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Contents

Interim measures before national courts in the context of EU and Czech law[1]

Václav Stehlík[2]

1. Basic framework

In the decisions in cases *Rewe*[3] and *Comet*[4] the Court of Justice of the European Union (further only "Court of Justice" or "Court") made it clear that the proper application of EU substantive law is primarily based on the use of national procedural rules. However, these rules may be corrected by principles of equivalence and effectiveness. After *Rewe*/*Comet* cases the Court used these corrections only exceptionally; its approach turned into more rigorous scrutiny especially at the end of 80s and beginning of 90s starting with *Peterbroeck*/*van Schijndel*[5]line of case-law. This new development brought in more confusion about the question what national procedures or institutes will not stand the equivalence or effectiveness scrutiny.

The following analysis will focus on the impact of Court's case-law on the powers of national courts to issue interim measures and provisionally suspend the application of the EU law or national law with consequences for the EU law. A typical **feature** of these measures is their **temporary nature**: they are limited, on one end, by the initiation of the proceedings and, on the other, by the final decision on the matter. In many cases, without these powers the final decision of national courts on the substance of the dispute would be deprived of its necessary effect. Consequently, particular controversy may concern provisions which do not give national courts the power to adopt interim measures or limit this power to specific conditions. From a different perspective, the diversity of procedural regulations of the Member States may weaken the effective and uniform application of the EU law in Member States.

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1 The article is based on the research partially published in Stehlík, V.: Aplikace národních procesních předpisů v kontextu práva EU, Leges, Praha 2012, s. 264, and on further research supported by the Czech Grant Agency project No. P408/12/1003 "*European Union law before Czech courts: theory and practice*"; this concerns especially the last chapter of this paper.

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3 *33/76 Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirthschaftskammer für das Saarland* [1976] ECR 1989.

4 *45/76 Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043.

5 Comp. especially cases *C-312/93 Peterbroeck, van Campenhout & Cie SCS v Belgian State* [1995] ECR I-4599 and *C-430-431/93 van Schijndel and van Veen v Stichting Pensioenfonds voor Fyziotherapeuten* [1995] ECR I-4705.

Generally speaking, in terms of the EU law the availability of an interim measure is desirable at least for two reasons:

- it contributes to the protection of individual rights which can be threatened by incorrect implementation;
- it gives a protection to the EU law itself since an incorrect implementation can compromise the fulfilment of objectives for which it was adopted.

Since no harmonized EU based legislative rules on interim measures before national courts have been adopted, the basic rules have been formulated by the Court. In the case-law it is possible to distinguish **two variations**:

1. interim suspension of application of **national law** in case that there is an alleged breach of the EU law;
2. interim suspension of the application of the **EU law** or national implementing regulations if national courts have doubts about the validity of the EU law.

In the following both these alternatives will be analysed with respect to the basic case-law and subsequent cases, including the limits on the application of the EU standards in this area.

2. *Factortame I* case: interim measures against national law

The first situation was covered in the famous case ***C-213/89 Factortame I***[6] which is often mentioned with regard to the establishment of the principle of primacy of the EU law over national constitutional rules. At this point it may be recalled that the dispute before the national court concerned British fishing quotas which were used by ships with Spanish crew, however, flying the British flag. It was regarded as an infringement, or as a circumvention of the provisions concerning fishing quotas for the UK. Therefore, the British regulation conditioned the "law of the flag" by a minimum percentage of persons with British nationality within the crew. It was likely that it was a restriction on the free movement of workers and discrimination on grounds of nationality.[7] However, the question was whether the British courts may, until the question is resolved in a preliminary ruling, temporarily suspend the application of the contested regulation. This was not possible due to the constitutional doctrine of absolute sovereignty of the British Parliament. Basically, under the British law, an act of the Parliament has to be fully applied until its abolition by the Parliament itself. According to the *House of Lords,* this presumption of validity was also used in the context of the *Factortame I* case,[8] although at the same time the *House of*

6 *C-213/89 R. v Secretary of State for Transport, ex parte Factortame Ltd. and Others* [1990] ECR I-2433.

7 As later stated by the Court in a preliminary ruling procedure.

8 It is interesting that *Divisional Court* met the request of applicants to issue interim measure; *Court of Appeal* and then *House of Lords* did not.

Lords admitted that the Spanish sailors would suffer irreparable harm if it was not possible to apply an interim measure.[9]

However, the Court was of a different opinion. Referring to *106/77 Simmenthal*[10] case it emphasized the requirement for full and uniform application of the EU law in all Member States and the consequent obligation of national courts to preferentially apply the EU law. In this context it may be noted that according to Italian national constitutional provisions in *Simmenthal* the national court itself could not disapply Italian law in case of its conflict with the EU law. The contradiction of Italian and European law was perceived by the Italian *Corte Constituzionale* as a constitutional-level issue. Therefore, according to the procedures in case of an alleged non-compliance, the court first had to refer the case to the constitutional court which would then decide with regard to the principle of the primacy of the European law about non-application of the relevant Italian legislation. But these powers did not belong to the court deciding the dispute. According to the Court, these procedural regulations prevented application of the EU law and violated the principle of primacy, according to which any national court has the right to directly decide on preferential application of the EU law. Any elimination of conflicting laws is a matter of national procedures that the EU law does not take into consideration.

Similarly, in ***Factortame I*** case there was a national-law based obstacle for the national court to fully apply the EU law. Until the authoritative interpretation of the Court and the subsequent priority application in the case concerned, the provisions of constitutional law prevented it from using certain procedural institute: to suspend the application of the national law and provide preliminary or interim primacy to the potentially directly effective EU law. Both cases concerned a procedure that prevented or hindered a prompt enforcement of the EU law. The difference was that in one case the existing procedural steps were found superfluous; in the second case they were missing.

The parallel between the two cases was also reflected in the reasoning in *Factortame I* case where the Court referred to the conclusions in *Simmenthal* case and reiterated that:

"***any provision*** *of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by* ***withholding from the national court having jurisdiction*** *to apply such law the power* ***to do everything necessary*** *at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect* ***are incompatible*** *with those requirements, which are the very essence of Community law.*"[11]

9 For more see e.g. Schermers, H., G., Waelbroeck, D., F.: Judicial Protection in the European Union, Kluwer Law International, 6th edition, Hague/London/New York 2001, p. 208.

10 *106/77 Simmenthal SpA v Ministero delle Finanze* [1977] ECR 629, paras. 14 and 17.

11 Comp. *Factortame I*, (emphasis added), paras. 18–19 with reference to *Simmenthal* case,

In relation to the assessment of the application of national procedural rules, it is interesting that in *Simmenthal* case the Court quite emphatically demanded priority application of the EU law, without leaving room for national procedures, even though these procedures ultimately always led to the recognition of the primacy of the EU law – we could say that enforcement of the EU law within the framework of national procedures was ensured. As was noted by *Dougan*, in *Simmenthal* case the Court did not work with the space given by *Comet/Rewe* case-law which in principle accepts the national procedural steps leading to the enforcement of the EU law. The Court primarily placed emphasis on full application of the EU law by the court which directly decides the dispute.[12]

A similar starting position was chosen by the Court in *Factortame I* case when assessing the powers of the national court to grant an interim measure. In this latter case it also did not refer to the application of the *Comet/Rewe* principles. With respect to the above findings, the Court stated that:

"*the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that* ***a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule****.*"[13]

According to the Court, this interpretation is confirmed by the system introduced by the then Article 177 of the Treaty (now Article 267 TFEU) governing preliminary rulings:

"*whose* ***effectiveness would be impaired if a national court****, having stayed proceedings pending the reply by the Court to the question referred to it for a preliminary ruling,* ***were not able to grant interim relief*** *until it delivered its judgment following the reply given by the Court.*"[14]

To summarize the aforementioned, according to the Court **the effectiveness of the EU law** would be impaired if the national court would not have the power to suspend the application of the contested regulation in relation to the judgment it is to issue in the given case. If in the absence of restrictive national law it would issue this interim measure, it must have the power to do so. In other words, the national court has this **power directly under the EU law**. This power is, therefore, autonomous and independent on national law.[15] That conclusion

paras. 22 and 23.

12 For more see Dougan, M.: National remedies before the Court, Hart Publishing, Oxford and Portland Oregon, 2004, pp. 125–126.

13 See *Factortame I*, point 21, (emphasis added).

14 Comp. ibid, point 22, (emphasis added).

15 Comp. Apter, S., A.: *Interim Measures in EC Law: Towards a Complete and Autonomous System of Provisional Judicial Protection before National Courts?*, vol. 7.2, Electronic Journal of Comparative Law, (June 2003), available at http://www.ejcl.org/72/art72-1.html, p 9.

follows also from the system of legal remedies to protect rights in the EU law which also includes a preliminary ruling. It would be against the effectiveness of this procedure and proper application of the EU law, if the national court which initiates a preliminary ruling in a concrete case, could not simultaneously suspend the application of the contested regulation and adjust the position of the parties until the Court considers the matter. The time aspect plays a significant role here. In this context it may be noted that the time gap between the start of the preliminary ruling and the response of the Court is not negligible[16] and after its expiration without issuing an interim measure, securing the rights under the EU law could be very difficult, or even impossible.

However, despite the relatively strict formulation of the decision, the *Factortame I* case may be read with certain **ambivalence** as far as the Court's reasoning and the possible impact of its decisions are concerned.

On the one hand, the decision of the Court is formulated strictly towards the national law. With regard to the reference to *Simmenthal* case and the requirement of primacy of the EU law over national procedural rules which make full application of the EU law unnecessarily difficult or postpone it in time it would be possible to argue that the interim measure which restricts the application of potentially conflicting national law must be available; the opposite rule of national law which in *Factortame I* case did not allow for interim measure to be issued cannot be applied. In this perspective, the national judges would have **an obligation to create a new judicial remedy** which did not exist in the national law before. This is in contrast with the earlier rhetoric of the Court in *Nord*[17] that the EU law creates no new remedies[18] and is dependent on national law.

It is evident that this interpretation of the Court's decision is **highly intrusive** both in relation to the national law and to the position of national courts and judges deciding the matter. It requires that the courts become active "makers" of law, both in the absence of codification in a certain area, and in case of (explicit) opposite national rules applied under British law. It does not represent a situation when there is a discrepancy between the written rules of national and EU law (e.g. directly effective prohibition of restrictions to the free movement of goods versus its restrictions by the national law) but creating new rules justified by an undefined general principle of effectiveness. Generally speaking, the position of the courts as "co-makers" of law is more common in Anglo-Saxon legal system which is essentially based on the precedential nature of the decisions of the courts, but it is perceived to be considerably less legitimate in the continental

16 Length of preliminary ruling procedure is currently about 16 months; expedited and accelerated procedures from 2 to 6 months, urgent preliminary ruling procedure a little over 2 months. Current information at http://curia.europa.eu/jcms/jcms/Jo2_7032/; for details on accelerated and urgent procedures see Stehlík, V.: Zrychlená a naléhavá řízení před Soudním dvorem EU – teorie a praxe, Právník, no 5, 2011, pp. 448–468.

17 *158/80 Rewe-Handelsgesellschaft Nord mbH v Hauptzollamt Kiel* [1980] ECR 1805.

18 Ibid, point 44.

system of law where the courts are strongly linked with the application of statutory law.

From this perspective *Factortame I* case had a **potential to differentiate itself from the earlier line of case-law** in the area of primacy of the EU law and attitude of the Court to national procedural rules. In previous cases, national courts were encouraged not to apply national law which was contrary to the EU law or to apply written provisions of the EU law instead of national law. The cases were related to both substantive[19] and procedural aspects of national law.[20] It did not concern any creation of new procedures but "only" non-application of the existing ones. In *Factortame I* case, there were no written rules in the British law concerning the powers and procedures of courts neither on national nor on European level. If the Court were to stay with this strict approach which it indicated in *Factortame I* case, it would lead a significant strengthening of the powers of national courts in the enforcement of the EU law.

But **on the other hand** – as comments in literature indicate[21] – the Court did not strictly follow that line of reasoning. We cannot overlook the **contradiction** in its decision. Although it formulated the power of national courts to issue interim measures, it did not further specify **conditions** under which such measures may be issued, despite the fact that the *House of Lords* specifically asked about them.[22] Thus, the Court left their formulation to the national law, more precisely to the application of the principle of equivalence and – in the context of the absence of an equivalent means in British law – to a great extent to the application of the principle of effectiveness.[23] The ambiguity of the decision can be seen in the fact that the Court did not refer directly to the application of *Comet/Rewe* principles; their relevance was confirmed in later decisions.[24]

From the aforementioned it is clear that the Court's decision in *Factortame I* case was not unequivocal and its impact was not as major as might be deduced from above.[25] The Court incorrectly interpreted British law and it seems that the rather austere decision[26] was based mainly on the presumption that the remedy

19 See f.e. famous cases 6/64 *Costa v E.N.E.L.* [1964] ECR 585 (prohibition of increasing tariffs during transition period) or 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 (application of secondary legislation in common agricultural policy).

20 See above *Simmenthal* case.

21 Comp. f.e. Dougan, quoted at footnote 12, p. 320 or Ward, A.: Judicial Review and the Rights of Private Parties in EU law, 2nd completely revised ed., Oxford University Press, Oxford 2007, s. 96–101.

22 See *Factortame I*, point 15.

23 Comp. Dougan, quoted at footnote 12, p. 320.

24 Explicitly see later case *Unibet*, point 43, which is discussed in the text below.

25 Their opinions and development after *Factortame I* case is summarized by Ward, quoted at footnote 21, pp. 96–101.

26 Overall the decision has 24 paragraphs, including the legal and factual questions, preliminary rulings and decision on the costs; the Court's reasoning itself is elaborated only in 6 paragraphs (17–22).

concerned was available in British law. Perhaps that is why the Court did not define more detailed rules, leaving the procedures of national courts upon the application of principles of equivalence and effectiveness.

It should be added that subsequently **British courts** dealt with *Factortame I* case in this way. The strict requirement of the Court for the existence of power to issue an interim measure was interpreted narrowly. In *Factortame I* decision itself, the *House of Lords* followed the premises of the Court and permitted issuing an interim measure. However, under the instructions of the *House of Lords*, in other proceedings before British courts when the direct effect of the EU law was not entirely clear, interim measures were to be applied only in exceptional cases. As a result of this process, those who applied for this procedural institute were not usually successful.[27] This ambivalence required further explanation and it was the Court's motive to further specify the conditions for the issuance of an interim measure in the subsequent case-law.[28]

Despite the limited interpretation of the findings in *Factortame I* by British courts, this case may be considered as an **important stone in the mosaic of the application principle of the primacy** of the EU law, the status or the obligations of national courts in its enforcement, providing protection to individual rights and ensuring their effective judicial protection. The importance of the case is emphasised for example by *Craig* and *de Búrca*; they state that although *Factortame I* case does not differ from the previous case-law in purely legal sense, its impacts in the national law are rather dramatic.[29] The Court refuted earlier theses that the EU law does not create any new remedies and in the absence of EU harmonization it is dependent on national law. We may remind the aforementioned, purely practical reason for this Court's decision: if it was not possible to issue an interim measure and the rights of the parties would be determined only in the final decision of a national court, in practice this time delay could mean that the final judgment would not be able to ensure proper application of the EU law, it would be useless to the parties and it would irreversibly damage their interests. The fact that conclusions in *Factortame I* needed further clarification is not so surprising. It is a common feature of the dynamic nature of Court's case-law which may be witnessed in many areas.

Despite the ambiguity of its assessment and diversity of comments, in a wider context *Factortame I* case can be considered as one of those cases from the early 90s where – under the auspices of application of the principle of effectiveness – the Court made **more severe interventions into national procedural rules**.

27 See Ward, quoted at footnote 21, p. 171.

28 See below the discussion on *Zuckerfabrik* and *Atlanta* cases and especially the aforementioned *Unibet* case.

29 See also Craig, P., de Búrca, G.: EU law – text, cases and materials, 5th ed., Oxford University Press, Oxford 2011, p. 226.

Among its "companions" in this period there are cases as *Dekker*,[30] (decided in 1991, the same year as *Factortame I*), *Emmott*[31] and *Francovich*[32] (decided also in 1991), or *Marshall II*[33] (decided in 1993). Eventually, after *Marshall II* case, the Court eased its case-law,[34] explicitly revised some of its conclusions,[35] and developed some others.[36] In later cases, the Court increasingly respected national selection of procedures and relied on the application of the principle of equivalence and effectiveness by the national court adjudicating the dispute.

As indicated above, even the conclusions from *Factortame I* did not avoid certain **clarifications.** It is connected with the fact that in *Factortame I* itself the conditions for issuing an interim measure were not explicitly addressed and the Court left it over to the national law. It seems rather strange especially in a situation if these provisions are completely missing in national law. Therefore, it was up to the national court – in this case the *House of Lords* – to formulate these conditions. As stated above, the conditions formulated by the *House of Lords* were not very favourable to recognizing the powers of British courts to issue interim measures; therefore, in practise they were limited only to exceptional cases.

The matter of issuing interim measures was opened soon after *Factortame I* in *Zuckerfabrick* and *Atlanta* cases. In these decisions, the conditions for issuing interim measures were formulated; both in relation to national legislation implementing the EU law, as well as in relation to the EU law itself. There was also a related question of the applicability of these conditions on a *Factortame I* case-like situation. This was later, after almost two decades, clarified in *Unibet* case. All these cases will be discussed successively below.

30 *C-177/88 Dekker v Stichting voor Jong Volwassenen (VJV) Plus* [1990] I-ECR 3941 where the Court – contrary to the explicit national legislation – inferred objective liability of employers for discrimination against employees on grounds of sex without the need to prove the responsibility of the employer.

31 *C-208/90 Emmott v Minister for Social Welfare* [1991] ECR I-4269 where according to the Court did not apply the time limits for claims resulting from unexecuted directive; for detail see below the part dedicated to time limits.

32 *C-6 and 9/90 Francovich and Bonifaci v Italy* [1991] ECR I-5357 and the State's liability for damages caused by breach of the EU law.

33 *C-271/91 M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367 where the Court stated non-application of national limits for damages and the power of national courts to adjudge interest.

34 See Craig, P., de Búrca, G.: EU law – text, cases and materials, 5th ed., Oxford University Press, Oxford 2011, pp. 227–231.

35 E.g. conclusions in *Emmott* case were found specific for the circumstances of the case – comp. *C-410/92 Johnson v Chief Adjudication Office* [1994] ECR I-5483, point 26.

36 E.g. conditions for liability for damages in *C-46/93 a C-48/93 Brasserie du Pecheur SA v Germany a R. v Secretary of State for Transport, ex parte Factortame Ltd. and others* [1996] ECR I-1029 and the formulation of serious breach of the EU law as a condition for liability in case of a broad discretion of Member States.

3. Interim measures against national implementing legislation and EU law

From the aforementioned it follows that *Factortame I* was viewed primarily through the prism of EU law primacy. It confirmed conclusions about the structural applicational primacy as it was formulated in *Simmenthal* case. As a result, national procedural rules must give way to ensure full application of the EU law. The subsequent case-law on issuing interim measures concerns a slightly different situation. As we noted earlier it is the question of whether and under which conditions the interim measure against the EU law is permitted, either directly or indirectly through national law. In this respect, again we may distinguish two variants:

- **suspension of the application of the national implementing legislation** which was issued in order to implement the EU law;
- **suspension of the application of the EU law itself** (directly effective) without any national implementing legislation.

In the early 90s – in a relatively short time interval – these variations were subject to the Court's decision in preliminary ruling procedures primarily in cases *Zuckerfabrik* and *Atlanta*, which were initiated by German courts. In the following part, we will focus closer on these cases and the subsequent case-law.

3.1 Interim measure against implementing acts: the basic premise

In relation to national law which was issued in order to implement the EU law, the basic problem lies in the fact that any temporary suspension of implementing legislation which is supposed to "bring the EU law to life" actually suspends also the application of the EU law itself. A temporary suspension of national implementing legislation – i.e. basically the legislation issued at national level under the authorization of the EU legislator – can be at the expense of proper application of the EU law. In some respects this situation is **similar to *Factortame I***: in both situations, national court deciding the matter is to suspend the application of *national* law, but with consequences for the EU law.

On the other hand, we can see a **difference** from the decision in *Factortame I* where the interconnection of national law and EU law was not as straightforward as in case of implementing legislation; primarily, it concerned the question of whether the EU law is applied in a particular area, or how it affects the powers of the Member States. From this point of view *Factortame I* is more concerned with the question of division of powers. That dimension diminishes if the national law is issued for the purpose of implementing the EU law and it is clear that the national law is in the domain of delegated powers. This gives more room to accept a more significant intervention of the EU law into the powers of the national courts to issue interim measures, namely the conditions under which they may do so.

When deciding on interim suspension of implementing legislation, it is possible to distinguish **two possibilities** that appear in the decision-making of national courts and which also arise from the subject of the preliminary ruling procedure. Thus, the national court can have:

- doubts about the validity of the EU law or
- doubts about the correct interpretation of the EU law, and, therefore, its proper implementation in national law.

As far as the **validity** of EU law is concerned, it should be reminded that national judges themselves cannot declare an act of the EU law invalid or inapplicable in a particular case. Based on the decision in *Foto-Frost*[37], the Court reserved for itself an exclusive competence to assess the validity and, therefore, also possibly to limit the application of the contested EU law provision. The national court can only rely on the presumption of validity of the EU law; in case of doubt it must refer it to the Court. The conclusions of the Court regarding the validity or invalidity are binding in all Member States. Therefore, declaring the EU law invalid is completely beyond the powers of national courts.[38]

The review of validity itself is performed by the Court in **several procedures**.[39] There is both a direct action for annulment (Article 263 TFEU) before the Court and also indirect actions such as the preliminary ruling procedure (Article 267 TFEU) in proceedings before a national court, or plea of illegality (Article 277 TFEU) in proceedings before the Court. According to the Court, the founding treaty "*established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted this review Community Courts*"[40] and these remedies and procedures as a whole create a complete system to ensure the validity review of the EU law. All these procedures are mutually complementary. When reviewing the validity based on the founding Treaties, the Court is explicitly entitled to suspend the application of the contested regulation.[41]

From the summary given above it is clear that the review of validity is strictly **centralized**. In this respect, it would be expected that the review of validity in proceedings before national court should be parallel to the suspension of the application of the EU law by the Court. However – similarly to the situation in

37 Comp. *314/85 Firma Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, point 20.

38 For more see Stehlík, V.: Účinky rozhodnutí Evropského soudního dvora v řízení o předběžné otázce, Právny obzor no. 4, 2005, pp. 312–334.

39 For the individual proceedings and their effects including selected literature see Hamuľák, O., Stehlík, V.: Praktikum práva Evropské unie. Ústavní základy a soudnictví, Leges, Praha 2011, pp. 142–173.

40 See *C-50/00 P Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677, point 40.

41 See Art. 278 TFEU (suspending the application of acts) and 279 TFEU (issuing interim measures) and Articles 83–90 of the Rules of Procedure of the Court (version from 1. 7. 2011).

Factortame I case – in the written EU law this power is not explicitly stated in relation to decision-making of national courts.

In addition to doubts about the validity of the implemented EU law, a national judge might consider issuing an interim measure in the event of doubt as to the **correctness of the implementation of the EU law** into national law. First and foremost, in case of an apparent conflict of national and EU law, the principle of primacy must be followed and if the conditions for direct effect are met, the national judge is obliged to apply the EU law directly, omitting the contradictory national legislation.

However, problems may occur, particularly if the EU act is not directly effective or its interpretation is not clear, as well as the assessment whether the problematic implementation is in line with the EU law. The logic of the situation suggests that the absence of direct effect in case of EU acts that require national implementation represent a more likely scenario in practice. At this stage, the national court (of the last instance) should ask the Court for interpretation of the act. It is the exclusive power of the Court to provide a binding and uniform interpretation of the EU law across the whole EU using the preliminary ruling procedure, including the obligatory procedure in case of national courts of the last instance.[42] In addition to the aforementioned procedure, again a national judge might consider issuing an interim measure against the controversial implementation act. From the perspective of the EU law, the negative effect is that any suspension of national implementing legislation leads to the suspension of the EU law itself as it is acting through the implementing act.

Regarding the impact on the EU law, both variants – that is issuing an interim measure in relation to both the review of validity and the contested interpretation of the EU law – are the same. Conditions for issuing an interim measure against an implementing act in case of doubt about EU law validity was an issue in *Zuckerfabrik*; in case of interpretation will be dealt in *Kofisa*.

3.2 *Zuckerfabrik* case: challenging the validity of EU law and interim measures against implementing legislation

The Court had an opportunity to comment on the question of power and conditions for issuing interim measures when contesting the *validity* of the EU law in ***C-143/88 and C-92/89 Zuckerfabrik***[43] which was decided a year after the

42 At national level this was accepted also by the Czech Constitutional Court in *Pfizer* case, decision of 8 January 2009, II. ÚS 1009/08, where not referring a question for preliminary ruling by a court last instance is considered a violation of the right to the lawful judge guaranteed by the Czech Charter of Fundamental Rights. For more see Stehlík, V.: The obligatory preliminary ruling procedure and its enforcement in the Czech and Slovak legal order, UWM Law Review, University of Warmia, Olsztyn, no. 3, 2011, pp. 6–25.

43 *C-143/88 a C-92/89 Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Paderborn* [1991] ECR I-415.

Factortame I. The case concerned a dispute over the legality of an EC regulation and a decision adopted on its basis by German administrative authorities. According to it a levy was collected from sugar producers in order to eliminate the losses of the European Community caused by high export refunds financed by the Community. The aim was to ensure the sales of the Community's sugar surpluses to third countries in that given year. One of the questions of the national court was:

- whether the general force of a regulation in the Member States does not exclude the power of national courts to suspend provisionally effects of an administrative act adopted on the basis of that regulation until the dispute in the main proceedings is settled; and
- about the conditions under which national courts may provide interim protection, or whether this protection is provided purely on the basis of national law or the EU law itself states the conditions which are applicable in this case.[44]

In relation to the first question the Court concluded that the general character of the regulation **does not preclude the power** of national courts to suspend the enforcement of a national administrative measure adopted on the basis of the regulation. The Court explicitly established a relation between the power to preliminary suspend the application of national law which appears to be in contrary to the EU law, as stated in *Factortame I* case, and the suspension of application of the EU law under the circumstances of *Zuckerfabrik* case. In this regard, it stated that:

"*[t]he interim legal **protection** which Community law ensures for individuals before national courts **must remain the same**, irrespective of whether they contest the compatibility of national legal provisions with Community law or the validity of secondary Community law, in view of the fact that the dispute in both cases is based on Community law itself.*"[45]

The aforementioned findings concerned the power of national courts to issue interim measures in *Zuckerfabrik* case. Only then the Court addressed the **conditions** thereof. Thus, it was unclear whether the requirement for the same level of protection exclusively concerns the existence of *powers* or whether it means that also the *conditions* for issuing interim measures should be the same in both situations. This is of particular importance especially for the situation in *Factortame I* case where the Court did not formulate any detailed conditions. Although at first glance it may seem it is so ("*interim protection ... must remain the same ...*"), this conclusion does not follow from *Zuckerfabrik* case quite clearly. The Court dealt

44 Comp. ibid, point 5.

45 See *Zuckerfabrik*, point 20, (emphasis added).

with the conditions themselves in other parts of the decision where it did not refer explicitly to the *Factortame I* case.[46]

As indicated above, in the following part of the *Zuckerfabrik* decision the Court pursued the formulation of the **conditions** for issuing interim measures. In case of temporary suspension of the EU law, the national court must reflect the factual and legal context of the case. The national court must take into consideration the **following aspects**:[47]

- it must be convinced that there are serious doubts about the validity of the EU law;
- suspension of enforcement must keep the nature of a preliminary decision;
- national court deciding on the interim measure may order suspension only until the Court rules on the question of validity;
- if the question is not subject of proceedings before the Court, the national court is obliged to seek a preliminary ruling;
- adoption of interim measures should prevent serious and irreversible damage to the party seeking its adoption. It means that the damage should occur before the prospective decision of the Court on the validity of the contested regulation; in principle purely pecuniary damage cannot be regarded as irreversible;
- when deciding on interim measures, national courts must respect the existing case-law of the Court on validity of the disputed acts;
- national court must take into account the interests of the Union, especially the damage to the EU resulting from non-application of the contested act; it must also take into account the possible impacts on individual interests and national interests;
- if the interim measure poses a threat to the financial interests of the EU, national court must require adequate financial guarantees (e.g. the deposit of money or other security).[48]

The Court then summarized these conditions into **three basic points** when an interim measure would be admissible:

1. national court has serious doubts regarding the validity of EU measures and if the validity of the act is not yet subject to decision of the Court, it will seek a preliminary ruling;[49]

46 We will come back to the question of application of *Zuckerfabrik* case conditions to cases like *Factortame I* below in connection with the discussion over the Court's conclusions in *Unibet* case.

47 For detailed definitions of the conditions see De La Torre, F., C.: Interim Measures in Community Courts: Recent Trends, Common Market Law Review, vol. 44, 2007, pp. 273–353.

48 Comp. *Zuckerfabrik* and argumentation in paras. 24–32. See also *C-465/93 Fruchthandelsgesellschaft and others (I) v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761.

49 Recently confirmed e.g. by *C-305/09 European Commission v Italian Republic*, decided on

2. there is demand and threat of serious and irreparable damage to the applicant;
3. the national court takes into account the EU interests.[50]

These general conditions have been regularly repeated by the Court in the subsequent case-law.[51] The Court set these conditions fairly strictly; with regard to the *erga omnes* effect of the decisions in preliminary rulings, these conditions are applicable uniformly before courts in all Member States.

In the light of the aforementioned considerations regarding the correlation between the review of validity of the EU law and the implications of the interim measures issued by the national court, it is not surprising that the Court explicitly related the conditions to those applicable in the review of validity in an action under Article 263 TFEU.[52] Due to the dependence of national courts on the decision of the Court regarding the (il)legality of EU secondary legislation, adopting an interim measure by a national court might be regarded as **ancillary to the review validity** of the EU law by the Court, whether this review is carried out in a procedure under Article 263 or under Article 267 TFEU. Hence, from this perspective, the application of the same conditions for issuing an interim measure as by the Court itself seems to be logical.

To summarize the findings in *Zuckerfabrik* case, it may be noted that:

1. the Court confirmed the existence of power of national courts to issue interim measures and to preliminary suspend the application of the EU law;
2. unlike in *Factortame I* case, the Court set quite detailed conditions that must be met for the issuance of an interim measure.

In this regard, *Ward* highlights the different approach of the *House of Lords* in the instructions for the British courts on issuing interim measures following the decision in *Factortame I* case and the requirements of the Court formulated in *Zuckerfabrik* case, particularly with regard to the emphasis on safeguarding the interests of the EU.[53] It is difficult to determine whether in its decision the Court responded also to the restrictive interpretation of the conditions formulated by the *House of Lords.* However, even in the Court's case-law the *Zuckerfabrik* case does not represent a significant shift. Although the conclusions regarding the powers and conditions seem to be logical and reasoned by the cohesiveness of the system of preliminary validity review,[54] at the same time it is a significant inter-

5 May 2011, so far not published, point 43.

50 Comp. *Zuckerfabrik*, point 33.

51 Comp. below e.g. cases *Atlanta*, point 51, or *Krüger*, point 47.

52 Comp. *Zuckerfabrik*, point 27.

53 See Ward, quoted at footnote 21, p. 171.

54 Recently confirmed e.g. in joined cases *C-453/03, C-11/04, C-12/04 and C-194/04 The Queen, on the application of ABNA Ltd and others v Secretary of State for Health a Food Standards Agency*, judgement of the Court of 6 December 2005, European Court reports p

ference into the national rules governing the procedures before national courts. The requirements of the Court may cause national courts considerable complications. While previously it was sufficient for national courts to fulfil criteria set by national law, after *Zuckerfabrik* case it also has to examine the case-law of the Court and the General Court regarding interim measures. Thus, national courts are bound to monitor EU interests, analyse the damage that may arise to the EU or decide on the appropriate financial guarantees for the EU. From this perspective, *Zuckerfabrik* case reflects Court's activist period of the early 90s in relation to national procedural rules.

3.3 *Atlanta* case: interim measures directly against the EU law

A slightly different variation in relation to *Zuckerfabrik* case and an interim measure against national *implementing* act is the situation where the national court questions the legality and application of *the EU law directly*, without any mediation via implementing acts.

The question of power and the conditions for issuing an interim measure in this legal context was dealt with by the Court a few years after the *Zuckerfabrik* decision in case ***C-465/93 Atlanta***.[55] The core of the dispute was the EU regulation establishing banana import quotas.[56] The importers of bananas from third countries into the EU were deprived of the duty-free quota. For that reason, in proceedings before a German court they contested the legality of the EU regulation and at the same time they requested this duty-free quota as an interim measure. In one day the German court both asked for clarification of the conditions for preliminary suspension of application of an EU act and asked about the validity of the given EU regulation.[57]

The Court confirmed that if a national court has doubts about the legality of an act and at the same time it starts the preliminary ruling procedure, it also has the power to preliminary suspend the application of an EU act. Further it concluded that in the proceedings before the national court the same conditions as in *Zuckerfabrik* case are applicable.

But *Atlanta* case enabled the Court – in its own words – to further **clarify** these **conditions**.[58] First, the Court specified how to interpret the factual and legal circumstances leading the national court to serious doubts concerning the

I-10423, point 103.

55 *C-465/93 Atlanta Fruchthandelsgesellschaft mbH and others v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761.

56 Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas, OJ L 47, 25.2.1993, pp. 1–11.

57 *C-466/93 Atlanta Fruchthandelsgesellschaft mbH and others v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3799. In this decision the Court confirmed the validity of the regulation. In both cases – i.e. regarding the possibility to issue interim measures and also the validity of the regulation – the Court issued a judgement on the same day.

58 Comp. ibid, point 34.

validity of the regulation, as formulated in *Zuckerfabrik* case. According to the Court:

"[t]hat requirement means that the national court cannot restrict itself to referring the question of the validity of the regulation to the Court for a preliminary ruling, but ***must set out, when making the interim order, the reasons*** *for which it considers that the Court should find the regulation to be invalid."*[59]

Therefore, in addition to initiating proceedings for a preliminary ruling, the national court must demonstrate that there are **valid reasons** for the suspension of the application of the EU law. According to the Court, when assessing the question of invalidity, national court must take into account the **degree of discretion** of the EU institutions in the sector concerned. One can imagine that fulfilling this condition requires a good knowledge of the EU law and decision-making processes and, therefore, again it makes it significantly more difficult for the national court to grant interim measures or, at least, to ground them properly. The question of assessing discretion of the EU institutions is the subject of litigation before the Court and in practice we can hardly imagine how competent the national court is to be able to examine this issue.[60] On the other hand, it is significant to follow how strictly or to what details the Court would require the application of this condition in practice, and whether at all a decision of a national court in a particular case will ever get before the Court. As far as we know it has not been at the core of the Court's subsequent decisions on interim measures.

The practical difficulty in fulfilling conditions and requirements for sound reasoning can be seen from further "clarification" according to which the act in question is not to be completely divested of efficiency. According to the Court the national court must examine the **cumulative effect** of its decision. Therefore, it has to examine what are the implications for the application of the EU law if a large number of other national courts provisionally suspended the application of the act concerned.[61] In this regard, the specific situation of the parties must be taken into account; whether these particular circumstances distinguish them

59 See ibid, point 36.

60 A general reproach might be added that these conditions affect especially the activities of lower courts without sufficient analytical background, for which, due to their work load, it will be difficult to analyse the Court's case-law in this area in details.

