied criminal competences, if necessary and essential for the effectiveness of the Community rules adopted. However, the ECJ also limited the Community implied criminal law competence by specifically stating that the determination of the type and level of criminal penalties imposed falls outside of such a competence. In this respect, the ECJ demonstrated that its supportive stance towards the supranational institutions might be limited and that it also takes into account the interests and arguments of the intergovernmental Council, representing the Member States. At any rate its teleological and "effet utile" focused interpretation seems to prevail.

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[20] See, Judgment of the Court (Grand Chamber), Case C-440/05, Commission v. Council, „Ship-source pollution," 23.10.2007, points 52, 53, 62, 64, 66, 68, 69.

[21] See, Judgment of the Court (Grand Chamber), Case C-440/05, Commission v. Council, „Ship-source pollution," 23.10.2007, point 69.

[22] See, critical reflection on the expansion of the Community criminal comptence to these fileds In: Dawes, A., Lynskey, O.: The ever-longer arm of EC law: The extension of Community cometence into the field of criminal law. Common Market Law Review, 2008, No. 45, p. 131 – 158

2.2 THE ROLE OF THE ECJ IN DISGUISED INSTITUTIONAL DISPUTES

2.2.1 PUPINO CASE

In my view Pupino Case[23] represents a leading case in the area of criminal law. In this case the ECJ was asked by the Italian court within the preliminary ruling procedure under art. 35 TEU to give an interpretative ruling on specific provisions of the framework decision on the standing of victims in criminal proceedings, which related to the special criminal procedure to be employed in respect of vulnerable victims, respectively application of the procedural benefits, such as testifying outside the trial and before it takes place, towards maltreated children. In fact the Italian court probably wanted the ECJ to rule on its duty to the so-called euroconform interpretation, which could seemingly allow for higher protection of maltreated children in comparison with the valid Italian legislation, if strictly interpreted without taking into account the aims of the invoked provisions of the framework decision at stake.

In this case the Commission, in the position of intervening party, respectively the party submitting its observations, supported the view that the framework decisions should operate like directives within the first pillar.[24] Specifically the Commission argued that indirect effect, while being aware that the direct effect is explicitly excluded by art. 34(2)(b,c)TEU, should be confirmed also in relation to framework decisions. By contrast, the majority (although slight) of the Member States (represented by the Italian, British, Swedish and in principle Dutch government), which submitted their observations, and which (for academic purpose of this paper) might be regarded as spelling out the view of the intergovernmental Council, opposed the above mentioned view. Their arguments emphasized inter alia that framework decisions and Community directives shall be deemed as completely different and separate sources of law, and that a framework decision cannot therefore place a national court under an obligation to interpret national law in conformity - an obligation, which was derived by the ECJ case-law concerning Community directives.[25] The ECJ, however, rejected this argument and held quite the opposite, supporting thus the view of the Commission. The ECJ firstly stressed the binding nature of framework decisions, inspired largely by the directives as defined in art. 249

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[23] See, Judgment of the Court (Grand Chamber), Case C-105/03, „Pupino," 16.6.2005.

[24] See, Judgment of the Court (Grand Chamber), Case C-105/03, „Pupino," 16.6.2005, point 31.

[25] See, Judgment of the Court (Grand Chamber), Case C-105/03, „Pupino," 16.6.2005, point 25.

TEC. As a result the ECJ stated that the binding character of the framework decision places on national authorities, and particularly national courts, an obligation to interpret national law in conformity.[26] Moreover, the ECJ added, that while having jurisdiction in preliminary ruling procedure, this would be deprived of most of its useful effect, if individuals were not entitled to invoke framework decisions in order to obtain a confirming interpretation of national law before the courts of the Member States.[27] Furthermore, the ECJ, without any clear reference in the text of the TEU (unlike Article 10 TEC), went further to pronounce the applicability of the principle of loyal cooperation in this field as well, pointing to both the aim of the Union to create an ever closer Union among the peoples of Europe, where the solidarity shall reign, and the necessity to ensure that the Union may effectively fulfil its tasks.[28] Till this point the ECJ seemed to be supportive - without any reservation - to supranational perspective, introduced by the Commission. However, again here its support was not "blind" and unlimited. The ECJ emphasized the limits to the application of the so-called indirect effect. The ECJ held that such interpretation cannot be contra legem and conflict the principles of legal certainty and non-retroactivity or establish and aggravate criminal liability.[29]

In my view the ECJ in this case again showed a kind of tendency to support rather the supranational perspective to the expense of the intergovernmental one. However, again the application of newly introduced principle of loyal cooperation, respectively indirect effect or euroconform interpretation within the third pillar was subject to a set of clear limits, as enumerated above. Therefore, in my opinion, it might be concluded that the ECJ in this case in principle did not misuse its interpretative power, but applied it in rather quite well balanced than excessive manner. However, I am also well aware of the possible burdensome requirements upon Member States or any other problematic implications, which might be generated by this judgement.[30] Therefore my conclusions hold only in so far as the established

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[26] See, Judgment of the Court (Grand Chamber), Case C-105/03, „Pupino," 16.6.2005, point 34.

[27] See, Judgment of the Court (Grand Chamber), Case C-105/03, „Pupino," 16.6.2005, point 38.

[28] See, Judgment of the Court (Grand Chamber), Case C-105/03, „Pupino," 16.6.2005, points 41, 42.

[29] See, Judgment of the Court (Grand Chamber), Case C-105/03, „Pupino," 16.6.2005, points 44, 45, 47.

[30] See, for instance Spaventa, E.: Opening Pandora´s Box: Some reflections on the Constitutional Effects of the Decision in Pupino. European Constitutional Law Review, 2007, No. 3, p. 18 – 22 or Peers, S.: Salvation outside the church: Judicial protection in the third pillar after the Pupino and Segi judgments. Common Market Law Review, 2007, No. 44, p. 921 – 924, where the author comes up with practical examples, for instance that the wrongful detention, prosecution and conviction connected to the double leopardy rules

above mentioned limits are to be fully observed and cautiously applied both by the Member States and the ECJ itself (for instance, the ECJ should be especially restraint, when holding on the conform interpretation and should in no way specifically instruct national courts in a way, which could be objectively perceived as contra legem interpretation).

2.2.2 GÖZUTOK AND BRÜGGE CASE

The last case, which will be dealt with briefly in this paper, concerns the ruling of the ECJ on the ne bis in idem principle, enshrined in art. 54 of the so-called Convention implementing Schengen agreement (CISA), which was integrated into the Union framework with the entry into force of Amsterdam Treaty (1999). This principle reads as follows: "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party." In the Gözutok and Brügge Case[31] the question emerged within the preliminary ruling procedures instigated by the Belgian and German courts, whether also settlement of the respective criminal cases by the public prosecutors, whereby the criminal proceedings were discontinued, while the imposed obligations were fulfilled, respectively the prescribed sum of money was paid, even without the court being involved, amount to such a final disposal, or not.[32] The supranational Commission submitted observations, calling the ECJ to hold in affirmative and to give an autonomous meaning to the term "final disposal", which would cover also the decisions terminating criminal proceedings by the public prosecutors, even without any involvement of the courts.[33] On the other hand, governments of Germany, Belgium and France (which represented a slight majority of those Member States, which submitted their observations), defended quite the opposite view and pleaded for a restrictive interpretation of the principle or rule at stake, wishing to keep their power to criminalize.[34] Belgium even pointed to the Council Programme of measures to implement the principle of mutual recognition of decisions in criminal

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should be compensated in accordance with the principles established as regards liability for damages of Member States for infringement of the european law.

[31] See, Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Gozütok and Brügge," 11.2.2003.

[32] See, Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Gozütok and Brügge," 11.2.2003, points 2, 8, 23.

[33] See, Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Gozütok and Brügge," 11.2.2003, point 41.

[34] See, Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Gozütok and Brügge," 11.2.2003, point 41.

matters, whereby for the future work it was proposed to recognise also other decisions than those of the courts. In this respect, however, the Belgium asserted, that due to the fact that such legislation was only planned for the future, it could not be inferred beforehand by the ECJ through its case-law.[35] The ECJ, however, rejected this kind of perspective. Again, the ECJ put rather "supranational" glasses on and confirmed that other criminal proceedings were to be barred, if beforehand the same criminal case had been settled by the public prosecutor even without any involvement of the judge and the obligation imposed had been fulfilled.[36] However, here, it would not be precisely fair to hold that the ECJ ruled against the Council as such because it is true, that should the Council be of another view (i.e. that the courts´ decisions were to be meant solely), it was its job, to be more precise in wording. The wording of the relevant art. 54 CISA, as the ECJ noticed and stressed, left enough room to rule in the way promoted by the Commission and confirmed by the ECJ.[37] Besides the wording itself, the ECJ, also emphasized the purpose and objective of the relevant provision, which is designed to guarantee that the right to freedom of movement is not obstructed by the fear to be prosecuted once more in another Member State (after final disposal of the criminal case in one Member State).[38] Furthermore, the ECJ pointed out that in fact it would lead to absurd consequences, if the ECJ were to rule in line of the observations of the above mentioned governments. Such interpretation, excluding the application of ne bis in idem rule in cases where the courts are not involved, would only effectively harm the offenders of minor or medium offences, which might be regularly settled even without the court intervention. By contrast the serious offenders could enjoy this safeguard against repeated criminal proceedings.[39]

The reasoning of the ECJ - although primarily teleological but not contrary to the wording at the same time - in this case seems to me quite convincing. The ECJ therefore in my view did not excessively transgress its interpretative "discretional leeway" here. The ECJ rather proved only the readiness to fill the gaps, which the Council left to it. The further ECJ case-

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[35] See, Opinion of the Advocate General Colomer to the Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Gozütok and Brügge," 11.2.2003, point 128, 129.