61 The request to examine the practice of courts also in other Member States is obviously inspired by case *283/81Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415, point 16, where the Court defined the conditions under which a court of last instance does not need to initiate obligatory preliminary ruling procedure. CILFIT case was by some commentators interpreted as binding for nations court to rely not on their own discretions but on the Court, and did not forget to initiate the preliminary ruling procedure; in this regard see e.g. Mancini, G., F., Keeling, D., T.: From CILFIT to ERT: The Constitutional Challenge Facing the European Court, Yearbook of European Law, Claredon Press, Oxford 1991, p. 3; Bobek, M.: Porušení povinnosti zahájit řízení o předběžné otázce podle čl. 234(3), C.H.Beck, Praha 2004, p. 39.

from other persons.[62] It cannot be overlooked that the wording of this condition closely resembles the restrictive concept of individual concern adopted by the Court when determining the *locus standi* of underprivileged applicants in the action for annulment under Article 263 TFEU.[63]

In addition, the Court commented in more details on the condition that requires national courts to respect the Court's **earlier decision** in the given matter. Thus, if the Court has already rejected the merits of an action for annulment or found no grounds for invalidity in a preliminary ruling procedure, the national court concerned cannot suspend the application, or it must cancel the measures already taken. An exception is the case when the national court refers to other grounds of invalidity.[64]

In the overall conclusion of *Atlanta* case the Court reiterated the three conditions formulated in *Zuckefabrik* case and explicitly it added a **fourth condition**: when deciding on interim measures, the national court must take into account all decisions of the Court and the General Court on the legality of regulations or on the requests for similar interim measures at the EU level.[65]

In general it can be **concluded** that *Atlanta* case complements the *Zuckerfabrik* decision. Similarly to the sister-couple cases such as *Rewe/Comet* or *Francovich/Factortame III*, *Zuckerfabrik/Atlanta* cases create a couple and in the subsequent case-law they are usually quoted together. When a national court is deciding on an interim measure either against national implementing acts based on potential invalidity of EU law as well as directly against the EU law, it bases its decision on the same conditions or reasoning.

In *Zuckerfabrik/Atlanta* a logical connection to procedure before the Court/General Court in review of validity was made. We cannot object to the fact that the Court requires the use of the same conditions as it uses itself. By this the Court established the basis for **uniform EU-wide standards/conditions** that are further elaborated in the subsequent case-law. We believe that these findings are a natural consequence of the requirement for a unified judicial protection of the individual rights in the validity review of EU law.

Finally, one can deliberate a little bit on the fact that the requirement for a uniform interpretation was formulated only in the early 90s in *Zuckerfabrik/Atlanta* cases. This relates to the developments at the EU level. For a long time the question of interim suspension of application was not dealt uniformly even

62 Comp. *Atlanta*, point 44.

63 Comp. especially case *25/62 Plaumann and Co. v Commission* [1963] ECR 95.

64 Comp. *Atlanta*, point 46. Again, this reminds the diction of the Court's decision regarding the obligatory character of its preliminary rulings. But the Court allows raising again questions for preliminary ruling in the same matter if the national court states different reasons for invalidity. For more see f.e. Stehlík, V.: Řízení o předběžné otázce v komunitárním právu, Univerzita Palackého v Olomouci, Olomouc 2006, pp. 123–132.

65 Comp. *Atlanta*, point 51.

in the proceedings before the Court. The situation changed in connection with a significant increase in applications for interim measures in the 80s[66] and then in in the late 80s when the Court began regularly to refer to the conditions formulated in its previous decisions on the admissibility of interim measures; thanks to this the judicial doctrine in proceedings at the EU level started to unify. The creation of the General Court, i.e. the Court of First Instance at that time, also significantly contributed to the stabilization of conditions since the two-tier judicial system allowed for appeal against the decisions of the Court of First Instance to the Court.[67] These facts help to explain the creation and more detailed specification of the conditions for interim measures also in proceedings before national courts.

3.4 *T. Port* case: outer limits for interim measures

Finally, the third major case which clarified the scope of powers of national courts to issue interim measures was ***C-68/95 T. Port*** case.[68] Similarly to *Atlanta* case, the *T. Port* case concerned a regulation which established quotas on imports of bananas into the EU.[69] The importing company, however, did not contest the validity of the regulation but claimed that due to temporary problems with the supplier of a third country its quota – determined by the volume of imports in previous years – was not properly set. The importer demanded an interim measure which would grant it a higher quota. The case reached the German Federal Constitutional Court which confirmed the claim for the interim measure also with regard to the regulation itself which allowed for taking this kind of difficulties on the part of importers into account. In subsequent proceedings before the German Court of Appeal this issue was addressed again, and questions concerning the powers to issue interim measure regarding the application of the given regulation were referred to the Court through the preliminary ruling procedure.

The Court upheld the conclusions from *Zuckerfabrik/Atlanta* cases;[70] but at the same time it distinguished *T. Port* from these cases. *T. Port* case did not primarily concern the review of validity of the regulation but the provision of judicial protection for individuals which must be considered in the overall context of the EU judicial system. The regulation itself enabled to **issue an interim measure**; but it had to be **authorised by the Commission** which should determine the existence and extent of the rights of traders. The Commission did not issue the measures but that did not constitute the power of national courts to do

66 This trend continued also in the 90s; comp. de la Torre, F.: Interim Measures in Community Courts: Recent Trends? Common Market Law Review, vol. 44, 2007, p. 274.

67 Comp. ibid, p 275. To the right to appeal against the decision of the General Court about issuing interim measures see Art. 57 of the Statute of the Court.

68 *C-68/95 T. Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065.

69 Council Regulation (EEC) No 404/93.

70 See *T. Port*, especially paras. 47–51.

so. Likewise, the demand that the Court stated inaction of EU institutions cannot be subject of preliminary ruling procedure. Both the Member States and the traders themselves are provided with a remedy either by a direct proposal of the Commission, or in particular through the proceedings for failure to act. In these proceedings directly the Court or the General Court is entitled to decide about interim measures.[71]

T. Port case therefore complemented *Zuckerfabrik/Atlanta* cases; a national court is entitled to issue an interim measure if the validity of the EU law is contested. But the national court cannot substitute the powers of EU institutions to issue interim measures if they are attributed to them by the EU law. From this perspective, *T. Port* case represents a limit for the powers of national courts in this area.

3.5 *ABNA* case: power of administrative authorities to issue interim measures

Finally, there is a very interesting recent decision in joined cases ***C-453/03 ABNA***[72] concerning the status of administrative bodies. These cases were brought by three courts of different Member States (the United Kingdom, the Netherlands and Italy) concerning the validity of the EU directive on the circulation of compound feedingstuffs.[73] One of the questions asked about whether **the administrative authorities have powers to issue interim measures** and to suspend the application of the contested act, or whether this power belongs only to courts in the review of the administrative decision. In the context of this case it is important to mention that the court of the Member State had already issued an interim measure and at the same time the proceedings for a preliminary ruling on the review of the validity of this act had been initiated. Therefore, the conditions for issuing this interim measure, particularly with regard to the examination of the (strict) conditions of *Zuckerfabrik/Atlanta* cases, had to be met. In this situation it seems that issuing interim measures by administrative authorities of (other) Member States is justified.

However, the Court was of another opinion. It summarised its conclusions regarding the conditions for issuing an interim measures in *Zuckerfabrik/Atlanta* cases and the position of national courts as to give full effect to the EU law.[74] Although the national public authorities assume that these conditions are met, they are not entitled to issue an interim measure under these conditions because:

71 Comp. ibid, paras. 52–61.

72 *C-453/03, C-11/04, C-12/04 a C-194/04 The Queen, on the application of ABNA Ltd and others v Secretary of State for Health a Food Standards Agency*, judgement of the Court of 6 December 2005, European Court reports p I-10423.

73 Directive 2002/2/EC of the European Parliament and of the Council of 28 January 2002 amending Council Directive 79/373/EEC on the circulation of compound feedingstuffs and repealing Commission Directive 91/357/EEC, OJ L 63, p. 23.

74 See *ABNA*, paras. 103–107.

- the status of those bodies in general cannot provide the same degree of independence and impartiality as the status granted to the national courts;
- it is not certain that these authorities are able to ensure adversarial trial which allows to hear out the arguments put forward by the parties before weighing their interests and making the decision.[75]

These conclusions are not compromised by the need for speedy proceedings when it is in the interest of the participants to provide them with protection as quickly as possible. According to the Court, also courts can issue interim measures promptly; the necessity for speed or economic aspects of proceedings cannot prevail over the guarantees provided by judicial proceedings.[76]

Thus, while the administrative authorities have a duty to preferentially apply the EU law in case of its conflict with national law,[77] on the other hand, when they should provisionally disapply the EU law, they do not have the same power as the national courts to issue an interim measure. And not even if they consider that the conditions for its issue were met, not even if objectively these conditions were met in another case and assessed by a court of (another) Member State. Therefore, interim measures of this type can be issued only in subsequent judicial proceedings.

3.6 Case-law following *Zuckerfabrik/Atlanta* cases

In subsequent cases the Court elaborated conditions formulated in *Zuckerfabrik* and *Atlanta* cases in specific situations. One of them is the case ***C-334/95 Krüger***[78] in which the Court accepted the possibility to appeal against the decision of a national court to issue an interim measure while this measure remained in force. The preliminary ruling regarding the validity of the EU law would lose its meaning only if a superior court changed or cancelled the decision on interim suspension of application of the act concerned.[79] In ***C-17/98 Emesa Sugar***[80] the Court confirmed that *Zuckerfabrik/Atlanta* conditions apply even if the national court decides on interim measures against authorities of non-member countries which are responsible for the implementation of the EU law (specifically from overseas countries and territories).

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75 Comp. ibid, point 109.

76 Comp. ibid, point 110.

77 See *C-118/00 Larsy v INASTI* [2001] ECR I-5063 and the obligation of social security authorities to apply then Directive 1408/71; for detail see Craig, P., de Búrca, G.: EU law – text, cases and materials, 5th ed., Oxford University Press, Oxford 2011, p. 264 and the sources quoted here.

78 *C-334/95 Krüger GmbH & Co. KG v Hauptzollamt Hamburg-Jonas* [1997] ECR I-4517.

79 Comp. ibid, point 52. Direct reference to *Zuckerfabrik* and *Atlanta* cases is in point 50 of the decision.

80 *C-17/98 Emesa Sugar (Free Zone) NV v Aruba* [2000] ECR I-00675, see especially point 73.

Finally, the range of variations is complemented by a decision in the form of an order of the President of the Court in ***C-186/01 Dory***.[81] The case concerned the interpretation of the directive implementing the principle of equal treatment for men and women[82] which – according to Mr. Dory – was violated by Germany by introducing conscription for men only. The German court initiated a preliminary ruling procedure.[83] In these proceedings Mr. Dory demanded that the Court issued an interim measure and suspended the application of the decision of the German military administration ("call-up"). In his rejecting order the President of the Court pointed out to the indisputable character of the preliminary ruling procedure under which, unlike in direct actions, the Court is not entitled to grant such interim measure. Due to the division of competencies this is a task for the national court, under the conditions stated in *Zuckerfabrik* case.[84]

4. Conditions for suspension of application of national law: current development

4.1. Basic framework

While the Court made a link between the conditions for granting interim measures in situations like in *Zuckerfabrik* and *Atlanta* cases, it was still not clear whether these conditions apply also in relation to situations like *Factortame I*. When we compare, on the one hand, *Factortame I* and, on the other hand, *Zuckerfabrik/Atlanta* cases and the subsequent case-law, we can see an obvious difference in the elaborateness of the Court's reasoning. While in *Factortame I* the Court did not formulate further conditions for interim suspension of national law, in the context of interim measures against national implementing legislation or directly against the EU law there is a whole set of conditions for national courts.

One of the reasons for this discrepancy can be deduced from the fact that in *Factortame I*, the Court focused primarily on the question whether the EU law itself gives the power to national courts to issue an interim measure even if the national law did not permit it. Thus, the Court (intentionally) did not deal with the conditions[85] and left the matter to the application of national regulation (with regard to *Rewe/Comet* cases while following the principles of equivalence and effectiveness). However, with respect to the subsequent development in *Zuck-*

81 *C-186/01 R Alexander Dory and Bundesrepublik Deutschland* [2001] ECR I-7823.

82 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, p. 40.

83 *C-186/01 Alexander Dory v Bundesrepublik Deutschland* [2003] ECR I-2479; in this decision the Court subsequently held that limiting compulsory military service only to men is compatible with the EU law.

84 Comp. ibid, point 12.

85 For the direct question of *House of Lords* see *Factortame I*, point 15.

erfabrik/Atlanta cases, a dilemma remained whether *Factortame I* case is only the first step in the development of EU rules on interim measures and the subsequent case-law represents clarification also in relation to this case, or whether in *Factortame I* case the Court intentionally left out detailed conditions and, as a result, indicated that different conditions for interim measures should be applied.

In *academia* conclusions regarding the differences in both situations were not perceived unambiguously. This is well illustrated in *Dougan's* work who argues that conditions formulated in *Zuckerfabrik/Atlanta* cases could also be used for granting an interim measure in relation to the situation in *Factortame I* case.[86] Therefore, it would be possible to apply these conditions in parallel in relation to interim measures, or to temporary suspension of the application of national law in case of an alleged conflict with the EU law, whose validity is challenged. This is based on the requirement that individuals should be protected in both situations in the same way, and also on the requirement for uniform application of the EU law.[87]

But simultaneously *Dougan* pointed out that the Court itself did not explicitly equate the situations in *Factortame I* and in *Zuckerfabrik/ Atlanta*. Consequently, it can be argued that those conditions need not be necessarily uniform, with respect to the different perspectives of both situations. In *Zuckerfabrik/Atlanta* the presumption is that the Court has an exclusive power to assess the validity of the EU law; granting an interim measure suspending its application is closely related to it – the Court leaves this decision up to the national court under prearranged conditions. On the other hand, in *Factortame I* the situation concerned an assessment of the compatibility of national law with the EU law where the requirement for the very existence of an interim measure is sufficient, given that other conditions may be governed by national law while respecting the principle of equivalence and effectiveness.[88] The Court had the opportunity to solve this dilemma in *Unibet* case.

4.2. *Unibet* case: refining the rules

A recent case ***C-432/05 Unibet***[89] may be labelled as exceptional. It covers an interesting mix of diverse topics regarding the effective enforcement of EU law in the context of national procedural rules, especially:

- application of the principles of effectiveness and equivalence;
- clarification of the rule that the EU law does not create new remedies;
- conditions for issuance of interim measures or actions for damages; and
- generally, the right to effective judicial protection.

86 See Dougan, quoted at footnote 12, p. 130.
87 Comp. ibid, p. 320.
88 Comp. ibid, pp. 323–325.
89 *C-432/05 Unibet (London) Ltd, Unibet (International) Ltd v Justitiekanslern*, judgement of the Court of 13 March 2007, European Court reports p I-2271.

Since the decision was linked to several important questions of national procedural law, it should be examined in more detail, including several references to the main conclusions in the opinion of Advocate General *Sharpson* who aptly analysed some controversial points.[90]

The case concerned the Unibet company – operating betting (lottery) games – which wanted to advertise its services in Sweden. For this purpose it obtained an advertising space in several Swedish media. However, in Sweden betting and lotteries were strictly regulated and all lotteries for public were subject to authorization by the competent administrative authorities. It was forbidden to promote participation in an unpermitted lottery organized in Sweden or in a lottery run outside Sweden. In accordance with this act the Swedish authorities took a variety of measures against the media which cooperated with Unibet company, including criminal procedures.

The Unibet company, even though it was not the participant of these proceedings, filed an action against Sweden, the aim of which was to declare that under then Article 49 of the Treaty (free movement of services, now Article 56 TFEU) it had the right to promote its services in Sweden. At the same time, the Unibet company sought an interim measure in order to be provisionally admitted to exercise the rights until the decision in action for declaration, and, finally, it sought compensation for the damages resulting from the conflicting regulations and procedures of Swedish authorities.

In the proceedings the Swedish court referred several questions to the Court concerning:

- obligation to include in national legislation a separate action aimed at determining the compatibility of the EU and national law if the national law permits only incidental review;
- obligation to provide interim protection through which national law is provisionally prevented from being applied if the applicant claims a breach of the EU law;
- conditions/criteria on which such an interim measure should be granted.[91]

The obligation to allow for a separate declaratory action

In relation to the admissibility of interim measures it was necessary to decide whether the EU law forces national law to introduce a declaratory action. This is connected with the issue of interim measure which has an ancillary nature and can be used only in other pending proceedings. However, in Swedish law, there did not exist a separate action for declaration that would allow to examine

90 For details on the case see Stehlík, V.: Národní procesní autonomie v reflexi na případ Unibet, Debaty mladých právníků 2007, Univerzita Palackého v Olomouci, Olomouc 2007, pp. 127–130.

91 Comp. *Unibet*, point 30.

the compatibility of national and EU law. This review was permissible incidentally, i.e. in other proceedings (e.g. for damages). National courts at various levels declared this action inadmissible because in their opinion it did not meet the legal requirements for its filing. In particular, there was no specific legal relationship between the Unibet company and the Swedish state. Consequently if the court admitted the action, it would equal to an abstract examination of the compatibility of a regulation with the EU law, and under Swedish law that was not possible.

In this respect, the basic question for the Court was whether the **right to an effective remedy** guaranteed by the EU law in the general principles of law contains the right to direct action for declaration of compatibility of national and EU law, or whether it is sufficient to have this review incidentally within related proceedings.[92] According to the Court in the absence of uniform rules, Member States have the right to determine the competent courts and procedural requirements to ensure the protection of rights guaranteed by the EU law. Only if there were no procedural means at national level – not even incidental – it would be possible to confer rights on individuals stemming directly from the EU law. When making these considerations, the Court referred to *Rewe/Comet* cases and to the case-law regarding the primacy of the EU law, including the aforementioned *Simmenthal* and *Factortame I* cases.[93]

The Court confirmed its earlier case-law that the EU law did not intend to create new procedural tools other than those governed by national law. However, this rule is only a starting point and it depends on the context whether with regard to the principle of effectiveness, specifically effective judicial protection, it will be necessary to apply certain procedural measures, even if they are not available in national law.[94]

The Court then concluded that a different situation would be if there were no procedural means ensuring not even incidental protection of rights of subjects participating in the proceedings – that is a situation when protection of rights of individuals is not adequately guaranteed by national procedural law.[95] Therefore, it is up to the national law to determine the *locus standi* of individuals on condition that national treatment must not interfere with the right to effective judicial protection and the principles of equivalence and effectiveness are applied.[96]

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92 Comp. ibid, point 37. When defining the right to effective judicial protection the Court referred to the constitutional traditions of the Member States, to Art. 6 and 13 of the European Convention on Human Rights and to Art. 47 of the Charter of Fundamental Rights of the European Union, which at that time was only unbinding declaration.

93 Comp. *Unibet*, paras. 38–39.

94 Comp. Taborowski, M.: Case C-432/05 Unibet – some practical remarks on effective judicial protection, 14 Columbia Journal of European Law, vol. 14, 2007/2008, p. 630.

95 Comp. *Unibet*, paras. 40–41.

96 Comp. ibid, paras. 42–43.

In *Unibet* the Court explicitly formulated the **obligation of euro-conform interpretation**[97] of national procedural rules in the context of ensuring effective judicial protection when it stated that:

"*it is for the national courts to* ***interpret*** *the* ***procedural rules*** *governing actions brought before them, such as the requirement for there to be a specific legal relationship between the applicant and the State, in such a way as to enable those rules, wherever possible, to be implemented* ***in such a manner*** *as to contribute to the attainment of the objective, referred to at paragraph 37 above, of ensuring effective judicial protection of an individual's rights under Community law*".[98]

Then in the light of these general observations the Court analysed Swedish law with regard to the principle of equivalence and effectiveness, and concluded that the principle of effective judicial protection as such does not require the existence of a separate action seeking primarily to challenge the compatibility of national provisions with the EU law. In principle, it is sufficient that the compliance can be examined indirectly in other proceedings. According to the Court these proceedings include also the action for damages; the assessment, if it is necessary to create a new procedural means, depends on whether a claim for compensation is sufficient to ensure the right to effective judicial protection. As inferred e.g. by *Taborowski*, this situation is the norm and, in practice, the alternation of existing procedural legislation by the principle of effectiveness is sufficient, and new procedural means do not need to be created.[99]

It should be added that according to the Court procedures are considered not to be available if the person:

"*… was forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with Community law*".[100]

This argument obviously offers a parallel to the case-law of the Court which concerns insufficient *locus standi* of individuals to bring an action for annulment under the fourth paragraph of Article 263 TFEU. The circumstances of the well-known *Jégo-Quéré* case show that individuals may have the only chance to violate the EU law in order to contest the validity of the legislation in subsequent legal proceedings.[101] It seems that contrary to the case-law regarding the

97 Comp. case *14/83 Von Colson and Kamann v Land Nordhein-Wetsfalen* [1984] ECR 1891.

98 See, *Unibet* point 44, (emphasis added). For the requirement of euro-conform interpretation of national procedural rules see also *C-50/00 P Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677, point 42 or *C-263/02 P Commission of the European Communities v Jégo-Quéré & Cie SA* [2004] ECR I-3425, point 32.

99 Comp. Taborowski, M.: Case C-432/05 Unibet – some practical remarks on effective judicial protection, 14 Columbia Journal of European Law, vol. 14, 2007–2008, p. 631.

100 See *Unibet*, point 64.

101 For a favourable decision in favour of the locus standi of the then Court of First Instance see T-177/01 Jégo-Quéré & Cie SA v Commission of the European Communities [2002]

locus standi of individuals to bring the action for annulment the Court is not so restrictive in relation to the *locus standi* of individuals in proceedings before national courts *in favour* of the EU law. To require the breach of national law as the only tool for the party to launch the review of compatibility is in breach of the right to effective judicial protection (as opposed to the action for annulment and situation in *Jégo-Quéré* case).

For example *Arnull* describes this ambivalent approach of the Court to the interpretation of the right to effective judicial protection as "*extremely damaging community cohesion law and threatens to lead to undermining the spirit of cooperation that was so important element of its relations with national courts*."[102] In the previous case-law, the Court intervened also when there was a need to create new procedures but the obligation of national courts to create new remedies was not clearly defined in this regard.[103] In *Unibet* case, the Court openly admitted that the **principle of effective judicial protection may require new procedural means**. Thus, any uncertainty on this issue was eliminated.[104] Anyway, *Unibet* case potentially opens the way for greater intervention into national procedural rules.

Without wanting to underestimate the aforementioned criticisms or analyse in detail the reasons why in cases like *Jégo-Quéré* the Court did not loosen the conditions for filing an action for annulment,[105] in practise there are relatively few cases when the Court abandoned its doctrine formulated in *Nold* case and inferred the obligation of national courts to create a new procedural means. Though it might be done by the principle of effectiveness directly by national courts, in our opinion it is in fact unlikely that in such a sensitive situation national court would create a new procedural means using solely its own discretion, without referring the matter for a preliminary ruling.

ECR II-2365; for a contrary decision of the Court in the appeal decision see *C-263/02 P Commission of the European Communities v Jégo-Quéré & Cie SA* [2004] ECR I-3425.

102 Arnull, A.: Case C-432/05, Unibet (London) Ltd, Unibet (International) Ltd v Justitiekanslern, judgment of the Grand Chamber of 13 March 2007, Common Market Law Review, vol. 44, 2007, p. 1776.

103 Here Arnull quotes e.g. cases *Simmenthal I*, *Factortame I*, *Courage* or *Antonio Muñoz*; see ibid, footnote no. 39.

104 Comp. ibid, p. 1773.

105 One of the obvious reasons is the problem of overloading the Court and the fear of increasing the number of cases which might paralyse the Court. There is a large number of analyses and commentaries in the literature, including the question of partial extension of the *locus standi* by the Lisbon Treaty; for this topic see e.g. Blahušiak, I.: Access of citizens to the Court: The role of regulatory acts, Dny Práva, PF MU Brno, Brno 2010, p. 2399 et seq.; Mikulová, K.: Prístup jednotlivcov k súdnému preskúmaniu právnych aktov EÚ podľa čl. 263 a 267 ZFEÚ, Dny Práva, PF MU Brno, 2010, especially p. 2612 et seq.; Sehnálek, D.: Jednotlivec v evropském soudnictví, Dny Práva, PF MU Brno, 2010, p. 2704; available at: http://www.law.muni.cz/content/cs/proceedings; Mazák, J.: *Locus standi* v konaní o neplatnosť: od Plaumannovho testu k regulačným aktom, Právník no 3, 2011, p. 219 et seq.

Rather theoretical dimension of these considerations is apparent also in *Unibet* itself where the Court concluded that in Swedish law there were sufficient (indirect) means and this direct "intervention" was not necessary.[106]

The power to grant an interim measure

As indicated above the availability of action for declaration is closely connected with the right of subjects to achieve the grant of an interim measure to suspend the application of national legislation. The question is whether the principle of effective judicial protection requires the legal order of a Member State to set up the possibility of granting interim measures until the competent court decides on the conformity of national law with the EU law.[107]

Quite unsurprisingly the Court referred to *Factortame I* and *Siples*[108] cases, and – to ensure full effectiveness of the final decision on the matter – it confirmed the power of national court to issue such an interim measure.[109] It further stated that:

"*Where it is* ***uncertain*** *under national law, applied in accordance with the requirements of Community law,* ***whether an action*** *to safeguard respect for an individual's rights under Community law* ***is admissible****, the* ***principle of effective judicial protection requires*** *the national court to be able, none the less, at that stage,* ***to grant the interim relief*** *necessary to ensure those rights are respected.*"[110]

In other words, the aim of these measures is to achieve interim protection of rights which the applicant claims in the matter itself. Therefore, it is important that the substantive action is possible; and if it is, interim measures must be available too. On contrary, if no such action is possible in the case concerned, according to the Court it is not admissible to decide on interim measures in the matter.

In that regard we may refer to the opinion of Advocate General *Sharpson* who points out to the employ of *Factortame I*. There the Court concluded that the *national court deciding the case* shall have the power to issue interim measures. According to *Sharpson*, in case of inadmissibility of an action the national court should not be regarded as the court hearing the case, and, thus, concludes the inadmissibility of any interim measure itself.[111] In this regard she foreshadowed the subsequent decision of the Court.

The Court has not mentioned the third variant yet – that is the case when the admissibility of action is *uncertain* under national law; therefore, it is disput-

106 See *Unibet*, point 65.
107 Comp. ibid, point 66.
108 *C-226/99 Siples Srl v Ministero delle Finanze a Servizio della Riscossione dei Tributi* [2001] ECR I-277.
109 Comp. *Unibet*, point 67.
110 Ibid, point 72, (emphasis added).
111 Comp. opinion of the Advocate-General *Sharpson* in *Unibet* case, point 76.

able whether the absence of a procedural means is consistent with the EU law or with the principle of effective judicial protection. In the case of uncertainty the national court should have the power to issue interim measures.[112] In *Unibet* decision it is possible to see a shift in the case-law, since in previous cases it was not disputed that the "main" proceeding was admissible and interim measure was just ancillary to it. However, the *Unibet* case shows that this is not necessarily always the case and that the principle of effective judicial protection may require granting a relatively independent interim measure even without clarity over the *locus standi* of subjects to bring the merits of the case.

As we noted above, with regard to the circumstances of the *Unibet* case itself, the national court found the declaratory action unavailable and in the context of procedural means provided by the Swedish law it was not prescribed even under the EU law. Therefore, it was not possible to grant an interim measure. However, outside this framework the Court ruled the admissibility of interim measures in action for damages which was filed by the Unibet company and which was admissible. The Court held that:

"*…where the competent* ***national court*** *examines, in the context of the claim for damages, whether the Law on Lotteries is compatible with Community law,* ***it must be able to grant the interim relief sought****, provided that such relief is* ***necessary****, which it is a matter for the national court to determine, in order* ***to ensure the full effectiveness*** *of the judgment to be given on the existence of the rights claimed under Community law*".[113]

In the final phase the Court referred to the national court and its assessment about the necessity of the interim measures in a particular case. In this respect, we can see certain insufficiency in the arguments of the Court which essentially requires and presupposes the review of compatibility of national and EU law in an action for damages. *Arnull* points out that this strict requirement may be in conflict with the principle of procedural economy, and it is not always an available means of reviewing the compatibility of EU and national law.[114]

Conditions for issuing interim measures

Finally, for purposes of this analysis the key point are the conditions under which a national court grants interim measures.[115] The Swedish court directly

112 Comp. *Unibet*, point 72.

113 See ibid, point 76.

114 Comp. Arnull, A.: Case C-432/05, Unibet (London) Ltd, Unibet (International) Ltd v Justitiekanslern, judgment of the Grand Chamber of 13 March 2007, Common Market Law Review, vol. 44, 2007, p. 1775.

115 For more on these questions see Sinaniotis, D.: The Interim Protection of Individuals before the European and National Courts, Kluwer Law International, Hague/London/New York 2006, p 51 and following; Hamuľák, O.: Předběžná ochrana subjektivních komunitárních práv v řízení před národními soudy – podmínky a mantinely, Sborník z konference Olomoucké Monseho dny 2007, Univerzita Palackého v Olomouci, Olomouc 2008, pp. 439–456.

asked whether the conditions in *Factortame I* and *Zuckerfabrik/Atlanta* cases are the same or different, as was discussed in the previous subsections. In *Unibet* case the Court had a "chance" to clarify this dilemma. In this respect, arguments used by the Court in *Zuckerfabrik* case might be used as a starting point: the protection provided by interim measures must remain the same, regardless of whether the compatibility of national legislation with the EU law or the validity of secondary EU legislation are questioned; in both cases the dispute is based on the EU law itself.[116]

This issue was again raised by the Advocate General *Sharpson*, according to whom this statement primarily concerned the *existence of power* to issue interim measures and not the conditions for that. In her opinion, in situations like *Factortame I* or *Unibet*, i.e. regarding the compatibility of national and EU law, an analogy with action for annulment in *Zuckerfabrik/Atlanta* does not apply, and, thus, it is not necessary to apply the same criteria as the criteria used by the Court when reviewing validity.[117]

In this regard the Court held as follows:

"*It is clear from established case-law that the suspension of enforcement of a* ***national provision based on a Community regulation*** *in proceedings pending before a national court, whilst it is governed by national procedural law, is in all Member States subject to conditions which are uniform and* ***analogous with the conditions for an application for interim relief brought before the Community Court*** *(judgements… Zuckerfabrik… Atlanta… ABNA etc.). However, the case in the main proceedings is* ***different*** *from those giving rise to those judgments in that* ***Unibet****'s application for interim relief does not* ***seek to suspend*** *the effects of a national provision adopted in accordance with a Community regulation where the legality of that regulation is contested, but rather* ***the effects of national legislation where the compatibility of that legislation with Community law is contested****.*"[118]

Therefore, the Court endorsed the view embodied in the opinion of the Advocate General. In doubt about the compatibility of national and EU law, the conditions of domestic law should be used and when applying them the national courts are limited (only) by the principle of equivalence and effectiveness.

These findings may be criticized with regard to the principle of uniform application of the EU law as they could lead to different conditions applicable in various Member States.[119] However, we do not believe that granting interim measures in the event of a conflict of national and EU law must necessarily be

116 Comp. case *Zuckerfabrik*, point 20.

117 Comp. opinion of the Advocate-General in *Unibet* case, paras. 91–96.

118 See *Unibet*, point 79, (emphasis and abbreviations added).

119 Arnull, A.: Case C-432/05, Unibet (London) Ltd, Unibet (International) Ltd v Justitiekanslern, judgment of the Grand Chamber of 13 March 2007, Common Market Law Review, vol. 44, 2007, p. 1778.

tied to uniform conditions in all Member State. It is not a final judgment, and the damage that might result from evidently faulty application of the EU law even in the form of interim measure could be compensated. From a more general point of view, it can be assumed that in situations like *Factortame I/Unibet*, there is no reason not to respect the characteristics and customs of national procedural rules.

Anyway, in *Unibet* case the Court upheld the findings of *Factortame I* case and the different circumstances and conditions associated with the grant of interim measures in *Factortame I* and *Zuckerfabrik/Atlanta* cases. It can be regarded as a sign of an increased respect of the Court for national procedural rules, done in a similar way in other cases at the end of the 90s and at the beginning of this century.[120]

5. *Kofisa* case: controversial interpretation of national implementing legislation

Finally, we should open one more dimension of interim measures: these are rules which national courts should use in cases concerning doubts on *interpretation of* EU law (and not validity as analysed in the previous text); in other words – whether we apply the strict conditions from *Zuckerfabrik/Atlanta* cases or the conditions formulated in *Factortame I* and *Unibet*. These cases do not give a clear answer.

For example *Ward*[121] in this regard refers to ***C-1/99 Kofisa***[122] case which concerned a disapplication of a decision issued by national administrative body taken on the basis of the EU regulation establishing the EU Common Customs Tariff.[123] The question for preliminary ruling was formulated in terms of whether the power to suspend the application belongs only to the customs authorities, as specified in the EU Common Customs Tariff, or also to national courts. Thus, it was a question of interpretation of specific provisions of the EU legislation.

On the one hand, the Court confirmed that according to the wording of the Common Customs Tariff this power is exclusively reserved for the customs authorities; however, at the same time such a provision must not undermine the principle of effective judicial protection as a general principle of law.[124] Therefrom the Court deduced the power of national courts to suspend the implementation of the decision of the customs authority in order to ensure the full effectiveness

120 Comp. ibid, p. 1780.
121 See Ward, quoted at footnote 21, p. 172.
122 *C-1/99 Kofisa Italia Srl v Ministero delle Finanze, Servizio della Riscossione dei Tributi* [2001] ECR I-207, especially paras. 44–49.
123 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community customs code (OJ 1992 L 302, p. 1.
124 Comp. *Kofisa*, point 46.

of the judgment which is to be issued.[125] Here the Court explicitly refers to the passages from *Factortame I* case where it deduced the power of national courts to grant interim measures.[126]

Since in *Kofisa* case the question of a preliminary ruling concerned the powers (as in *Factortame I* case) and not the conditions for its implementation, in our opinion the Court did not need to argue with *Zuckerfabrik/Atlanta* cases where those conditions were dealt with. After all, in these cases regarding the power of national courts it also referred to *Factortame I* case.[127] In *Kofisa* case the Court could limit itself only to general statements on the existence of powers as was already decided in *Factortame I*. Thus, based on the *Kofisa* case itself, without Court's explicit formulation, we cannot unequivocally conclude that these conditions would not be applicable.[128]

Therefore, the *Kofisa* decision did not answer the question whether a situation regarding contested interpretation of the EU law and suspension of national implementing law might be considered equivalent to suspension of national law in cases such as *Factortame I. The Factortame I* case also concerned the interpretation of primary EU law and arguably contradicting national law which could (possibly) result in EU law based individual rights. If the case is examined from the perspective of a national judge, this situation is largely analogous to granting interim measures in relation to national law without any direct links to EU obligations. Simply put, it is the application of national law whose compatibility with the EU law is challenged, and intervention or impact of the EU law depending on its potentially incorrect interpretation is uncertain.

In this situation, the national judge will naturally follow procedural rules laid down in national law, including the possibility to preliminary suspend the application of national law; they may exercise the option to leave the examination of the EU law validity to the preliminary ruling procedure and – based on *Factortame I* decision – they will have the power to suspend the application of the contested national legislation. When formulating this power in *Factortame I* case, the Court also primarily required the application of the principles of equivalence and effectiveness and generally demanded engagement of national procedural rules.

Since, except for *Kofisa* case, the question of issuing interim measures against implementing acts in case of an ambiguous interpretation was subject to decisions of the Court rather rarely,[129] judicial conclusions are not entirely clear and

125 Comp. ibid, point 48.

126 See *Factortame I*, point 21.

127 See *Zuckerfabrik*, point 19 and *Atlanta*, point 23.

128 Identically see *C-226/99 Siples Srl v Ministero delle Finanze a Servizio della Riscossione dei Tributi* [2001] ECR I-277, paras. 16–19.