[36] See, Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Gozütok and Brügge," 11.2.2003, point 48.

[37] See, Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Gozütok and Brügge," 11.2.2003, point 42.

[38] See, Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Gozütok and Brügge," 11.2.2003, point 38.

[39] See, Judgment of the Court (Grand Chamber), Joint Cases C-187/01, C-385/01, „Gozütok and Brügge," 11.2.2003, point 40.

law on certain other aspects of this principle showed, however, that not all other judgements were so well balanced or enough sensitive for criminal law differences (Van Esbroeck,[40] Van Straaten, Gasparini, Bourquain), while others (Miraglia, Kretzinger, Kraajenbrink, Turanský) showed that the ECJ is ready to set limits to its expansive jurisprudence either. However, analysis of these cases goes beyond the aim of this paper, and will not be therefore further dealt with here.

2.2.3 INTERIM CONCLUSIONS

Also within the preliminary ruling procedures, respectively two analysed cases, which might be (with a great deal of simplification) regarded as the representants of the so-called disguised institutional disputes, the ECJ confirmed its preference for supranational perspectives, promoted by the Commission. However, the rulings of the ECJ, sketched above, seemed to me not to be excessive, because they followed quite persuasive teleological, systematical and logical line of reasoning and did not conflict directly the explicit wording. Moreover, as was demonstrated on Pupino case, a set of limits was established for the correct application of the confirmed principles such as that of indirect effect, which was "transported" to the so-called third pillar from the first pillar case-law on directives. In his respect, it might be admitted that also in these cases, especially the first one, the ECJ started gradually to rebuild the "Maastricht temple". However, quite sensitively, I would tell. The ECJ was not willing to destroy the third pillar but was rather ready to improve some of its functional features.

3. CONCLUSION

In this paper the role of the ECJ in institutional disputes within the area of criminal law was dealt with. The aim of the paper was to verify the hypothesis that the ECJ supports the supranational institutions, represented by the Commission and the EP, to the expense of the Council. After examining the four leading cases, two of them falling within the category of the so-called clear institutional disputes and other two belonging to the disguised institutional disputes, it might be concluded, in my opinion, that indeed there is a great tendency to support supranational institutions and their views and perspectives by the ECJ. However, it has to be added as well, that such a "support" is not granted as unconditional or without any limits, as was shown, for instance by both the Ship-source pollution Case and Pupino Case. The ECJ usually also strives (but not always succeeds) to give persuasive reasons for its final conclusions, which rest mainly on teleological and systematical interpretation, whereby the principle of effectiveness plays the crucial role.

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[40] For a brilliant critical reflection see, Komárek, J.: "Tentýž čin" v prostoru svobody, bezpečnosti a práva. Jurisprudence, 2006, č. 3, s. 51 - 57.

Finally, as regards the perspectives of the role of the ECJ in institutional disputes within the criminal law with the entry into force of the Lisbon Treaty, it must be stressed, that most of such institutional disputes in front of the ECJ, at least the clear ones, will probably disappear, due to the fact that the third pillar will also disappear, respectively will be integrated within the main Union policy areas, governed in principle by the same supranational rules, like co-decision with the EP or qualified majority voting within the Council. As a result, it is to be expected in my view that the disputes will be rather held in "political arenas" than in front of the ECJ. However, the ECJ, which jurisdiction was strengthened in the criminal law area substantially, will undoubtedly actively exercise its competences in certain other respects, aspects and fields, concerning e.g. larger powers as regards preliminary ruling procedures and completely newly introduced infringement procedures in this area. The "lisabonised world" will not thus see that much - if any - direct or clear institutional disputes within the criminal law area in front of the ECJ, generated mainly by the pillar struggles in the past. However, we might look forward to series of interpretative judgments or even the judgments on validity of the instruments adopted, where particularly those Member States, defeated within the Council, or individuals, by way of preliminary ruling procedures, will come up with their applications, interventions or observations and the ECJ will be called upon to rule on the issues of validity and interpretation. No doubt that the ECJ will even within this new setting prefer supranational perspective. After all it remains its task to ensure that in interpretation and application of the founding Treaty (newly - Lisbon Treaty) the law is observed. The law of supranational autonomous legal order (respecting both the international law and common constitutional traditions of the Member States).

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THE TRANSPOSITION OF THE FRAME-DECISION REGARDING THE EUROPEAN WARRANT OF ARREST IN THE ROMANIAN LAW

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Abstract
The European warrant of arrest represents a genuine revolution in what regards the procedure of persons' extradition and surrender who get round the criminal accusation, lawsuit or the execution of a punishment. If the simplification of the extradition procedures was an objective of the European Union' member states regarding the way in which this simplification should be realised, the positions of the member states were different.

Key words
The European warrant of arrest; The extradition procedures; European Union.

For a long time, the main form of international, judicial cooperation in penal matter, unanimous recognized, but with some restrictions, was extradition.

Although initially, the judicial cooperation was realized through bilateral conventions concluded between different states, the main criteria being the geographic one (especially vicinity) subsequently, once with the acknowledgement of the danger represented by the organized crime both for the security of the citizens and for the state institutions the world's states found new forms of cooperation especially at regional level.

The adoption by the European Council, in the middle of the last century, of the European Convention of extradition, completed and successively modified by means of two additional protocols, fully contributed to the prevention and the rebuttal of the transnational criminality, with all its severe forms of manifestation, as terrorism, gunrunning, drugs traffic and human beings traffic.

The founding of the European Union and, later, of the Schengen space created new possibilities of action for the delinquent elements and, implicitly, the escalation of the criminality, accentuated possibilities for the enlargement of the territory of action through the adhesion of the new member states.

Do to this background, which determined the escalation of criminality, the objective of the European Union to become a space of liberty, security and justice, seemed to be in danger[1].

The experience cumulated in time, during the complex activity of international, judicial cooperation in penal matter by implementing the provisions of the European convention of extradition, was faced with some problems, mainly administrative ones, which lead to the diminishing of the efficiency of the act of justice.

The solution which was found was to institute new procedures of surrender the offenders between the member states, procedure which will simplify the whole activity, so all persons who commit offences in the European Union's space to be identified and surrendered to the states on which territory they committed the deeds, in order to be tried and convicted as soon as possible.

In the doctrine was specified that, in essence, the step towards the European warrant was made by the terms of the conclusions resulted from the Tampere meeting: the formal procedure of extradition should be suppressed by the member states for the persons who have the tendency to elude justice, after they were the subject of a permanent conviction and replaced by a simple transfer of the person[2].

Given the above, in order to cover the negative aspects found in the execution of the European Convention on Extradition, the European Union adopted the Framework Decision. 2002/584/JHA of June 13, 2002 on the European arrest warrant and surrender procedures between Member States[3].

The importance of this international instrument results even from the elements of originality brought by the procedure of surrender the offenders between the member states through the simplification and the promptness with which is made the judicial cooperation in the boundaries of the European Union.

The main novelties brought by the endorsing of the frame Decision refers to:

- the enlargement of the sphere of applicability to include new types of offences of a greater gravity;

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[1] A. Boroi, I. Rusu, *Cooperarea judiciară internațională în materie penală*, Ed. CH Beck, Bucureşti, 2008, p. 300.

[2] G. Stroe, *Mandatul de arestare european. Dreptul românesc în condițiile post-aderării la Uniunea Europeană*, vol. V, Institutul de Cercetări Juridice, Ed. Dacoromână TDC, Bucureşti, 2007, p. 281.

[3] JOCE L190/2002, p. 1.

- the renunciation to the procedure of verifying the double incrimination in the case of these groups of offences;

- the simplification of the procedures of surrender;

- the increase of the efficiency through the shortening of the terms of surrender;

- the simplification of the administrative stage;

- the possibility of a direct collaboration between the judicial institutions;

- the surrender of their own citizens;

- the obligation to respect the previsions of the frame Decision by all the member states.

The adopting of the frame Decision at the European Union level makes the previsions of European Convention of extradition inapplicable between the member states. Practically, at the level of the European Union, the European Convention of extradition is replaced by the European warrant.