129 See *Siples* case which was decided at the same time as *Kofisa* case and did not bring anything fundamentally new.

an analogy has to be used. In the absence of explicit case-law of the Court in this matter, we incline to the application of the same conditions as in case of doubt about the compatibility of national and EU law, and, therefore, to the use of (only) the principle of effectiveness and equivalence formulated in *Factortame I*. We find this situation closer to the circumstances of *Factortame I* than of *Zuckerfabrik/Atlanta* cases. This conclusion can be supported by the general trend in the recent case-law of the Court to mitigate the interference in national procedural law.

6. Summary EU law rules on interim measures

It is clear from the above that the requirement for full application of the EU law has been the *leitmotif* for the Court to actively formulate the conditions for interventions in national procedural rules. Individual conclusions can be summarized in a few generalised instructions for national courts:

- the power to issue an interim measure in situations like in *Factortame I* and *Zuckerfabrik/Atlanta* cases: in both situations national courts have the power to decide on interim measures even if the national procedural rules do not allow it. The legal basis for this power is based directly on the EU law;
- conditions for interim measure in situations like *Factortame I*: in case of an alleged contradiction between national and EU law the conditions for issuing interim measures are not formulated in the EU law. The Court requires only a general test of equivalence and effectiveness;
- conditions for interim relief in the situations like *Zuckerfabrik/Atlanta*: in case of an alleged invalidity of the EU law national courts are bound by the conditions formulated in these cases. Conditions for assessing the admissibility of preliminary measures are the same as those applied by the Court in the validity review of the EU law;
- a separate claim for interim measures in *Unibet* case: in case of an alleged contradiction between national and EU law the Court does not require a separate *locus standi* for interim measures if the main procedure is not admissible unless the right to effective judicial protection is violated;
- conditions for issuing interim measures in case of doubt about the correct implementation – in situations like *Kofisa*: here the general principles of effectiveness and equivalence are applied just as in *Factortame I* case;
- launching a preliminary ruling in case of doubt about the validity: simultaneously to the decision on interim measures suspending the application of EU law the national court must seek a preliminary ruling;
- launching a preliminary ruling procedure in case of doubt about the correct interpretation: if the national court has any doubts about the compatibility of EU and national law, or about the correctness of national

implementation, then with regard to the principle of the primacy the national court applies the directly effective EU law immediately without taking into account conflicting national implementation. If at the same time the interpretation on the EU act is unclear and if it is the last instance court, it has an obligation to seek a preliminary ruling;

- the enforcement of the obligation to issue an interim measure by individuals: even though most analysed cases concerned primarily the *power* of national courts to issue interim measures if a national court does not issue an interim measure when all the conditions are met, it equals to a violation of the EU law. Individuals might make claims in appeal proceedings or claim a compensation for the damages caused by the violation of the EU law by its incorrect application;
- the enforcement of the obligation to issue an interim measure by an action under EU Treaties: a Member State is responsible for breach of the EU law by its courts and may be sued by the Commission (see the action under Article 258 TFEU). This is especially true in case of non-compliance with the conditions for issuing interim measures against implementing acts.[130]

The analysis might be concluded by one more general note. The formulation of strict conditions in *Zuckerfabrik/Atlanta* cases does not mean that the **role of national courts** is simple and problem-free. For example, the condition that national courts must consider the impact in EU-wide context and take into account the consequences that would arise if the national courts (in other Member States) decided not to apply the act in question is – in our opinion – in everyday practice of (especially lower) courts rather difficult to fulfil. This question needs to be seen with regard to preserving procedural economy – i.e. the time gap which occurs until the response from the Court in the given case. Impacts on EU interests are mitigated by the requirement to provide sufficient (financial) safeguards by the party seeking the action, but – despite this – the safeguards will be used only after the final decision of the Court. Therefore, it can be expected that national courts will be rather reserved to decide on interim measures against the EU law.

Granting interim measures in situations like in *Factortame I/Unibet/Kofisa* cases is not much clearer. The failure to comply with these conditions is – due to the content vagueness of this principle in particular cases – difficult to prove and we suppose that in practice national courts will have a considerable space for their own assessment of the matter.

130 As a recent example see e.g. *C-305/09 European Commission v Italian Republic*, judgement of 5 May 2011, yet not published, especially paras. 43–45. This case concerned the suspension of Italian legislation regarding recovery of unlawful state aid which was found inconsistent with the EU law by the Commission. At national level, its enforcement was suspended although the validity of the decision of the Commission was not challenged before the Court and the conditions set down in *Zuckerfabrik/Atlanta* cases were not met.

Anyway, in both types of situations it will also be up to the parties of the dispute which will be interested in getting the interim measure to persuade the national court that the all the conditions are met.

7. Czech procedural rules, EU law and interim measures before Czech courts

The previous text gave a complex analysis of EU rules on interim measures. In the following we will focus in short on the practice of Czech Courts in the area of procedural rules. The basis is formed by decisions of the Supreme Court, Supreme Administrative Court and Constitutional Court that may be found in their public databases.[131]

The Supreme Court deals as a last instance court mostly with civil and penal cases. Our research on these cases did not unveil any case which would directly concern the issue of interim measures with a clear link to the EU law. The EU law-based cases even do not elaborate on the principle of national procedural autonomy and the principles of effectiveness and equivalence as adjudicated in *Rewe*/*Comet* cases.[132] The EU law based cases concern more precedence of EU law and its application in the area of substantive law or the CILFIT criteria concerning the preliminary ruling procedure.[133] The Supreme Court uses the referral to the principle of effectiveness and equivalence only exceptionally, for example when endorsing EU law-based rules on state liability for breach of EU law.[134]

The Supreme Administrative Court is the highest Czech court dealing with appeals in administrative-law cases. In relation to the EU law it is more explicit in its referrals to the EU law compared to the Supreme Court. In the area of Czech procedural rules *vis-à-vis* the EU law requirements we could mention f. e. application of EU asylum rules and direct referral to the principle of national procedural autonomy,[135] acceptance of principle of equivalence in customs proceedings[136] or in the application of EU completion rules,[137] national rules on the party's right of participation in licensing proceedings in transport services.[138]

131 For the Supreme Court see http://www.nsoud.cz/JudikaturaNS_new/ns_web.nsf/WebSpreadSearch; for Supreme Administrative Court see http://www.nssoud.cz/main0col.aspx?cls=JudikaturaExtendedSearch, for Constitutional Court see http://nalus.usoud.cz/Search/Search.aspx.

132 Actually we could not detect any case directly quoting these cases.

133 From the early case-law see f.e. 25 Cdo 1582/2006 , most recently see f.e. decision 28 Nd 153/2012.

134 Comp. f.e. decision 28 Cdo 2927/2010 and especially par. 34 where it refers to case 199/82, San Giorgio[1983] ECR 3604.

135 Comp. f.e. quite early after Czech accession to the EU case No. 3 Azs 259/2005-2 or No. 4 Azs 450/2005-44 decided in 2006.

136 See a series of cases, f.e. 1 Afs 21/2008-98.

137 Comp. f.e. č. j. 7 Afs 7/2008-200, 5 Afs 9/2008-328

138 Comp. f.e. 8 As 21/2008-189–176 and few more case decided on the same day.

However, so far we have not found any case dealing directly with granting interim measures and the implication of EU law based rules as are set up in the Court of Justice' case law.

Similarly, we are not aware of any cases of the Czech Constitutional Court that would open the issue of national procedural autonomy or specifically EU rules on interim measures if application of EU law is concerned.

The quick survey given above made it clear that the Czech highest courts deal with the EU rules on the application of national procedural rules rather scarcely, if at all. An exception is the Supreme Administrative Court and even this court does not deal with it explicitly very often. In the cases footnoted above it generally accepts the basic principles and does not deal in much detail with subsequent "intricate" case-law of the Court of Justice. To refer to the subject matter analysed in this paper, it seems that none of these courts has dealt specifically with the grant of interim measures against EU law or national implementing law. We might speculate on the reasons thereof; however, we suppose that an important part in the EU law enforcement should be the parties themselves who might use the EU rules to support their interest – that is valid also in relation to the interim measures – these measures might be required by one party to postpone the use of a national rule to its disfavour; however, the recourse to strict EU law based rules might be used also as a tool for the party in the dispute to whose detriment the issue of interim measures is aimed.

We assume that one of the reasons for infrequent use of EU law based corrections (principles of equivalence and effectiveness) is their complexity and the Court of Justice case-law that sets up these rules. So far, the Czech legal literature has not dealt with these procedural rules extensively. We might also share an optimistic view that any recourse to the EU rules has not been necessary yet; and the Czech procedural rules "sufficiently" protect EU law interest. Be it as it may, we suppose that the application of national procedural rules should be the rule and the recourse to, on one hand, casuistic and, on the other, rather abstract EU rules may and probably will remain quite rare.

And the best top level domain for European Enterprises is ...

Radka MacGregor Pelikánová[1]

Introduction

The overriding phenomenon of the start of the 21st century, the Internet, is a global system built up by computers and their networks which communicate based upon relevant protocols. The Internet's virtual and international nature makes any approach to it, and the many economic and legal aspects related to the Internet and its use, perplexing and causes difficulties with its classification and submission to a certain classical model. At the same time, its critical importance, serving as both beacon and bulwark, its heavy economic and social impact, as well as other related factors, results in it becoming ever more imperative to decisively tackle this issue, possibly bundle of issues, and take on a relevant, constructive and pro-active attitude ultimately leading to the selection, application and enforcement of an optimal economic, as well as legal, regime.[2]

One of the core problems and challenges related to the Internet and its use is the issue of identification and liability. Technically, the Internet is a global, worldwide and free connection of network knots through computer networks. They have a unique numeric address determined by the Transmission Control Protocol (TCP) and Internet Protocol (IP) and a unique in word transcribed address, a domain name. The conversion of numeric and word addresses is facilitated by the Domain Name System (DNS). Each and every knot, connected personal or sever computer, website or (sub)domain, has it´s domain name and is located within a pre-set space, called a top level domain (TLD) which is identified by an abbreviation. The domain name has a pre-determined tree structure, including several letters formations separated by dots and ranked according to the level of generality and specialty. Typically the first letters in the formation, placed at the very left, concerns a concrete individual spot (e.g., a computer) and the last letters formation, at the very right, refers to the pertinent TLD.

Domains and domain names are becoming truly valuable assets and precious elements of the intellectual property portfolio, despite the lack of their unified legal framework with a strong enforcement. A European Enterprise can establish it´s virtual presence under the auspices of various TLDs, each having it´s

1 Academic researcher and lecturer at Česká zemědělská univerzita – Provozně ekonomická fakulta, Czech Republic.

2 MacGREGOR PELIKÁNOVÁ, Radka, 2012. New top level domains – pending success or disaster? *Legal and Economic Issues of Central Europe*, Vol.3/2012, No.1, p.75–81. ISSN 2043-085X.

own regime, set of rules and policies, technical and financial requirements. At the same time, each TLD generates different opportunities and challenges. The obvious, at least the far and away most common, choices lie in several TLDs. Before describing them, it is important to review the general framework and the domain name spectrum *per se* (1.). Traditionally, the business TLD Number 1 for everyone was and remains TLD.com (2.) Since 2005, the EU has been offering a matching alternative – TLD.eu (3.). Naturally, entrepreneurs from the EU can use instead of these two a national TLD, ccTLD, which can be, though not necessarily, a TLD of their state (4). Last, but not least, and evolution during the last year generates a brand new option for everyone, the so-called new gTLDs (5.). This presentation does not offer a conclusive and final one-size-fits-all recommendation, but it is a great resource to generate a map of the domain scenario for business conduct in the EU and it should serve as a jumping-off point for an European enterprise wanting to succeed in the postmodern globalized and Internet 'switched-on' society.

1. Domain name spectrum – ccTLDs and gTLDs

Traditionally, TLDs are grouped and categorized into two types – generic TLDs (gTLDs) and national, i.e. country code, TLDs (ccTLD). Registration within a gTLD presents the opportunity to a natural person or legal entity, irregardless of their origin, nationality or place of incorporation of business, to obtain a verbal transcription of the concerned numeric address, i.e. a domain of a certain level within a gTLD. The ending abbreviation of such a TLD is indicative of the orientation and specialization of lower level domains appertaining to this gTLD, such as „.com", „.org", „.net", „.edu". If the concerned natural person or legal entity prefers a classification according to the country of origin over the classification according to the specialization, then it is appropriate to opt for an identification at a national basis, within a TLD of a particular state – ccTLD. This means a domain name ending with a two letter code of a country according to tj ISO 3166, e.g. „.cz", „.de" či „.uk".

Since 2006, the two-pronged offer of conventional gTLDs and ccTLDs has been extended by a new TLD *sui generis* and having a mixed character (apparently more towards ccTLDs than gTLDs) – TLD of the European Union carrying the ending identification abbreviation ".eu" – „TLD.eu". At this point, the namespace consists of 22 gTLDs, 250 ccTLDs and 30 international ccTLDs (IDN country code) and that brings the total number of TLDs to about 300.[3]

The current DNS is managed and operated by a not-for-profit public benefit corporation, the Internet Corporation for Assigned Names and Numbers

3 BECKSTROM, Rod. Speech – Opening Remarks. *Seminar on New Generic Top-Level Domains*, 8th December 2011, Beijing, China, p.4. Available at http://www.icann.org/en/presentations/beckstrom-speech-new-gtlds-beijing-08dec11-en.pdf

(ICANN). Principal tasks of ICANN include coordination of the DNS, IP, root system functions and the assigning of gTLDs as well as ccTLDs.

These TLDs operate on various models sharing a similar structure. Typically, a TLD has a designated Registry operator, often just called Registry. ICANN and each Registry enters into a Registry Agreement regarding a particular TLD and charging the Registry with the duty to exercise a public service for the Internet community, i.e. a Registry is responsible for the technical operation of this TLD. Registries can partially delegate their functions and as a matter of fact they do so and use the accredited Registrars for the registration of domains and domain names based on a Registrar Agreement, i.e. each TLD Registry has its own standard Registrar Agreement to be concluded with all Registrars. The accreditation of (at least some) Registrars is executed by ICANN. Based on Registration Agreements, Registrars deal with Registrants and holders and other end-users. Thus, the selection of a TLD by a potential Registrant should be followed by his or her decision about which Registrar to use. For example, current gTLDs are served by over 900 independent Registrars who interact with Registrants. Each Registrar develops its own strategies, including the determination of prices and other charges, i.e. different Registrars can charge different prices for the registration of an identical domain name.[4]

The harmonization, if not directly unification, of TLD systems and their compliance with the fundamental policies is achieved by contractual instruments transposing certain clauses, e.g. Uniform Dispute Resolution Policy (UDRP). The backbone contractual instruments share these clauses, i.e. they are to be found in Registry Agreements, Registrar Agreements and Registration Agreements. Naturally, along with these "standard" clauses, the Registry for each TLD and its own Registrars develops their own policies and rules and includes them in Registrar Agreements and Registration Agreements. These particularities as well as the implementation and operation itself by a Registry and it´s Registrars matter! Hence, the name and cost are just some of the factors to be taken into account when selecting a TLD and the particular Registrar!

2. Going globally generic? TLD.com, please!

Among the historically oldest gTLDs created in 1984 was one gTLD which has always been the most popular for business, i.e. TLD.com. It needs to be emphasized that TLD.com is a gTLD open not only to all entrepreneurs and business persons. Its impressive popularity and exponential growth for almost two decades is the reason for an appreciation as well as for a worry about its further smooth operation. A European entrepreneur has the option to register his or her domain within TLD.com and as a matter of fact, due to its massive popularity and proclaimed suitability for business conduct, the registration within

4 ICANN. gTLD Applicant Guidebook – Preamble, version 2012-01-11, 11th January 2012. Available at http://newgtlds.icann.org/en/applicants/agb

TLD.com should be always seriously considered. Nevertheless, even a cursory review of TLD.com shows that TLD.com is definitely not the best solution for everyone.

Originally, the TLD.com was intended to be the TLD for businesses *par excellence*, the low registration requirements and their low enforcement resulted in a non-restriction character of TLD.com since the mid-1990s, i.e. TLD.com became a TLD for everyone. As a matter of fact, during the 1990s there occurred a true boom when TLD.com became the most heavily used TLD for e-commerce, website presentations, email and networking, as a result of which this period was called the *dot.com companies* era. The introduction of additional gTLDs designated for businesses and open to all did not impact seriously this development, and thus it was the political and economic issues, rather than the emergence of the so called concurring TLD.biz in 2012 which impacted the so far *win-win* TLD.com.

Similar to other TLDs, the institutional framework and operation of TLD.com consists of the coordinator ICANN, the Registry Verisign Global Registry Services, and a number of Registrars taking care of registrations and dealing directly and on a daily basis with Registrants. The Registry Agreement for TLD.com was entered by ICANN and Verisign Inc. in 2006,[5] underwent 5 amendments[6] and has 10 Appendices, including Appendix No.8 with a model Registrar Agreement, i.e. the Agreement to be entered into by the Verisign Global Registry Services with each of the accredited Registrars. The registration fee charged by the Registry to Registrar for each registered domain is USD 7 and the ultimate fee to be paid for the registration of a domain by the Registrant to Registrar oscillates between USD 10 and 20. Registry Agreement, Registrar Agreements and even Registration Agreements include a UDRP clause and so TLD.com disputes are decided by one of four, by ICANN accredited, ADR providers. One of them is the WIPO Center.

VeriSign´s control of principal gTLDs was the subject of much external as well as internal criticism, including from ICANN. Ultimately, VeriSign moved to the decentralization approach and partially reduced its portfolio, while keeping the Registry function for TLD.com and TLD.net. In 2010, Verisign Global Registry Services executed seizure orders issued by the U.S. Immigration and Customs Enforcement agency and turned down a large number of domains within TLD.com that were suspected of being used for the illegal sale and distribution of counterfeit goods. Naturally, this act raises a number of questions and contrib-

5 .com Registry Agreement between ICANN and VeriSign, Inc. March 1, 2006. Available at http://www.icann.org/en/about/agreements/registries/verisign/registry-agmt-com-22sep10-en.htm

6 *Amendment No.5 to the .com Registry Agreeement* between ICANN and VeriSign modifying Appendix 8 of the March 1, 2006. Entered on July 5. 2012. Available at http://www.icann.org/en/about/agreements/registries/verisign/registry-agmt-amendment-5-05jul12-en.htm

utes to the discussion about the (in)appropriateness of entrusting the most popular TLD to a private US corporation, and an European Entrepreneur desiring to add his domain to the existing over 100 million domains in TLD.com[7] should consider it and understand the contractual instruments and pertinent clauses, especially those about technical performance, fee policy and dispute resolution.

3. Going generically European? TLD.eu, please!

The European integration represents a concept predominantly understood as a procedure for unification on an economic level, including the field of information technology. More precisely, European integration should be perceived as a complex phenomenon entailing an abundance of complicated processes in various fields.[8] The economic area is at this center and the Internet issues are its critical points. Therefore, Europeanization contributes and supports the decision of European enterprises to use the European infrastructure and Internet venues to do business, to go via TLD.eu. The integration requirements contributed to the fact that European law, as the EU law (or law of the EU) and the law of EURATOM,[9] and European institutions have been heavily endorsing the Europeanization of the domain portfolio of Entrepreneurs from the EU.

The idea of a TLD for the EU emerged over one decade ago and the proposed TLD.eu demonstrated from its beginning a number of differences in comparison to conventional gTLDs and ccTLDs, and this in regard to openness and requirements as well as the institutional framework. The starting point of this project occurred in 2000, when ICANN approved the granting of the numeric code alfa-2 "eu" and made possible the issuance of Regulation (EC) No 733/2002 of the European Parliament and of the Council on the implementation of the .eu Top Level Domain (Regulation 733/2002). Considering the initiative eEurope approved by the Lisbon strategy[10] and the Council resolution 2000/C 293/02 on the organization and management of the Internet,[11] the Commission selected the European Registry for Internet Domain „EURid" to be the Registry for TLD.eu. The Commission Regulation (EC) No 874/2004 laid down public policy rules concerning the implementation and functions of TLD.eu and the principles governing registration (Regulation 874/2004). [12]

7 http://www.whois.sc/internet-statistics/

8 VEČEŘA, Miloš, 2012. The Process of Europenization of law in the context of Czech law. *Acta universitatis agriculturae et silviculturae Mendelianae Brunensis*, LX, 60, 2, p.459–464. ISSN 1211-8516.

9 POREMSKÁ, Michaela, VÍTEK, Bohumil, 2012. European Law as terminological issue. *Acta universitatis agriculturae et silviculturae Mendelianae Brunensis*, LX, 68, 2, p.517–522. ISSN 1211-8516.

10 *The initiative eEurope approved by the European council in Lisbon on 23rd and 24 th 2000.*

11 *„6. RESOLVES TO INSTRUCT THE COMMISSION:. …. to set up a European network bringing together the scientific, technical and legal skills that currently exist in the Member States with regard to domain name,address and Internet protocol management."*

12 MacGREGOR PELIKÁNOVÁ, Radka, 2011. Právní a ekonomický úspěch domény nejvyšší

Based on these two highly important regulations for TLD.eu, Regulation 733/2002 and Regulation 874/2004, the European Commission entered, with EURid, into an agreement on TLD.eu and the registration of its domain names and TLD.eu was launched. Thus clearly the traditional triangular contractual framework was extended and ICANN, Registry (EURid), and Registrars were joined by EU organs and institutions. Thus the normally private law decentralized structure for a TLD is significantly modified for TLD.eu.

As a result, since 2006 any legal entity or natural person from a member state of the EU is able to apply for, and become a holder of, a domain from the TLD.eu. The sources for the pertinent legal regime are rules issued by the EU, especially both Regulations, as well as by ICANN and EURid, particularly Domain Name Registration General Conditions (General Conditions) and Registration Rules. According to Regulation 874/2004[13] and General conditions, disputes are to be decided by the provider selected for TLD.eu – the Arbitration Court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic. The dispute proceedings are governed by Alternative Dispute Resolution Rules (ADR Rules) and Supplemental ADR Rules of the Arbitration Court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic.[14] A complementary soft-law regulation is represented by the EURid code of conduct from 2007.

A financial analysis of TLD.eu sounds *prima facie* positive. EURid charges local Registrars only 4 EUR per domain name from TLD.eu, but still operates in the black numbers on its financial statements. Naturally, Registrants and holders get domain names from their Registrars with a surcharge, i.e. Registrars charge them more than 4 EUR to cover their expenses and any possible added services offered as a package, such as a domain name plus a website design and setting. The final prices vary, but generally seem to be affordable and similar to those for domain names from ccTLDs. In point of fact, the addition of 30 IDNs from 20 countries and territories in the DNS root zone has driven the average annual registration fee down from 35 USD to 7 USD.[15] The dispute resolution fee for the use of the ADR mechanism has decreased to 1 300 EUR, but is still criticized as too

úrovně .eu – pravda či mýtus roku 2011? *Právo, ekonomika, management*, Vol.2, 4/2011, p.2–10. ISSN 1804-3550.

13 Article 22 Alternative dispute resolution (ADR) procedure "*1. An ADR procedure may be initiated by any party where: (a) the registration is speculative or abusive within the meaning of Article 21; or(b) a decision taken by the Registry conflicts with this Regulation or with Regulation (EC) No 733/2002. 2. Participation in the ADR procedure shall be compulsory for the holder of a domain name and the Registry. 3. A fee for the ADR shall be paid by the complainant.*"

14 http://eu.adr.eu/adr/adr_rules/index.php

15 BECKSTROM, Rod. Speech. *The London Conference on Cyberspace*, 2nd November 2011, London, UK, p.3. Available at http://www.icann.org/en/presentations/beckstrom-speech--cybersecurity-london-02nov11-en.pdf

high for a SME, especially considering that the winning party does not obtain a reimbursement of this fee.

The overall good impression and the thumbs up regarding TLD.eu and the registration and administration of domain names with the abbreviation ".eu" is supported by statistics. The growth in the amount of domain name registrations reaches 5–10% annually and the TLD.eu is the 4th most popular ccTLD in the territory of the EU[16] and one of the ten most popular TLDs. Reportedly, TLD.eu is an instrument of European identity which does not destroy national registrations, i.e. the increase of domain name registrations within TLD.eu does not cause a decrease of registrations within ccTLD in the member states (TLD.de, TLD.uk, TLD.nl, etc.). Nevertheless, the total amount of over 3.5 million domains within TLD.eu, 150 thousand of which are "Czech",[17] does not indicate a great success *per se* and a guarantee for the future, especially when one considers that there are over 210 million domain names in gTLDs, including over 100 millions in TLD.com and 13 million of domain names in TLD.net.[18]

As a matter of fact, one third of the holders of domain names from TLD.eu are involved in business and it is probably instructive to study how they perceive the EU and the EU´s economic viability and how important (and worthy) it is for them to promote their European identification. According to survey data offered by EURid, 45% of respondents consider a domain within TLD.eu as a good investment and 82% of respondents perceive a domain within TLD.eu as an added value for a SME (small-medium-enterprise). The smoothness of the registration and administration of European domain names is assured by 18 Czech accredited Registrars. Naturally, these are not the only options for Czechs desiring to hold a domain name from TLD.eu because the European Union provenience requirement applies only to holders, but not to Registrars, and thus natural persons or legal entities can register their domain names in TLD.eu through accredited Registrars which are not from the European Union.

In sum, there is an abundance of data and evidence demonstrating that TLD.eu in principal meets pre-set goals, e.g. general satisfaction of the public from the EU with the legal regime as well as organic structure, profitable operation of EURid incentive programs such as a 50% fee reduction in the case of a registration for more than one year and a dispute settlement mechanism addressing and resolving conflicts regarding domain names and intellectual property rights within weeks, or just a few months. In addition, strategic and marketing considerations stimulate businesses to protect their intellectual property portfolio by the registration of "preventive" domain names within TLD.eu.

16 The largest number of national domain name registrations within the EU is in German TLD („.de"), in Great Britain TLD (.uk") and in the Netherlands TLD („.nl").

17 http://www.eurid.eu/en/about/facts-figures/statistics

18 GOLDSBOROUGH, Reid, 2011. World of Website Addresses Poised for Dramatic Expansion. *Community College Week – Technology Today.* 7/25/2011, p.31. ISSN 1041-5726.

Quo vadis TLD.eu? Are you going to keep up the good work and match, or even supersede, concurring ccTLDs and gTLDs? The answer should definitely take into account the ccTLDs from the EU and *vanity* ccTLDs as well as the concept of the unlimited amount of new gTLDs.

4. Going conventionally or less conventionally national? Cozy and individual rather than large and global? A ccTLD would do it!

One of the obvious choices to conduct business via a TLD is the use of the national TLD of the provenience of the entrepreneur. Naturally, a Czech entrepreneur should consider exploring the TLD.cz which is, since the mid 1990's, a legitimate venue to do business in, and explore the benefits of communication instruments.[19] The current structure and organization of TLD.cz has been strongly marked by its Registry and sponsor, an interest association of legal entities CZ.NIC, z.s.p.o. (CZ.NIC). CZ.NIC is a legal entity created by Internet services providing entities, including the academic association CESNET z.s.p.o., and registered in a Registry kept by the Prague Municipality. Since its beginning in 1998, its key status documents are the Foundation Agreement and Bylaws, the latest version is from June 2012.[20] Perhaps special attention should be paid to Art.1 of the Bylaws, which includes fundamental provisions, scope of business of CZ.NIC,[21] its financing[22] and its organic structure.[23]

19 HOSTAŠ, Petr. Praxe při registraci národních domén .cz a řešení sporů. In *Sborník příspěvků z konference pořádané na Vysoké škole veřejné správy a mezinárodních vztahů* v Praze ve spolupráci s Úřadem průmyslového vlastnictví Praha v pátek dne 22.6.2007, s.34.

20 More information available at http://www.nic.cz/ resp. http://www.nic.cz/files/nic/Stanovy20120612-26-schvalene_zneni.pdf

21 Čl. I. Stanov – 4.Předmět podnikání sdružení – *4.1. Předmětem podnikání sdružení je a) zpracování dat, služby databank, správa sítí; b) služby v oblasti administrativní správy a služby organizačně hospodářské povahy u fyzických a právnických osob. 4.2. V rámci podnikání tak sdružení a) definuje pravidla registrace doménových jmen pod ccTLD CZ, průběžně tato pravidla aktualizuje a vytváří mechanismy pro zabezpečení jejich dodržování. b) zajišťuje registraci doménových jmen druhé úrovně pod ccTLD CZ. c) zajišťuje provoz jmenných serverů pro ccTLD CZ. d) zastupuje ccTLD CZ při koordinaci národních a regionálních registrářů a standardizačních institucí. …..*

22 Čl. I. Stanov – 5.Financování sdružení – *5.1. Činnost sdružení je financována z a) vstupních členských příspěvků, b) registračních a udržovacích poplatků za registrace doménových jmen pod ccTLD CZ a c) dalších zdrojů. 5.2. Vstupní členský příspěvek činí 5.000,– Kč. 5.3. Registrační a udržovací poplatky za registrace doménových jmen pod ccTLD CZ jsou stanoveny v cenících, které schvaluje představenstvo sdružení…. …*

23 Čl. I. Stanov – 6. Orgány sdružení *Orgány sdružení jsou ▫ Valná hromada (část III stanov) ▫ Kolegium (část IV stanov) ▫ Představenstvo (část V stanov) ▫ Dozorčí rada*

Within the scope of its authorization and in accordance with relevant agreements entered into with ICANN[24] and the Czech state,[25] CZ.NIC is responsible for key functions, such as maintaining the name server for TLD.cz, actualization of .cz zone and maintaining the compatibility and access to the Internet. Accordingly, CZ.NIC coordinates with respect to the DNS and issues and enforces registration and dispute resolution rules, e.g. it pushes through the arbitration clause empowering the Arbitration Court in Prague. As a matter of fact, in the summer of 2012, CZ.NIC arranged for updating the Registration rules[26] and ADR Rules.[27]

For technical issues, CZ.NIC relies on one of its members and the true precursor, EUNET.[28] Further, CZ.NIC uses a decentralized management system and entrusts the registration *per se* to a number of accredited Registrars functioning on a commercial basis and this leads to an increase in the quality of provided services and a decrease in the fees to be paid by the ultimate clients, Registrants.[29] Currently, almost fifty Registrars assist with the registration and administration of nearly one million domains registered within TLD.cz. [30]

The ration of one domain within TLD.cz for every ten Czech citizens suggests that Czech entrepreneurs go regarding their virtual presence "national". As mentioned above, they use extensively as well the quasi-national, or more specifically supra-nationally regional, TLD.eu, i.e. over 150 thousand domain names within TLD.eu are registered for Czechs.[31] Nevertheless, the majority of Czech entrepreneurs ignore the fact that there are more options and opportunities for them within the ccTLDs spectrum. One of the overlooked possibilities is the use

24 *Accountability Framework (AF) – Registry Agreement about TLD.cz* between CZ.NIC and ICANN on November 1, 2006. Available at http://www.icann.org/en/about/agreements/cctlds and reflecting *Memorandum of Understanding/Joint Project Agreements* between U.S. Department of Commerce (DoC) a ICANN from November 25, 1998 and September 29,.2006 and*Affirmation of Committments* between U.S. Department of Commerce (DoC) a ICANN from September 30, 2009.

25 Memorandum about the administraiton of the domain space entered by the Ministerium of Informatics and CZ.NIC on April 21st, 2006, Memorandum about Computer Emergency Response Team – CSIRT.CZ entered by the National Security Authority and CZ.NIC entered on March 28th, 2012 and confirming Memorandum about the infrastructure, the Internet and IPv6 entered by the Ministry of Industry and Commerce and CZ.NIC on June 25th, 2012.

26 http://www.nic.cz/files/nic/doc/Pravidla_registrace_CZ_DSDng_20120601.pdf

27 http://www.nic.cz/files/nic/Pravidla_ADR_20120401.pdf

28 TRAPL, Vojtěch. Právní problematika národní domény .cz. In Sborník příspěvků z konference pořádané na *Vysoké škole veřejné správy a mezinárodních vztahů* v Praze ve spolupráci s Úřadem průmyslového vlastnictví Praha v pátek dne 22.6.2007, p.10.

29 HERCJUK, Tomáš. *Domény a kontextová reklama:* bakalářská práce č.TH Praha, ČR, 2012. Metropolitní univerzita Praha. Vedoucí práce JUDr. Vladimír Zamrzla, s.6.

30 More informatik available at http://www.nic.cz/ resp. http://www.nic.cz/files/nic/Stanovy20120612-26-schvalene_zneni.pdf

31 http://www.eurid.eu/en/about/facts-figures/statistics

of ccTLDs with commercial licenses, especially *vanity* ccTLDs. Entrepreneurs in neighborhood countries show more initiative, open mindedness and knowledge and they go ahead and increasingly use domains from very exotic island countries. This can be demonstrated by the ccTLD of the islands of Tokelau and Teletok in the South Pacific – TLD.tk, which was created in 1997 and whose sponsor is the state government of Tokelau and Teletok and whose Registry is Dot TK, resp. BV Dot TK.[32] The TLD.tk has undergone a successful evolution and the number of its active domains in 2012 exceeded the number of active domains of the tremendously popular conventional ccTLD belonging to Great Britain, TLD.uk.[33] The exponential growth should continue and it is even suggested that TLD.tk will pass the most popular ccTLD., TLD.de.[34] The great prospects of TLD.tk are well based since the registration is open, almost no requirements are imposed and the entire operation is profit generating despite the collection of fees from Registrants.[35] Thus more or less any person without paying any fee[36]

32 More information availalbe at the internet page Dot TK http://www.dot.tk/en/index.html?lang=en

33 .UK domain hits 10 million milestone – 10 million .uk domain names currently registered. *Domain Name Wire,* March 16, 2012. Available at http://domainnamewire.com/2012/03/16/uk-domain-hits-10-million-milestone/ – *Today .uk domain registry Nominet announced that the .uk domain crossed the 10 million domain milestone this week. The domain name swarvemagazine.co.uk, registered on March 12, represented the 10 millionth domain. Of course, more than 10 million domains have been registered to date, but this is the base of currently registered .uk domain names. The .uk domain ranks fourth in the world for size, following .com, .de (Germany), and .net, according to VeriSign's latest domain industry report. That makes it number two for country code domain names, with .tk for Tokelau nipping at its heels…..*

34 BERKENS, Michael H., 2012. The Inside Story of the Fastest Growing TLD.TK Adding 1M Registrations Per Month It´s Free & Soon # 1. *The Domains*, March 17, 2012. Available at http://www.thedomains.com/2012/03/17/the-inside-story-of-the-fastest-growing-tld-tk-adding-1m-registrations-per-month-its-free-soon-1/ – *„The extension is is .TK and its the ccTLD of the tiny island nation of Tokelau located in the South Pacific, population 1,268… the worlds 2nd largest ccTLD … and not long after that will pass .De to become the number one ccTLD…"*

35 BERKENS, Michael H., 2012. The Inside Story of the Fastest Growing TLD.TK Adding 1M Registrations Per Month It´s Free & Soon # 1. *The Domains*, March 17, 2012. Available at http://www.thedomains.com/2012/03/17/the-inside-story-of-the-fastest-growing-tld-tk-adding-1m-registrations-per-month-its-free-soon-1/ – *„All previously owned, non-renewed domain names, plus those that were taken back by the registry for non-compliance with its rules wind up being owned and retained by the registry. There are 45 Million domains owned by the registry.Those 45 Million domain names generate 5 Million visitors a day. Yes million.That traffic is monetized by the registry by parked pages (yes the same type of pages they do not allow registrants to have on .TK domains). The registry declined to say how much money was being generated from those parked pages but they did say that the .TK registry was now the second largest revenue producer for the country."*

36 Note.: approximately half milion of domains from TLD.tk are „special", e.g. for one letter or one number domain name is charged the Annual fee of USD 2 500. Further not renewed or confiscated domain names belong to *Dot TK* (in this case the passive holding is allowed!) Currently, there are 45 millions and are visited every day by 5 millions people

can register and become a holder, i.e. Registrant, of a domain within TLD.tk. In addition, IDN and an active protection against domain hijacking is provided. Further, the TLD.tk policy limits speculations with domain name registrations by requiring an active www use[37] and by applying a unique anti-abuse program,[38] which allows a fast identification, immediately followed by the confiscation of the fraudulent domain.[39]

Such an attractive offer is gladly accepted by many entrepreneurs from all over the world, especially from China, Vietnam, India, and Russia. The number of active domains within TLD.tk passed 11 millions and every day is increased by approximately 40 thousand new domains. Provided this trend continues, then in the beginning of 2013 the number of domains within TLD.tk should reach 17 million. Inasmuch as the most popular ccTLD in the EU, TLD.de, has "only" 15 million domains and does not grow aggressively, it seems that *Dot TK*, especially its very proactive director and skillful business and marketing expert, Joost Zuurbier, and the government of Tuvala should be able soon to proudly announce that their TLD.tk is number one ccTLD.[40]

5. Going as free and as new as possible? A new gTLD just for you!

After a quarter century of great functioning of gTLDs there occurred a revolutionary moment for the DNS when, in January 2012, there was launched a project of unlimited new gTLDs. The DNS became open to everyone for freely

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and the paid access to them is a big source for financing TLD.tk.