Consistent to the obligations assumed in the complex process of prevention and struggle against the trans-frontier criminality, Romania, since 2004, as future member of the European Union, adopted the Law nr. 302/2004 regarding the international, judicial cooperation in penal matter, normative act in which were transposed, in the internal legislation, the provisions of the frame Decision mentioned above. Subsequently, the normative act was successively modified through many normative acts, the last modification and completion being made by the adopting of the Law nr. 222/2008[4].

In what regards the field of application of the European warrant of arrest, in the Romanian Law the frame Decision nr. 584/JAI/2002 was transposed through the dispositions art. 81 and 85.

Article 81 regulates the object and the conditions of releasing an European warrant of arrest by the competent Romanian Authorities. Thus, according to the present form of this article, "(1) in the situation stipulated by the art. 66 paragraph (1) is emitted an European warrant of arrest when the prescription of the penal responsibility or the execution of the punishment or the amnesty or the reprieve was not applied, according to the Romanian law and is completed one of the following conditions:

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[4] I. Rusu, *Mandatul european de arestare, în urma modificărilor aduse de Legea nr. 222/2008,* în CDP nr. 1/2009, p. 48.

a. The punishment foreseen by the law is at least of a year, if the arrest and the punishment is demanded to exercise the penal pursuit or trial;

b. The punishment or the safety measure depriving of liberty applied is of at least 4 moths, if the arrest and the surrender is demanded for the execution of the punishment or for the safety measure depriving of liberty."

The rules of release and transmission of the European warrants of arrest emitted by the Romanian judicial authorities are settled by the art. 82 – art. 83 from the Law nr. 302/2004. The transmission can be made by any mean which provided a written prove allowing to the judicial authorities to verify its authenticity.

The Romanian law has many alternative means of communication, encouraging as much as possible the direct contact between the issuing Romanian judicial authorities and the ones from the other member states, being also used the transmission through Interpol. The European warrant of arrest is transmitted in copy to the Minister of Justice according to the dispositions art. 83 paragraph (6) from the Law 302/2004 as it was modified by Law nr. 222/2008.

In order to identify the competent authority of fulfilling, the emitting Romanian authorities can use the Atlas available on the site of the European Judicial Network[5] or can call the contact points of Romania for R.J.E. or the contact points for R.J.E. from the member state of execution[6].

In the case in which the European warrant of arrest was emitted for the penal pursuit or the trial of a person, the Romanian emitting instance has the possibility that, until the pronouncing of a resolution by the authority of execution on the procedure of surrender, ask that authority the examination of that person, according to the art. 19 from the frame Decision or the temporary surrender of that person. From practical point of view, this situation is necessary for the acts which are urgent or for the acts which necessitate the presence of the person or to avoid the repeated postponing of the cause.

The taking over must be made in 10 days from the date of the foreign judicial authority final decision, with the exception of special cases or if there is a legal motif to postpone it, the over fulfillment of this term could lead to the release of that person. In special occasions or for other independent reasons, the competent Romanian authority for taking over has the obligation to inform the foreign authority on the case, which renders the

[5] http://www.ejn-crimjust.europa.eu/EAW_atlas.aspx

[6] http://www.ejn-crimjust.europa.eu/contact_points.aspx

taking over impossible, and in this case the taking over should be executed until the expiration of another 10 days term.

The obligatory reasons of major necessity belonging to a European warrant of arrest provided in art. 3 from the frame Decision were also transposed in the Romanian law (art. 88 paragraph 1):

a. when, from the information it disposes, results that the pursued person was definitively judged for the same deeds by a state member, other than the remittent state, with the condition that in case of the conviction, the sanction be executed or to be, in that moment in execution or the execution to be prescribed, the punishment of being pardoned or the offence of being amnesty or to intervene another cause which stops the execution, according to the law of the state of conviction;

b. when the offence on which the European warrant is based is under the protection of the amnesty in Romania, if the Romanian authorities have, according to the Romanian law, the competence to institute proceedings against that offence;

c. when the person submitted to the European warrant does not answers criminal, due to his age, for the deeds on which the warrant is based according to the Romanian law.

In the boundaries and the spirit of the frame Decision, according to the Romanian law, the simple tenure of Romanian citizenship by a person does not constitute a reason of denial for the surrender. In spite all these, when the European warrant of arrest was emitted for the proceedings in criminal matters the instance can subordinate the surrender to the condition that that person to be send in Romania to execute the punishment pronounced eventually against him. When the European warrant of arrest was emitted for the punishment's execution, the surrender can be refused only if the pronounced punishment is compatible with the Romanian legislation and the competent Romanian authorities guarantee to do the execution of this punishment in Romania. A very good completion to clarify the judicial and practical ways in which is realized the execution of the punishment in Romania in the situation of the failure to act of a European warrant in the hypostasis provided in the art. 88 paragraph (2) p.c was brought by the Law nr. 222/2008[7], paragraphs (3) and (4).

In what regards the procedure of issuing the European warrants of arrest, is eliminated a problem which determined a fragmented practice related to the judge who is entitled to emit the European warrant of arrest. According to

[7] Law no. 222/2008 amending and supplementing Law no. 302/2004 on international judicial cooperation in criminal matters was published in the Official Gazette, Part I no. 758 of 10.11.2008.

the new form of the art. 81 paragraph (2): "The European warrant of arrest is emitted, during the phase of proceedings in criminal matters, by the judge commissioned by the president of the instance which has to judge that cause and during the trial and execution phase by the judge commissioned by the president of the first instance or of the execution instance, in the following conditions:

- at the introduction of the prosecutor who does and surveys the proceedings in criminal matters of a person, if the arrest and the surrender are demanded for these reasons;

- at the writ of summons which decided that the accused is remanded in custody or which decided the safety measures, according to the case, or the body which must execute the warrant, if the arrest and surrender are demanded for judgment or the execution of the prison punishment or of a safety measure abridgement of liberty."

Also, in the new paragraphs newly introduced of the same article 81 is definitely clarified a problem which appeared in the judicial practice: is an ending for the emitting of an European warrant of arrest necessary or not? Now, the paragraph (3) and (4) of the art. 81 stipulate: "(3) The competent judge verifies the fulfillment of the conditions stipulated in paragraph (1) and proceeds, by case, in this way:

a. Emits the European warrant of arrest and supervises taking measures for its transmission, according to the dispositions art. 82 and 83; if the person is placed on the territory of the European Union member state, decides the translation of the European warrant of arrest, in 24 hours, according to paragraph (6);

b. Finds that, by reasoned ending, the conditions stipulated in paragraph (1) are not fulfilled in order to emit a European warrant of arrest.

In what regards the procedure of implementation of the European warrant of arrest, to eliminate the inconvenient represented by the situation in which the courts, judicial authorities of implementation, being directly applied by the foreign emitting judicial authorities with a European warrant of arrest which constituted a case, fixed a trial term. The result was the observation that that person was not found on the territory of Romania and this trial term facilitated the procedure of implementation of the European warrant of arrest. So, new articles were introduced 88-88 which regulates a series of previous procedures, which enhance the role of the prosecutor in the procedure of implementation of the European warrant of arrest, keeping in mind the imperative of respect the fundamental human rights. This newly introduced procedure respects other national legislation of applying the frame Decision. In this regard, must be mentioned the appointment of the

prosecutor's offices near the courts of appeal as authorities which can use the European warrant of arrest (art. 78 paragraph (2)).

The Romanian law guarantees to a person, as the Constitutional Court stated, all the procedural rights, if that person has a procedural quality different from the defendant one from the internal penal procedure, being essential that in the penal procedure of the emitting state to be respected the right to a correct trial, because there, in the emitting state, that person has the status of suspect or accused. All the procedural guaranties previous assured are maintained and even strengthen by the Law nr. 222/2008, an example in this regard being the new article 90. The person has (with the exception of the situation in which agrees with the surrender) the right to appeal both against the closing on which the arrest was made and against the decision to surrender, in the terms stipulated by art. 94[8].

Taking into consideration the imperative of respecting the very short terms of implementation of an European warrant of arrest and considering the fact that some time these terms could not be respected as a result of the advance of unconstitutional exceptions, clearly without base only for the purpose of delaying the procedure, a new 93 article was introduced which stipulates that the trial of the implementation will be made in term of 45 days from the notice of the Constitutional Court.

Another problem which must be solved by the Law 222/2008 is the one related to the necessity to emit an internal warrant of arrest when the arrest is made on the basis of an European warrant of arrest, as title for the arrest, as for the moment it was instituted in the case of the delayed surrender. The solutions gave by the Romanian law, Law nr. 222/2008 (art. 90 paragraph (13) and art. 94 paragraph (3)) are in our opinion, the correct one because the European warrant of arrest which is a judicial decision sui generis which replace the classic demand of extradition, but which, in spite of the symbolic name chosen by the European lawyer does not have the judicial nature of a warrant of arrest, because the judicial authority from the emitting state does not orders, and could not do it, the arrest of the person, but, as results from the first paragraph of the European warrant of arrest demands to the judicial authority of implementation the arrest and the surrender of the person on the basis of the mutual recognition principle of decisions. This does not exclude that in some states as Hungary, the equivalence of the European warrant of arrest with the internal warrant, but for this is necessary a corresponding procedural implementation in the internal law.