37 BERKENS, Michael H., 2012. The Inside Story of the Fastest Growing TLD.TK Adding 1M Registrations Per Month It´s Free & Soon # 1. *The Domains*, March 17, 2012. Available on http://www.thedomains.com/2012/03/17/the-inside-story-of-the-fastest-growing-tld-tk-adding-1m-registrations-per-month-its-free-soon-1/ – „*You can register your domain name for between 1–12 months however you need to have the domain live, with content, not simply parked or within 72 hours of registration or the domain will be taken away.*"

38 Note.: a reinforced monitoring version is provided for a fee of až USD 799 monthly.

39 BERKENS, Michael H., 2012. The Inside Story of the Fastest Growing TLD.TK Adding 1M Registrations Per Month It´s Free & Soon # 1. *The Domains*, March 17, 2012. Available on http://www.thedomains.com/2012/03/17/the-inside-story-of-the-fastest-growing-tld-tk-adding-1m-registrations-per-month-its-free-soon-1/ – „*The .TK Registry has an immediate take down policy for abuse including any domain they find engaging in Spam, the distribution of Malware or viruses and doesn't allow any domain to be used for phishing. The .Tk Registry uses a combination of people checking on 1,200 domains per hour to see if they are in compliance along with content filter and virus software…*"

40 TRIK, Marcel, van der MEER, Maurice, ZUURBIER, Joost, DALRYMPLE-SMITH, Hugo, GODRECHE, Jeremie, 2012. Dot TK has grown to the second largest country code top level domain. *Domain Daily*. Palo Alto (CA), USA : Freedom Registry, 25.June 2012 – „*The exponential growth of Dot TK continues because of its free domain name registration process while all other top level domain registries require a nominal charge per year and some level of administrative bureacracy. Furthermore, Dot TK allows internationalized domain names (IDN) – … Dot TK expects to reach the 17 millionth active domain name registration before the end of this year…*"

applicable new TLDs, i.e. open to quasi everyone for quasi anything.[41] After years of hesitations, the events start to move rapidly.

Some private parties, natural persons as well as legal entities, gladly embraced this new opportunity and are eagerly preparing to apply for and to hold attractive gTLDs, such as „.car", „.eco", „.hotel", „.shop".[42] The length of the registration process, the launching difficulties and the cost reaching 185 thousands USD[43] are not about to deter them. Other private parties are much more reluctant or even opposed, as they are suspicious about speculation[44] and abuses by applicants and greediness from ICANN.

ICANN is determined to maintain a friendly and open-minded appearance and thus had invited and kept inviting all stakeholders to express their opinions, suggestions, and concerns regarding the new gTLD.[45] At the same time, the well established standing of key leaders and representatives of ICANN is fairly obvious. The last President and CEO of ICANN, Rod Beckstrom, delivered a pertinent speech on 12th December 2011 in Moscow, Russia.[46] He described the launching of new gTLDs as "*one of the biggest developments in the Internet´s history*" and as a program "*carefully crafted by the global Internet community to help ICANN fulfill its mission to increase consumer choice, competition and innovation*." Obviously, these statements are not unanimously shared and just a mere cursory check of opinions presented on the Internet renders it patently obvious that the enthusiasm concerning new gTLDs and about the regime does not radiate from everyone and even the website of ICANN reveals many dissenting

41 ARTHUR, Charles, 2011. ICANN announces huge expansion of web domain names from 2012. *The Guardian,* June 20, 2011. ISSN 0621-3077. Available at http://www.guardian.co.uk/technology/2011/jun/20/icann-domains-expansion-annnounced – „ *Icann's decision follows years of discussion and debate, and went through more than seven revisions. Icann insists that strong efforts were made to address the concerns of all interested parties, and to ensure that the security, stability and resiliency of the internet are not compromised. The move is the biggest change to the internet's domain naming system since ".com" was introduced 26 years ago, which opened out the formerly academic and military system to commercial use. Icann will receive applications for new domain names for 90 days from 12 January 2012. The fee is $185,000, and the form for application is 360 pages long. It will also begin an awareness campaign pointing out that it has introduced the new scheme.*"

42 HATCH, David, 2011. No ICANN Do. *National Journal*. 5/21/2011, p.15. ISSN 0360-4217. FOX, Maggie, 2011. ICANN OKs Domain-Name Free-For-All. *Congress Daily.* 6/20/2011, p.4. ISSN 1936-6132.

43 ROUBEIN, Rachel. Cities could cash in on new domain extensit, 2011. *USA TODAY*. 7/13/2011, ISSN 0734-7456. ROSENFELD, Everett, 2011. The End of the .com Era. *Time*. 7/4/2011, Vol. 178, Issue 1, p.25. ISSN 0040-781X.

44 FINKEL, Ed. The XXX Factor, 2011. New Domain Names Could Lead to Trademark Problems for Businesses. *ABA Journal*. November 2011, Vol. 97, Issue 11, p.28. ISSN 0747-0088.

45 http://www.icann.org/en/news/announcements/announcement-06jan12-en.htm

46 Beckstrom, Rod. Speech – Opening Remarks. *New Generic To-Level Domains*, 12th December, 2011, Moscow, Russia, p.5. Available at http://www.icann.org/en/presentations/beckstrom-speech-moscow-12dec11-en.pdf

and discontented postings, while ICANN itself admits that there are risks (and issues) involved.[47]

So far almost two thousand new gTLDs have been applied for (and paid). The review, objections, evaluation, and registration process regarding the first cohort is culminating at the very moment of the drafting of this presentation and shortly the first new gTLDs should be cleared and ready for delegation.

It is reassuring that probably the best ADR provider with respect to domain names, the WIPO Arbitration and Mediation Center, continues to advise ICANN based on the UDRP experience and suggests pre- and post-delegation. As the exclusive service provider of dispute resolution services for trademarks, the WIPO Arbitration and Mediation Center has sufficient resources for this new procedure and accommodates the Trademark Rights Protection Mechanism for new gTLDs.[48] The process is rather expensive, since the fee for a legal right objection case reaches 10 thousand USD.[49]

The introduction of new gTLDs is a dynamic process with the vivid participation of the Internet community, heated discussions and resulting numerous ongoing and *ad hoc* changes. The burning question asks whether this new trend, i.e. the emergence of new top level domains with new domain names is a path to the post-modern globalized paradise or instead to hell. Are we steering towards a massive success or disaster? Are we going to "*Catch lightning in a bottle*", as Baseball Hall-of-Famer Leo Durocher used to say, or be struck by it? Naturally, no unanimous answer is available at this point and the insufficiency of information, together with the lack of experience dealing with such trends makes the evaluation and forecasting difficult, if not directly impossible.

Conclusion

The virtualization and dematerialization of private as well as business life, including the conduct of business, are noticeable features of the 21st century. One must bear in mind that e-commerce is the biggest and the fastest growing market in the world.[50] It is indispensable to consider the domain as a space on the Internet and the domain name as an Internet code address of a computer knot (IP numeric address) converted through the DNS database placed on special name computer

47 http://www.icann.org/en/news/announcements/announcement-09jan12-en.htm

48 WIPO. Press Conference Release: *WIPO Prepares for Launch of New gTLDs while Cybersquatting Cases Continued to Rise*, PR/2012/704. Geneva, March 6, 2012. Available at http://www.wipo.int/pressroom/en/articles/2012/article_0002.html

49 WIPO Schedule of Fees for New gTLD Dispute Resolution – http://archive.icann.org/en/topics/new-gtlds/wipo-fees-clean-19sep11-en.pdf

50 CORTÉS, Pablo, 2011. Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers. *International Journal of Law and IT.* 3/1/2011, Vol. 19, Issue 1, p.1. ISSN 0967-0769.

servers[51] into a verbal (literal) form. Such a unique and symbolic name[52] performs many more functions than merely serving as an address and undeniably has a strong significance for successful business conduct. Thus, the choice of a TLD for a domain to be used for entrepreneurial activities truly matters and definitely should be done while considering key factors, including economic, legal, and technical aspects.

Conceptually, it is necessary to admit that TLD regimes and the DNS setting and application are on the edge of International law and National law as well as between Public law and Private law. They are products neither of the state´s will nor of a private organization´s will. They manifestly have supported the perception of industrial property as a conglomerate of public and private elements, i.e. as it has been done consistently by certain authors.[53]

Since conventionally neither international treaties nor national statutes[54] regulated the administration and distribution of domains and domain names and states have exercised none or just a limited influence,[55] various instruments started to be developed by the coordinator ICANN and private Registry and Registrars to mitigate it. One of the best known is the global use of standardized rules, such as UDRP, and four listed ADR providers, i.e. to the WIPO Arbitration and Mediation Center, the Arbitration Center for Internet Disputes at the Czech Arbitration Court, National Arbitration Forum, and the Asian Domain Name Dispute Resolution Centre.

The EU is aware of this trend and understands intellectual property rights, including the denomination rights,[56] as an important instrument for (de)regulation and support of all four cornerstone freedoms – movement of persons, goods, services, and capital.[57] Thus, the EU offers and endorses the TLD.eu oper-

51 KOŠČÍK, Michal. *Doménové spory* – Diplomová práce. Brno, ČR: Právnická fakulta Masarykovy univerzity – Katedra právní teorie, 2006/2007, s.8.

52 AUGUSTIN, Adam. *Doménová jména a jejich užití při podnikání* – Diplomová práce č.5. Praha, ČR: Metropolitní univerzita Praha, 2009, s.2–4.

53 SLOVÁKOVÁ, Zuzana. *Průmyslové vlastnictví.* 2.doplněné a rozšířené vydání. Praha, ČR: LexisNexis CZ s.r.o., 2006, s.14. ISBN 80-86920-08-9 a MacGREGOR PELIKÁNOVÁ, Radka, 2009. Jakou definici průmyslového vlastnictví potřebujeme? *Právní fórum*, 2/2009, s. 45 a násl. ISSN 1214-7966.

54 The only long lasting exception is the American Anticybersquatting Consumer Protection Act.

55 As a matter of fact, traditionally the only state directly involved in these types of issues, the USA, has been criticized for the interference and was requested to withdraw. Even the recent involvement of the EU has a rather moderate extent.

56 MacGREGOR PELIKÁNOVÁ, Radka, 2010. Intellectual property rights and their enforcement in the Czech Republic. *Journal on Legal and Economic Issues of Central Europe*. Vol.1, No.1, p.15. ISSN 2043-085X.

57 VOJČÍK, Peter. Priemyselné práva na označenie a podnikanie. In JAKL, L. (Ed.). *Právní ochrana duševního vlastnictví při podnikání* – Soubor vědeckých prací. Praha, ČR: Metropolitní univerzita Praha, 2011, ISBN 978-80-86855-71-4, s.30–31.

ated by EURid and accredited Registrars. Undoubtedly, TLD.eu is a domain to be considered by entrepreneurs from the EU along with the traditional first business domain option, TLD.com. Nevertheless, both of them are truly big domains with a heavy and rigid regime. Thus an entrepreneur focusing on flexibility and local significance may prefer ccTLDs, either conventionally their own ccTLD or any approproiate *vanity ccTLD*. For a Czech entrepreneur these options are the old reliable TLD.cz operated by CZ.NIC and a very dynamic, thus maybe not completely stable, TLD.tk. A list of TLD options after January 2012 would be incomplete without the new gTLDs.

Despite the lack of professional interest, or maybe due to such a lack, TLDs and DNS have been developing successfully in recent years and it will be extremely interesting to observe what the future will bring. Is TLD.com about to protect its leading position? Is TLD.eu going to keep up the good work? Is the era of ccTLDs over? Are n*ew gTLDs* about to become a great move in the right direction? If yes, for whom, and how? Are the applicable or just suggested rules and conditions fair and objective as proclaimed? What is the future of the dispute settlement regarding domain names, especially those from TLD.eu and *new TLDs*?

In today's rapidly changing, tension-filled world, we are confronted with an increasing number of various concepts of knowledge, methods, etc., and it is extremely challenging to go ahead with communication, unification and/or integration.[58] Although there are many issues, challenges, and questions, there is, as well, a healthy potential for (at least some) positive answers and for the achievement of an efficient and effective virtual presence and communication.

Let´s observe the evolution of this economic, legal and technical adventure involving more than 1.6 billion people using the Internet,[59] and their attitude and preferences regarding the Sophie´s choice about which domain to use for the registration of their computers and networks, i.e. to go either with gTLD or ccTLD or TLD.eu or *new gTLD*.[60] The first American Nobel laureate in economics and probably the foremost academic economist of the 20th century, Paul A. Samuelson made/had a point with his statement *"I don't care who writes a nation's laws — or crafts its advanced treatises — if I can write its economics textbooks,"*[61] but regarding the choosing of the best domain venue for business

58 URBANOVÁ, Martina, DUNDELOVÁ, Jana, ROZBOŘIL, Blahoslav, 2012. Knowledge society in 21st centruy. *Acta universitatis agriculturae et silviculturae Mendelianae Brunensis*, LX, 70, 2, p.533–537. ISSN 1211-8516.

59 ALRAMAHI, Moe, 2010. New gTLDs – Pandora´s Box is open. *International Review of Law, Computers & Technology*. Vol. 24, No. 2, p.183–192. ISSN 1360-0869.

60 WOOD, Nick, 2011. Should you apply for a gLTD? *Managing Intellectual Property*. 2011/July, August 2011, p.28–30. ISSN 0960-5002.

61 WEINSTEIN, Michael M., 2009. Paul A. Samuelson, Economist, Dies at 94. *The New York Times*, December 13, 2009. Available at http://www.nytimes.com/2009/12/14/business/economy/14samuelson.html?pagewanted=all&_r=0

the legal framework really matters, at least as much as do the economic and technical considerations and criteria.

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ROUBEIN, Rachel, 2011. Cities could cash in on new domain extensit. *USA TODAY*. 7/13/2011, ISSN 0734-7456.

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WOOD, Nick, 2011. Should you apply for a gLTD? *Managing Intellectual Property*. 2011/July, August 2011, p.28–30. ISSN 0960-5002.

The new principles in internal audit function in banks: stagnation or step forward?

Klára Kubáňová[1]

In June 2012 the Basel Committee on Banking Supervision issued *The internal audit function in banks*[2], the revision of *Internal audit in banks and the supervisor's relationship with auditors*[3] issued in 2001. *The internal audit function in banks* should be a reaction to the crisis that has begun in 2007 and should take into consideration the main failure of both individual banks and a system as a whole. As this 2012 document is the reaction to the crisis suffered, the comparison with previous document should demonstrate whether the current principles are stronger and will be more sufficient and whether these can effectively help and prevent the spread of the crisis.

Internal auditing

The internal auditing was defined in 1999 by the Board of Directors of the Institute of Internal Auditors as "an independent, objective assurance and consulting activity designed to add value and improve an organization's operations; it helps an organization accomplish its objectives by ringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes.[4]" The internal audit should be then the independent review off all bank´s activities that should evaluate all risks, take them into account while assessing the risk profile of the bank and oversee that the remedial actions will be taken if necessary.

Internal audit in banks and the supervisor's relationship with auditors

Internal audit in banks and the supervisor's relationship with auditors issued in 2001 set forth 20 principles for internal audit function. The internal audit function in banks of 2012 promulgates 20 principles as well; these later issued principles are organized in a different way, they are better linked to each other

1 Department of Financial Law and Financial Sciences, Law Faculty of the Charles University in Prague.

2 Basel Committee on Banking Supervision. *The internal audit function in banks* [online]. 2012 [2012-08-12]. ISBN 92-9197-140-5. Available at: http://www.bis.org/publ/bcbs223.pdf

3 Basel Committee on Banking Supervision. *Internal audit in banks and the supervisor's relationship with auditors* [online]. 2001 [2012-08-12]. Available at: http://www.bis.org/publ/bcbs84.pdf

4 The institute of Internal Auditors: Definition of Internal Auditing. [online]. 2012 [2012-08-12]. Available at: https://na.theiia.org/standards-guidance/mandatory-guidance/pages/definition-of-internal-auditing.aspx

and the document seems to be more complex. At first no fundamental differences could be drawn, but after a detailed comparison, a particular development and elaboration of the 2012 document can be deduced.

Comparison

As *The internal audit function in banks* of 2012 follows on the previous document the character of the main leading principles remains constant. Some principles are restructured, but the ideas are unchanged. The majority of principles could be found in both documents, but the 2012 document provides some new, or at least changed, ones. As Ed Larkin, partner at KPMG, confirms "the document has been significantly restructured and principles reordered, making direct comparison difficult"[5].

Responsibility of the board of directors and senior management

The 2012 document sets forth that "the bank's board of directors has the ultimate responsibility for ensuring that senior management establishes and maintains an adequate, effective and efficient internal control system and, accordingly, the board should support the internal audit function in discharging its duties effectively."[6] This principle was in the very similar wording included in the 2001 document, where this principle was the leading one followed by other duties like that senior management has to perform establishing system for assessing various risks of the bank activities, system for relating risks to the bank´s capital level and methods for monitoring compliance with laws and regulations and supervisory and internal policies, while the board of directors had to review at least once a year the internal control system and capital assessment procedure.[7] As written above some requirements were released in the 2012 document as these activities should be assigned to the audit committee or/and to special audit department, than to senior management. This release and transfer of liability to the body independent (or not directly dependent) of the bank´s economic results is, or should be if followed appropriately, clearly much more preferable than if such activities were assigned to senior management solely. The system for relating risks to the bank´s capital level is not included in principles only, but also in many global regulatory standards, for example in the current Basel III.

5 KPMG: Australia. Internal audit function in banks: Consultation and regulatory expectations [online]. 2012 [2012-09-29]. Available at: http://www.kpmg.com/AU/en/IssuesAndInsights/ArticlesPublications/Banking-Newsletter/december-2011/Pages/internal-audit-function-in-banks-consultation-period.aspx

6 Basel Committee on Banking Supervision. The internal audit function in banks [online]. p. 3, 2012 [2012-08-12]. ISBN 92-9197-140-5. Available at: http://www.bis.org/publ/bcbs223.pdf

7 Basel Committee on Banking Supervision. *Internal audit in banks and the supervisor's relationship with auditors* [online]. p. 2, 2001 [2012-08-12]. Available at: http://www.bis.org/publ/bcbs84.pdf

The board of directors should currently review not only the effectiveness and efficiency of the internal control at least once a year but also the performance of the internal audit function. The responsibilities of senior management are set more thoroughly in the 2012 document, but they basically represent principles of 2001 in an advanced version; senior management remains responsible for internal control of all risks faced by the bank, for reporting the board of directors on the scope and performance of the internal control system and senior management is newly responsible for informing the internal audit of new developments, risks and changes, for taking actions on all internal audit findings and recommendations and senor management should also ensure that the head of internal audit has all necessary information.

Key features of the internal audit function: permanence, independence, competence

Both 2001 and 2012 document require that "each bank should have a permanent internal audit function[8]" while according to the new principles the responsibility to ensure the permanency lies upon senior management and the board of directors (previous document imposed the duty to take all necessary measures to ensure the permanence of internal audit on senior management only). Both documents expect the internal audit to be conducted by bank´s own internal audit staff.

As permanency, both documents require that the bank's internal audit function must be independent of the audited activities, it should have a sufficient standing and must act with objectivity. The 2001 document stated that "the internal audit department operates under the direct control of either the bank´s chief executive officer or the board of directors or its audit committee (if one exists)"[9]; the new principles issued in 2012 already request the audit committee, or its equivalent, to exist and set forth its authority in the Annex 2 in Responsibilities of a bank's audit committee[10]. The internal audit must be independent in the sense that it must be free to report its findings and assessments, and should not be involved in control measures in any way. Both documents proclaim to be useful to periodically rotate internal audit staff within the internal audit function, which should ensure objectivity and impartiality. While the 2001 document required that internally recruited auditors should not audit activities or func-

8 Basel Committee on Banking Supervision. *The internal audit function in banks* [online]. p. 10, 2012 [2012-08-12]. ISBN 92-9197-140-5. Available at: http://www.bis.org/publ/bcbs223.pdf

9 Basel Committee on Banking Supervision. *Internal audit in banks and the supervisor's relationship with auditors* [online]. p. 4, 2001 [2012-08-12]. Available at: http://www.bis.org/publ/bcbs84.pdf

10 Basel Committee on Banking Supervision. *The internal audit function in banks* [online]. p. 21, 2012 [2012-08-12]. ISBN 92-9197-140-5. Available at: http://www.bis.org/publ/bcbs223.pdf

tions they performed within the last twelve months, the revised 2012 document does not require any time period for rotation of internal audit staff, but on the other hand the rotation procedure is required to be governed and conducted in accordance with written policy. The call for more independence and autonomy of internal audit function in revised document is also apparent from provision regarding remuneration of the internal audit; the remuneration obviously should not be linked to the financial performance of the bank as a whole and on the opposite it should be determined in accordance with the bank´s remuneration policies and practices. To summarize, independence of internal audit function is substantially enhanced in the 2012 document.

Both documents also highlight professional competence and due professional care being essential for the proper functioning of the bank´s internal audit function. Section concerning this requirement enumerates skills that internal auditor must have capacity to collect and understand information, examine and evaluate audit evidence and to communicate with the parties interested in internal audit; this should be combined with suitable methodologies, tools and sufficient knowledge; senior internal auditors should be able to draw impacts and supervise the auditors who have only limited competence and skills. These skills should be monitored by the head of internal audit department. Skills required by the 2012 document are still very general; it is on legislative body of every state to transfer them (if this was not done yet) into a binding legal document that can only directly impose these duties on such auditors and management. The appropriate sanctions, applicable to individual auditors or to the bank as a whole, for non-compliance with such provisions should be developed and included into statutory provisions as well.

The internal audit plan

Both documents also highlight the role of the audit plan which should set down the objectives, tasks and procedure of internal auditing, while the board's approval implies that an appropriate budget will be available to support the internal audit function's activities and simultaneously that the audit plan is flexible according to the risk profile. The audit plan should be annually established by the head of the internal audit function and approved by the board of directors. The 2012 document requires that "the plan should be based on a robust risk assessment (including input from senior management and the board) and should be updated at least annually (or more frequently to enable an ongoing real-time assessment of where significant risks lie)."[11] The audit plan is reviewed and approved by the audit committee and it should be also communicated with senior management. The internal audit plan should cover the procedure of audit-

11 Basel Committee on Banking Supervision. *The internal audit function in banks* [online]. p. 10, 2012 [2012-08-12]. ISBN 92-9197-140-5. Available at: http://www.bis.org/publ/bcbs223.pdf

ing, measures necessary to be taken in certain year period and it would be probably useful to include some "crisis scenario" if necessary.

The internal audit charter

"Each bank should have an internal audit charter that articulates the purpose, standing and authority of the internal audit function within the bank[12]" defines Principle 5 of the 2012 as well as Principle 6 of 2001 document. The internal audit charter should be, according to the revised document, drawn up and reviewed by the head of internal audit and approved by the board of directors; the previous document also required the approval of senior management; board of directors´ approval could have been replaced by audit committee (if existed) – this is not possible any longer. The revised document also provides list of requirements the charter should establish, the only new requirement seems to be the criteria for outsourcing.

In both documents it is included that charter should establish the purpose of internal audit, its position within the bank, the responsibility of the head of internal audit department, the obligation to communicate, or the criteria for providing consulting or advisory services. No fundamental changes between both documents regarding internal audit charter could be found.

Audit Committee

Both 2001 and 2012 document emphasize the role of the audit committee within the internal audit function. The audit committee is composed of board of directors. The 2001 document imposed certain responsibilities upon audit committee, but also allowed the situation that such committee had not existed; the revised document on the other side assumes that "large and internationally active banks have an audit committee or its equivalent and that other banks are strongly encouraged to establish such a committee."[13] The committee should provide the oversight of the bank´s internal auditors; the responsibilities, which have been expanded compared to the 2001 document, are given in the Annex 2[14]of revised document. According to this Annex the audit committee has the responsibility (for example) to monitor the financial reporting, oversee accounting policies and bank´s financial statements, ensure that senior management establishes an

12 Basel Committee on Banking Supervision. *Internal audit in banks and the supervisor's relationship with auditors* [online]. p. 5, 2001 [cit. 2012-08-12]. Available at: http://www.bis.org/publ/bcbs84.pdf

13 Basel Committee on Banking Supervision. *The internal audit function in banks* [online]. p. 2, 2012 [2012-08-12]. ISBN 92-9197-140-5. Available at: http://www.bis.org/publ/bcbs223.pdf

14 Basel Committee on Banking Supervision. *The internal audit function in banks* [online]. p. 21, 2012 [2012-08-12]. ISBN 92-9197-140-5. Available at: http://www.bis.org/publ/bcbs223.pdf

effective control system and if necessary takes corrective actions, to approve the audit plan, audit charter and code of ethics, review the audit reports, approve or recommend the external auditor, or to address control weaknesses.

The role of audit committee is strengthened; its responsibilities have not been as much expanded than better organized and elaborated in detail. On the other side there are no criteria for membership in the audit committee as it was in 2001 document[15], the only criteria is, as written above, that the audit committee is a specialized committee within a board of directors.

The relationship of the supervisory authority with the internal audit function

The relationship between supervisory authority and internal auditors is the one that has been expanded the most. The principles of 2001 defined this relationship pretty briefly and no direct principles or particular requirements derived from this document; the 2001 document provided just some basic requirements on supervisory activities like that supervisory authority should periodically review and evaluate the bank´s capital adequacy, as well as evaluate the work of internal audit department; supervisory authority should also discuss the risk areas and take appropriate measures. The 2001 document also set forth that supervisors should encourage the discussion between internal and external auditors; there should be a periodic meeting of supervisors, internal and external auditors, where the efficiency of their cooperation should be mainly discussed.

As the relationship between supervisory authority and internal auditing has not been described in detail in 2001 document, the revised one provides much more complex definition. It is set forth that there must be an effective communication between supervisors and internal auditors; this communication must be a basis for supervisors´ understanding of the internal audit´s role within the particular bank but such communication cannot undermine the independence of both interested parties – their relationship should be transparent. The main tasks of supervisory activities are included in Principle 16 that provides that supervisors should "discuss the risk areas identified by both parties, understand the risk mitigation measures taken by the bank, and monitor the bank's response

15 The 2001 document stated that „an audit committee should include at least three members of the board of directors who are not current or former members of senior management. Where members of management are permitted on the audit committee by local law or regulation, they should not constitute a majority of the members of the committee. The members should have a background that is compatible with committee duties. At least one member should have a background in financial reporting, accounting or auditing. For efficiency, the following persons may be allowed to attend regularly the meetings of the audit committee: the chie executive officer or a member of senior management, the head of the internal audit department and the external auditor." Basel Committee on Banking Supervision. *Internal audit in banks and the supervisor's relationship with auditors* [online]. p. 16, 2001 [2012-08-12]. Available at: http://www.bis.org/publ/bcbs84.pdf

to weaknesses identified"[16]. The revised document also lays down a crucial principle that the relationship between supervisory authority and internal audit is two-way; this means that not only internal auditor but also supervisors should share relevant information, which gives both parties an equal standing. The 2012 document also specifies particular matters that should be always covered during the process of supervision: "bank's capital and liquidity positions, its processes and methods for determining, monitoring, controlling and reporting on material risks"[17]. The document also specifies the information, data, measures taken, various controlling mechanisms and other particular activities that should be reported to supervisors from internal auditors. Based on evaluation of all relevant information and data, the supervisory authority should assess the quality and functioning of the internal audit function, which influences the overall assessment of the bank´s risk profile. According to the revised document "supervisors should formally report all weaknesses they identify in the internal audit function to the board of directors and require remedial actions."[18] By such reporting and actions taken the supervisory authority can improve the function of the internal audit; supervisors may require changes and particular measures to be included in remediation plan made by board of directors. Although the document mentions the remedy or remediation plan pretty often, no specific remedy is provided. The supervisory authority is given pretty big power and has big influence on internal auditing, but the lack of direct remedial competences weakens such power and this creates barrier in efficiency and effectiveness of the supervisors.

Conclusion:

The revised document seems to provide more elaborated system for internal audit function; it lays down more requirements that should improve the current internal audit´s situation and supervision of bank activities. The revised document requires more independence, provides more competence to internal auditors and strengthens the relationship between internal auditors and the supervisory authority. However, this regulation still seems to be not sufficient.

Under the 2001 document, which is not very different from the revised one, the world suffered one of the biggest crises in its history which has not said the final word yet. It is clear that these principles were not functioning and unfortu-

16 Basel Committee on Banking Supervision. *The internal audit function in banks* [online]. p. 15, 2012 [2012-08-12]. ISBN 92-9197-140-5. Available at: http://www.bis.org/publ/bcbs223.pdf

17 Basel Committee on Banking Supervision. *The internal audit function in banks* [online]. p. 16, 2012 [2012-08-12]. ISBN 92-9197-140-5. Available at: http://www.bis.org/publ/bcbs223.pdf

18 Basel Committee on Banking Supervision. *The internal audit function in banks* [online]. p. 3, 2012 [2012-08-12]. ISBN 92-9197-140-5. Available at: http://www.bis.org/publ/bcbs223.pdf

nately, as the 2012 document brings just "cosmetic changes", it cannot be expected to be effective either. Having regard to the fact that "an internal audit function, independent from management and composed of competent auditors, is a key component of a bank's sound governance framework"[19] stated by Stefan Ingves, chairman of the Basel Committee and governor of Sweden's central bank, this document still seems to be too general as it does not provide any specific details and more importantly the document does not take into account the possibility that the internal audit will not follow the imposed rules. It is necessary to realize, even the principles set forth the opposite, that the internal audit is always bias; the internal audit is always dependent on banks results as every individual auditor is the employee of particular bank – in 2006 the internal auditors of Goldman Sachs must have known about the speculating in the Greek debt market; in 2008 the internal audit consciously did not prevent risk transactions with derivatives within the Lehman brothers.

One of the possibilities to improve the stated situation could be the outsourcing of internal audit as the internal audit could never be fully independent. The internal audit function, if outsourced, could be then more powerful guarantee that the bank´s activities follow desired requirements. And, as the outsourcing of the internal audit would be on a contractual basis, the particular sanctions could derive from the breach of such contract.

The further weakness of the revised principles is that the document does not impose any sanctions if any of the principle is breached and thereby its power is very limited. But the issue lies in the kind of sanction itself; the sanction should not be the nature of any financial punishment; the austerity measures taken in Greece today are the best example of inefficiency of such kind of sanction. And the proof that the solution is not clear and easy one is also the current situation where world's leading economists cannot find the definite answer.

The revised document is probably not the final one. There should be a clearer and more definite document, which imposes direct obligations and sanction if such obligations are breached. The current reaction to the crisis suffered seems to be unfortunately insufficient.

19 Investment Executive. From the Regulators [online]. [2012-09-23]. Available at: http://www.investmentexecutive.com/-/basel-calls-for-stronger-internal-audit-strategies-for-banks

Criminal Justice rationalization and its possibilities when prosecuting organized crime

Bronislava Coufalová[1]

1. Problems Connected with Organized Crime Sanctioning

Organized crime is undoubtedly one of the most serious problems of current society. It is a phenomenon affecting many areas of civic society in different ways and with different intensity, thus infringing the rights of individuals. It also poses a significant threat to law-abiding democratic state and its democratic system. It is a phenomenon, which has been flourishing especially in areas with ineffective legislation and public authority. In this way it should be regarded as one of the biggest safety risks not only abroad, but also in the Czech Republic.

It is criminal law, which plays an indispensable role in the fight against organized crime. Cases of organized crime undoubtedly count to serious crime. In such cases criminal law is the means of the last instance. There is no other branch of law, which could represent a sufficient tool in the fight against this phenomenon. According to the existing law criminal law offers many substantive law as well as procedural legal institutes through which we can sanction the organized crime. However, it is good to know that in such cases the traditional schemes usually fail to achieve their goal and so it is necessary to search for more effective ways.

Considering the fact that organized crime activity is becoming more and more sophisticated and can be characterized by a high degree of secrecy and professionalism of the individuals participating, it is obvious that the whole process leading to detection, conviction and sanctioning of the individual participants must differ from traditional criminal proceedings applied in cases of common crime.

Despite the fact that the Criminal Substantive Law and the Criminal Procedural Law contain a whole range of provisions that can be used in the fight against organized crime, it seems that the phenomenon of organized crime constantly keeps winning its battle with investigative, prosecuting and adjudicating bodies. It is the lack of sufficient amount of relevant evidence, which represents the biggest problem in the process of detecting organized crime. This logically results from the fact that organized crime can be characterized, apart from other things, by its strict rules of unity, obligation to maintain secrecy and strict sanc-

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tions in case of breach of these rules. Thus it is very hard to expect any kind of cooperation with the investigative bodies on the part of the participants as the state is lacking in tools through which it could balance the uneven level of sanctions imposed by the state and those carried out by the organized crime members. Thus the failure of evidence often results in the criminal proceedings being too long. As far as the economic aspect is concerned it is too expensive and last but not least it fails to produce the primary purpose, i.e. conviction and sanctioning of individual perpetrators.

Not only a great number of theorists, but also many practitioners consider it important to amend the legislation regulating the position of those participating in organized crime activity i.e. members of organized crime groups and criminal societies, who are willing to cooperate with the investigative, prosecuting and adjudicating bodies through providing important information in exchange for their impunity or lower punishment.

It is the institute of so-called King's/Queen's evidence, also called cooperating accused.[21] This is no new institute as far as European countries are concerned and it has been in use in many European countries (such as e.g. Poland, Italy, France, etc.). It could be one of the possible tools that could contribute to hastening and facilitating the activity of investigative, prosecuting and adjudicating bodies in connection with organized crime detection and sanctioning.

There have always been many proponents as well as opponents of the legislative enshrinement of the regulation dealing with the institute of "King's/Queen's evidence"[32] The cooperating accused can represent a possible solution to the negative impact of criminal proceeding in cases of organized crime. The fact that, the investigative, prosecuting and adjudicating bodies have a means of evidence in the form of a person who can provide relevant information and at the same time he/she is willing to share this information during the proceedings, this fact will undoubtedly facilitate and speed up the whole process. Such direct evidence in the form of a witness providing relevant information will definitely serve as a crucial element within the whole process of providing evidence and at the same time it can serve as an impulse to gain other relevant evidence. In such case the criminal proceedings are no longer a tiring effort to convict the perpetrator with uncertain outcome and substantial costs.

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2 The Black's Legal Dictionary defines the term King's/Queen's evidence so that "if there are more than just one person accused of a crime, one of them testifying against the others based on the promise that he/she will be acquitted, such a person is considered to be providing testimony which is on the same level as the testimony given by the King/Queen or the state." See Black, H.C. et al.: Black's Legal Dictionary. II volume. 6th edition. Prague: Victoria Publishing, 1993, p. 802. Thus it is obvious that the term "cooperating accused" is more appropriate – term which was finally adopted by the Czech legislator.

3 See e.g. Vantuch, P.: K návrhu právní úpravy institutu „korunního svědka". *Trestněprávní revue* 2003, No. 3, p. 77–82; Musil, J.: Korunní svědek – ano či ne? *Trestní právo* 2003, No. 4, p.. 21–24, No. 5, p. 9–15.

However, it is good to say that the introduction and use of the institute of the "King's/Queen's evidence" (or cooperating accused) poses a significant risk of disturbing and upsetting the basic principles the criminal law is built on. Moreover, there is another drawback connected with the use of this institute. It is the fact that it is very hard to completely prevent the accused from taking advantage of this institute for the purposes of getting even with other perpetrators of organized crime. As it was mentioned above, the investigative, prosecuting and adjudicating bodies often find themselves in the state of lack of evidence in the course of proceedings dealing with felonious crimes. Thus if there is not a sufficient amount of other evidence, the person who wants to gain some privilege resulting from the position of "King's/Queen's evidence" may wish to intentionally withhold his/her share in the crime committed and can also provide false testimony and frame the other members of the criminal society or organized crime group thus achieving their conviction for the purposes of taking revenge or removing a competitor from within the criminal environment. It is good to realize that it is the people with many previous convictions, with bad characteristic features and without conscience and sense of responsibility who are likely to become the cooperating accused. In such cases it would be logical that their testimony would not be trustworthy and therefore it would have to be supported by other means of evidence. [43] However, even these individuals may be motivated by the effort to provide true testimony, not only trying to rely on their position and calculating in cold blood as they know that their false testimony can rid them of the privilege offered by the position of cooperating accused. An important factor motivating the cooperating accused to provide true testimony could also be the threat of sanctions imposed in cases of false testimony, which is a crime itself.

1.2. The History of the Legal Regulation of the so-called Principal Witness (cooperating accused)

The intention to amend the institute of the so-called principal witness was first met with a favourable response in the proposal initiated by the Ministry of the Interior prepared in cooperation with the Ministry of Justice as soon as 2002.[54] This proposal was supposed to have introduced the institute of temporary discontinuance of criminal proceeding, discontinuance of criminal prosecution, provision, regulating proceeding against cooperating accused and temporary postponement of criminal prosecution in connection with the perpetrator who has decided to cooperate with the investigative, prosecuting and adjudicating bodies. However, the proposed amendment was not adopted as it was showing a number of deficiencies.

4 Breucker, M., Engberding, R.: *Die Kronzeugenregelung*. Stuttgart: Richard Booberg Verlag, 1999,p. 97.

5 This material was submitted for consultation under OBP – 1697/CZ – 2002.

In 2004 a group of deputies submitted a proposal in the Chamber of Deputies amending the criminal code and criminal laws based on the Polish legal regulation including the law on principal witness, which has been the part of the legal regulation since 1997. [65] However, this proposal was rejected by the Chamber of Deputies after the President refused to sign it.

Thus the institute of cooperating witness was enshrined in the Czech criminal law only in connection with the re-codification of the Substantive criminal law including the amendment No. 41/2009 Coll. regulating the conditions under which the prosecutor can mark an accused as a cooperating accused. This was enabled through the provision § 178a of the criminal code which was included in the amendment. Subsequently it was possible to take into account this fact when imposing sentences through the adoption of the new criminal code (No. 40/2009 Coll.).[76]

1.3 The Concept of Cooperating Accused in the Current Legal Regulation

Under the provision § 178a of the criminal code the accused is not granted immunity from prosecution i.e. they can be prosecuted, however, it is possible to lower the sentence or acquit the accused in case all the legal conditions have been met. The following conditions have to be satisfied if the accused is to be marked as a cooperating accused.

- it has to be a proceeding dealing with a very serious crime
- the accused shall report facts to the prosecutor contributing significantly to clarification of the specific crime committed by the members of an organized group, members linked to an organized group or those who have acted in favour of such an organized group, or the accused shall report facts which can help to prevent the crime to be completed
- the accused shall be taken under oath to give a complete and true testimony about aforementioned facts both in the pre-trial hearing as well as before the court
- the accused shall confess to the crime for which he is prosecuted with no reasonable doubts about his free will, intention and certainty to confess
- the accused shall declare his agreement with the fact that he/she has been marked as a cooperating accused
- the prosecutor considers such a marking as necessary with respect to the nature of the crime committed which the accused has decided to clarify, also taking into account the crime to which the accused has confessed,

6 Ustawa o świadku koronnym z dnia 25 czerwca 1997 r. Více k problematice institutu korunního svědka v Polsku viz Pływaczewski, E. W. (red.): *Przestępczość zorganizowana. Świadek koronny. Terroryzm*. (W ujęciu praktycznym). Kraków: Zakamycze, 2005, 772 s.

7 In the period between 2004 and 2010 three draft bills were submitted (moreover the factual intent of the criminal code was also submitted) which sought the introduction of the institute of the principal witness in the Czech criminal law system. However, none of them were adopted.

the person of the accused as well as the circumstances of the case, especially the facts whether and to what degree the accused took his share in committing the crime he is now bound to clarify as well as what are the consequences of his actions.

Before the accused is marked as a cooperating accused by the prosecutor, the prosecutor has to interrogate the accused not only for the purposes of getting the facts about the case, but also for the purposes of getting the contents and facts of the confession of the accused as well as for the purposes of making the accused realize the consequences of his/her confession. The accused must also be told about his rights and duties concerning his being marked as a cooperating accused, and the consequences brought about in case of breaking the oath (§ 178a clause 3 of criminal code as amended).

If all of these requirements have been met, the fact that the accused has been marked as a cooperating accused will be reflected in the sentencing in such a way that the court will take this fact into account when imposing the sentence and type and terms of punishment, assessing the contribution of the cooperating accused to the whole criminal proceeding (§ 39 clause 1 of the criminal code), the court will also take into account the mitigating circumstances under the § 41 letter m) of the criminal code and last but not least the court may lower the prison term under the lower limit of the severity of the prison term without being bound by any kind of restrictions (§ 58 clause 4 of the criminal code).

The criminal code amendment adopted through the Act No. 193/2012 Coll. heavily influenced the legal regulation of cooperating accused enacting the possibility not to impose any punishment upon the cooperating accused. Under the § 46 clause 2 of the criminal code coming into effect September 1, 2012 the courts can refrain from any kind of punishment if special requirements have been met.

Thus according to the new legal regulation the prosecutor can argue that the cooperating accused should be acquitted if the prosecutor considers this important with respect to all the circumstances, especially with respect to the nature of the crime mentioned in the confession of the accused in comparison with the crime the accused is bound to clarify, with respect to the measure in which the cooperating accused can clarify the crime committed by the members of the organized criminal society, in connection with the organized group or in favor of the organized criminal society, with respect to the significance of the testimony for the criminal proceeding when talking about evidence collected, with respect to the person accused and to the circumstances of the specific case, specially the fact whether and to what degree the accused took part in committing the crime he is now bound to clarify and with respect to what consequences his conduct had (§ 178a clause 2 of the criminal code as amended), unless the cooperating accused has committed a crime which is more serious than the one he helped to clarify, unless he participated in the organizing or soliciting to the crime he

is now bound to clarify, unless he has inflicted a serious bodily harm or death intentionally and unless there are good reasons for exceptional increase in the prison term (59 of the criminal code).

The change in the procedural regulation must be followed by a change in the substantive regulation through the enactment of a new provision § 46 clause 2 of the criminal code. Under this provision the court shall refrain from sentencing the perpetrator who has been marked as cooperating accused provided all the conditions contained in the § 178a clause 1. and 2. of the criminal code have been satisfied and if the cooperating accused has given a true and complete testimony about the facts which can contribute significantly to clarifying of the crime committed by the members of the organized group, in connection with the organized group or in favour of the organized group both in the pre-trial hearing and the hearing before the court. However, it is not possible to refrain from punishing the perpetrator marked as a cooperating accused if the crime committed by the cooperating accused is more serious than the one he/she has helped to clarify, if he participated in organizing or soliciting to the crime he has helped to clarify if he intentionally inflicted a serious bodily harm or death through this criminal act or if there are good reasons for exceptional increase in the prison term (§ 59). Relatively significant changes as far as rights and duties of the courts can also be seen in the provision § 58 clause 4 of the criminal code. [87]

However the provision § 178a of the criminal code is connected with a set of interesting problems of great importance:

1) First it is important to ask a question whether the accused who is eligible to be awarded the status of cooperating accused could have necessarily participated in committing an exceptionally serious crime which is the subject of the criminal proceeding. The first clause of the § 178a " …in the proceeding dealing with an exceptionally serious crime…" can be interpreted in such a way that the accused must have participated in commiting of the specific crime. It is obvious that those who have participated in the commission of the crime can usually provide the investigative, prosecuting and adjudicating bodies with the most reliable

8 The court will lower the punishment of imprisonment under the lower limit of the prison term for the accused who has been marked as a cooperating accused provided that the conditions set out under the § 178a clause 1 of the criminal code have been satisfied and on condition that the accused has provided in the pre-trial hearing and the hearing before the court a true and complete testimony about the facts which can significantly help to clarify the crime in the pre-trial hearing and the hearing before the court, i.e. the crime committed by the members of an organized group, in connection with the organized group or in favor of an organized criminal society; the court will take into account the nature of the crime committed mentioned in the confession in comparison with the crime committed by the members of the organized group, in connection with the organized group and in favour of the criminal society, i.e. the crime he has clarified. It will also take into account the significance of such activity of the accused, the perpetrator and the circumstances of the case, especially if he has participated and to what extent he has participated in the crime he has sworn to clarify and subsequently what was the result of such actions.

information. However, it does not always have to be the case. Even a person who has not participated in commission of the crime in any way can provide crucial information which can come from different sources.

According to the recently adopted provision of the clause 2 it is not necessarily the person who has participated in commission of the exceptionally serious crime who can be marked as a cooperating accused. The provision goes as follows "unless the cooperating accused has committed a crime which is more serious that the one he has helped to clarify…". Thus it is obvious that the legislator take into account the possibility that the cooperating accused can also be a person who has not participated in the commission of a exceptionally serious crime.

2) The status of cooperating accused is confined to the proceeding before the court, as results from the wording of the law "… the prosecutor can mark the accused as a cooperating accused in the formal accusation…" Based on this provision the accused does not have any guarantee that they will be granted this status at least for the proceeding before the court, even though they have provided all the relevant and crucial information during the pre-trial hearing. The accused could not be granted this status without providing the important evidence at the pre-trial hearing. The period between the provision of the relevant information by the accused up to the submission of the indictment can take a long time and the legal uncertainty of the accused whether or not they will be marked as a cooperating accused in the formal accusation can heavily influence their willingness to cooperate.

There is another question, which is closely connected with this issue, i.e. whether the court is allowed to judge the accused as a cooperating accused even when the prosecutor did not mark him/her as a cooperating accused in the formal accusation. If the court has arrived at the conclusion (after the trial) that the accused has cooperated with the investigative, prosecuting and adjudicating bodies both in the pre-trial hearing as well as during the proceeding before the court as defined in the provision § 178a of the criminal code it would be convenient for the accused to have the status granted even during the trial. However, this is not possible under the current legal regulation.

However, it is the court which bears the procedural responsibility for finding the facts of the case during the pre-trial hearing without any reasonable doubts. Thus if the court assumes after hearing the evidence that the accused has significantly contributed to clarifying the important facts of the case, then it should be allowed to somehow "reward" the accused. Bearing in mind the fact that this privilege is vested exclusively in the hands of the prosecutor during the pre-trial hearing, it would be possible to condition this step by the consent given by the prosecutor who has filed the complaint. Thus the accused willing to cooperate would have a stronger guarantee and his position would be strengthened. Thus, it is advisable to propose this regulation

3) Another complication connected with the application can be found when using the § 46 clause 2 of the criminal law regulating the absolute discharge. Can the court refrain from punishing the cooperating accused even if the prosecutor has not suggested this in the formal accusation? Based on the wording of the first clause § 46 clause 2 of the criminal code it is not possible as the court shall refrain from punishment only in case other conditions have been satisfied namely in the § 178a clause 1 and 2 of the criminal code including among other things the condition that the prosecutor suggests the absolute discharge in the formal accusation ((§ 178a clause 2 of the criminal code).

According to the intended law it would be convenient if the court could decide about the absolute discharge even in cases when the prosecutor has not suggested this in the formal accusation with the other conditions having been met, as under the rule of the constitutional regulation expressed in the article 40 clause 1 of the Charter of Fundamental Rights and Freedoms it is "only the court which shall decide about the guilt and the punishment". Thus the regulation under which the decision of an impartial and unbiased court is predetermined by the prosecutor's proposal made in the formal accusation cannot be considered as complying with the constitution.

4) The fact that the legislator completely neglected a whole range of procedural issues connected with this institute when adopting the provision § 178a of the criminal code and its subsequent amendment can be considered as a serious deficiency. The first deficiency to be criticised has been mentioned in point number 3), i.e. the impossibility of the accused to defend himself against the steps of the prosecutor if he/she has not marked the accused as a cooperating accused in the formal accusation, even though the accused has provided important information in his testimony in the pre-trial hearing. The Criminal Procedure Code does not even set the form of such a decision. This deficiency seems to be a crucial one, especially at the moment when the same information has been provided to the prosecutor by two accused, one of them being granted the status of cooperating accused the other not.

Thus it is obvious that even the current legal regulation probably cannot be motivating enough to make the accused cooperate with the investigative, prosecuting and adjudicating bodies as a result of the absence of at least minimal guarantee of rights of the accused. This assertion cannot even be disproved by the fact that the legislator significantly widened the advantages of the person who has been marked as a cooperating accused. These advantages came into force through the last amendment regulating the possibilities of imposing punishment or refraining from punishment respectively.

In cases of common crime the possibility for the accused who has been charged with a serious crime for the absolute discharge is very small. However if it is a person who cooperates with the investigative, prosecuting and adjudicat-

ing bodies dealing with organized crime then the situation is different. In such cases it should be taken into account whether it is in the public interest to destroy such organized crime groups rather than punish individual criminals although the crime they have committed was a serious one. Thus if we come to the conclusion that the sanctioning of the organized crime should, from this viewpoint, be the primary role of the state, then there is another question, i.e. whether or not there should be other advantages secured for the cooperated accused, namely e.g. the possibility to meritoriously discontinue the proceeding during the stage of pre-trial hearing.

Conditions, which, if fully satisfied, would lead to discontinuance of criminal prosecution should be clearly and not too vaguely defined, so that this institute could be used only exceptionally with those perpetrators who fully deserve this advantage of impunity from the state. On the other hand the principle ultima ratio, i.e. the requirement to apply this institute only in cases when the purpose of the criminal proceeding cannot be achieved in different way, should also be included in the legal regulation of principal witness.

1.4 The Concept of the Cooperating Accused in the Slovak Legal Regulation

The Slovak criminal legislation saw a considerable progress in the area of procedural handling of the accused who to certain extent participated in the clarifying of corruption or certain type of criminal activity connected with organized groups as early as in 2003. Based on the amendment of the then effective criminal code from 1961, carried out through the law No. 457/2003 Coll. it was possible from December 1, 2003 to temporarily postpone charging a person who significantly participated in clarifying of a crime of corruption, a crime of founding, plotting and supporting of a criminal or terrorist group or an exceptionally serious intentional crime committed by an organized group, criminal society or a terrorist group or who participated in detecting the perpetrator of such a crime (compare § 162a of the criminal code No. 141/1961 Coll. as amended, effective up to December 31, 2005).

Subsequently the prosecutor was allowed to discontinue the prosecution of this person or to discontinue the prosecution of the accused who has significantly participated in the clarifying of this crime or who participated in detecting or conviction of the perpetrator (compare § 172 clause 3 of the criminal code No. 141/1961 Coll. as amended, effcetive up to December 31, 2005). The provision regulating the discontinuance of the prosecution, under which the investigator could now with the previous consent of the prosecutor discontinue the prosecution if the accused significantly participated in clarifying of a crime of corruption, a crime of founding, plotting and supporting of a criminal or terrorist group or an exceptionally serious intentional crime committed by an organized group, criminal society or a terrorist group or if the acussed participated in detecting or conviction of the perpetrator of such a crime was also supplemented. However,

neither of these procedural decisions could be applied if the accused person was also the person who organized the crime or acted as a person soliciting to the crime he/she helped to clarify.

When re-codifying the criminal law in 2005 the Slovak legislator decided to introduce the institute of cooperating accused which was, however, introduced in a form slightly different from the Czech Republic. In comparison with the Czech legal regulation the marking of the accused as a cooperating accused in the Slovak legal regulation affects especially the process of the criminal proceedings against the accused and not only the possibility of sentencing and imposing the imprisonment punishment and its length[98]. In particular it is the provision § 218 of the criminal code (Act No. 301/2005 Coll, as amended), which allows the prosecutor to decide upon the conditional discontinuance of criminal prosecution of the cooperating accused provided the following conditions have been satisfied:

- The accused has significantly participated in clarifying of a crime of corruption, a crime of founding, plotting and supporting of a criminal or terrorist group or an exceptionally serious intentional crime committed by an organized group, criminal society or a terrorist group or if the acussed participated in detecting or conviction of the perpetrator of such a crime
- The clarifying of such a crime is in the public interest and outweighs the interest in criminal prosecution of the accused
- It is not possible to conditionally discontinue the criminal proceeding against the accused who has organized the crime, participated in the solicitation to the crime or against the accused who has ordered the crime even though he has helped to clarify the crime

In case of a judicial decision where the court decided to conditionally discontinue the criminal prosecution, the cooperating accused is provided a probationary period which is in comparison with the "ordinary" conditional discontinuance of the criminal prosecution under the § 216 of the criminal code twice as long, i.e. ranging from two to ten years. Within the specifically provided probationary period the accused is only obliged to further participate in the clarifying of the specific crimes.

Based on such legally determined conditions regulating the possibility to award the status of cooperating accused it is possible to say that the Slovak legislator was rather benevolent and not very consistent when adopting this institute as this conception must necessarily result in a discussion over a whole number of controversial issues.

9 However, compare § 39 clause 2 letter e) of the Slovak criminal code (Act No. 300/2005 as amended)

First it is important to raise the issue of the gravity of the crime committed by the person who has been awarded the status of the cooperating accused.[109] The Slovak legal regulation does not set any limits, i.e. the status can be awarded to a person who has committed a common crime but it can also be someone who has committed the most serious crime. The only limitation can be seen in the fact that it cannot be a person who has organized the crime, person who has participated in the solicitation to the crime or the person who ordered the crime which is being clarified. Bearing in mind that the § 218 of the criminal code is followed only in cases when the prosecutor comes to the conclusion that it is in the public interest to clarify the specific crime and that this interest outweighs the importance of the criminal prosecution of the accused it is important to consider the situations when the accused has committed a crime which resulted in an intentional killing of one or more individuals, but at the same time he would significantly participate in the clarifying of a crime of bribery and corruption.

Thus it is important to consider whether the public interest in the clarifying of such a crime will outweigh the interest of the society in the criminal prosecution of the accused, or whether the public interest in the clarifying of a crime of bribery can outweigh the interest in the punishment of a perpetrator who has intentionally caused death?

The outlined example can be considered an extreme situation, however, I assume that it can be used to illustrate the deficiencies of the legal regulation of the cooperating accused when talking about the gravity of the crime the accused has committed. Moreover, this argument is strengthening if we realize that it is the prosecutor who will decide whether the conditions for the conditional discontinuance of criminal prosecution have been satisfied. In this context it is important to raise the issue of the credibility of the accused – witness who, by the way, helps to clarify the act which is defined by the law as a crime, but at the same time this accused faces a strict sanction for his actions.

In the same way it is important to think about the meaningfulness of the regulation of the probationary period. As it was mentioned above the cooperated accused is provided with the probationary period ranging from two to ten years as a result of the decision upon the conditional discontinuance of criminal prosecution. It is a wide scope and it could especially be the upper limit which could make the accused feel uneasy and doubtful, however, the legislator probably took into account the complexity and lengthiness of the whole criminal proceeding in

10 There was a lot of disagreement over these issues in the Slovak legal environment after the adoption of this legal regulation – compare Žilinka. M.: Spolupracujúca osoba a procesné postupy podľa Trestného poriadku. *Justičná revue* 2007, č. 5, s. 622–627; Čentéš, J. a kol.: *Trestný poriadok s komentárom*. Žilina: Eurokódex, 2006, s. 366; Sťahulová, S.: Podmienečné zastavenie trestného stíhania spolupracujúceho obvineného. In: Hamuľák, J., Martvoň, A. (ed.): *Míľniky práva v stredoeurópskom priestore*. Zbornik z medzinárodnej konferencie doktorandov a mladých vedeckých pracovníkov. Bratislava: Univerzita Komenského, 2009, s. 996–1001.

such cases. Seen in this light the length of the probationary period itself should not raise any doubts.

However, the situation is different when talking about the conditions the accused is obliged to satisfy during the probationary period. The only condition set by the legislator is the one under which the accused must participate in the clarifying of the crime. Thus the accused who is in the probationary period is not even under the most elementary duty, i.e. to lead an orderly life or make up for the harm they have caused. Thus his position and status of the cooperating accused will not be shaken even if they will keep on committing further crime during the probationary period, etc.

Taking into account the fact that the accused is under no obligation to compensate the harmed person or even enter into an agreement with the harmed person over the compensation than the provision saying that the harmed can file a complaint with suspended effect (§ 218 clause 3 of the criminal code) against the decision upon the conditional discontinuance of the criminal proceeding of the cooperating accused loses its sense. On what grounds would it be possible to respond positively to such a complaint?

If the cooperating accused meets the conditions during the probationary period, the prosecutor will decide that this accused has satisfied the conditions. Thus the prosecutor can make such a decision after the whole of probationary period and not during this period. It is this part of the regulation which also seems to be problematic. When setting the particular length of the probationary period it is necessary to take into account the specific case that is being dealt with and the probable length of such a case. However, it can happen that the criminal proceeding of the case in which the cooperating accused participated has been finally concluded upon the judgment, but the accused is still in his probationary period and thus it is not possible to decide according to the designed law whether the accused has proved to be useful.

Last but not least it is important to deal with the issue of the procedural role of the prosecutor and his possibility to decide. In cases when the accused participates in clarifying of the crime there are three possible ways how the prosecutor can decide under the criminal code. In such a case it is possible to decide on the discontinuance of the criminal prosecution (§ 228 clause 3 of the criminal code)[1110] or to optionally discontinue the criminal prosecution (§ 215 clause 3 of the criminal code), or to decide on the conditional discontinuance of the criminal prosecution of the cooperating accused (§ 218 and subsequently the criminal code). The conditions for all three types of decisions are the same except for one small deviation mentioned in § 215 clause 3 of the criminal code and thus it is

11 In this case it is also the police authority which can decide on the discontinuance with the previous consent of the prosecutor. Thus if we take into account the nature of such decision it is not required that the public interest in clarifying of such crime should be compared with the interest in the criminal prosecution of the accused.

possible to choose any of them provided all the conditions required by the law have been satisfied. However, the results of these decisions are different.

Thus it is important to ask a question what are the criteria according to which the prosecutor is going to decide? In the professional circles question was asked whether this deficiency of the legal regulation can offer opportunities for corruption. [1211]

There should not be any problem with the application of the provision § 228 clause 3 of the criminal code regulating the discontinuance of the criminal prosecution as this can precede the decision on the conditional discontinuance or the discontinuance of the criminal prosecution. However, some problems can appear in cases when conditions for the conditional discontinuance of the criminal prosecution as well as the conditions for the discontinuance of criminal prosecution have been met. According to Klátik such an ambiguity of the legal regulation can make the impression that the criminal prosecution will be discontinued in such cases when the cooperation of the accused with the investigative bodies has been very active. However if this was not the case and the activity of the accused was showing not sufficient signs of efficiency then it would be wrong to completely discontinue the criminal prosecution as it would be more appropriate to provide the accused with the chance to reconsider his actions during the probationary period so that this accused may be marked as the one who has proved to be useful by the court. [13,12]

It is obvious that according to the law designed it is necessary to set out clear conditions under which it will be possible to decide on the discontinuance of the criminal prosecution and those conditions under which it is possible to decide on the conditional discontinuance of the criminal prosecution.

After the re-codification of the legal regulation the professional literature contained presumptions that the accused must have participated in the criminal activity which he later helped to clarify to the investigative bodies and to the court itself. [1413] However, this idea was subsequently abandoned and the current theory does not condition the granting of the status of the cooperated accused by a necessary share or participation in the specific crime committed.[1514] Although

12 Žilinka. M.: Spolupracujúca osoba a procesné postupy podľa Trestného poriadku. *Justičná revue* 2007, No. 5, p. 622–627; Čentéš, J. a kol.: *Trestný poriadok s komentárom*. Žilina: Eurokódex, 2006, p. 366; Sťahulová, S.: Podmienečné zastavenie trestného stíhania spolupracujúceho obvineného. In: Hamuľák, J., Martvoň, A. (ed.): *Miľniky práva v stredoeurópskom priestore*. Zbornik z medzinárodnej konferencie doktorandov a mladých vedeckých pracovníkov. Bratislava: Univerzita Komenského, 2009, p. 996–1001.

13 Klátik, J.: *Zrýchlenie a zhospodárnenie trestného konania*. Banská Bystrica: Univerzita Mateja Bela, 2010, p. 187–188.

14 Čentéš J. a kol. : *Trestný poriadok s komentárom*. Žilina: Eurokódex, 2006, p. 366.

15 Sťahulová, S.: Podmienečné zastavenie trestného stíhania spolupracujúceho obvineného. In: Hamuľák, J., Martvoň, A. (ed.): *Miľniky práva v stredoeurópskom priestore*. Zbornik z medzinárodnej konferencie doktorandov a mladých vedeckých pracovníkov. Bratislava:

it is highly probable that the person has participated in the criminal activity being investigated, however, it does not necessarily have to be the case. Thus the cooperating accused could have committed any crime except for the crime of organizing, solicitation or ordering of the crime investigated.

In conclusion it can be said that the institute of the cooperating accused has not been much used in the Slovak legal environment. According to annual reports of the General Prosecutor's Office of the Slovak Republic the institute of the conditional discontinuance of the criminal prosecution of the cooperating accused was only used once in 2007 and 2009, in 2006 and 2008 was not used at all. [1615]

Based on what was said above it is possible to come to the conclusion that the institute of the cooperating accused as it is set out in the Czech and Slovak legal order shows significant differences, especially as far as the benevolence provided to the accused by the state is concerned. The range of benefits provided by the Czech criminal law system to the accused for his cooperation covers solely the area of sanctions, the maximum benefit being the regulation of the provision § 46 clause 2 of the criminal law regulating the absolute discharge which came into force September 1, 2012. This step seems to be rather benevolent especially if we take into account the fact that the accused might have committed a serious crime. On the other hand it is also important to take into account the possible negative impact of the criminal proceedings against the accused who has been cooperating with the investigative and prosecuting bodies when testifying against the perpetrators of the organized crime especially with respect to the fact that the criminal proceeding must have reached the stage of a proceeding before trial if the accused is to be granted the absolute discharge.

By contrast the Slovak legislator designed the position of the cooperating accused and the resulting benefits procedurally rightly as the prosecutor is allowed to terminate the criminal prosecution through the meritorious decision in the pre-trial stage of the criminal proceeding. Although this legal regulation is also showing a number of deficiencies which should be removed further ahead it is still according to existing law more motivating for the accused than it is under the Czech legal regulation especially with respect to the possible settling of the case.

Univerzita Komenského, 2009, p. 996–1001.

16 available on http://www.genpro.gov.sk/spravy-o-cinnosti/43431 – access 15. 8. 2012

A Child at risk – the Czech Republic experience

Zdeňka Králíčková[1]

INTRODUCTION

The annual statistics show that a *very high number of children* are *born out of wedlock* in the Czech Republic.[2] In some cases it is planned, in others it is a failure in life. It is well-known fact that there has been an increase of cases where the child's father is not legally determined before the birth. There are *a very high number of fatherless children* especially with mothers who have only the basic education, who are on the edge of social exclusion and on the edge of poverty. [3]

Unfortunately, social reasons sometimes lead single mothers to abandoning their children and leaving them in the *so-called baby-boxes* immediately after birth (for detail see part 1.3.), or to signing an *application for hidden birth* in hospital under the law (see part 1.2.). The public as well as the experts wonder why women in an advanced country, which the Czech Republic is when compared with other parts of the world, *give up* their children in relatively high numbers in the early 21st century.

The *New Civil Code,* which was adopted in the Czech Republic after many peripeties this year (cf. the Act No 89/2012 Coll. effective since 1 January 2014, hereinafter NCC), introduces the *term of surrogate motherhood* into the Czech legal order (Section 804, NCC). The rights of child are left aside and the fact of *uncertain position of child* from the very beginning is not taken seriously.

In addition to the low marriage rate the *number of divorces* paradoxically *increases* in the Czech Republic.[4] The statistics reveal that petitioners are mostly women and *minors are not an obstacle to a radical termination of the matrimonial bond.*[5] Moreover, divorce is not taken as a stigma but as a *dignified solution of*

1 Associate Professor, Faculty of Law, Masaryk University, Brno, Czech Republic.

2 Cf. http://www.czso.cz/eng/redakce.nsf/i/percentage_of_extra_marital_births_1950_2010 (15th May 2012).

3 Cf. a number of works by *Senta Radvanová* dealing with the problem of single-parent families and the phenomenon of *"feminization of poverty"*; *Radvanová, S.:* Žena a právo [THE WOMAN AND THE LAW]. Praha: Orbis, 1971; Stav české rodiny a rodinného práva v současné době [THE CURRENT STATE OF THE CZECH FAMILY AND FAMILY LAW]. Právní praxe, 1999, No 2 – 3; Vyživovací povinnost s otazníky [THE MAINTENANCE DUTY WITH QUESTION MARKS]. Právo a zákonnost, 1990, No 8.

4 Cf. http://www.czso.cz/eng/redakce.nsf/i/marriages_and_divorces_1950_2010 (15th May 2012).

5 It is also a well-known fact that minors are mostly put into the exclusive care of mothers after divorce. Even if this "*traditional model*" is not supported by the gender-neutral provi-

a difficult life situation. We may fully agree with the opinion that a *minor cannot be protected against the divorce of his/her parents*.[6] Nevertheless, the Act No 94/1963 Coll. on Family (hereinafter AF) includes the so-called *"hardship clause"* consisting in prohibition of divorce if it were in conflict with the interests of a minor due to special reasons (Section 24, Para 2, AF). The New Civil Code sets this forth in a similar manner (see Section 755, Para 2, Sub-Para b, NCC). An interpretation and mainly an application of this provision are rather difficult. If one of the spouses seeks the divorce and the court finds a *qualified breakdown* of the relationship between the spouses it is a question whether the court dismissal of the divorce is of a benefit to anyone regarding the interests of the child. This conception may make the situation of the spouse endangered by domestic violence more difficult when his/her priority is safety, separation from the attacker and – a speedy divorce. It is well-known that victims of domestic violence are primarily women and that minors are often witnesses of a pathological behavior. Unfortunately, the phenomenon of domestic violence is not mentioned at all in connection with the legal regulation of divorce, neither in the existing law nor in the New Civil Code. Therefore the situation of minors is very difficult due to the silence of the lawgiver.

We hold the view that *many cases of pathology* – intended motherhood without a father, abandoning children or making their legal position uncertain from the very beginning, instability of co-existence of couples with minors, domestic violence – *do not contribute to the desired pro-family conduct* and we think that they *make the position of children* (and their mothers as well as fathers) *both actually and legally worse in the Czech Republic.*

The following text aims at finding an answer to the question whether abandoning a child or applying for hidden identity makes the way of the child to a substitute family by adoption easier. Further, an attention is paid to surrogate motherhood in connection with the child's rights, including the right of the child to know his/her origin. The final part is focused on protection of the child endangered by domestic violence.

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sion of Section 26, AF, the statistics say that this is the most frequent post-divorce arrangement. The courts frequently approve agreements of parents in this *"traditional spirit"* but they often approach the *"traditional arrangement"* authoritatively, e.g. when they acknowledge the so-called factual state, or the alternative care is not feasible e.g. because of a longer distance from the new residence of the parents, or – which is much more serious – because the alternative care is refused by the mother. In connection with the regulation care the maintenance duty towards the minors is also obligatory regulated and on a case-by-case basis the *"traditional contact"* with the so-called non-caring parent. The courts seldom prohibit contact or regulate the so-called assisted contact or the contact on a neutral ground even if there are reasons for that, e.g. domestic violence.

6 Towards this, see *Hrušáková, M. a kol.:* Zákon o rodině. Zákon o registrovaném partnerství. Komentář [THE ACT ON FAMILY. THE REGISTERED PARTNERSHIP ACT. A COMMENTARY]. 4rd ed. Praha: C. H. Beck, 2009, pp. 71 – 72.

1. HIDDEN BIRTHS, SO-CALLED BABY-BOXES AND REAL CHANCES OF THE CHILD TO BE ADOPTED

1.1. First, it is necessary to consider the status conception of motherhood in the Czech Republic. The ancient Roman law principle of *mater semper certa est* respecting the fact of birth has been *traditionally* considered as the basis for creating the *status relationship of mother – child.* This principle was expressly introduced into the Czech legal order only in 1998 by the so-called Great Amendment to Act on Family (see Art. 50a, AF).[7] However, the principle was respected even when the phenomenon of assisted reproduction appeared and created a disharmony between the biological (genetic) reality, the social situation and the legal status.[8] Due to a long time passivity of the lawgiver there was an obstacle to the development of the so-called surrogate motherhood on a commercial basis. Nevertheless, the rights of the mother need not be, and frequently are not, identical with the rights of the child.

1.2. As for the principal negative elements of the Czech legal order concerning motherhood it is necessary to point out the Act pursuant to which *the single mother older than 18 years with a permanent residence in the Czech Republic has a right to hide her identity in connection with birth* (see Act No 422/2004 Coll.). The Act was adopted at the initiative of members of Parliament in 2004 without going through the standard legislative process. This Act did not change the Act on Family which expressly established the principle of *mater semper certa est. The mother is a woman who gave birth to the child* (see Art. 50a, AF). The 2004 Act amended without any conception the Act on People's Health, the Act on Records of Births, Name and Surname, and the Act on Public Health Insurance. We should add that the mother is allowed to ask for hiding her identity after giving birth to the child.[9]

The experts came to the conclusion that *the child,* whose mother wants her personal data not to be revealed at the birth, *has a mother,* however, he/she does not know her identity; the child may then demand that *"an envelope with his/her mother's personal data"* should be opened, for example, in the proceedings on determining the parenthood.[10] We may only criticize the meaning of haphazard

7 Cf. also *Haderka, J.:* Otázka mateřství a otcovství od účinnosti zákona č. 91/1998 Sb. [THE QUESTION OF MOTHERHOOD AND PARENTHOOD SINCE THE ACT NO 91/1998 COMING INTO EFFECT]. Právní praxe, 1998, No. 9, p. 530 ff.

8 Cf. Sections 27d–27h, Act No 20/1966, Coll. on Care of People's Health as amended by Act No 227/2006 Coll. on Human Embryo and Stem Cell Research and Related Activities and a Change of Some Related Acts. Towards this in detail, see *Frinta, O.:* Asistovaná reprodukce – nová právní úprava [ASSISTED REPRODUCTION – A NEW LEGAL REGULATION]. Právní fórum, 2007, No. 4, p. 123 ff.

9 We may add that this conception was also taken over by the new Act No 372/2011 Coll. on Health Services which even explicitly mentions *preserving the mother's anonymity* in Section 37.

10 Towards this, see *Hrušáková, M., Králíčková, Z.:* Anonymní a utajené mateřství v České

and non-conceptual bills creating a completely unsatisfactory state undermining pro-family conduct and disrupting the legal consciousness.