By the Law 222/2008 clarified a series of other aspects as the institution which assures the taking over/the surrender (specifying that in the Ministry of Internal Affairs and Administrative Reform the competent service is the

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[8] Florin Răzvan Radu, *Cooperarea judiciară internațională și europeană în materie penală – îndrumar pentru practicieni,* Wolters Kluwer, Bucureşti, 2009, p. 151-152.

International Center for Police Cooperation), art. 100 and 102, referring to the "multiple warrants".

So, the adopting of the frame Decision at the European Union level, makes the provisions of the European Convention of extradition inapplicable between the member states. Practically, at the level of the European Union, the European Convention of extradition is replaced by the European warrant of arrest.

In spite all these, at Europe level, the European Convention of extradition remains valid being applied in two distinct situations namely:

When the extradition of a person between two states is imposed, of which one is member of European Union and the other state does not have this quality, indifferent of their position.

When the extradition between two European states is imposed which are not members of the European Union[9].

In other words Romania, through its designed judicial organs, will obligatory apply the stipulations of the frame Decision (and those of the special law) when is demanded the surrender of a person by a member state of the European Union, or when such state demands the surrender of a person found on the state's territory.

In the same conditions, Romania will apply the stipulations of the European Convention of extradition when is demanded the surrender of a person found on the territory of an European state which is not part of the European Union, or when a state from Europe which is not part of the European Union demands the surrender of a person which is found on the territory of Romania (respecting the conditions imposed by the Romanian law and by the European Convention of extradition).

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[9] I. Rusu, *op. cit.,* p. 49.

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SANCTIONS IN PUBLIC INTERNATIONAL LAW

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Abstract
The violation of an international obligation causes international responsibility of the States. In this context, a State who commits a unlawful act of international perspective and whose liability has been established under the rules of international law may be subject to sanctions, having also the obligation to repair the damage caused. After the end of the Cold War, the sanctions adopted under the United Nations, and then by the European Union began to be increasingly more frequently used as a tool "intermediary" between the negotiations and coercive measures in order to induce a desired behavior avoiding appeal to armed force, having in view the fact that peaceful settlement dominates the entire field of the international responsibility. This study analyzes the most important aspects concerning the international sanctions used by the UN and the EU and which can be classified as economic sanctions (restrictions on imports, exports, investments), military sanctions, financial sanctions (blocking of funds and other economic resources), travel restrictions, restrictions of transport (road, air, maritime), cultural sanctions, sporting, diplomatic sanctions (expulsion of diplomats, breaking diplomatic relations, suspended official visits).

Key words
International responsability of the State; international sanctions; coercive measures.

States, in a full equality of rights and based on their free consent, in an agreement process of their will, create juridical regulations by treaties or by tradition that lead to the international law's creation. The states' will agreement, as a basis of the international law and of its compulsory feature, is usually accomplished in a sinuous process framework, during which we make concessions and mutual compromises, acceptable solutions. In this way the creation of the juridical regulation takes place, a creation that becomes equally compulsory for all the states[1]. Regarding the appliance system of the laws and, at the same time, the punishing system for breaching the laws, we have to say that complying with and applying the international law regulations is an obligation for all states. But, unlike the internal law, in the international law there is no centralized coercion device. But this fact

[1] D. Popescu, A. Năstase, *International Public Law*, "Şansa" Press and Publishing House, Bucharest, 1997, p. 36-37.

does not mean that the international law, on the whole, does not have a juridical nature, its laws are compulsory for all the states that have accepted them[2]. Therefore, even if the international law does not have legislative, executive and judicial bodies structured in a "vertical juridical system" by means of which it could adopt juridical laws, follow their appliance manner and impose their respect if needed, the compulsory power of the international law is based on the states' will agreement that is the basis of both creating and compliance with the international law regulations[3].

Since an international law regulation is justified from the point of view of the entire international community's interests and is received as such by the international community's members, its compliance is not based especially on constraint, by applying penalties[4]. Besides, in any juridical system, the penalties are not the ones that are the basis of the laws compliance, but the general interest's perception that the laws have to be complied with, by creating a juridical system from which every state benefits, according to the multiple mutuality principle[5].

And even if a lot of international law laws do not stipulate penalties, specific aspects, even some internal right branches, as the constitutional right, the penalty is not an essential element for the existence and enforcement of the law and we have to say that there is a certain constraint in the international relations, too, but the international law has also penalties whose palette is quite diversified[6]. It is just that, between sovereign and equal subjects, from the juridical point of view, the constraint is accomplished in different ways, in a juridical horizontal system[7], and the international control of applying the juridical laws is generally exerted even

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[2] Gh. Moca, M.Duțu, *International Public Law*, "Juridical Universe" Publishing House, Bucharest, 2008, p. 65. These international law particularities determined certain jurists (the nihilism) to affirm that it was not a real right and it is not compulsory. (I.Diaconu, *International Public Law Handbook*, Lumina Lex Publishing House, Bucharest, 2007, p.19-21)

[3] Often invoked in supporting the international law's consensual feature, it is a phrase that became famous from the content of a decision pronounced by the Permanent Court of International Justice in 1927, in "Lotus" case: "The law rules that are compulsory for all the sates... are the emanation of their own free expressed will, as it results from conventions or traditions generally accepted as expressing law principles".(R.Miga Beşteliu, *International Public Law*, All Beck Publishing House, Bucharest,1998, p. 8)

[4] Ibidem, p. 5-7.

[5] A state that does not comply with a law in its relations with other states shall not have the benefit of applying the respective law for it by the other states (I. Diaconu, op. cit., p. 19-21).

[6] V. Cretu, *International Public Law*, "România de mâine" Foundation's Publishing House, Bucharest, 1999, p. 19

[7] R. Miga-Beşteliu, op. cit., 1998, p. 5-7.

by states, and there is a concomitant censorship and self-censorship process, mutually, in the reports between them[8].

In this context, the state that makes an illicit act or fact from the international point of view against another state and whose responsibility[9] has been already established, according to the international law's rules, may suffer certain penalties, also having the obligation to repair the prejudice cause by it.

In case of erga omnes international obligations, breaching a certain obligation attracts the independent appliance of certain penalties and subsequently the obligation to repair the material prejudices that have been caused[10]. At the same time, the reestablishment of the international juridical order in these situations, whereas in the international society there are no public authorities with executive and judicial attributions as the ones that exist inside a state, rises two questions: who qualifies an act as being illicit and who is able to apply a penalty, and what kind of penalty, against the state that violated the law. The answer for this question can consider only the fact that the international law is a coordination law and not a subordination one, and states are equal from the juridical point of view so that they have to ascertain the illegality and apply penalties. If an illicit act is produced by a state against another state, the victim-state ascertains and tests the act's illicit feature and it may begin to apply penalties. If an ius cogens law, from the international crimes' category, is encroached, it is every state's interest, not only the victim-state's, to undertake the measures that are imposed so that the imperative law be complied with. Outside the states, in certain circumstances, penalties may be applied by the United Nations Organization, in the name of the international community, and also by other international organizations, as long as their constitutive acts were empowered with such attributions[11].

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[8] Al. Bolintineanu, A. Nastase, B. Aurescu, *International Public Law*, All Beck Publishing House, Bucharest, 2000, p.13).

[9] The responsibility represents the essential element of every social behaviour law. The human action has as a consequence a result and the institution's role is to guide and to determine the behaviour according a behaviour rule. The responsibility's institution is indissolubly linked by the organized human society, by the behaviour that the ones that structure it should have, being a general penalty of all the behaviour regulations. And even if the responsibility does not represent exclusively a institution specific to the law, it is an institution of the human society as such, and, in exchange, its role proves to be essential in law by the contribution it has in applying and affirming the juridical regulation, considering the fact that it represents something delusive, without applying penalties to the ones that have encroached the juridical norms. Known not only in the internal law, but also in the international law, this institution appears like a guarantee of complying with all the juridical laws, helping to keep the international order. (I. Anghel, *Responsibility in the International Law*, Lumina Lex Publishing House, Bucharest, 1998, p.7-9).

[10] Al. Bolintineanu, A. Nastase, B. Aurescu, op. cit., p.258.
[11] R.Miga-Beşteliu, op.cit., 1998, p.11-12.

Considering the things mentioned above, we may appreciate that the penalties in the international law may be defined as those constraining measures, adopted by a state or a group of states or an international organization against a state (more states) that have breached the international law regulations, being an instrument in order to re-establish the international legality[12]. The penalties are adopted in order to determine the change of certain activities or policies that do not comply with certain behaviour standards shared by the international community. In the international life, the penalty is not perceived as a punishment or a vengeance applied by the victim-state or by an international organization, but as a concern to determine the change of the author-state's encroachment behaviour. The penalties may be considered also as a complement of the means of solving the litigations, an alternative for the force or the force threatening[13], an important instrument for the maintenance of peace and of international security. After the Cold War, the penalties adopted by UNO and, subsequently, by the European Union, began to be more and more frequently used as a "transitional" tool between the negotiations and the coercive action that follows the induction of the desired behaviour by avoiding the force of the army, considering that the peaceful solving dominates the entire matter of the international responsibility. Once their use becomes more and more frequent, the penalties features have been changed under the pressure of the need to avoid their collateral effects and the impact's efficiency over the target groups. Therefore, the need to protect the most vulnerable segments of the population in the states that suffer restrictive measures has determined the avoidance of imposing certain complete interdiction systems, as the ones stipulated initially in art. 41 of UNO Charter. These first generation measures were pointed against the state whose government was responsible for threatening the peace and the international security, not against the persons that were directly responsible of these things. Gradually, there were identified specific restrictive measures, as the arm embargos, the travel interdictions, the freeze of certain persons' or entities' funds. Also, in the text of the documents that represent penalty systems were included stipulations regarding the humanitarian exceptions from the appliance of this type of penalties. These changes in the penalties' features were also motivated by the need to streamline them as political tools for diplomacy, in order to directly and immediately affect those groups, often the leading elites whose behaviour has to be influenced. In the same time, in elaborating and implementing these individualized penalties, we follow the respect of the human rights and fundamental liberties, especially of the right of the persons or entities punished in an equitable process and of their access to effective attack ways. Also, we want the measures to be proportional to the followed purpose and to be

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[12] *********International Public Law Dictionary*, Scientific and Encyclopaedic Publishing House, Bucharest, 1982, p. 262.

[13] R. Miga - Beşteliu, *International Public Law*, vol. II, C.H.Beck Publishing House, Bucharest, 2008, 167.

accompanied by an exception system that has to consider the basic needs of the ones that were punished[14]. Being used quite frequently during the 17th and 18th centuries, these constraining measures were coded by the international law starting with the 20th century. Therefore, the penalties formulated in the first world war found their materialization in the Pact of the Nations' Society, where it is shown that the Society's coercive actions that contained military, economical and financial measures, interfered in the following situations: a) in case of aggression by a state that is not member against a state that is member of the Society b) in case of illicit war, c) if an arbitral or judicial sentence is not executed. Beside these things, the Society of Nations could also apply other moral penalties – reproaches, the recommendation to break the diplomatic relations, disciplinary penalties – the exclusion from the Society, pecuniary penalties etc. These penalties' efficiency was very low because they were applied inconsistently. By creating the United Nations Organization, a new penalties system was created.

The penalties stipulated in UNO Charter are more nuanced, they may be applied individually or collectively, they may be direct or indirect, they may be institutionalized or not, they may be pronounced by a political organ (the Security Council) or by a jurisdictional one[15], they have different functions – the reestablishment of the encroached legality, the removal of the enemy documents, offering again the rights to the injured state etc.

And they are classified in two great categories: penalties without using the force of the army and penalties that use the force of the army [16]. Regarding the penalties applied directly by the victim-state, we mention that, if in the past, using the war and generally using the force as a behaviour penalty considered as not being accorded to a state's one – was considered as a legal way, accepted by the international law regulations, at present any manifestation of force or of threatening with force is prohibited in the international relations according to art. 4, paragraph 2 in UNO Charter. However, the international law allows the use of force in order to exert the individual or collective self-defence right against an armed attack according the stipulations of art. 51 of the Charter[17]. Therefore, in the name of the self-

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[14] www.mae.ro

[15] Catherine Kosma Lacroze, La penalty en droit international (http://www.net-iris.fr/veille-juridique/doctrine/10842/la-penalty-en-droit-international.php)

[16] *********International Public Law Dictionary*, Scientific and Encyclopaedic Publishing House, Bucharest, 1982, p. 262

[17] Art. 51 of UNO Charter specifies: "No provision from the current Charter will touch the inherent individual or collective self-defence right if an armed attack occurs against a Member of the United Nations until the Security Council takes the measures needed in order to maintain the international peace and security. The measures taken by the members in the exertion of this self-defence right will be immediately known by the Security Council and will not affect the Security Council's power and duty because the current Book carries

defence right, if a state is a victim of an armed attack, it has "the right" to punish directly the state-aggressor by the same means, complying with the conditions stipulated by UNO Charter[18]. So, speaking about a such right, we cannot use the economical aggression or other type of constraint, but it can be used for preventive purposes or when an imminent danger appears, the preventive war being illicit, against the international law rules. As a consequence, art. 51 of the Charter must be interpreted restrictively and the individual or collective self-defence right represents an exception from the principle of not using the force, especially when invoking the self-defence represents sometimes an attempt to give an apparent juridical legality to the aggression force's policy[19]. In this context we have to mention that, in recent years, the international community has also dealt with situations that generated controversies regarding the licit or illicit feature of the use of the force by the states or groups of states with a constraining, punishing feature. Therefore, we were concerned if and how much a state can defend itself and react with the army's force against the international terrorism acts. Ignoring many speculations and controversies regarding the terrorist attempts since September 11th, 2001 and the military measures adopted by USA and by other states that are member of NATO against Afghanistan as a response to the terrorism acts accomplished on the American territory, the entire international community agreed with the fact that, in case of terrorism acts with extremely serious consequences, it is justified the invocation by the victim-state/states of the individual or collective self-defence right that finances and prepares such terrorist actions on its territory. But at the same time, against the terrorism acts with a limited feature and less serious consequences, the victim-state may adopt legal non-military measures, from the category of the penalties without using the force of the army, that may be applied also for other acts that do not comply with the international law and the special literature identifies retorting measures and the retaliation[20]

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on anytime the actions that it considers as being necessary in order to maintain or re-establish the international peace and security. "

[18] R. Miga -Beşteliu, op.cit., 1998, p. 13.

[19] D. Popescu, A. Năstase, op.cit., p. 100.

[20] The retort is a state's reaction, legal from the international law's point of view that is used in order to respond to an enemy act, against the international uses, accomplished by another state. The act to which we respond by retort is not an illegal act that encroaches the international law's principles or a treaty's clauses, but it is about an enemy ac, for example legislative, administrative, judicial measures with no friendly feature for another state and its citizens (for example, the increase of the custom taxes for the products imported by a state,\, the interdiction of the citizens' entry or the interdiction of a state's ships' entry on the respective state's territory, the mass expulsion of a state's citizens from the respective state etc). As retort examples, we may mention: the cancellation of an economical assistance (suspending or reducing the economical assistance by USA of the states that, during the '60s, had extended their fishing areas beyond the territorial sea or that do not respect the human rights), the expulsion of the diplomatic staff or of the foreign citizens, the refuse to participate to certain activities in order to protest against a state's non-friendly actions, revoking the diplomatic and consular privileges, reducing the imports from such a

that may have different types of diplomatic[21], juridical[22], military[23], economical[24], cultural, sport[25] penalties, some of them regarding the free circulation[26] etc.

The difference between retort and retaliation is difficult to accomplish because, in practice, these constraining ways are combined, both of them being used in the same time[27].

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state, instituting a commercial embargo etc. (A. Crăciunescu, *International Public Law*, Concordia Publishing House, Arad, 2006, p. 252).
The retaliation represents constraining measures taken by a state against another state as a response to the illicit actions accomplished by the last ones. A state has the right to use the retaliation only if certain conditions are achieved: if there is an action against the international law from the other state's part, if the state that applies the retaliation's measure was injured itself, if the retaliation was foregone by a demand to repair the damage that was not solved, if we keep the proportion between the act accomplished by the other state and the retaliation measure, if we do not use the force at all. The state A disposes the massive expropriation of some goods belonging to certain citizens of the state B, without granting them the established compensations, for example, by an agreement to guarantee the investments or basing on other international law's rules. The state B may "respond" by expropriating, with no compensations, the goods of certain citizens of the state A, citizens placed on its territory. (R. Miga - Beşteliu, op.cit., 2008, p. 171).

[21] Ex. Breaking the diplomatic relations, expulsing the diplomatic staff, suspending the official visits etc.

[22] Ex. Suspending the appliance of the valid treaties, the nullity of certain treaties contracted by force or that encroach imperative regulations of the international law etc.

[23] The military penalties represent the embargo's enforcement in armament's field (interdictions regarding selling, supplying, transferring or exporting any type of armament and connected military equipments, including arms and munitions, vehicles and military equipments) or represent the military support's elimination.