If the adoption of a child from the hidden birth is at issue then the situation is more than precarious. We have to start with the fact that a child from the hidden birth has a mother. Due to the international conventions[11] in 1998 the so-called Great Amendment to the Act on Family was adopted. It is crucial that the natural family of a child enjoys an increased protection and adoption and other forms of an alternative family care are really understood as subsidiary to the care in the natural family. The new legal regulation, after the amendments and pursuant to the New Civil Code, *specifies the consent of parents with adoption and the issue of parents' non-interest with the child*. As for particularities, we appreciate that *mothers may only consent with the adoption of their newborn children after the expiry of the puerperium* (cf. Section 68a, AF, Section 821, NCC) and *the so-called non-interest is examined by the court in the proceedings on adoptability* (cf. Section 68 AF, Section 813 NCC). Therefore we may say that the law protects the mother against impetuous or immature actions while also protecting her underage child or his/her right to life in their natural family. We emphasize that the existing legal regulation as well as the New Civil Code also guarantee full protection for underage parents, especially for underage mothers (cf. Section 67, Para 2 AF, Section 811 NCC). *Therefore it is expressly set down that the consent of a parent, or parents, is the basic requirement for adopting a child.*

We should note that *parents cannot lawfully give up their child*. If parents consent with the adoption it is a question whether the registered interested persons will want to adopt their child. The legal bond of the natural parents lasts until other people lawfully become the parents. What is relevant is the legal force of the judgment on adoption. We may add that the Czech legal regulation recognizes only *full adoption* when the child is fully integrated in the adopting family.

Let us return to the *issue of the consent of parents with the adoption of their child*. The law distinguishes *two types*, namely:

(a) direct consent which is given by a parent in the court proceedings on adoption after the expiry of the obligatory preliminary care of the future adoptive parents lasting at least for 3 months (Section 67, AF); the consent with the adoption is also given by an underage parent (cf. Section 67, Para 2, AF);

(b) the so-called blank consent given by a parent generally after the expiry of at least 6 weeks since the birth of the child (cf. Section 68a, AF); then the

republice – utopie nebo realita? [ANONYMOUS AND HIDDEN MOTHERHOOD IN THE CZECH REPUBLIC – UTOPIA OR REALITY?]. Právní rozhledy, 2005, No. 2, p. 53 ff.

11 Cf. the European Convention on the Adoption of Children (see Communication No 132/2000 Coll.) and the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (cf. the Communication No 43/2000 Coll.).

administrative proceedings on procuring the adoption (matching) by the state may start.

In practice, it often happens that mothers abandon their children after birth, they are not interested in the child anymore and they do not come to give their consent with the adoption. Therefore the law defines *the institute of an non-interest* with child. Again, *two types may* be distinguished, namely:

(a) the so-called *absolute non-interest* lasting for two months after the birth; it is up to the mother to argue and prove in the proceedings on adoptability that she was barred in expressing her non-interest by a serious obstacle (cf. Section 68, Para 1, Sub-Para b, AF);

(b) the so-called *qualified non-interest* lasting for at least six months anytime during the life of the child; it is up to the mother, or the parents, to argue and prove that they have consistently expressed their interest in the child, especially by visiting the child regularly, by fulfilling their maintenance duty and by showing an effort to regulate their family and social conditions so that they could personally take care of the child in future (cf. Section 68, Para 1, Sub-Para a, AF).

Due to the changes introduced by the Great Amendment to Act on Family (1998) the Civil Procedure Code were amended, too. The so-called *proceedings on adoptability of the child* were introduced in which *the parents' non-interest with the child is examined* (cf. Section 180a-180b, Act No 99/1963 Coll., Civil Procedure Code, hereinafter CPC). The participants in the proceedings on adoptability are the parents and the child. If the court founds their non-interest, the child does not become legally free but *adoptable.* He/she may be put on the list of children eligible for adoption and an administrative body may start proceedings on procuring the adoption (matching). If suitable adopting parents are found for the child the interested couple may ask for having the child in the obligatory preliminary care for at least three months. If the care is successful, the interested couple may file a motion with the court for the adoption of the child (cf. Section 181 and the following ones, CPC). Only the interested couple and the child will be participants in the *proceedings on adoption of the child.* It is important that the child's parents will not be participants in the proceedings on adoption any more as the court had already decided about their non-interest in the proceedings on adoptability of the child.

It is true that the way of the child from the hidden birth to a new family is not a direct or simple one. Nevertheless, if the court decides about adoptability of the child due to the mother's unconcern or her preliminary (blanket) consent (Section 68a, AF), the parents cannot intervene in the proceedings on adoption any more, or extort the adopting parents or otherwise impede their new role.

1.3. As already mentioned in the introduction, since 2005 there has been an increase of the number of *private so-called baby-boxes*, i.e. the places for putting away unwanted children at the premises of maternity hospitals financed by the

Statim foundation. The statistics say that there are already 50 of them and they have *"saved"* 74 children since 2005.[12] It is a question whether the so-called baby-boxes give the abandon children more chances for adoption. The children from the so called baby-boxes are *"without past"*.

It is crucial that a children from the so-called baby-box *have a similar status as a found child* even if the former is not legally regulated at all, being it only *a private initiative of the Statim foundation. The child from the baby-box has neither mother nor father*. Of course, the police have to search for the child's parents as the child has the right – at least theoretically – to know his/her origin. The search is usually fruitless. Nevertheless, in some cases mothers changed their minds about abandoning their child and sought to have the child in their care and to be registered in the book of births.

As for adoption, we may say that the child from the so-called baby-box is *"legally free"* and therefore *"ideal for adoption"*. However, his/her adoption is often *only a theoretical possibility.* The persons interested in adoption choose such children only rarely as there is no information about them or their family medical histories. Also, the health state of these children is often problematic as their mothers concealed their pregnancy giving birth in hiding and in unsuitable conditions, i.e. by self-help etc.

However, some experts and the general public have been tolerating the abandoning of unwanted babies in the so-called baby-boxes referring to the idealistic concepts aiming at preventing murders of newborns.[13] We may only add that in such cases the child cannot be denied the right to *bring a status action for determining motherhood* if he/she knows who his/her mother is.

2. SURROGATE MOTHERHOOD: PANDORA'S BOX

We should first note that the Czech scholarly literature used to condemn experiments of the type of surrogated motherhood referring to common sense and the natural course of things.[14] During the preparation of the New Civil Code the necessity of regulating surrogate motherhood was not originally discussed at all. The aim of the drafters of the New Civil Code was to follow the traditional

12 For detail se www.statim.cz (15th May 2012).

13 See *Zuklínová, M.:* Několik poznámek k právním otázkám okolo tzv. baby-schránek [A FEW NOTES ON LEGAL ASPECTS OF THE SO-CALLED BABY-BOXES]. Právní rozhledy, 2005, No. 7, p. 250 ff.

14 See *Haderka, J.:* Surogační mateřství [SURROGATE MOTHERHOOD]. Právny obzor, 1986, No 10; Právní ochrana statusu dítěte narozeného z lékařsky navozeného oplodňování: co je a co není právně přípustné v České republice [LEGAL PROTECTION OF THE STATUS OF THE CHILD BORN DUE TO MEDICALLY INDUCED INSEMINATION: WHAT IS AND WHAT IS NOT LAWFUL IN THE CZECH REPUBLIC]. Správní právo, 1998, No 4; Některé právní problémy reprodukční medicíny [SOME LEGAL PROBLEMS OF REPRODUCTIVE MEDICINE]. Zdravotnictví a právo, 2000, No 2.

principle of the origin of the child from the mother who gave him/her birth and to expressly state that *an action of the genetic mother against the mother who gave birth to the child cannot be successful*.[15] Nevertheless, this sentence was not included in the New Civil Code. Instead, there is a short statement saying that *the mother of the child is the woman who gave him/her birth* (Section 775, NCC). Let us note that it is identical with the existing regulation. It is a pity that the ministerial team turned away from the original aim of the main drafters of the New Civil Code and many co-operators and did not deal with this issue in more detail as it was done in Slovakia.[16]

It is alarming that the New Civil Code uses the term *surrogate motherhood*, even if in one provision only (cf. Section 804 *in fine* NCC). It should be noted that the term surrogate motherhood got into the government draft in spite of an express disagreement of many experts as well as the main drafters. The law says quite briefly, that *adoption is excluded among relatives in the direct line and siblings and that this does not apply in the case of surrogate motherhood* (cf. Section 804 *in fine* NCC). A provision concerning the so-called surrogate contract has not been included in the New Civil Code nor in any other regulation. As for the medical side of the question, it should have been dealt with in a new Act on Special Health Services. This did not happen, though.

The practice shows that if there is an informal agreement about surrogate motherhood among the relatives, the conception usually takes place in the natural manner. This may sometimes disrupt a fragile family situation. We emphasize that *both health acts* (the original Act No 20/1966 Coll. as well as the new Act No 373/2011 Coll. on Special Health Services) *make it possible to carry out assisted reproduction only with an infertile couple*. An artificial insemination of a surrogate mother in a medical institution has thus been out of law and must not be covered by the state health insurance system.

How can intentional parents get an ordered child? If we exclude an exchange of the identity cards of the surrogate mother and the intentional mother, *adoption is the only option.* As mentioned above, the New Civil Code does not specifically regulate this issue. The mother of the child is then the woman who – even if at an order – gave birth to him/her (cf. Section 50a, AF, Section 775 NCC). *After giving birth she may consent with the adoption of her child.* We emphasize that due to international conventions and the so-called Great Amendment to the Act on Family (1998) the consent is only valid after the expiry of puerperium. It will be a *direct adoption* without the necessity of procuring by the state (matching). If the mother who gave birth to the child fails to keep her promise to consent with

15 See *Eliáš, K., Zuklínová, M.:* Principy a východiska nového kodexu soukromého práva [THE PRINCIPLES AND FOUNDATIONS OF THE NEW CODE OF CIVIL LAW]. Praha: Linde, 2001, p. 167.

16 Cf. Section 83, Act No 36/2005 Z. z. Towards this, see *Pavelková, B.:* Zákon o rodine. Komentár [THE FAMILY ACT. A COMMENTARY.]. Praha: C. H. Beck, 2001, p. 504 and ff.

the adoption and hand the child over to the intended parents the adoption does not take place. If the ordering couple changes their minds refusing to adopt the child their decision must be fully respected.

We hold the view that *uncertainty for the surrogate mother as well as the intended mother from the ordering couple constitutes uncertainty for the child from the very beginning*. There is a trivialization of the fact that a woman – the surrogate mother – is instrumentalized, that her womb is factually leased for considerable financial amounts and that the human embryo is being degraded to a mere subject-matter of a contract.

3. RIGHTS OF MOTHER VS. RIGHTS OF CHILD VS. RIGHTS OF FATHER

As for paternity, the current theory and practice do not often deal with the question whether insisting on the strict law based on traditions *protects fatherhood, regardless of being it legal, social or biological*. Even less frequently we ask the question whether by insisting on the old conception *rights and legally protected interests of the child are not infringed*, especially *the natural right of the child to know his/her origin*. The Czech legal regulation of fatherhood does not basically differ *from the conception of earlier European regulations* that establish legal assumptions of paternity and that were created at the time when the legitimacy of a child born in wedlock was highly valued and when methods of assisted reproduction as well as paternity tests were at their beginnings. The rights of children were taboo as well as human rights in general.[17]

We should note that the so-called Great Amendment to the Act on Family (1998) has strengthened the rights of putative fathers. Following the case law of the *European Court of Human Rights* concerning Article 8, *Convention for the Protection of Human Rights and Fundamental Freedoms*, in the case of *Keegan vs. Ireland,*[18] the above mentioned Great Amendment to the Act on Family (1998) introduced provisions aiming at *strengthening the status of the man who thought himself to be the child's father even against the will of the mother* who had given consent to the adoption of the child in the given case. A new provision was added to by the active legitimacy of the putative father to bring an action for determining paternity.[19] The law then sets forth that a child must not be adopted until

17 Generally, cf. *Králíčková, Z.:* Lidskoprávní dimenze českého rodinného práva [THE HUMAN RIGHTS DIMENSION OF THE CZECH FAMILY LAW]. Brno: Masarykova univerzita, 2009.

18 See the judgment from 25 May 1994, 16/1994/411/ Series A, No 209. A legal wording could be as follows: *"An adoption of the child born out of wedlock and against the will of his/her father breaks Article 8, Convention for the Protection of Human Rights and Fundamental Freedoms."* See *Haderka, J.:* Případ Keegan versus Irsko [THE CASE OF KEEGAN VS. IRELAND]. Právní rozhledy, 1995, No. 8, p. 311 ff.

19 Cf. *Hrušáková, M. (coll.):* Zákon o rodině … [ACT ON FAMILY …]. Op.cit., pp. 260 ff.

the proceedings on determining paternity initiated by the putative father has not been finished (Section 70a, AF).

The New Civil Code brings *a number of novelties*. Namely, the lengthening of the denying paternity periods in the first assumption benefiting the husband of the mother from the mere six months to six years (cf. Section 785, NCC) and the establishing of the option for the court to excuse someone's missing of these periods (cf. Section 792, NCC) thanks to the finding of the Constitutional Court.[20] Nevertheless, *the conception of assumptions of paternity was not redefined in favor of certainty based on a DNA analysis*. The construction of the third assumption of paternity is based on such a state of knowledge when it was not possible to determine positively the father of the child.[21] It is still based on an intercourse in the so-called critical period (cf. Section 783, AF).

Unfortunately, the denying right of the child disappeared from the New Civil Code even if the explanatory note expressly mentions its establishing in connection with the intended subject-matter and principles and the bases of the new code of private law.[22] By preserving the legal situation based on assumptions, the lawgiver does not give the child a chance to realize his/her interests in finding out his/her origin and bringing his/her biological reality in line with the legal state. We may imagine a situation when the interests of the mother, the father and the child are mutually in conflict and it is necessary to look for a solution. The European Court for Human Rights held in the *case Paulík vs. Slovakia* that "*when denying paternity the lack of a procedure for bringing the legal position into line with the biological reality flew in the face of the wishes of those concerned in the given case and did not in fact benefit anyone*."[23] We hold the view that the fact that

20 Cf. the finding of the Constitutional Court from the 8th July 2010, Pl ÚS 15/09, published under No 244/2010 Coll.

21 Towards this cf. *Frinta, O.:* Určování rodičovství (nejen) v návrhu nového OZ [PATERNITY DETERMINATION IN (NOT ONLY) THE DRAFT OF THE NEW CIVIL CODE]. In *Šínová, R. (ed.):* Olomoucké právnické dny 2008. Olomouc: Univerzita Palackého, 2008, pp. 217 – 223, where the author states: *"There is a question then whether <the third assumption> should not be understood in another way, and if so, in which one", but I leave considerations according to the designed law aside". In another work of his the author more or less agrees with preserving the existing state of affairs except for the regulation of periods for the so-called critical period, see Frinta, O., Tégl, P.: O návrhu nového občanského zákoníku a jeho kritice (a taky o kontinuitě a diskontinuitě) [TOWARDS THE DRAFT OF THE NEW CIVIL CODE AND A CRITIQUE OF IT (AND ALSO TOWARDS CONTINUITY AND DISCONTINUITY)]. Právní rozhledy, 2009, No 14, p. 498.*

22 Cf. *Eliáš, K., Zuklínová, M.:* Principy a východiska nového kodexu soukromého práva [THE PRINCIPLES AND FOUNDATIONS OF THE NEW CIVIL CODE]. Op. cit., p. 168, where the authors state that the new legal regulation will be added to by *"the right of a major child to deny paternity (resulting from the right a person to know his/her biological origin)."*

23 Cf. the judgment from 10th October 2006, complaint No. 10699/05 in the issue of the right to have private and family life respected, the prohibition of discrimination and the right to peacefully enjoy property. Towards this cf. the reaction of the Slovak lawgiver in the issue

the child cannot directly seek denial of paternity impedes him/her to establish a legal relationship with the man who conceived him/her and who would fulfill his role of social father if he had knowledge of his paternity. The assumptions or the lapse periods for their denial protect primarily mothers who usually know best who the father of their child is. The interests of the child may be in conflict with the interests of the mother.[24] It cannot be said that by protecting mothers the law protects their children at the same time.[25]

4. CHILD V. DOMESTIC VIOLENCE

As already mentioned, *an underage child cannot be protected against the divorce of his/her parents*. Both the experts and the public ask the question *how to protect a child against domestic violence* which often appears in connection with the breakdown of the marriage.

It should be noted that by the *police banishment for 10 days* (Section 44, Act No 273/2008 Coll. on Police of the Czech Republic) or the *court banishment for 1 month* (see Section 76b, CPC) of a violent person from the household the problems caused by domestic violence cannot be *complexly solved*.[26]

Due to the new provision of Section 25, AF, established by the so-called Great Amendment to the Act on Family (1998), a marriage cannot be divorced until a judgment on the post-divorce care of the minors (exclusive, joint or alternative), the maintenance and the contact rights is made.[27] The court deciding about the post-divorce care of the minors has usually no other choice than to regulate the situation of the child authoritatively if an agreement of the parents cannot be approved. The court divorcing the marriage more or less takes into account

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of a new trial due to the Strasbourg case law (see Section 228, Para 1, Sub-Para d), Slovak Civil Procedure Code].

24 Towards this cf. the statement of the Ombudsman as a collision custodian of the child included in the Finding mentioned under note No 19 above, where he does not recommend abolishing the period at issue referring to – among others – the right of the mother to have her honor, privacy and good reputation protected (sic!).

25 We fully agree with the finding of the Constitutional Court in the case mentioned above that "*In the opinion of the bench of the Constitutional Court, the unconstitutionality of Section 57, Para 1, Family Act, consists primarily in the imbalance of the basic rights and interests of the child's father, whose paternity was determined on the basis of the first assumption of paternity, those of the child and those of his/her mother. The unconstitutionality of the above mentioned provision may also be supported by the conflict with the child's own interests*." See also *Králíčková, Z.*: Ochrana slabší strany v rodinném právu [PROTECTION OF THE WEAKER PARTY IN FAMILY LAW]. Právník, 2011, No. 4, pp. 362 ff.

26 For details see *Králíčková, Z., Žatecká, E., Dávid, R., Kornel, M.:* Právo proti domácímu násilí [LAW AGAINST DOMESTIC VIOLENCE]. Praha: C. H. Beck, 2011.

27 We emphasize that parental responsibility lies with both parents always according to the existing law (cf. Section 31 and further, AF).

the decision on the post-divorce regulation of the relation of the parents to the minors.[28]

If a family is endangered by domestic violence the necessity to regulate the relationship to the minors before the divorce itself may make the situation of the endangered persons much worse. Of course, it often depends more on the legal reasons of housing and other property aspects of the marital co-existence than on the termination of the marital status by the court.

The New Civil Code follows the so-called Great Amendment to the Act on Family (1998) and the intended subject-matter is still based on the so-called qualified breakdown of marriage with the condition that if the married couple has children, the judgment on divorce must be preceded by the decision on the relation to the minors for the post-divorce period (cf. Section 755, Para 3, NCC).

We appreciate the fact that the new legal regulation considers the phenomenon of *domestic violence* establishing *the option of the court to restrict or exclude the right* of the violent partner or the ex-partner *to live in the house or the flat* regardless of the legal reason for his dwelling there (cf. Sections 751–753, NCC, *A special provision against domestic violence*, cf. also Section 762, Para 2, NCC, in connection with the maintenance of the ex-spouse; in context of inheritance law cf. also Section 1482, NCC, and also Section 3021, NCC, included in the transitory and final regulations). However, it is a period of *maximum six months* even if *with the option of repeated prolongation* (cf. Section 752, NCC). It is surprising that the lawgiver chose a shorter period than that of the so-called *court banishment which may be ordered for up to one year* (cf. Section 76b, CPC). This procedural institute appears then more favorable. It should be noted that both institutes may be freely combined.

Unfortunately, the New Civil Code does not say anything about minors endangered by domestic violence not even in connection with divorce or post-divorce arrangements of relations to minors, or in connection with the regulation of the exercise of parental responsibility after divorce or during *de facto* separation of the parents. The experts hold the view that the situation of minors endangered by domestic violence must not remain without regulation regardless of the factual separation of the parents of the child due to the spouse's fleeing from the family dwelling because of the violent spouse, or due to banishing, restricting or prohibiting to use the family dwelling, or due to divorce. The situa-

28 We should note that the so-called Great Amendment to the Family Act (1998) established an option of divorce pursuant to Section 24a, AF, without ascertaining the so-called qualified breakdown of marriage or its reasons. However, not every couple is able to reach an agreement on the divorce, on the post-divorce arrangement of relationships to the minors, on the division of the community property and on the arrangement of the use of the family dwelling. Not always the reasons are only subjective. Sometimes the option of the so-called agreed divorce is made impossible by objective facts, such as continuing domestic violence in the broadest sense of the word.

tion is more than difficult and it cannot be said that if a legal regulation protects the parent endangered by domestic violence it also protects the child even if he/she frequently witnessed physical or psychical attacks.[29]

There is a *problem* primarily that the court is not expressly given a duty *ex offo* to regulate the situation of a minor especially if one of the parents is *banished* from the family dwelling (by police or court) or if his/her right to live in the family dwelling is temporarily restricted or abolished. As the issue is not regulated we may only state that:

- the banished parent, or the parent prohibited from meeting and contacting the other parent of the child, is only factually restricted in the exercise of parental responsibility, especially in the personal care of the child, but he/she remains a legal representative of the child with the right to decide about substantive issues concerning the child, and if not decided by the court otherwise, *with the right to contact personally (or in other ways) the child*; it is necessary for the banished parent to contact a respective intervention center and an authority in charge of social-legal protection of children and to ask for mediating personal or another contact with the child;
- therefore *it is necessary to distinguish* whether the parent has been banished because of a minor regardless of the minor being a direct or indirect victim (witness) or for other reasons;
- *if domestic violence is connected with the child* it is necessary *to consider* whether a parent should be *deprived of parental responsibility* (Section 44, Para 3, AF) or *restricted in or prohibited from personal or another contact with the child* (Section 27, Para 3, AF).

As for the New Civil Code, we appreciate the fact that it makes possible to regulate *contact on the so-called neutral ground, or to set conditions or the circle of persons who are or are not allowed to be present* (cf. Section 888, NCC).[30] We appreciate the fact that in harmony with the trends[31] the New Civil Code estab-

29 The author is updating her ideas published earlier, see e.g. *Králíčková, Z.:* Dítě ohrožené CAN a domácím násilím [THE CHILD ENDANGERED BY CAN AND DOMESTIC VIOLENCE]. Právní rozhledy, No 11, pp. 381 – 389.

30 The Section 888, NCC, sets forth: *The child who is in care of only one parent has the right to contact with the other parent to the extent which is in the interests of the child, and similarly, the other has the right to contact with the child unless the court restricts or prohibits such a contact; the court may also set conditions of contact, especially the place where it should take place as well as the persons that are allowed or are not allowed to be present. The parent who has the child in his/her care is obliged to prepare the child properly for the contact with the other parent, to enable properly the child's contact with the other parent and to cooperate with the other parent to the necessary extent during his/her exercise of the right to personal contact with the child.*

31 See e.g. *United Nations. Department of Economic and Social Affairs. Division for the Advancement of Women:* Handbook for Legislation on Violence against Women. New York: United Nations, 2010; *Jackson, N. A. (ed.):* Encyclopedia of Domestic Violence. Lon-

lishes an explicit duty for the court to deal with the right to contact with the child of the parent whom it restricts in parental responsibility (cf. Section 872, NCC). If the parent is deprived of parental responsibility he/she does not have *ex lege* right to contact with the child unless the court decided not to deprive the parent of contact rights because of the interests of the child (cf. Section 872, NCC).

CONCLUSION

It has been hinted above that a minor often gets endangered due to an objective unfavorable situation but also due to a pathological conduct of his/her parents.

As for the legalizing of hidden births or the introducing of surrogate motherhood into the legal order of the Czech Republic we may state that both institutes give mothers rights regardless of their children's rights and legally protected interests. Fathers' rights are often omitted completely. The fact that the situation of minors endangered by domestic violence is not explicitly regulated, especially in connection with divorce or (forced) separation of their parents, brings about a number of problems in practice. This benefits no one – especially the endangered minors.

don: Routledge, 2007.

Unification of law in the field of family law – roads and dead-end-roads

Prof. Dr. Martin Löhnig[1]

I. Unification of the substantive family law

In the European legal policy an all-embracing unification in the field of family law is oftentimes considered as desirable. On a comparative law basis a "Commission on European Familiy Law" (CEFL)", composed of numerous professors from all over Europe, is compiling the so called "Principles of European Family Law" (Principles) since 2001. In the fields "Divorce and Maintenance Between Former Spouses"[2] and "Parental Responsibilities"[3] these Principles exist already, whereas the work on "Property Relations Between Spouses"[4] is still in progress.

More recently however the single Europeans nations and regions legal tradition is stressed as a value of its own. This paradigm shift is observable for example in comparative law that does not any longer mainly look for common ground but instead emphasizes what the individual legal systems distinguishes from each other. Plurality – and not equality or unification – is now considered as an value of its own.

Others claim, that, in particular in the field of family law, elements of an European legal culture do indeed exist and could be used as basis for an unification of law. One line of argument points to the canon law fundament of the European matrimonial law. However, at the best such a fundament would back the western part of Europe with the intellectual centre Rom, but that is, of course, not identical with entire Europe. Moreover, from this tradition only the principle of consent and the spouse's duty to mutual assistance have survived. The rest was washed away by numerous changes like the creation of far reaching possibilities to get divorced or the creation of same-sex marriages – not even to mention the alterations that took place concerning the purpose of marriage or the question by whom the marriage ceremony has to be performed.

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2 Katharina Boele-Woelki, Walter Pintens, Frédérique Ferrand, Cristina González-Beilfuss, Maarit Jänterä-Jareborg, Nigel Lowe, Dieter Martiny (ed.), Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses, Intersentia: Antwerp-Oxford, 2004.

3 Katharina Boele-Woelki, Frédérique Ferrand, Cristina González-Beilfuss, Maarit Jänterä-Jareborg, Nigel Lowe, Dieter Martiny, Walter Pintens, Principles of European Family Law regarding Parental Responsibilities, Intersentia: Antwerp-Oxford, 2007.

4 http://ceflonline.net/principles.

In favour of the existence of a European legal culture another line of argument[5] points to the achievements during the last decades: Equal rights for men and women, reduction of discrimination against homosexual relationships that nowadays, too, have the possibility of entering into a relationship that is legally acknowledged, growing acceptance of extramartial cohabitation, reduction of discrimination of children born out of wedlock or the perception of children as legal persons rather than as mere objects of their parental custody. On the basis of the Convention for the Protection of Human Rights and Fundamental Freedoms these standards could be transposed in the legal system of the Member States by the European Court of Human Rights. In fact this is already taking place, however on a very different range, depending on the respective national legal system.

Moreover, working with these alleged basic principles of European legal culture would require in particular a very abstract perspective that not only ignores the various exceptions but also the fact that these principles may be understood differently in the various European regions. Also, in many parts the aforementioned Principles appear as a intersection of terms detached from the legal reality, that are connoted unequally in the various legal systems and that are constructed differently, depending on the respective legal system in its total and the particular legal culture. In some cases they are not even this, but elevate things to Principles that influential CECL members consider as being "modern". The contemporary way of comparison of law highlights this findings prominently because it avoids to declare legal instruments from different legal systems prematurely as identical without taking the differences into account that derive from the normative overall context or the way the law is applied. Especially in the field of family law these differences are rather large.

Under the umbrella of an alleged „European legal culture" two cultural areas exist that are completely different and separated for now 1000 years. With the Turkey a country would join this circle that belongs to a third large cultural area. Thinking about a European unification in the field of family law would, therefore, makes it necessary to consider at least three different levels of legal cultures: An alleged European Legal Culture, the different legal-cultural areas in Europe (the West, the East, the Islamic Culture), national legal cultures and, as not all European states have a unified family law, even regional legal cultures: For instance the Spanish regional laws (fueros) differ sometimes quite strongly. However, this does not constitute an existential problem for Spain – a finding that is endorsed by the example of the USA with its 50 matrimonial laws that are partly based on completely different principles.

5 Walter Pintens, Europeanisation of Family Law, in : Katharina Boele-Woelki (ed.), Perspectives for the Unification and Harmonization of Family Law in Europe, Intersentia: Antwerp-Oxford 2003, p. 6.

Such a focus on regional and national legal cultures may be criticized as backward-looking and structural conservatism; it may also easily slip to anti-European resentments. But on the other side, this focus is maybe due to the respect we own the cultural plurality in Europe and the human desire to cultivate it. However, heterogeneousness of legal systems has no end in itself. Therefore, there are no objections against a gradual integration of legal culture in the field of family law. In this field of law many European legal systems adopted already ideas from the neighbor states and, by this, lost their peculiarities. However, it makes a big difference if legal unity is growing step by step or if it is decreed pan-European respectively orientated blindly on alleged pan-European "Principles".

The crucial questions therefore are: Which advantages would such a decreed unification of law offer? And: Would it outbalance or at least counterbalance the loss of culture that would come along with it in comparison with a gradual multipolar integration? The advocates of a decreed unification of law point to the benefit of legal certainty for bi- and multinational families in a Europe characterized by a considerable mobility of its population. However, the special position of bi- and multinational families does not justify a radical unification of family law in whole Europe. In average in the EC only 5 % of the inhabitants of a Member State are not a citizen of this state. Arguing with such exceptions is always dishonest or, at least, bears evidence of the inability to desist from the own belonging to a mobile European elite. In addition, legal certainty for bi- or multinational families can be achieved by other means.

The abstract guarantee of maximal mobility throughout Europe is not a value on its own by whose realization any kind of thoughtfulness may be put aside. In truth the call for unification of the substantive family law in Europe is often motivated by two factors: Firstly, the attempt to use the European level as a detour to implement "progressive" law that would not be capable of winning a majority in the single states. This blind "progressive thinking" is nothing less than a form of cultural imperialism.[6] Secondly the effort to postulate the primacy of a globally structured economic order by claiming that the differences in Europe do not derive from cultural disparities but from the social conditions that have to be equalized. This argument is not convincing. First of all Europe would be reduced to a mere economic area. Secondly, the differences in the social conditions are, of course, part of a nation's or region's culture. They are even part of the legal culture as they are interdependent with the law in force.

However, the warning of a cultural loss by unification of law voiced by a family law scientist from Germany that also works on history of law may sound particularly strange, as one may claim that especially in Germany multiple unifications of family law have taken place in the last 120 years. For instance one can point to the German Empire of 1871 and the coming into effect of the German Civil Code (BGB) on January 1st, 1900: The confessional divided German

6 Pierre Legrand, Sens et non sens d'un code civil européen, R.I.D.C. 1996, 811.

Reich, in whose catholic south still canon matrimonial law that does not know the possibility of divorce was in force, and the protestant north, in particularly Prussia, adopted a unified family law based on the Prussian-protestant model. The constitution of the German Empire did not transfer such a competence to the Federal Government. But a few years after the formation of the Reich this competence was created by an amendment of the constitution. The already in 1875 adopted "Law on Civil Status"[7] established the compulsory civil marriage throughout the German Reich. This was considered as a welcomed opportunity to finally get rid of the remnants of churchly influence in family law, a position that on the Bavarian level would never have been acceptable to a majority. As it turned out, this was also the first step to a "cultural abolishment concept" that was decided on in some kind of national flush but that by and large and in the medium term proved its worth. However, this unification of law procedure took place in a cultural area that was clued together by the togetherness in the Holy Roman Empire over the centuries, the same language and a very strong national spirit.

„The European citizen will seek European solutions"[8] – true, but maybe one should wait until European citizen indeed exist. And this won't happen if the European Commission tries to design the very same Europe that it considers as the "area of freedom" in a centralist manner without showing respect for the European cultural pluralism.

II. Legal harmonization

Hence, an assimilation of the substantive family law on EC level is not recommendable because the advantages that would go along with that for a minority would not outweigh the arising disadvantages for the majority. And other convincing reasons to act so do not exist. Even a transfer of competences to the EC – which would be necessary as luckily in the opinion of the majority of scholars and judges not even with the freedom of movement any kind of legislative power of the EC can be justified – is fortunately not acceptable to the majority.

The question arising is therefore, by which other means legal certainty for bi- and multinational families can be achieved? The answer: Harmonization of law. When talking about harmonization one has to separate three different issues: (1) The international jurisdiction of courts has to be unified. (2) The criteria to decide which legal system is applicable in cases with a foreign element have to be standardized, too. So not the substantive family law but the conflicts of law provisions have to be unified. (3) Last but not least it must be guaranteed that

7 Reichsgesetz über die Beurkundung des Personenstands und die Eheschließung vom 6. Februar 1875, RGBl. 1875 I, p. 23.

8 Esin Örücü, A Familiy Law for Europe: necessary, feasible, desirable?, in : Katharina Boele-Woelki (ed.), Perspectives for the Unification and Harmonization of Family Law in Europe (2003), p. 571.

court decisions of a member state are recognized in all other member states as easily as possible and that they can be judicially enforced.

These measures don't have to be restricted on the EC, that has the instrument of regulations to work with, but can also be fructified for non EC member states by the means of international treaties.

1. International jurisdiction of courts

a) The international jurisdiction of courts was unified by the Brussels-I-Regulation.[9] As a basic rule persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State, Art. 2–4 Brussels-I-Regulation. Art. 5–7 Brussels-I-Regulation deal with special jurisdictions. They are orientated on the substantive or procedural familiarity with the subject.

b) As far as matrimonial law and the law of parents and child are concerned, the Brussels-I-Regulation is supplemented by the Brussels-IIa-Regulation[10] that governs the divorce itself and the ancillary matters explicitly mentioned in the Regulation, in particular parental custody. The originally for the Rom-III-Regulation[11] intended rules of jurisdiction and provision concerning agreements regulating the court jurisdiction did not come into force. The preparatory works for the intended Rom-V-Regulation that shall deal with matrimonial property regimes do also not affect these court jurisdictions.

The Brussels-IIa-Regulation is based on the principle of residence; this rejection of the former principle of nationality works as a model for other areas of legal harmonization. Art. 3 Brussels-IIa-Regulation stipulates that in matters relating to divorce jurisdiction shall lie with the courts of the Member State in whose territory

- the spouses are habitually resident, or
- the spouses were last habitually resident, insofar as one of them still resides there, or
- the respondent is habitually resident in the event of a joint application, either of the spouses is habitually resident, or
- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there.

It is noticeable that this jurisdiction is of exclusive nature if a spouse is sued that has his habitually residence in the territory of a Member State, Art. 6 Brus-

9 Regulation No 44/2001.
10 Regulation No 2201/2003.
11 Regulation No 1259/2010.

sels-IIa-Regulation. For decisions dealing with matters of parental responsibility over a child who is habitually resident in a member state the jurisdiction lies with the courts of that member state, Art. 8 Brussels-IIa-Regulation. The following articles stipulate special jurisdictions for cases involving child abduction or change of residence.

c) Moreover the EC Regulation No 4/2009 contains provisions for the international jurisdiction in maintenance obligations that, too, are based on the principle of residence. The jurisdiction shall lie with:

- the court for the place where the defendant is habitually resident, or
- the court for the place where the creditor is habitually resident, or
- the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties, or
- the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.

2. Conflict of law provisions

A unification of the conflict of law provisions would make certain that every European court has to decide a specific family law matter by applying the same substantive law. However, one has to be aware of the fact that this solution will provide less legal certainty compared with a unification of the substantive family law, because harmonizing the conflict of law provisions only does not guarantee that every court applies foreign law correctly. Beyond the question of legal certainty the unification of the conflict of law provision is the consistent advancement of the legal harmonization as she diminishes incentives for a "forum shopping" arising from the wide catalogue of jurisdictions particularly in divorce cases by the Brussels-IIa-Regulation.