[24] The economical penalties represent any restriction imposed by a country in the international commerce with another country, in order to convince the second country's government to change its policy; these restrictions are mainly about: blocking the funds or the economical resources, interdicting the interdiction at export and/or import, interdictions regarding the investments, the payments and the capital movements or the tariff preferences' elimination.

[25] The cultural penalties are materialized in the interdiction to participate in cultural, sport, regional or world competitions.

[26] Ex. Interdictions for the citizens of a state to enter in another state's territory, landing or taking-off interdictions for the airships belonging to the respective state etc.

[27] For example, in case of *USA's diplomatic and consular case in Teheran* since 1979, when a group of Iranian students took hostages and retained in the places of the USA Embassy in Teheran the entire diplomatic and consular staff of this state. Comparing to this situation, that was developing in the conditions of change of that country's political system, the Iranian authorities took no measure in order to comply with the Iran's international obligations to provide the foreign diplomatic and consular staff's immunity, but also of the embassy's places. USA demanded the reduction of the workers' number at Iran's Embassy in Washington, and then broke all the diplomatic relations with Iran and forbid the Iranian citizens to entry in USA's territory. From all these things, we may see with no doubt thee retort's forms. USA disposed the block, in the American banks and in some foreign banks,

Among the coercive measures applied by means of some international organizations, the most important ones and the ones that are charged with a lot of consequences are the ones applied in UNO's framework, by the Security Council, based on the prerogatives conferred to this body by chapter VII of UNO Charter. According to art. 39 of UNO Charter, the UNO Security Council interferes when a certain international situation represents: a) a threatening against peace, b) an encroachment of the peace, c) an aggression act. After ascertaining the facts and judicially framing them in one of the three mentioned categories, before getting to apply the collective security measures stipulated by the Chapter VII of the Charter, the Security Council may invite the interested parties to accept the temporary measures that it considers as being necessary. In the absence of a corresponding answer from the state whose actions represent a threatening against the peace, of its encroachment or of an aggression act, the Council may take a series of political, economical or military measures that may be named penalties[28]. The penalties that the Security Council may impose may be distributed in two categories, depending on the use or the absence of the use of the military force. In the first category there are the political and economical measures inspired from the Pact of the Nations' Society and from the states' individual practice: the total or partial disconnection of the economical relations and of the railway, maritime, aerial, postal, telegraphic communications, of the radio and of the other diplomatic relations' breaking." (art. 41)[29]. The second category refers to the actions that the Council may attempt by military forces and it may contain demonstrations, blocking measures and other operations executed by aerial, maritime, or terrestrial forces of the United Nations' members.[30]. These international

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of the Iranian accounts, representing about 13 billion dollars[27], and also the block of the Iranian planes that were under their control. Therefore, by these pressures, they tried to release the hostages taken by the Iranian people. The last actions are types of the retaliation. (A. Crăciunescu, op. cit., p. 268).

[28] In the current conditions, when the human rights' protection has become an essential component of the international peace and security, this problem has stopped being an internal question and became an international law's field and a field of the relations between the states. The encroachment of the human rights endangers the friendly relations between the states and the international peace, justifying the adoption of the penalties by the international community; therefore, with no intervention right, the states may interfere, in such situations, individually or collectively, with non-military measures against the state that accomplishes such illicit acts, in contradiction with the international law. If there are massive extremely serious violations of the human fundamental rights, the state may also interfere by military measures that, in order to have a licit feature, need the Security Council's authorization. (Gh. Moca, M. Duțu, op. cit., p. 68-69).

[29] R. Miga -Beşteliu, op. cit., 1998, p. 14-15.

[30] Art. 42 of UNO Charter shows: "If the Security Council considers that the measures stipulated in art. 41 are not appropriate or they are proved not to be appropriate, it may carry on, by aerial, naval or terrestrial forces, any actions he considers as being necessary in order to maintain or re-establishing the peace and the international security. This action

penalties imposed by the Security Council's resolutions are compulsory for all the states that are members of UNO.

The punishing systems of the Security Council have known a significant evolution, especially after the end of the Cold War. The types of penalties used internationally both by UNO and by EU are economical (restrictions when importing, exporting, investing, embargos regarding weapons), financial (freezing the funds and the other economical resources), travel restrictions, transport restrictions (road, aerial, maritime transport), cultural, sport, diplomatic penalties.

During 1945-1990, the UNO Security Council imposed penalties only in two cases – against Rhodesia (in present, Zimbabwe) and the South Africa – in order to condemn the human rights' encroachment and the power abuse in the internal political life. After 1990, when adopting the penalties against Iraq, the Security Council extended the use of this type of tool at different types of situations such as: armed inter-state conflicts, internal civil conflicts, terrorism, serious violations of the human rights and of the humanitarian international law. Since 1990 until present, 18 punishing systems were adopted, but 14 of them are valid in 2008. The growth of the punishing systems' number and their increased complexity has made the Security Council to adopt certain administrative measures for their efficient financial administration. Therefore, it was created, in its suborder, an institutional frame structured in some temporary organs, other permanent ones, in order to follow and improve the elaboration, appliance and implementation process of the imposed international penalties[31].

With a general title, at the level of the European Union, the penalties, also named restrictive measures, are established in the framework of the External and Common Security Policy, according to the objectives stipulated in the Title V of the Nice Treaty regarding the European Union, especially the art. 11. The restrictive measures may be imposed by EU either in order to apply in the community juridical order the penalties decided by the UNO Security Council, or as autonomous measures of EU. The purpose of adopting the EU's autonomous restrictive measures is to determine changes in the activities or the policies that regard encroachments of the international right or of the human right, and also policies that do not respect the law state and

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may contain demonstrations, blocking measures and other operations executed by aerial, maritime or terrestrial forces of the United Nations' Members".

[31] For the problems specific to every penalty system, they created Penalties Committees that generally have to supervise the implementation by the states that are members of UNO of the specific penalties imposed by the Security Council's resolutions. In present, 12 penalties committees develop their activity and work as subsidiary organs of the Security Council. For general aspects related to the international penalties, the Security Council decided to create on April 17th, 2000 an informal Working Group that had to elaborate recommendations and guides of good practices in order to improve the elaboration, appliance and implementation procedures of the penalties imposed by the Security Council. (www.mae.ro)

the democratic principles. At European Union's level, the European Union's Council decides the international penalties' appliance (restrictive measures) in the frame of the External Common Security Policy (ECSP). The European Union takes over totally in the community juridical order the penalties established by the UNO Security Council based on chapter VII of UNO Charter. The European Union may also adopt autonomous punishing measures, completing the ones imposed by UNO or independently, according to art. 60, 301 and 308 of the Treaty instituting the European Union. The penalties of the European Union's Council imposed by Common Positions and detailed by Decisions and Regulations are compulsory for the member states that have to create the juridical and institutional frame in order to implement them efficiently. The EU's punishing systems are applied both in the context of the fight against the terrorism and in order to correct the behaviour that is not accorded to the leading elites of certain countries[32]. EU applies penalties based on UNO Security Council's resolutions no. 1267 and 1373. EU applies measures pointed against the persons and groups involved in terrorism acts and that appear on the list taken over from the most recent common position, a changing position of the Common Position 2001/931/ECSP[33].

The international organization has already mentioned but also other ones may apply a series of other penalties to their members, stipulated in their constitutive acts, as losing certain advantages that come from the membership, the temporary suspension of the right to vote or of the membership, or even the exclusion from the organization[34].

In order to provide the efficient appliance by Romania of the international penalties instituted by the Security Council's Resolutions based on the Chapter VII of UNO Charter, and also EU's autonomous restrictive measures established by the Common Positions adopted in frame of the External and Common Security Policy, they adopted the Emergency Ordinance no. 202/2008 regarding the international penalties' appliance. OUG no. 202/2008 provides the direct applicability and the national compulsoriness of the international penalties adopted by UNO Security Council (art. 3, paragraph 1, corroborated with art. 1 paragraph 1 of OUG no. 202/2008), for all the law subjects to whom it is addressed, including the

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[32] www.mae.ro

[33] http://ec.europa.eu/external_relations/cfsp/penalties/docs/index_ro.pdf

[34]Therefore, South Africa was temporarily excluded from the Work International Organization after its apartheid policy and it has lost his right to vote in frame of the Health World Organization. Therefore, the same treatment was also applied to Cuba in the framework of the American States' Organization. In the framework of the International Monetary Fund and of the International Bank for Rebuilding and Development, the encroachment of certain obligations may have as consequence the non-granting of loans. (R. Miga -Beşteliu, op. cit., 1998, p. 14-16).

physical and juridical persons, of private law, since their adoption by the Security Council. The penalties or other restrictive measures adopted at the level of the European Union are compulsory for Romania, as a member state of the European Union. The penalties adopted by documents of other international organizations or by unilateral decisions of the states may become compulsory at the national level only if a special normative document is adopted (art. 4 paragraph 4 corroborated with art. 1 paragraph 2 of OUG no. 202/2008). The punishing system adopted at the international level refers to the achievement of the objectives stipulated both in UNO Charter and in the documents elaborated at the level of the European Union regarding the External and Common Security Policy (ECSP) and they consider the following things: maintaining the peace and improving the international security, promoting the international cooperation, safeguarding the common values of the international society, of the fundamental interests, of the independency and of all the states' integrity, developing and reinforcing the democracy and the law state, and also respecting the human rights and fundamental freedoms. To what extent the penalties adopted at the international level proved and prove their efficiency is an aspect that has to be analysed for each case, from the point of view of certain defining elements that regard the justification of the imposed measure, the way the implementation of the penalty was financially administrated, the support from the international public opinion, the way the penalty was respected by the international community's members, the time it lasts, and also its economical and humanitarian costs. But irrespective of the proved efficiency, we do not have to say that the international penalties, even if they appear as strong pressure tools over the states that do not comply with their behaviour to the international law, especially the economical penalties are many times extremely brutal measures that provoke serious sufferings to the civil population, without touching the aimed ones[35]. However, in spite of all the contestations against their efficiency, the international penalties remain the most important discouragement factor of the illicit actions, against the international law's laws, in order to provide poise in the international relations.

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EUROPEAN COURT OF JUSTICE AS LAW-MAKER: EXAMPLE OF INTELLECTUAL PROPERTY PROTECTION ON EU INTERNAL MARKET

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Abstract
Specific legal system of the European Union entails specific judiciary methods realized by the European Court of Justice (ECJ). Its task consists among others in filling gaps and lacunae in EU law. Gaps in primary law are filled by secondary law and ECJ case law. As ECJ is a very creative court, sometimes it is very difficult to assume, if its decision is still an interpretative one or if it creates new legal rules. The aim of this presentation is to demonstrate Court's activities in the field of intellectual property protection of goods on EU Internal Market. The protection of different intellectual property rights seems to be in contradiction with the free movement of goods protected by those rights. The ECJ gives solution by separating the existence of a right from its exercise - the right cannot be exercised in a way that would make impossible the free movement of protected goods. Another "invention" of the ECJ case law is the theory of the exhaustion of the right in the whole EU by introducing the goods anywhere (in any country) of the EU Internal Market.

Key words
European Court of Justice; Teleological interpretation; Gaps filling; Intellectual property; Existence of a right; Exercise of a right; Community exhaustion of a right.

1. LAW-MAKING FUNCTION OF THE EUROPEAN COURT OF JUSTICE THROUGH INTERPRETATION: IS THE LAW-MAKING ACTIVITY OF THE COURT POSSIBLE AND HOW IS IT EXERCISED?

Specific legal system of the European Union entails specific judiciary methods realized by the European Court of Justice (ECJ).[1] The wording of the primary and often the secondary law is not unambiguous, is often too general and permits different interpretation. The correct interpretation may not be obvious. As examples we can mention Art. 30 (measure with equivalent effect to a quantitative restriction), 82 (dominant position), 48 (public policy) of the EC Treaty. The Rome Treaty is a framework treaty. It is concise and sets out sometimes very generally its objectives. The details

1 According to the Lisbon Treaty the new denomination of the Court is "Court of Justice of the European Union".

are missing, but they are needed. How could we apply a legal provision if we do not know what is its exact scope and meaning?

Let us now quote a note by a famous English judge, Lord Denning:[2] "*The Treaty is quite unlike any of the enactments to which we have become accustomed. The draftsmen of our statutes have striven themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them...*

How different is this Treaty. It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean.

An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty, there are gaps and lacunae. These have to be filled in by the judges, or by regulations and directives. It is the European way."

EU law must be uniform. This concerns not only its wording (text) but its interpretation and application as well. How to realize that? If a court is supposed to provide for a uniform interpretation, it must first be correct and binding. Fortunately, the EC Treaty gives the solution in its Art. 220.[3] One of the ECJ basic functions is to assure uniform interpretation and application of EU law in the whole Union. The CJ is entitled to give the authoritative and consequently binding interpretation of the primary and secondary law. Its task consists among others in filling gaps and lacunae in EU law.

For EU law, the reason of a too general wording of its provisions is sometimes the unability of Member States to reach an agreement on the exact wording of a Treaty provision or a regulation or directive. It thus remains very general and the ECJ is supposed to provide its exact sense by interpretation, since exact scope and meaning of its provisions are often not quite clear.

How should the interpreting court proceed? The result should correspond to the will of the law-maker, which has not been exactly expressed. The court will use different interpretation methods that must be combined together and the court should not overpass its field of operation - within the limits of the interpreted rule. Those limits are determined by:

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2 Lord Denning was one of the most significant personalities of the English judiciary. He died in 1999 aged 100. This quotation has been taken from the publication Dehousse, R., The European Court of Justice, the Politics of Judicial Integration, New York, St. Martin's Press, 1998, p. 73.

3 Newly Art. 19 of the Treaty on European Union.

- the text (wording) of the rule,
- the context of the rule, i.e. its position in the whole document,
- historical context,
- purpose of the rule,
- other circumsatnces and existing case law,
- sometimes "travaux préparatoires" able to clarify indirectly the motivation of the legislator.

Often a concrete rule, which is needed, does not exist. Gaps in primary law are filled by secondary law and ECJ case law. Numerous gaps appearing in secondary law are filled by ECJ case law only. ECJ creates this missing rule generally through teleological interpretation of the whole document (for instance the EC Treaty).

As ECJ is a very creative and activist court, sometimes it is very difficult to assume, if its decision is still an interpretative one or if it creates new legal rules, especially in cases when the Court uses teleological interpretation of the Treaty as a whole. Teleological interpretation is the motive power of the interpretation by the ECJ, taking into account the purpose of the rule. However, this method of interpretation must not be absolutized and must not go against the express wording of a provision. Yet it happened for instance in the Chernobyl case (70/88), where the ECJ accorded the European Parliament the power to bring the action on the basis of Art. 230 of the Treaty against other institutions, even though did not permit it.

The Court has through its jurisprudence established in more than 50 years of its activities many general principles of European law, such as effet utile, Francovich liability, primacy, direct effect and the whole system of general principles of Community (now Union) law. When filling gaps - its function to form new rules is absolutely necessary - who else would do that? In the majority of cases it is not possible to wait until legislative changes take place, or even primary law treaties are amended. The development of EC (EU) law is, in this sense, spontaneous. The consequence is that the wording of the CJ judgments is sometimes very general, similar to the general rules contained in the primary or secondary law.

The Court of Justice is an absolutely independent body, not subordinated to any other EU body or to Member States. Its rulings could be overruled only by an amendment of the primary law or the adoption of a new act of secondary law.

The ECJ sometimes replaces political institutions.[4] The Community legislature is in many cases unable to fulfill its task to adopt a detailed regulation of some matter. Consequently, the ECJ must complete its details to make it sufficiently specific. It "has become one of the principal engines in the integration process."[5] The result of the ECJ interpretation can be not only a negative obligation for Member States, but also new rights for individuals. Those interpretative decisions are based on the principle of supremacy of EC (now EU) law, established by the Court as well.

To give an other example - let us mention the judgment Cassis de Dijon (120/78). The Court deviates from the wording of the EC Treaty and brings new exceptions from the general prohibition of limitation of EC internal trade contained in Art. 30. In fact, the Court did not add new items to the list of exceptions in Art. 30, but determined that certain measures of Member States apparently restricting the EC internal trade do not fall into the very general definition of Art. 28. In addition to that, it did not follow its own extremely wide definition of such a measure given formerly in the Dassonville judgment (8/74).

With its interpretative cornerstone decisions concerning the system of Community law the ECJ becomes the policy-maker. It can suggest new areas to be explored and initiate EU legislative intervention.[6] It can "substitute" the absence of details in the Community legislation. The Court can be considered as a "laboratory" of influence of national and international (European) politics.[7] For instance the Cassis judgment, according to some views, influenced the harmonization policy in the EC.[8]

A pertinent question arises: Are still Member States "Masters of the Treaty"? Why do Member States accept unwanted ECJ jurisprudence? There are undoubtly at least two reasons:

- The Court had not deviated from Member States' interests.[9] But what are "Member State interests"? Different Member States may have different interests. They do not act as a unique (and uniform) force. There is no "opposition coalition". Consequently, there is no general opposition against the ECJ jurisprudence. For instance the Francovich judgment on state

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4 Alter, K.J., The European Court's Political Power, Oxford University Press, 2009, p. 125

5 Dehousse, R., ibid., p. 75.

6 Ibidem., p. 82.

7 Alter, K.J., ibid., p. 29.

8 Ibidem, p. 147

9 Ibidem, p. 124

liability is hardly acceptable for some member states, but others remain indifferent and their reaction is thus none, i.e. not negative.