The EC already enacted a couple of regulations harmonizing the Member States conflict of law regulations, namely in the areas of maintenance obligations and divorce. Others areas shall follow. However, even on this level legal harmonization has to face some serious problems.

a) Maintenance obligations are deal with by EC Regulation No 4/2009 from June 18, 2011 (sometimes called Rom-VI-Regulation) that came into force on December 18, 2008. It applies to maintenance obligations arising from a family relationship, parentage, marriage or affinity, Art. 1. Because the question if such a family relationship is established continues to be covered by the national law of the Member States (recital 21), it is possible that the scope of application with regard to same-sex marriages or registered affinities will develop differently.

Art. 15 of Regulation No 4/2009 refers to the Hague Protocol of November 23, 2007 on the law applicable to maintenance obligations (hereinafter referred to as the 2007 Hague Protocol). Only the EC ratified the 2007 Hague Protocol so far. Nonetheless the EC declared in the instrument of ratification that the conflict of law provisions concerning maintenance obligations shall be governed by the Hague Protocol from June 18, 2011 on, although under international law the Protocol is not yet in force. Exceptions exist for Denmark and GB. The Hague Protocol is applicable not only in relationship to other member states, but applies universally.

Art. 3 of the 2007 Hague Protocol stipulates as general rule that maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor. In the case of a change in the habitual residence of the creditor, the law applicable changes, too. Therefore, the conflict of law provisions, too, are based on the residence principle. Art. 4 of the 2007 Hague Protocol amends this rule for mutual maintenance obligations between parents and children: If the creditor is unable, by virtue of the law referred to in Article 3, to obtain maintenance from the debtor, the law of the forum shall apply, Art. 4 para. 2. If even by this the creditor is unable to obtain maintenance from the debtor, the law of the State of their common nationality, if there is one, shall apply, Art. 4 para. 4. Art. 5 of the 2007 Hague Protocol stipulates a special rule with respect to spouses and ex-spouses: In the case of a maintenance obligation between spouses or ex-spouses, Article 3 shall not apply if one of the parties objects and the law of another State, in particular the State of their last common habitual residence, has a closer connection with the marriage. In such a case the law of that other State shall apply.

b) The Rom-III-Regulation stipulates which substantive divorce law is applicable. The preliminary question if in the field of divorce law unified conflict of law provisions are really necessary for the functioning of the single European market and, connected with that, if the EC actually had the legislative competence, is answered in the affirmative implicitly by the Rom-III-Regulation. However, looking on the US and its domestic market that functions despite 50 different marriage laws the suspicion arises that the EC acted ultra vires.

The Rom-III-Regulation came into force on December 20, 2010 and shall apply from June 21, 2012 on, Art. 21. The regulation stipulates the law applicable involving a conflict of laws to divorce and legal separation, Art. 1 para. 1. The Rom-III-Regulation applies universally. Therefore the law declared applicable in the regulation applies even if it is not the law of a Member State, e.g. Norwegian law.

However, only 15 Members States (Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Rumania and Slovenia) take part at the so called "closer cooperation" within the

EC, of which the Rom-III-Regulation is a part. Therefore its scope of application is limited to these Member States. Even in the field of divorce law it is still a long way to go for unified European conflict of law provisions. From a legal policy point of view, German scholars argue that it is doubtful if the sensitive international divorce law is the appropriate field to test the instrument of "closer cooperation", even more as the Regulation with her far reaching choice of law possibilities, the change from the principle of nationality, which was so far the standard under German Law (Art. 17 para. 1 s. 1 Introductory Act to the German Civil Code, EGBGB), to the principle of residence and its extreme friendliness towards divorce (compare Art. 10 Rom-III-Regulation) is regarded as "modern, extensive and aggressive"[12]. From a traditional point of view the design of this conflict of law provisions is indeed not strictly "neutral". Rather it should help to enforce particular aspects of substantive law on the level of conflict of law provisions already: The facilitation of divorce to the greatest possible extent.

An economic domestic market alone doesn't create a federal order within whom one may point to the US as a prototype for a residence orientated approach, and for good reasons the question on party autonomy concerning the choice of the law applicable is not answered homogeneous in Europe.

Art. 5 Rom-III-Regulation allows the spouses to designate the law applicable to divorce and legal separation provided that it is one of the following laws:

- the law of the State where the spouses are habitually resident at the time the agreement is concluded, or
- the law of the State where the spouses were last habitually resident, insofar as one of them still resides there at the time the agreement is concluded, or
- the law of the State of nationality of either spouse at the time the agreement is concluded, or
- the law of the forum.

If the spouses didn't designate the law applicable pursuant to Article 5, divorce and legal separation shall be subject to the law of the State:

- where the spouses are habitually resident at the time the court is seized; or, failing that,
- where the spouses were last habitually resident, provided that the period of residence did not end more than one year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that,
- of which both spouses are nationals at the time the court is seized; or, failing that,

where the court is seized.

12 Staudinger/Mankowski (2011) vor Art. 13–17b EGBGB Rn. 39.

c) As part of the Stockholm program the European Commission meanwhile also submitted proposals concerning martial property regimes (16.3.2011, COM (2011), 126) and registered partnerships property regimes (16.3.2011 COM (2011), 127). These proposals aim on a unification of the respective conflict of law provisions within a universal applicable Rom-V-Regulation. The proposal on martial property regimes embodies far reaching possibilities for the choice of law during the marriage in being (Art. 16, 18). In the absence of a choice of law martial property regimes shall be subject to the law of the State where the spouses were firstly habitually resident after marriage, or, failing that, of which both spouses are nationals at the time of marriage, or, failing that, of which the spouses considering all circumstances are closest linked with, Art. 17 of the proposal.

However, both proposals stipulate differing rules. Taking into account that in Europe the variety of regulations for legally framed partnerships is very broad, the classification will not always be easy. In addition, if terms like marriage etc. are to be determined autonomously, the danger of up- or downgradings arises. Last but not least the preliminary question if the particular legal partnership is valid is likely to cause difficulties, too.

However, the EC became victim of the scope of it's own proposal insofar as Member States that did not enact rules about civil partnerships or same-sex marriages offered resistance against this proposal. Moreover, the British law does not know the martial property regime as it commonplace e.g. in Germany, but offers the instrument of "financial relief" as consequence of a divorce. The tensions arising from these completely different approaches are evident. For the time being, a success of these endeavors is, therefore, unlikely, even more as according to Art. 81 para. 2 TFEU an unanimous decision in the Council of the European Union would be necessary.

As the matrimonial property regime is connected to numerous other areas of law, the implementation of this proposal would cause multitudinous difficult classification problems. In addition, problems about how to draw a line to other European regulations, including the intended regulation on the law of succession, would arise. However, that's of course no obstacle.

3. Recognition and enforcement

Finally a few words about recognition and enforcement of court decisions: On the basis of the Brussels-IIa-Regulation a judgment given in a Member State shall be recognized in the other Member States without any special procedure being required, Art. 21 para. 1. The following two articles stipulate some exceptions like e.g. if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought (ordre-public-reservation) or if due process of law was violated. A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that

Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there, Art. 28 Brussels-IIa-Regulation.

The aforementioned EC Regulation No 4/2009 constitutes a new quality level of harmonization by abolishing the exequatur procedure, Art. 17.

This may cause difficult problems in individual cases, for example in case of a "clean break" via paying a "lump sum" under British law: In which situations have divorce consequences to be qualified as belonging to the area of maintenance obligations and in which as being governed by the matrimonial property regime? The answer to this question is important particularly as in the latter situation EC Regulation No 4/2009 is not applicable.

This has two consequences: A judgment given in a Member State has to be recognized by another Member State without any special procedure being required and without a chance to contest the validity of his recognition. A judgment given in a Member State which is enforceable in that Member State is enforceable in another Member State like a domestic judgment; a declaration of enforceability is no longer required. In addition to this one has to take into account the cooperation of the new created "Central Authorities" of the Member States: A maintenance creditor may address the "Central Authorities" of his state of residence that will then take care of the enforcement of his maintenance claim in the foreign country, Art. 49 et seqq. EC Regulation No 4/2009. The character as a new quality level becomes apparent when comparing the EC Regulation No 4/2009 with the – so far only by Norway ratified and therefore not yet in force – Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance from 2007 (HCCH) that, contrary to EC Regulation No 4/2009, stipulates the customary rules about recognition and enforcement, Art. 23 HCCH.

The preparatory works for the Rom-V-Regulation, too, contain the mechanism of the EC Regulation No 4/2009 in its articles 26 and 32. This mechanism will therefore be the new standard. It will promote the European legal harmonization in a way that makes sense, provided that the respective Member State has sufficient safeguards to ensure a due process of law. However, to rely on that requires a considerable degree of trust.

4. Unification of substantive law revisited

Opposing a overhastily Europe-wide unification of substantive family law, this has to be pointed out explicitly, must not be put on the same level with the rejection of unifications of law on a regional scale in certain cultural areas or among neighbor states with a high degree of population exchange as a first step of a gradual integration.

An example for this is an agreement between Germany and France creating an optional matrimonial property regime between these two countries. However, this agreement has yet to be ratified. Although this matrimonial property regime is based on the structures of the German "matrimonial property regime "Zugewinngemeinschaft" [community of surplus]", it includes a number of alterations derived from French law. Due to that for German-French-couples this property regime is an interesting alternative to a "pure" German or French property regime. This special property regime will not only be open for German-French-couples, but for mere national marriages, too. The treaty is open for entry by other states. Who knows, maybe at the end of the development stands a central-European or even pan-Europe optional matrimonial property regime?

An example for a unification of law in a specific cultural area that is characterized by a distinctive emotion of togetherness is, of course, the Nordic legal family, whose states work together tightly in legislative matters for almost 100 years. However, who praises this as a directly transferable model for a unification of law in whole Europe is – I fear I am repeating myself – oblivious of the plurality of European legal culture.

III. Conclusion: Harmonization yes, unification no

Summing up: A speedy unification of substantive family law, particularly one that is decreed by European institutions, would lead to loss on national and regional legal culture that can't be justified. Possible however is a close cooperation of individual European cultural groups or neighboring countries. A unified European family law has to grow slowly.

The needs of bi- and multinational families can be met by a unification of the conflict of laws provisions and of the law of jurisdiction of the court as well as by enacting regulations on (mutual) recognition and enforcement of court decision. On this a number of important steps have been taken on the EC level already within the last ten years. Neighboring countries of the EC should, if possible, be included in this development.

The final act in the deregulation of the Austrian postal market: the Postal Market Act (Postmarktgesetz-PMG)[1]

Christoph Hofstätter[2]

On 1 January 2011, the PMG entered into force. It implements the EC/EU Postal Directive and finally eliminates the protected market for letters of the former incumbent "Österreichische Post Aktiengesellschaft" (Post AG). This is the last step in the full liberalization of the postal service sector in Austria.[3] The following article presents the new Act with a focus on the universal service and the closure of post offices by the Post AG.

1. Introduction

The roots of the former long-standing monopoly position in the postal sector date back to the 16th century[4]. It has even long been assumed that the postal service sector is a natural monopoly.[5] Austrian legislation has therefore upheld this specific market situation by the Postal Act of 1837[6] and the Postal Act of 1957[7] until the end of the 20th century.[8] The monopoly in the postal sector was recently given to the Post AG. Given that 52.85 per cent of the Post AG's shares are held by the ÖIAG, a corporation exclusively owned by the Republic of Austria, the Post AG can be considered a public-sector corporation.[9]

A paradigm shift was eventually brought about on a European level. Since the Green Paper on the development of the single market for postal services (COM/91/476)[10], the complete opening of the postal market in its Member States has been a major goal of the EU Commission. The ECJ, in contrast, considered restrictions on competition in accordance with Art 86 (2) EEC Treaty (now Art

1 Bundesgesetz über die Regulierung des Postmarktes (Postmarktgesetz-PMG Federal Law Gazette I 2009/123).

2 Universität Graz, Austria.

3 ErläutRV 319 BlgNR XXIV. GP 3.

4 *Adamovich*, Grundriss des österreichischen Staatsrechts[2] (1932) 514. By the so-called "Postregal", postal services were reserved for the emperor or the state.

5 A natural monopoly occurs when it is more efficient for production to be concentrated in a single firm (*Ogus*, Regulation: Legal form and economic theory (2004) 30).

6 PGS 240/1837.

7 Federal Law Gazette 1957/58.

8 Even the Constitutional Court (VfSlg 11.494/1987) considered the monopoly as constitutional.

9 *Feiel*, Zur Neuordnung des österreichischen Postrechts, ZÖR 2011, 417 (424).

10 *Stratil*, Postmarktgesetz (2010) 159 ff provides a compilation of the numerous EU documents concerning the postal service sector.

106 (2) TFEU) as necessary "to ensure the performance of the particular tasks assigned to the undertakings possessed of the exclusive rights".[11]

The legal basis for the liberalization of the postal market was thus the three Postal Directives.[12] The Directive 97/67/EC[13] ("1st Postal Directive") provides the overall framework for a moderate, step-by-step liberalization which guarantees universal postal service.[14] For a transitional period, it has hence preserved exclusive rights for the universal service provider. The Directive 2002/39/EC[15] ("2nd Postal Directive") restricted these rights, but still allowed Member States to reserve a certain part of the postal market for the universal service provider (Art 7 Directive 97/67/EC as amended by Directive 2002/39/EC).[16] The Directive 2008/6/EC[17] ("3rd Postal Directive") obliged Member States to accomplish the complete opening of the postal market by 31 December 2010.[18] Given the substantial changes introduced by the "3rd Postal Directive", a reform of the current Postgesetz (PostG) was not found appropriate.[19] It was therefore replaced by a new law: the Postal Market Act (Postmarktgesetz-PMG).

2. The content of the Postal Market Act

The Postal Market Act is divided into seven sections: (1) General provisions, (2) The universal service, (3) The duties of the universal service provider, (4) Other postal service providers, (5) Public Authorities, supervision procedures, (6) Penal provisions, (7) Transitional and final provisions.

11 ECJ, case C-320/91, *Corbeau*, report 1993 I-2533, 2568 margin no 14; criticized by *Geradin/Humpe*, The Liberalization of Postal Services in the European Union: An Analysis of Directive 97/67, in *Geradin* (ed.), The Liberalization of Postal Services in the European Union (2002) 91 (97).

12 *Feiel*, ZÖR 2011, 419.

13 Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ 1998 L 15, 14.

14 The following two Directives in this area are both amendments to Directive 97/67/EC.

15 Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, OJ 2002 L 176, 21.

16 *Holoubek/Damjanovic*, Postrecht, in *Holoubek/Potacs* (eds.), Handbuch des öffentlichen Wirtschaftsrechts I² (2007) 1287 (1292).

17 Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, OJ 2008 L 52, 3.

18 *Schneider*, Das neue Postmarktgesetz, ÖZW 2010, 2 (3). Some Member States (not Autria!) are authorized to postpone the implementation of this Directive until 31 December 2012 (Art 2, 3 Directive 97/67/EC as amended by Directive 2008/6/EC).

19 ErläutRV 319 BlgNR XXIV. GP 1.

2.1. General provisions

In accordance with § 1 PMG, the purpose of the Postal Market Act is to ensure high quality postal services encompassing at least a minimum range of services of specified quality at affordable prices for the benefit of all users. These objectives should be achieved without preventing competition.[20]

The PMG is applicable only for postal services operating on a commercial basis (§ 2 (1) PMG). In accordance with the Postal Directive[21], § 3 No. 1 PMG[22] defines "postal services" as services involving the clearance, sorting, transport and delivery of postal items. "Postal items" do not mean only letters, but also include books, catalogs, newspapers or periodicals (§ 3 No. 10 PMG). The PMG also applies to cross-border mail (§ 2 (2) PMG). An exception is made if the transport and the delivery of newspapers or periodicals are effected by publishers themselves or by an undertaking of their exclusive property.[23]

§ 4 PMG obliges the Austrian Federal Minister of Transport, Innovation and Technology (*Bundesminister für Verkehr, Innovation und Technologie*) to periodically check the quality of the universal postal service. The Minister's report has to be transmitted to the National Assembly (*Nationalrat*) to allow the parliament to modify the legal framework if needed.[24]

§ 5 PMG concerning postal secrecy is a complementary provision to the constitutional right of privacy of correspondence (Art 10 Staatsgrundgesetz 1867[25]).[26] Employees of a postal service provider are not allowed to give any information about postal items to others than the sender or the addressee of the item. Thereby included are not only the employees of the Post AG, but also the employees of their partner companies.[27] Given that most of these employees cannot be considered officials within the meaning of § 74 (4) Austrian Criminal Code[28] any more, § 57 PMG ensures postal secrecy by punishing every infringement of § 5 PMG.[29]

20 These provisions are programmatic and should facilitate the interpretation of the PMG (ErläutRV 319 BlgNR XXIV. GP 4).

21 Art 2 No. 1 Directive 97/67/EC, OJ 1998 L 15, 18.

22 § 3 PMG contains 16 definitions of terms used in the following provisions.

23 The undertaking's sole object has to be the transport and delivery of newspapers or periodicals to users. That should prevent corporations from bypassing the PMG by selling a small amount of its shares to a publisher (ErläutRV 319 BlgNR XXIV. GP 4).

24 ErläutRV 319 BlgNR XXIV. GP 5.

25 Staatsgrundgesetz vom 21. December 1867, über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder RGBl 1867/142.

26 *Wiederin* in *Korinek/Holoubek* (eds.), Österreichisches Bundesverfassungsrecht (1999), Art 10 StGG Rz 40.

27 ErläutRV 319 BlgNR XXIV. GP 5.

28 Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen (Strafgesetzbuch – StGB) Federal Law Gazette 1974/60.

29 *Stratil*, Postmarktgesetz 10.

2.2. The universal service

The key subject matter of the PMG is to guarantee a universal postal service in a liberalized Austrian postal market.[30] According to the Constitutional Court (*Verfassungsgerichtshof – VfGH*), the Austrian legislator has thereby fulfilled its responsibility to guarantee a basic infrastructure[31] and met the requirements of the Postal Directive.[32]

2.2.1. Definition

In accordance with § 6 (1) PMG, a universal service involves the permanent provision of a postal service of specified quality at all points in Austria at affordable prices for all users. That contains the clearance, sorting, transport and distribution of postal items up to two kilograms, of postal packages up to 10 kilograms, and services for registered items and insured items (§ 6 (2) PMG). § 6 (4) PMG explicitly excludes from the universal service all parcels that can be returned by the addressee to the sender at their expense ("Retourpaket"). No longer part of the universal service are also bulk mail items which are directly delivered at the distribution centers of the universal service provider (§ 6 (3) PMG).[33]

2.2.2. Post offices

The required number of post offices has been a very controversial topic over the last years in Austria. After the privatization of the postal service, which had previously been provided by the state, in 1996[34], the Post AG has systematically closed down many post offices (particularly in rural areas).[35] Given the numerous employees with a permanent employment status working at these post offices, their closure has been very problematical.[36]

§ 7 (1) PMG now states that a permanent provision of a postal service in Austria requires at least 1650 post offices. In larger municipalities and towns, a post

30 *Schneider*, ÖZW 2010, 4.

31 VfSlg 18.909/2009: „Infrastrukturverantwortung".

32 Art 3 No. 1 Directive 97/67/EC, OJ 1998 L 15, 19.

33 ErläutRV 319 BlgNR XXIV. GP 5. *Stratil*, Postmarktgesetz 14, considers this limitation in accordance with the Postal Directive given that the universal service is primarily dedicated to individuals. For *Schneider*, ÖZW 2010, 4, that is more than uncertain given that the CoJ, joined cases C-287/06 to C-292/06, *Deutsche Post AG/Germany*, report 2008, I-1243, qualifies these items as subject to the universal service.

34 § 1 Bundesgesetz über die Einrichtung und Aufgaben der Post und Telekom Austria Aktiengesellschaft (Poststrukturgesetz – PTSG) Federal Law Gazette 1996/201.

35 *Pöcherstorfer*, Die flächendeckende Versorgung mit Postdienstleistungen, in Post-Geschäftsstellenbeirat (ed.), Von der Postliberalisierung zur Post-Geschäftsstelle, RFG Schriftenreihe 3/2010, 5 (17 f); http://oesv1.orf.at/stories/346098 (3.8.2012).

36 The dealing with these employees by the Post AG has been harshly criticized: http://www.karriereentwicklungscenter.at/ (3.8.2012).

office has to be reached by 90 per cent of the inhabitants within 2 kilometers, in other regions within 10 kilometers.[37] 10 per cent of these 1650 post offices can be post offices that do not include universal service and standard opening hours (§ 7 (2) PMG).[38] Universal service is also ensured by the conditions for the closure of post offices operated by the Post AG. Such post offices can only be closed down in cases where it is not possible to cover the costs of running the post office in the long term and where the provision of universal service is ensured by another post office (§ 7 (3) PMG).

According to § 7 (5), (6) PMG, the complexity of the closure procedure also protects the post offices. The Post AG has to indicate every intended closure of one of its post offices to the municipality[39] and provide them with the documents proving that the conditions of § 7 (3) PMG are met. Within the next three months, they both have to look for an alternative to guarantee the current quality of postal service in this area.[40] The Post AG also has to inform the regulatory authority. It has to submit documents proving that it is not possible to cover the costs of running the post office in the long term and that the municipality's authorities have been invited for further discussions.

The regulatory authority then indicates the intended closure to the Post Office Advisory Board ("Post-Geschäftsstellen-Beirat").[41] Nevertheless, the regulatory authority is entirely responsible for reviewing whether the prerequisites for the closure of the post office are fulfilled. It can forbid the closure within three months. Otherwise, the Post AG is finally allowed to close down the post office (§ 7 (6) PMG).[42]

These provisions have a strong effect on the Post AG's economic management and could be unconstitutional regarding Art 6 StGG ("Erwerbsfreiheit": freedom to carry on a business). Given the role of postal services in a highly developed country, the Post AG as universal service provider (§ 12 (1) PMG) hence has to tolerate stronger restrictions than companies normally do under the stipulations of Art 6 StGG.[43]

37 According to ErläutRV 319 BlgNR XXIV. GP 6, these distances correspond to 10 minutes from a household to the next post office.

38 See 2.2.3.

39 However, municipalities are not being granted the status of party in the closing procedure (*Feiel*, ZÖR 2011, 435 following VfSlg 18.909/2009).

40 *Haubenberger*, Behörden und Verfahren in Post- und Universaldienstangelegenheiten, in Post-Geschäftsstellenbeirat (ed.), Von der Postliberalisierung zur Post-Geschäftsstelle, RFG Schriftenreihe 3/2010, 19 (23).

41 Compare 2.5.1.2.

42 *Haubenberger* in Post-Geschäftsstellenbeirat 24 f.

43 VfSlg 18.909/2009 following *Raschauer*, Österreichisches Wirtschaftsrecht[2] (2003) 185. That judgment, however, was given according to the circumstances of the old PostG, which had constituted a reserved market for the Post AG. After the fall of the last monopoly, the argumentation still seems valid as long as the Post AG gets financial support for providing universal service.

2.2.3. Opening hours, letter boxes, distribution

Post offices generally have to provide a full universal service within the meaning of § 6 (2) PMG on five working days per week (at least 20 hours per week). Exceptions are made for post offices operated by the municipalities.[44]

§ 9 PMG obliges the universal service provider to guarantee full geographical coverage via letter boxes. These letter boxes can be stationed on public property and have to be emptied at least once a day during the week.[45]

The universal service provider must distribute postal items on five working days per week at the addressee's address (§ 10 (1) PMG). § 10 (2) PMG however permits rural post box clusters in sparsely populated areas. § 11 PMG contains detailed rules regarding the timing from the clearance of mail to the distribution of postal items.

2.2.4. Organization and financing of the universal service

§ 12 PMG pronounces the Post AG the universal service provider. In 2016, the regulatory authority will have to review if there are other postal service providers that could provide universal service. In that case, a public tender procedure will have to be effected. In order to lower costs for universal service, two or more companies other than the Post AG may be pronounced the universal service provider.[46]

Given the full liberalization of the postal market, the universal service that is often inefficient in rural areas can no longer be financed by the profits made on the reserved market.[47] § 13 PMG therefore stipulates the financial compensation for the costs of the universal service that cannot be covered by the universal service provider. § 15 PMG generally defines the so-called net costs (*Nettokosten*) as all costs related to the universal service. The exact determination of these costs is effected according to the detailed provisions of § 15 (2)–(4) PMG. What is striking, of course, is that also costs based on legal provisions (regardless of the PMG) that prevent the Post AG from carrying out its business efficiently are net costs. Apparently, the high staff costs for civil servants with permanent employment status assigned to the Post AG by § 17 PTSG are taken into account.[48]

To compensate for the costs of universal service, the regulatory authority on application by the Post AG has to establish a fund (§ 14 (1) PMG). This fund is financed by licensed postal service providers with an annual turnover of more

44 § 8 (1), (2) PMG; *Schneider*, ÖZW 2010, 5.
45 *Feiel*, ZÖR 2011, 435.
46 *Feiel*, ZÖR 2011, 436.
47 *Feiel*, ZÖR 2011, 437.
48 *Schneider*, ÖZW 2010, 7; *Feiel*, ZÖR 2011, 438, who doubts that such provisions are in accordance with the Postal Directive.

than 1 million euro (§ 14 (2) PMG).[49] *Schneider*[50] criticizes the method of calculation of the particular contributions. He points out that it favors the Post AG over small companies, which constitutes an infringement of European law.[51] He, however, admits that the compensation is constitutionally required.[52] That could eventually lead to coverage by the national budget.[53]

2.3. The duties of the universal service provider

Section 3 of the PMG lists the duties of the universal service provider.[54]

§ 16 PMG prohibits the universal service provider from charging for some sorts of postal items according to the Geneva Conventions. In accordance with § 17 PMG, the universal service provider has to distribute postal items of the courts or the administration whose delivery is regulated in the Act on postal deliveries[55]. In this case, the universal service provider acts with public authority.[56] The sender of the postal item (the state or a public body) is hence liable for damages caused by the universal service provider.[57]

The universal service provider fulfills Austria's responsibilities under the Universal Postal Convention. It exclusively produces and sells stamps with the words "Austria" or "Republic of Austria" on it (§ 18 PMG). The universal service provider's obligation to contract with everybody based on the General Terms and Conditions (§ 19 PMG) shows the important role of postal services for the country's infrastructure. The regulatory authority has to be notified of the General Terms and Conditions prior to publication. If they are not compatible with the legal provisions enumerated in § 20 (4) PMG, and the regulatory authority rejects them, the General Terms and Conditions cease to be in force.[58]

In accordance with § 21 (1) PMG, the tariffs for each of the services that are part of universal service have to be affordable, cost-oriented, transparent and non-discriminatory. A uniform tariff shall be applied to all users (§ 21 (2) PMG).

49 In accordance with § 26 (2) PMG, the Post AG also is a licensed postal service provider. It has to contribute to the fund as well (ErläutRV 319 BlgNR XXIV. GP 9).

50 *Schneider*, ÖZW 2010, 7 f.

51 CoJ, case C-340/99, *TNT Traco SpA/Poste Italiane SpA*, report 2001, I-4109, 4163 margin no 58.

52 *Oberndorfer/Binder*, Strompreisbestimmung aus rechtlicher Sicht (1979) 38. Compare also the jurisdiction of the Administrative Court (VwSlg 10491 A/1981) and the Constitutional Court (VfSlg 12.564/1990) on price fixing for consumer goods by public authorities.

53 For example, if there are no other licensed postal service providers than the Post AG.

54 The title suggests that all duties are covered by this section. In fact, Section 2 contains some duties as well (for example § 10 (1) PMG).

55 Bundesgesetz über die Zustellung behördlicher Dokumente (Zustellgesetz – ZustG) Federal Law Gazette 1982/200.

56 *Walter/Kolonovits/Muzak/Stöger*, Grundriss des Verwaltungsverfahrensrechts (2011) Rz 201/1.

57 *Schneider*, ÖZW 2010, 8.

58 *Schneider*, ÖZW 2010, 9.

That does not exclude the right of the universal service provider to conclude individual agreements on prices with users. These agreements have to be indicated to the regulatory authority which checks if the conditions of § 21 PMG are fulfilled. § 22 PMG contains special provisions for single piece tariffs.[59]

To determine the net costs of the universal service, the universal service provider has to keep separate accounts within its internal accounting systems for the universal service and for the other provided services (§ 23 PMG).[60]

2.4. Other postal service providers

Section 4 regulates the rights and duties of postal service providers that do not provide universal service.

2.4.1. Market entry

§ 24 (1) PMG generally authorizes everybody within the restrictions by the PMG to provide postal services. The Trade Regulation Act[61] does not apply to these services (§ 24 (2) PMG).

In accordance with Art 9 (1) Postal Directive[62], § 25 PMG introduces a system of general authorization for the provision of postal services.[63] When a postal service provider starts operating, it has to indicate that to the regulatory authority. For reasons of transparency, the regulatory authority has to publish a list of these postal service providers on the internet (§ 25 (2) PMG).[64]

This general rule does not apply to postal services regarding postal items up to 50 grams. § 26 PMG thereby introduces a system of individual licenses. The universal service provider is granted a certain license by law (§ 26 (2) PMG). The others have to apply for a license at the regulatory authority which shall decide on the application within six weeks. A license is awarded (§ 27 (2) PMG)

- if the applicant proves the capability, reliability, and operating skills that are required for the license-based provision of postal services (No. 1)[65] and
- if it complies with national working conditions[66], particularly regarding the payment of its employees (No. 2).

59 *Feiel*, ZÖR 2011, 448 f.
60 *Schneider*, ÖZW 2010, 9.
61 Gewerbeordnung 1994 – GewO 1994 Federal Law Gazette 1994/194 (WV).
62 Directive 97/67/EC as amended by Directive 2008/6/EC.
63 *Feiel*, ZÖR 2011, 440.
64 As per 7 March 2012, twelve undertakings have become postal service providers in accordance with § 25 (1) PMG.
65 § 28 PMG gives an extensive definition of these three conditions.
66 In accordance with ErläutRV 319 BlgNR XXIV. GP 11, this should prevent negative social effects by wage dumping.

According to *Schneider*[67], the Austrian license-based system is not covered by the provisions of the Postal Directive. He points out that some conditions for the award of a license[68] do not conform with Art 9 (2) Postal Directive[69]. In particular, he criticizes the fact that the universal service provider is granted a license without an authorization procedure. *Schneider* considers that a violation of the principle of equality (Art 7 Federal Constitutional Act[70]), as well as a limitation of the license system on postal items up to 50 grams.

§§ 29, 30 PMG contain provisions regarding the transfer, modification and the termination of the license. What is striking is that the license for the provision of postal services can be transferred to third parties if prior agreement from the competent authority has been obtained. § 29 (1) PMG thereby deviates from the principle that licenses for certain professions constitute personal rights.[71]

By analogy with § 25 (2) PMG, the regulatory authority has to publish a list of the licensees on the internet (§ 27 (4) PMG).[72]

2.4.2. The duties of the postal service providers

The provisions regarding the General Terms and Conditions for the postal service providers (§ 31 (1)–(3) PMG are generally[73] in conformity with those for the universal service provider. § 31 (4) PMG even establishes an obligation to contract.[74]

The postal service providers have to make sure that their employees and the transported postal items can be distinguished from competing companies (§ 32 (1) PMG). They have to ensure the forwarding and the return (§ 32 (5) PMG) as well as the deposit (§ 32 (2) PMG) of postal items. § 32 (4)–(6) PMG obliges them to set quality criteria for its services and to publish the results of a yearly evaluation. For reasons of quality assurance, the regulatory authority has to assign an independent institution to measure the ordinary routing times of postal items on a yearly basis (§ 33 PMG). The postal service providers also have to establish a complaint management service (§ 32 (3) PMG).

67 *Schneider*, ÖZW 2010, 10 f.
68 He refers to § 27 (2) No. 1.
69 Directive 97/67/EC as amended by Directive 2008/6/EC.
70 Bundes-Verfassungsgesetz (B-VG) Federal Law Gazette 1930/1 (WV).
71 *Raschauer*, Allgemeines Verwaltungsrecht[3] (2009) Rz 1125.
72 As per 19 September 2011, four undertakings have become licensees in accordance with § 26 (1) PMG.
73 However, a specific regulation on tariffs like § 21 PMG is missing.
74 Following *Schneider*, ÖZW 2010, 12, it may be questioned if such interference with a person's right to property is really justified. In fact, everybody's access to postal services is already ensured by the universal service provider.

2.4.3. Access to the postal network

The PMG concedes other postal service providers only limited access to the facilities of the universal service provider. In accordance with § 36 PMG, postal service providers have free access to the current postcode system.[75] § 35 (2) PMG obliges the universal service provider to provide transparent, nondiscriminatory access to its address database. The conditions are to be negotiated in the first place between the universal service provider and the other postal service provider (§ 35 (3) PMG).[76] If an agreement between them has not been reached within three months, the regulatory authority on application by the postal service provider replaces the contract according to its order (*Bescheid*) (§ 35 (4) PMG).[77]

§ 34 PMG contains detailed provisions regarding post-office boxes and delivery boxes. Postal items are delivered to the addressee by dropping it into these boxes. For this purpose, the addressee generally has to provide a post-office box. [78] In buildings with more than four households on more than two floors, the house owner provides adequate delivery boxes. Delivery boxes are adequate if they at least fulfill the requirements laid down in § 34 (2), (4) and (5) PMG. These requirements have to be respected in the case of the construction of new houses (§ 34 (6) PMG) as well as if the delivery boxes are renewed (§ 34 (7) PMG).

Those delivery boxes that do not fulfill the requirements have to be replaced by the universal service provider by 31 December 2012. The thereby installed new boxes become property of the house owners (§ 34 (8) PMG).[79] The replacement has to be financed in advance by the universal service provider.[80] These costs are reimbursed to the universal service provider proportionally on its application. Every postal service provider (including the universal service provider) with an annual turnover of more than one million euros has to contribute. Their exact contribution is determined on the basis of market share (90 per cent) and total number of postal service providers (10 per cent).[81] The regulatory authority manages the replacement. Therefore, the universal service provider has to indicate its costs to the regulatory authority, enclosing all documents needed to prove the stipulated amount (§ 34 (10) PMG).

Who should bear the costs of the replacement has always been highly disputed. It was even brought before the VfGH. In 2006, the VfGH ruled that § 14

75 That ensures that postcodes are only changed by the universal service provider to guarantee a consistent delivery system (ErläutRV 319 BlgNR XXIV. GP 13).

76 *Feiel*, ZÖR 2011, 445.

77 *Schneider*, ÖZW 2010, 12.

78 *Feiel*, ZÖR 2011, 445.

79 *Schneider*, ÖZW 2010, 13.

80 ErläutRV 319 BlgNR XXIV. GP 12; VfGH 16.3.2012, G 97/11.

81 According to *Schneider*, ÖZW 2010, 13, § 34 (9) PMG discriminates against the other postal service providers as they are overcharged.

of the old PostG infringed the right to property of the house owners.[82] They were then charged with the full costs of the replacement. On application by the Post AG, the VfGH had also to decide whether § 34 (8)–(10) PMG infringes the constitutional rights of the applicant. Given that a high quality postal service is in the public interest and that the postal service providers' business depends on functioning delivery boxes, the VfGH considered these provisions constitutional.[83]

2.5. Public Authorities, supervision procedures

2.5.1. Competences and procedures

2.5.1.1. The postal authorities

The supreme postal authority is the Austrian Federal Minister of Transport, Innovation and Technology (*BMVIT*). The authority of first instance and subordinate to the *BMVIT* is the Postal Bureau (*Postbüro*).[84] The Postal Bureau's only responsibility is to conduct the administrative penal procedure (§ 37 (4) PMG).