- What means "Member State"? In fact the reaction to the activist ECJ jurisprudence, if any, emanates from Member States governments, not Parliaments. Parliaments are "too far" and governments are in most member countries much more "European" than Parliaments or public opinion.

- There is another aspect that must be taken into account. It is the recognition of the autonomy of EC (EU) law, and consequently of the European Court of Justice. This autonomy has been accepted by Member States.[10]

Let us now examine how the decision-making power of the ECJ has influenced one of the most practical areas of the Community law, the intellectual property protection.

2. EXAMPLE OF THE LAW-MAKING ACTIVITY OF THE COURT IN THE FIELD OF INTELLECTUAL PROPERTY PROTECTION ON INTERNAL MARKET

The interpretation function of the European Court of Justice within the meaning of Article 234 of the Treaty establishing the European Community (hereinafter “EC Treaty”) relates to primary legislation regulating especially general principles of Community functioning on the one hand, and secondary legislation whose aim is to regulate certain areas on the other hand. The ECJ plays its important interpretation role especially in cases where no secondary legal framework exists and actual legal problem arises which is brought to the ECJ. In such a situation, the ECJ is dependant only on the wording of the primary legal acts which sometimes leads to adoption of the new doctrine on the basis of interpretation of those acts. Through the legislative process of the institutions of the Community, such a new doctrine is reflected into secondary legislation (especially directives) and by virtue of them to the law and orders of the Member States.

One of such examples is the **principle of exhaustion of intellectual property rights** which closely relates to the so-called parallel imports of products, with which intellectual property rights are connected, from one country to another. The exhaustion principle means that once the genuine goods are put on the market by the rightful owner or with his consent (for instance, by his subsidiary or his licensee)11, some of his intellectual

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10 Dord, O., Systčmes juridiques nationaux et cours européennes: De l'affrontement ŕ la complementarité? In: Les cours européennes, Pouvoirs, No. 96, Seuil, Paris, p. 7.

11 In case of IHT Internationale Heiztechnik (C-9/93) the ECJ, inter alia, examined who may put the goods on the market with the consequence of exhaustion of trademark rights.

property rights are exhausted and these goods can be freely distributed without his consent. It is crucial in what territory the rights are exhausted. In general, two types of exhaustion are recognized, i.e., national and international. In case of application of the national principle, the rights are exhausted only within the territory of one state in which the product was put on market. This product can freely move (distribute, sell) merely on the market of that state. If a third person aimed to import this product into that country, the intellectual property right holder is entitled to prohibit such an import. According to the international principle, the rights are exhausted world-wide. As it will be demonstrated below, the regional (Community) principle of intellectual property rights exhaustion has been created by the ECJ based on its case-law.

The link between the exhaustion principle of rights and parallel imports results in part out of the previous text. Let us mention a hypothetical example for illustration. A company having its registered office in country A is selling its goods, with which the intellectual property rights are connected, to another undertaking from country B but at a lower price than it itself sells its goods in state A. If country A applies international exhaustion, a third party could purchase those products in state B, import them to state A, and sell them at a lower price there. The right owner could not prevent this parallel import and could not object to the infringement of its intellectual property rights. However, if state A applied the principle of national exhaustion, in such a case the right owner would be able to stop this parallel import. As it is obvious, the principle of exhaustion has a great impact on the scope of intellectual property rights, particularly, in relation to the imported products, in which intellectual property rights are incorporated, to the domestic country of the right holder.

This example shows that the principle of domestic exhaustion is very restrictive; however, it insures more protection for the private interests of right owners. But this situation may lead to an artificial partitioning of the market because only the right owner has the power to determine where his goods will be sold and to whom he will give his permission to distribute them. On the other hand, international exhaustion helps free movement of goods among states, and therefore, it is good for the public interest, i.e. especially for consumers who can buy goods at a lower price.

National type of exhaustion constituted an obstacle to free movement of goods within the internal market of the Community. At the beginning of 70s of the last century, first cases regarding parallel imports between Member

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In paragraph 34 the ECJ ruled: “This principle, known as the exhaustion of rights, applies where the owner of the trade mark in the importing State and the owner of the trade mark in the exporting State are the same or where, even if they are separate persons, they are economically linked. A number of situations are covered: products put into circulation by the same undertaking, by a licensee, by a parent company, by a subsidiary of the same group, or by an exclusive distributor.

States were brought to the ECJ. In this respect, it is important to emphasize that no directives regulating area of intellectual property rights, let alone exhaustion of those rights, existed at that time.

With regard to the exhaustion of economic copyrights (right of distribution), the judgment in case of *Deutsche Grammophon v Metro*12 belongs to the most important decisions of the ECJ. German sound recording company (Deutsche Grammophon) sold sound recordings through its French subsidiary in France. Metro acquired those records sold in France and resold them in Germany, but at a lower price than Deutsche Grammophon. One of the questions was whether an interpretation of certain articles of the EC Treaty allowed Deutsche Grammophon to rely on its exclusive right of distribution included in certain provisions of the German law on Copyright and related rights, to prohibit the marketing the German market of sound recordings lawfully sold (by this company or with its consent) in France.

According to the opinion of the ECJ mentioned in paragraph 11 of this judgment, "Amongst the prohibitions or restrictions on the free movement of goods which it concedes Article 36 refers to industrial and commercial property. On the assumption that those provisions may be relevant to a right related to copyright, it is nevertheless clear from that article that, although the Treaty does not affect the existence of rights recognized by the legislation of a member state with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty. Although it permits prohibitions or restrictions on the free movement of products, which are justified for the purpose of protecting industrial and commercial property, Article 36 only admits derogations from that freedom to the extent to which they are justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property ."13

The ECJ answered the question mentioned above and held, "It is in conflict with the provisions prescribing the free movement of products within the Common Market14 for a manufacturer of sound recordings to exercise the exclusive right to distribute the protected articles, conferred upon him by the legislation of a member state, in such a way as to prohibit the sale in that state of products placed on the market by him or with his consent in another Member State solely because such distribution did not occur within the territory of the first member state ."

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12 C-78/70 Deutsche Grammophon v Metro [1971] ECR 487

13 Whereas this case was decided a long time before the Amsterdam Treaty, it still refers to the old numbering. In this situation, Article 30 of new numbering is at issue.

14The term Common Market has been replaced by Internal Market.

From this decision, it is clear that the ECJ had to balance between a policy of free movement of goods and exclusive intellectual property rights of private entities guaranteed in national legislation. The ECJ decided this situation in favour of the public interest, i.e. free movement of goods within Internal Market of the EC. In this and other judgments, the ECJ created a dichotomy between the existence of the intellectual property rights and the exercise of those rights. But this approach is disputable because the exclusive right exist in order to be exercised.

By way of the referred and other judgments, the principle of Community exhaustion of intellectual property rights was established and parallel imports among Member States were allowed. Thus, if the product is put on the internal market (i.e., market of any of the Member States) by the right owner or with his consent for the first time, some of his rights (in particular, right to distribution) are exhausted for all the Member States and these product can freely move without his express consent throughout whole Community.

Currently, the question of exhaustion of economic copyrights is regulated in provisions of crucial EC directives solving this area; especially Article 4 (c) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, Article 5 (c) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, Article 4 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Article 9 (2) of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) – it derogated the Council Directive 92/100/EEC of 19 November 1992 having the same name.

The case-law of the ECJ and the mentioned directives set forth pertinent exceptions to the principle of exhaustion of copyrights as well

The principle of exhaustion of trademark rights was settled by the ECJ in case of *Centrafarm v Winthrop*15 in 1974. The ECJ in this judgment mentioned the specific subject-matter of a trademark by saying that "… the owner of the trade mark has the exclusive Right to use that trade mark, for the purpose of putting products protected by the trade mark into circulation for the first time, and is therefore intended To protect him against competitors wishing to take advantage of the status and reputation of the trade mark by selling products illegally bearing that trade mark ."16 However, it held that the owner of a trademark cannot rely on protection of

15 C-16/74 Centrafarm v Winthrop [1974] ECR 1183

16 paragraph 8

legislation of a Member State allowing him to prevent the import or marketing of a product in that state which has been put on the market in another Member State by him or with his consent because it is incompatible with the rules of the EC Treaty concerning the free movement of goods within the internal market. Furthermore, the ECJ ruled that it is not important whether price differences between the exporting and importing Member States exist resulting from governmental measures adopted in the exporting state with a view to controlling the price of the product.

Based on *Centrafarm* judgment, the aforementioned principles have been reflected into Article 7 of the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks and Article 13 of Council Regulation (EC) No. 207/2009 of 26 February 2009 on Community trade mark (codified version) – this Regulation replaced Council Regulation (EC) No. 40/94 of 20 December 1993 on Community trade mark.

To conclude - we can see very well on the example of intellectual property protection how the Court of Justice by its very radical law-making activities adjusts Community law to the needs of the really free movement of goods on EU Internal Market.

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