2.5.1.2. The regulatory authorities

The Austrian regulatory authorities are the *Rundfunk und Telekom Regulierungs-GmbH* (*RTR*)[85] and the *Post-Control-Kommission (PCK*). According to the "Austrian model"[86], the competences are allocated to an independent company and to a commission regarded as a tribunal within the meaning of Art 6 ECHR.[87] The RTR is generally responsible for all tasks based on the PMG if they are not assigned to the PCK (§ 38 (1) PMG) and acts as the PCK's supporting body (§ 38 (2) PMG).[88]

The PCK has three members (§ 41 (1) PMG). § 41 (2) PMG refers to § 118 (1)–(6) TKG 2003[89] on the Commission for Telecommunication Issues (*TKK*) and adopts its provisions with the necessary modifications. Two members (including the alternate members) of the TKK, a judge and a person with legal and economic knowledge, are also members of the PCK (§ 41 (2) No. 1 PMG). The third member has to be an expert in the postal sector and is nominated by

82 VfSlg 17.819/2006.

83 VfGH 16.3.2012, G 97/11. *Schneider*, ÖZW 2010, 13, had pointed out before the VfGH's decision that the best solution would be if the state paid for the replacement.

84 § 37 (1) PMG; *Feiel*, ZÖR 2011, 453.

85 It is established by § 16 (former § 5) Bundesgesetz über die Einrichtung einer Kommunikationsbehörde Austria ("KommAustria") und eines Bundeskommunikationssenates (KommAustria-Gesetz – KOG) Federal Law Gazette I 2001/32. The RTR does also operate in the telecommunications and media sector.

86 *Stöger*, Die Energieregulierungsbehörden und das Energie-Versorgungssicherheitsgesetz 2006, in *Raschauer* (ed.) Aktuelles Energierecht (2006) 21 (21).

87 *Raschauer*, Verwaltungsrecht[3] Rz 270.

88 *Schneider*, ÖZW 2010, 13.

89 Bundesgesetz, mit dem ein Telekommunikationsgesetz erlassen wird (Telekommunikationsgesetz 2003 – TKG 2003) Federal Law Gazette I 2003/70.

the *BMVIT* (§ 41 (2) No. 2 PMG). The PCK is chaired by the judge (§ 42 (1) PMG); valid decisions require unanimity (§ 42 (3) PMG). In accordance with Art 20 (2) No. 5 Federal Constitutional Act, all members are independent in the performance of their duties and not bound by any instructions.

Their tasks are listed in § 40 PMG completely. Decisions on "civil rights" within the meaning of Art 6 ECHR and fundamental decisions are thereby reserved for the PCK.[90] For example, the PCK is responsible for measures concerning post offices operated by the universal service provider, measures concerning the financing of the fund to compensate the universal service provider or concerning the General Terms and Conditions. The remaining tasks for the RTR are limited: for example it has to publish a list of postal service providers (§ 25 (2) PMG) and licensees (§ 27 (4) PMG) on the internet.[91]

Apart from these two authorities, the Post Office Advisory Board is established at the RTR. It has three members. They are nominated by the *Gemeindebund* (Association of Municipalities), the *Städtebund* (Association of Cities and Towns) and by the *Verbindungsstelle der Bundesländer* (Liaison Office of the Federal Provinces).[92] Its main task[93] is to advise the regulatory authority regarding the closure of post offices. Its statements are not binding.[94]

2.5.1.3. Rules of procedure

Unless otherwise prescribed by this Act, the General Administrative Procedures Act[95] shall be applied by the PCK. The PCK's decisions are final; no administrative remedies are admissible (§ 44 (1)–(3) PMG). They can hence be subject to an appeal to the Austrian Administrative Court (*Verwaltungsgerichtshof – VwGH*).[96] According to *Schneider*[97], decisions of the RTR are also final and can be subject to appeals to the VfGH or VwGH. For reasons of transparency, the decisions of the PCK as wells as the RTR shall be published in compliance with the data protection legal framework (§ 45 (1) PMG). In any case, the regulatory authority shall respect and protect the confidentiality of the commercial and industrial information (§ 47 PMG).

90 ErläutRV 319 BlgNR XXIV. GP 13.
91 *Schneider*, ÖZW 2010, 14.
92 § 43 (2) PMG; *Feiel*, ZÖR 2011, 455.
93 According to *Stratil*, Postmarktgesetz 62, § 43 PMG lists its tasks completely.
94 *Schneider*, ÖZW 2010, 14.
95 Allgemeines Verwaltungsverfahrensgesetz 1991 – AVG Federal Law Gazette 1991/51 (WV).
96 In accordance with Art 133 No. 4 Federal Constitutional Act, the appeal to the VwGH has to be explicitly permitted. An appeal to the *VfGH* is admissible in accordance with general rules.
97 *Schneider*, ÖZW 2010, 15.

2.5.2. Supervision of postal service providers

The key task of the regulatory authority is to supervise the postal service providers. The supervision procedures are laid down in § 51 PMG and contain two steps. If it occurs to the regulatory authority that a postal service provider is violating the PMG or other legal acts based on the PMG, the regulatory authority has first to inform the concerned provider. The postal service provider has the opportunity to respond to the accusations or to rectify the identified shortcomings within an adequate period. In the case the postal service provider did not alter its conduct, the regulatory authority sets the necessary measures in train, so as to ensure the compliance with the PMG by individual administrative ruling (*Bescheid*).[98]

In accordance with § 50 (1) PMG, the admissible measures are enquiries as to the universal service (No. 1), orders to correct the malfunctioning of the universal service (No. 2), to interdict envisaged measures by individual administrative ruling in case they would threaten the functioning of the universal service or are not in conformity with the PMG (No. 3, 4) and to interdict by individual administrative ruling the providing of a postal service to anyone who does not fulfill the requirements set by the PMG or ordinances (*Verordnung*) and individual administrative rulings based on it (No. 5). Any such measures imposed must be proportionate, taking into account the economic consequences for the postal service providers (§ 50 (2) PMG)[99].

The regulatory authority determines the committed violation by administrative ruling (§ 51 (4) PMG) as it is a prerequisite for the administrative penal procedure in accordance with § 56 PMG. The concerned postal service provider is party to the procedure (§ 51 (5) PMG).

Austria's utilities regulation is embedded in a European system. The PMG contains therefore some provisions regarding the interaction with the European Commission and the regulatory authorities of the other Member States. § 46 PMG obliges the regulatory authority to notify the European Commission with the information needed. § 48 PMG empowers the Austrian regulatory authority to cooperate with the European Commission and the regulatory authorities of the other Member States in cases of common interest. Regarding the interaction of several competition authorities, cooperation is compulsory.[100]

The postal service providers are obliged to provide the information needed to BMVIT at its justified request. The information has to be transmitted in written and electronic form in case it is required for the BMVIT to fulfill its tasks (§ 49

98 *Schneider*, ÖZW 2010, 15.

99 *Schneider*, ÖZW 2010, 16.

100 Administrative cooperation between Austrian authorities is laid down in Art 20 of the Federal Constitutional Act.

PMG). One of these tasks is to order by ordinance (*Verordnung*) the surveillance of the postal market regarding the development of competition (§ 52 PMG).

2.5.3. Dispute resolution and complaint management

Alongside the competences of the ordinary courts, the regulatory authority offers the possibility for dispute resolution between postal service providers and their clients. The regulatory authority will try to settle the conflict or at least point out its opinion on the case. The postal service providers are obliged to participate in this procedure and provide the regulatory authority with the documents and information needed (§ 53 (1) PMG). § 54 PMG offers municipalities and federal provinces a specific opportunity to file complaints. To ensure high quality postal services even in rural areas[101], any upcoming interruption to the universal service can be indicated to the RTR. The RTR looks at the complaints and transmits justified complaints to the PCK, which can adopt measures in accordance with § 50 PMG.[102]

2.6. Penal provisions

Any infringement of the provisions of the PMG – as well as other legal acts based on the PMG – listed in § 55 (1) PMG constitutes an administrative offence. The fines can go up to 30000 EURO. § 55 (1) PMG does not apply if the criminal courts are responsible for persecution or if stricter administrative penal provisions apply (§ 55 (2) PMG). The regulatory authority can rescind the penalty if the perpetrator resumes lawful status within a reasonable period (§ 55 (3), (4) PMG). § 55 (6) PMG destines fines for infringement to the federal government.

A company's economic advantages out of an infringement of the PMG can also be confiscated[103] on behalf of the regulatory authority. The regulatory authority thereby collaborates with the Vienna Cartel Court, which has to determine the sums of money proceeding from economic advantage (§ 56 (1) PMG). This amount is dedicated to finance the RTR (§ 56 (2) PMG).

As mentioned above, § 57 PMG ensures postal secrecy by punishing every infringement of § 5 PMG. This offence is open to criminal prosecution by the criminal courts.

2.7.Transitional and final provisions

Section 7 contains seven provisions (§§ 58–64 PMG). For instance, in accordance with § 61 PMG, all references to persons are to be understood to be gen-

101 ErläutRV 319 BlgNR XXIV. GP 14.

102 *Schneider*, ÖZW 2010, 17.

103 Even extraordinarily high fines cannot fully prevent companies from violating laws if their economic advantage is many times higher (ErläutRV 319 BlgNR XXIV. GP 15).

der-neutral, even if they are not given in a gender-neutral form. Apart from § 57 PMG[104], the BMVIT shall be entrusted with the implementation of the PMG.

3. Conclusion

According to the Postal Directive, the PMG shall implement the full liberalization of the postal market in Austria. At the same time, it has to ensure a high quality postal throughout Austria, in other words to guarantee a functioning universal service. Given the Post AG's role in Austrian society[105], the Austrian legislator has in the first place tried to protect the former monopolist. It is obvious that thereby a complete opening of the Austrian postal market enforced by the Postal Directive is not easy to achieve. Following *Schneider*[106], the author thinks that the future jurisdiction of the ECJ will show if the provisions of the Postal Directive really have been fully implemented. Even the VfGH will have to ascertain that the provisions of the PMG fulfill all constitutional requirements.[107]

104 The Federal Minister of Justice is entrusted with the implementation of § 57 PMG.

105 For example, the Post AG has always been the universal service provider and has numerous employees with a permanent employment status.

106 *Schneider*, ÖZW 2010, 17.

107 In a first case, the VfGH considered the provisions regarding post office boxes and delivery boxes (§ 34 PMG) constitutional (VfGH 16.3.2012, G 97/11).

Unveiling the overlooked freedom – the context of free movement of capital and payments in the EU law

Ondrej Hamuľák[1]

1. The objectives

Free movement of capital and payments represents the youngest of the freedoms within the single internal market of the European Union. The title "youngest" points on the very slow release of capital markets within the European Community and the European Union which leads to the tardy development of this freedom. It is young also from the view of the legal effects because it was the last of the freedom where direct effect of basal Treaty provision was accepted by the Court of Justice.

In the heading of this article I awarded the forth freedom with the adjective "overlooked" which is clearly my subjective opinion on the approach of the EU law scholars to this part of the internal market law. In the most of the substantive textbooks and casebooks we may find only marginal space devoted to this field, especially in comparison with the other market freedoms. My objective is to offer and general introductive insight to this area and to certain extent cover the emerging gap.

2. General introduction and historical developments

Even though the founders of the European Economic Community defined this freedom as the integral part of the economic integration and they demanded at least some minimal liberalisation of the capital and payment flows[2], the development was not satisfactory. Slower development of this freedom is associated with a lengthy release of capital markets and reluctance of states to deeper liberalization in this area. Free movement of capital and payments lies in cross-border transfers of financial assets, investing in shares and in immovable property, in the financial participation of foreigners in domestic enterprises etc. Cross-bor-

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2 See The Brussels Report on the General Common Market (known as Spaak Report). Available online at: http://aei.pitt.edu/995/1/Spaak_report.pdf. The Intergovernmental Committee on European Integration in this report (in Chapter 4, Section 2) determined that the free movement of capital would form part of the common market and would embrace acquisition, use and disposal of capital anywhere within the common market; the right to create a companies, to acquire shares in existing companies and to participate in their management.

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der investment is closely connected with the creation of the monetary union and the actual release of the markets for the investors has a significant connection with the area of state economic policy and taxation.[3] The area of monetary sovereignty as well as the field of economic policies and fiscal autonomy of a state they all are a distinctive attributes of statehood and the Member States in these areas are hesitant to give up their powers.[4]

Different character of this freedom was upheld also by the Court of Justice. In its seminal decision *203/80 Casati*[5] Court pointed out that the free movement of capital, in addition to the free movement of goods, persons and services, forms the fundamental freedom within the Community. But in one breath it refused to admit a direct effect of the provisions of former Article 67 of the Treaty establishing the European Economic Community. Thus Court halted the liberalization of capital movements and rather left that question to the Member States or other Community institutions. Its negative opinion was built mainly on the specific nature of the free movement of capital, which on the one hand can stimulate economic growth (investment, business development), but on the other hand, it may affect the economic and monetary policy of the state, distraught its balance of payments and thus adversely affect the functioning of the market. Further Court argued that the application of former Article 67 of the Treaty was dependent on the implementing measures and therefore could not have direct effect in within the national law.[6]

The most significant changes in the development of the free movement of capital and payments were introduced by the Maastricht Treaty. Maastricht in general brought a big change in the economic policy of the European Union by the inclusion of the new policy area – Economic and Monetary Policy. The close relation between this policy and liberalization of the capital flows was clear from the very beginning of integration. Maastricht treaty fulfilled the requirement of deeper linkage between the free movement of capital and the gradual development of economic and monetary union mainly by the let´s say redefinition of the context of the fourth freedom. Generally speaking by the adoption of the Maastricht Treaty[7] the free movement of capital and payments achieved formally the

3 See BARNARD, C.: The Substantive Law of EU: The four freedoms, 3rd ed., Oxford: Oxford University Press, 2010, p. 560.

4 See FALLON, M. Droit matérie generel de l´Union européenne. 2e edition. Louvain: Bruylant-Academia, 2002, s. 194–195.

5 Judgment of 11 November 1981, Casati, 203/80, ECR 1981 p. 2595.

6 What is in contrast to the Courts approach to another freedoms where the requirement of certain implementing or providing measures was not understand as obstacle to acceptation of direct effect of Treaty provision on freedom of establishment (Judgment of 21 June 1974, Reyners / Belgian State, 2/74, ECR 1974 p. 631) and free movement of services (Judgment of 3 December 1974, Van Binsbergen / Bedrijfsvereniging voor de Metaalnijverheid, 33/74, ECR 1974 p. 1299).

7 It is important here to note that Treaty provisions on the free movement of capital and payments came into the force on 1st January 1994 and not on 1st November 1993 as the

same level of integration like other freedoms of the internal market (concept of the freedom = no restrictions + exceptions from this ban). The Maastricht Treaty changed the provisions relating to the free movement of capital and payments and for both categories introduced prohibition of restrictions.[8] The importance of the Maastricht treaty lies also in fact that it united the issue of free movement of capital and free movement of payments (until this change of primary law both freedoms were understood in significantly different way – see next chapter). The change of the legal appraisal of free movement of capital and payments was later responded even by the Court of Justice which transformed its view on the possibility of direct applicability of the Treaty provisions. It found out that article 73b of the EC Treaty in the Maastricht version is capable of having direct effect (*C-163/94, C-165/94 and C-250/94 Sanz de Lera*[9]). According to the Court this article contains a clear and unconditional prohibition, which does not require further implementation and is therefore applicable in proceedings before national courts. The "Maastricht concept" of the freedom was maintained even after the adoption of the Lisbon Treaty and it applies till the present time (I will cover its contours below in this article).

2.1 Capital versus Payments

In the initial period of integration, free movement of capital and free movement of payments were treated as separate freedoms. Because of the differences between the two categories they were talked about as the fourth and fifth freedom of the common market. This was suggested mainly by separate legal regulation and basis. Free movement of capital was set out in Article 67 paragraph 1 TEC.[10] Free movement of payments was set out in Article 106 paragraph 1 TEC.[11] Another reason for distinguishing was the different regimes of both free-

Maastricht treaty in general did.

8 Article 73b of the EC Treaty in the Maastricht version stated:
"1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.
2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited."

9 Judgment of 14 December 1995, Sanz de Lera and others, C-163/94, C-165/94 and C-250/94, ECR 1995 p. I-4821.

10 "1. Member States shall, in the course of the transitional period and to the extent necessary for the proper functioning of the Common Market, progressively abolish as between themselves restrictions on the movement of capital belonging to persons resident in Member States and also any discriminatory treatment based on the nationality or place of residence of the parties or on the place in which such capital is invested"

11 "Each Member State undertakes to authorise, in the currency of the Member State in which the creditor or the beneficiary resides, any payments connected with the exchange of goods, services or capital, and also any transfers of capital and wages, to the extent that the movement of goods, services, capital and persons is freed as between Member States in

doms. It consisted in the fact that the same exceptions to the prohibition restriction applied to both of them, and also in the fact that the free movement of capital, respectively provisions of the Treaty regulating it, were not directly effective (*203/80 Casati*[12]), while the free movement of payments could be enforce before national courts (direct effect of the provisions on the free movement of payments was confirmed by the Court in decision *286/82 and 26/83 Luisi and Carbone*[13]). Faster development (liberalization) for the free movement of payments was a logical consequence of their importance for building a common market. Liberalization of the market for goods and services and free movement of persons is necessarily required liberalization of transfer of payments between the Member States. In case *286/82 and 26/83 Luisi and Carbone* (also later in judgment *308/86 Lambert*[14]) the Court confirmed the assumption that they are two separate components of the common market. It pointed out that in the case of payments there is a transfer of counter-value, fulfilment for received goods or provided services, and in case of free movement of capital there is autonomous movement of financial values = investment. Free movement of payments is connected with trade between entities from different Member States, it is primarily connected to an existing liability and meeting this liability. On contrary, free movement of capital is not tied to any previous trading, this case concerns investments and movement of fruits of investments (interests, dividends).

A different regime of both freedoms on the one hand and their similar nature (in both cases they in fact involved the transfer of financial values across borders) on the other hand led to complications – determining whether it was a case of free movement of capital and free movement of payments was important mainly because of protections of individuals. The Treaty did not contain any legal definition of capital or payments that would differentiate them. Even Council Directive 88/361/EEC of 24 June 1988, implementing Article 67 of the Treaty, was not conducive in this regard. Although in Annex I it contained classification of free movement of capital, the list was not exhaustive (as was interpreted by the Court of Justice in *C-222/97 Trummer*[15]).

As I mentioned above Maastricht reform removed existing problematic differentiation between free movement of capital and free movement of payments in a fundamental way. Since the Maastricht Treaty came into effect, we may speak of one freedom with two subcategories. Free movement of capital and payments are now significantly closer to one another. Both freedoms have parallel regime within the Union, they are subject to uniform legal regulation and one group of exceptions. But variations in external regime are preserved, i.e. concerning the

application of this Treaty"

12 Judgment of 11 November 1981, Casati, 203/80, ECR 1981 p. 2595.

13 Judgment of 31 January 1984, Luisi and Carbone / Ministero dello Tesoro, 286/82 and 26/83, ECR 1984 p. 377.

14 Judgment of 14 July 1988, Ministère public / Lambert, 308/86, ECR 1988 p. 4369.

15 Judgment of 16 March 1999, Trummer and Mayer, C-222/97, ECR 1999 p. I-1661.

free movement of capital and payments between Member States of the Union and third countries. Thanks to this approximation we may – in context of liberalization of movement of financial values within the EU – speak only of a single freedom.[16]

The above interpretation implies that the free movement of capital is connected with the transmission of the financial value across borders for the purpose of investment or in connection with the payment for received goods or services. Commission on its website clearly shows what categories of investments come under the free movement of capital:

- Foreign direct investment (FDI), including investments which establish or maintain lasting links between a provider of capital (investor) and an enterprise (in effect setting up, taking-over, or acquiring an important stake in a company or institution);
- Real estate investments or purchases;
- Securities investments (e.g. in shares, bonds, bills, unit trusts);
- Granting of loans and credits; and

Other operations with financial institutions, including personal capital operations such as dowries, legacies, endowments, etc.[17]

3 Free movement of capital as a prohibition of restrictions

In the Treaty, free movement of capital is constructed as prohibition of restrictions. Today, this prohibition is contained in Article 63 TFEU[18] (in the same form as in the time of its inclusion by Maastricht Treaty). The Treaty requires Member States to abandon measures that could constitute an obstacle to the free movement of capital and payments. In the primary law, of course, we do not find a definition or a list of prohibited restrictions. Due to the close connection between the free movement of capital and free movement of goods (monetary value of both, similar exceptions to the prohibition of restrictions), we may use the "Dassonville" definition to outline the "restrictions".[19] In this regard, the prohibition would concern any "direct, indirect, actual or potential restrictions" on movement of capital.

16 Therefore, for the purposes of the following text, we will use the abbreviated name free movement of capital for both categories. Payments will be mentioned only if different regime applies to them.

17 Available at http://ec.europa.eu/internal_market/capital/overview_en.htm#what.

18 1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.
2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

19 See TICHÝ, L. et al. Evropské právo. 4th ed. Praha: C. H. Beck, 2011, p. 500.

For other freedoms of the internal market it is typical that they are "protected" by broad definition of the term prohibited restrictions. All of them are built as prohibition of discrimination on grounds of origin = nationality (goods, persons, services) as well as prohibition of other (non-discriminatory) restrictions that may adversely affect free movement. With free movement of capital, the system is kept and even here it applies that the Treaty prohibits both discrimination (direct and indirect) and other restrictions which, although applied indistinctly, may adversely affect the free movement of capital (*C-302/97 Konle*[20]). In case of discrimination, origin of capital is the criterion, in case of other restrictions it is the possibility of a negative impact on the free movement of capital. The key point is the free movement of capital (the Treaty does not distinguish whether it is a movement to or from a Member State), and therefore the prohibition of restrictions concerns both restrictions on "import" of capital, and restrictions on its "export" from a Member State. Article 63 TFEU prohibits:

- unequal treatment between domestic and foreign capital, i.e. discrimination (*C-367/98 Commission v Portugal*[21]),
- other forms of restrictions on the free movement of capital, such as the authorization scheme (also *C-367/98 Commission v Portugal*); in the form of obstacles that may discourage from the exercise of free movement of capital (*C-478/98 Commission v Belgium*[22]); or in the form of measures that degrade movement of capital to just theoretical, illusory possibility (*C-35/98 Verkooijen*[23]).

The Court of Justice held that the prohibition of restrictions on free movement of capital has direct effect (*C-163/94*, *C-165/94 and C-250/94 Sanz de Lera*, or more recently *C-101/05 Skatteverket*[24]). According to the Court, Article 63 TFEU contains a clear and unconditional prohibition, which does not require further implementation and is therefore applicable in proceedings before national courts and in case of conflict with the national legislation it should take precedence.

3.1 Prohibited restrictions – examples from the case-law

The practice in the area of free movement of capital and application of the prohibition of restrictions brought several examples (we may say typical areas) where state measures concern this freedom and often negatively affect the liberalization of the movement of financial values. In this chapter we will look at the most typical examples of prohibited restrictive measures. There will be always at least one case study in each of the main areas to provide reader with the deep

20 Judgment of 1 June 1999, Konle, C-302/97, ECR 1999 p. I-3099.
21 Judgment of 4 June 2002, Commission / Portugal, C-367/98, ECR 2002 p. I-4731.
22 Judgment of 26 September 2000, Commission / Belgium, C-478/98, ECR 2000 p. I-7587.
23 Judgment of 6 June 2000, Verkooijen, C-35/98, ECR 2000 p. I-4071.
24 Judgment of 18 December 2007, A, C-101/05, ECR 2007 p. I-11531.

example. There is no space to offer a detailed analysis of all relevant cases here. The intent of this article is not to cover all important cases of the Court of Justice but to describe the main features of the fourth freedom of single market. Indeed there were some comprehensive studies of the development of the judicial approach.[25]

In next part I will turn my attention to the three categories of most common and most visible interferences to the freedom of movement of capital, concretely to the case of preservation of special rights in the hand of nationals which are generally known as golden shares; secondly to the area of taxation which is very "risky" zone once we are speaking about negative impacts on the free movement of capital; and thirdly I will speak about measures of state control over the capital and payment flows, where we are facing the conflict between state´s financial stability and financial interests on one side and demands of the free market on the other side.

3.1.1 Golden shares cases[26]

The term "golden shares" refers to a category of shares in companies that are associated with special rights. The owners of such shares exercises these privileges beyond normal rights of shareholders (e.g. participation in important decisions regardless of the amount of their share, they must always approve person in management, etc.). Creating "golden shares" is a typical side-effect of privatization of state enterprises when states try to maintain some influence through them.

We already know that free movement of capital is built on an open investment environment. On grounds of this freedom, owners of funds should have the right to invest their assets anywhere. This investment must be associated with the same rights as those enjoyed by other investors in the same company (i.e. all shareholders). The very existence of the special rights may hinder free movement of capital or make the potential investment less attractive and thus discourage people from exercising this freedom granted by the EU law (*C-58/99 Commission v Italy*[27]).

CASE STUDY: As an example of illegal introduction of "golden shares" we may mention case *C-171/08 Commission v Portugal*[28]. In its decision the Court

25 See FLYNN, L. Coming of Age: The Free Movement of Capital Case Law 1993–2002. Common Market Law Review, 2002, vol. 39, issue 4, pp. 773–805; MOHAMED, S. Recent case law in the field of free movement of capital. Journal of International Banking Regulation, 2001, vol. 3, no. 1, pp. 178–191; USHER, J. The Evolution of the Free Movement of Capital. Fordham International Law Journal, 2007, vol. 31, no. 5, pp. 1533–1570.

26 KRONENBERGER, V. The rise of the 'golden' age of free movement of capital: A comment on the golden shares judgments of the Court of Justice of the European Communities. European Business Organization Law Review, 2003, vol. 4, no. 1, pp. 115–136.

27 Judgment of 23 May 2000, Commission / Italy, C-58/99, ECR 2000 p. I-3811.

28 Judgment of 8 July 2010, Commission / Portugal, C-171/08, ECR 2010 p. I-6817.

of Justice reiterated all the basic postulates of its approach to the issue of "golden shares". That is why the Commission refers to the judgment as a decision on "golden rules on golden shares". The judgment was pronounced in 2010 as part of infringement proceedings. Commission brought an action against Portugal and claimed that measures of this state violate rules on free movement of capital. Portuguese law on privatizations contained legislation under which statutes of privatized companies may provide for the existence of golden shares which are intended to remain state's property and which confer on the state a right of veto over amendment to the statutes and other decisions in the field of management of the company. Subsequently, the statutes of Portugal Telecom (PT) actually identify shares that could be held only by the state or other public sector shareholders and which were associated with certain preferential rights (e.g. that at least one third of the total number of directors in the board, including the chairman of the board, shall be elected by a majority of votes allocated to the state and other public sector shareholders). The Court criticized the legislation as contrary to freedom of movement of capital and condemned Portugal for breach of the Treaty. In its words: "[t]he holding [by the Member State] of those golden shares, in so far as it confers on that State an influence on the management of the [company] which is not justified by the size of its shareholding in that company, is liable to discourage operators from other Member States from making direct investments in that company, inasmuch as they could not be involved in the management and control of that company in proportion to the value of their shareholdings. [...] Similarly, the structuring of the special shares may have a deterrent effect on portfolio investments in the company in so far as a possible refusal by the State concerned to approve an important decision, proposed by the organs of the company concerned as being in the company's interests, is in fact capable of depressing the value of the shares of that company and thus reduces the attractiveness of an investment in such shares [...]" (see paragraphs 60 and 61 of the judgement).

3.1.2 Area of taxation[29]

Frequent restrictions/interferences to the free movement of capital result also from the application of national tax systems. While it is true that in the field of direct taxation the Member States enjoy autonomy (direct taxation falls within the competence of the Member States), the Court has repeatedly stated that the Member States must exercise that competence consistently with European Union law (C-*311/97 Royal Bank of Scotland*[30]). Application of tax rules (e.g. determining tax rates, rules on tax deductions and tax abatements, calculation of tax bases) in situations of movement of capital to and from abroad may not be

29 USHER, J. The Evolution of the Free Movement of Capital. Fordham International Law Journal, 2007, vol. 31, no. 5, pp. 1549–1562.

30 Judgment of 29 April 1999, Royal Bank of Scotland, C-311/97, ECR 1999 p. I-2651.

stricter or less favourable than in the case of their application to wholly internal situations.

CASE STUDY: The Court gave its opinion on such prohibited unequal treatment for example in case *C-315/02 Lenz*[31] – under Austrian tax system the earnings of companies (dividends) were taxed at differend levels, according to whether the revenue was of Austrian or foreign origin. Different regime consisted in the fact that for income from capital of Austrian origin it was possible to enjoy tax benefits (adjusted tax rate reduced by half and taxation with discharging effect), while income from capital of foreign origin was taxed at the ordinary income tax (in the end, it was about twice the rate). A German national citizen Anneliese Lenz, subject to taxation in Austria, in her tax return for 1996 stated dividends from joined-stock companies established in Germany, whereupon she was assessed normal income tax on this income. Mrs Lenz considered the assessed tax as contrary to the rules of free movement of capital and in this sense she turned to Austrian courts with her claim. The question of conformity of the described Austrian legislation and requirement of European law came before the Court of Justice in the form of preliminary ruling. It stated that the legislation is not admissible within the meaning of the Treaty provisions. According to the Court, distinguishing taxes on dividends of Austrian and foreign origin constitutes a restriction on the free movement of capital, because on the one hand it may deter Austrian entities from investing their capital in companies established in other Member States and on the other hand in relation to companies established in other member States it constitutes an obstacle to raising capital in Austria.

3.1.3 State control/regulation of the movement of capital

Regulation of movement of capital to and from a country is one of the classic tools of state (not only) economic policy. Adaptation of rules of export of financial values for residents or vice versa of financial values imported by non-residents is subject to so-called foreign exchange laws. States may for various reasons (security, environment, for reasons of tradition, preservation of local communities, etc.) regulate the possibility of foreigners to take possessions of real property on their territory. Movement of capital also applies to rules on investments and provision of banking services, such as e.g. preference of operations in domestic currency. These categories of measures, however, interfere with the free movement of capital and without proper justification they are not compatible with the requirements of EU law. The Court addressed the issue of state regulation in several decisions. Examples include the following:

CASE STUDY 1: "Exports of money" – *C-163/94, C-165/94 and C-250/94 Sanz de Lera*[32]. This case concerned the system of authorization for export of

31 Judgment of 15 July 2004, Lenz, C-315/02, ECR 2004 p. I-7063.

32 Judgment of 14 December 1995, Sanz de Lera and others, C-163/94, C-165/94 and

means of payment from Spain. According to Spanish law on economic transactions with other countries, exports of financial resources (coins, banknotes, cheques) was subject to a prior declaration when the amount concerned exceeded one million of pesetas and to a prior administrative authorization when the amount concerned exceeded five million pesetas. Penalties were applied in case of breach of these requirements (i.e. export of money without declaration or authorization). In three different cases the authorities found out that Mr Sanz de Lera, Mr Díaz Jiménez and Mrs Kapanoglu exported abroad the amount of more than five million pesetas. Because they did not have the proper export authorization from the Spanish authorities, criminal proceedings were instituted against these persons. National court, which decided the case, stayed the proceedings and referred questions to the Court of Justice for a preliminary ruling, which among other things asked about compliance of the described Spanish rules and Treaty provisions on the free movement of capital and payments. The Court stated that conditioning the export of funds by previous authorization constitutes a restriction that (since it is dependent on the discretion of a national authority) is not compatible with the provisions of the Treaty. Spanish government justified the need for authorization scheme by requirement of supervision and prevention of infringements. The Court did not accept its argument because the described reasons of public interest could be achieved by more proportionate measures. In this spirit it then stated that the requirement of prior declaration is not contrary to the Treaty.

CASE STUDY 2: "Acquisition of immovable property by foreigners" *C-302/97 Konle*[33]. This case concerned the acquisition of immovable property by foreigners in Austria. The so-called Tyrol law on the transfer of land from 1996 contained a rule that all future acquirers of land had the obligation to apply for authorization by a public authority. At the same time they had to show that the planned acquisition will not be used to establish a secondary residence. While the law did not distinguish between Austrians and foreigners, in the end it represented a potential restriction on the free movement of capital for investment in immovable property. This key issue became the subject of preliminary ruling in which the Court of Justice stated that conditioning acquisition of property by a foreign entity with a previous permission by the authorities of a Member State is incompatible with the free movement of capital. In its response the Austrian government advocated the system by the fact that previous authorization is an important tool of town and country planning policies which in certain regions help to maintain permanent population and economy activities dependent on the tourist sector. The Court acknowledged that the reasons pursue important public purpose. However, in order to be recognized as compatible with European law, it was necessary to prove that such measures are not discriminatory and

C-250/94, ECR 1995 p. I-4821.

33 Judgment of 1 June 1999, Konle, C-302/97, ECR 1999 p. I-3099.

that this purpose could not be achieved by other, less restrictive ways. However, according to the Court neither of these criteria was fulfilled in this case.

4 Exceptions from the prohibition of restrictions on free movement of capital

Prohibition of restrictions on the free movement of capital is not absolute, and both the Treaty itself and the case-law of the Court of Justice offer several categories of exceptions where it is possible for the Member States to intervene in otherwise liberalized free movement of capital. As with the other freedoms, in case of free movement of capital there are important interests protected by both the Member States and the European Union itself.

Compared to other freedoms, exceptions to the prohibition of restrictions on the free movement of capital, however, are connected to several specifics. In addition to classic reasons (protection of public policy or public security), there are special exceptions only for the typical problems of movement of capital and payments (issues of tax audits, statistics, fiscal oversight, etc.). Another particularity is related to the global nature of the free movement of capital. The Treaty allows other specific exceptions from the prohibition of free movement to and from third countries. Reasons of admissible restrictions are not a closed list, admissible are both written exceptions (explicitly mentioned in the Treaty) and unwritten exceptions – mandatory (important) requirements of general interest – they are discovered through the case-law of the Court of Justice.

4.1 Explicitly stated reasons for derogation – written exceptions

Explicit reasons for derogation of free movement of capital are determined directly by text of primary law and particularly by Article 64–66 TFEU. These reasons include a wide range of restrictions which may hinder free movement of capital and payments and still not be considered to be contrary to European Union law. The Treaty reflects the global nature of this freedom. But liberalization of capital movements in relation to third countries requires a special regime. Therefore, the Treaty provides specific categories of exceptions from the prohibition of restrictions on the free movement of capital to and from third countries. Restrictions on the free movement of capital can also be a tool of foreign and security policy (in the form of embargoes). In this regard, the Treaty contains relevant instruments (Article 75 and 215 of the TFEU).

4.1.1 Historical third country restrictions

Article 64 paragraph 1 TFEU[34] authorizes the restrictions against third countries which existed in the law of the Member States before the date of full lib-

34 „1. The provisions of Article 63 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law

eralization of movement of capital, as at 31st December 1993, respectively 31st December 1999. This provision is sometimes denoted ad "grandfather" clause[35]. The reasons for the existence/retaining these exceptions are mainly historical. These dates are mandatory and the Court of Justice pointed out that measures restricting the free movement of capital to and from third countries under this Article must show some degree of legal continuity. "The words 'restrictions which exist on 31 December 1993' presuppose that the legal provision relating to the restriction in question have formed part of the legal order of the Member State concerned continuously since that date. If that were not the case, a Member State could, at any time, reintroduce restrictions on the movement of capital to or from third countries which existed as part of the national legal order on 31 December 1993 but had not been maintained." (*C-101/05 Skatteverket*[36]).

4.1.2 New third country restrictions

Member States agreed with the liberalization of free movement of capital also in relation to third countries, and thus they lost the opportunity to introduce new measures (this loss was compensated by retaining existing measures, see previous part). Power to adopt measures which would constitute a step backwards as regards the liberalization of the free movement of capital was conferred mainly upon the EU institutions (article 64 paragraph 3 TFEU[37]). Such measures may be adopted only by the Council acting unanimously after consulting the European Parliament. Member States may adopt new measures in relation to third countries only in exceptional cases. They can do so only provided that (1) the Council did not exercise its (previously described) right, (2) measures concern only the area of taxation, (3) they are compatible with one of the Union's objectives and functioning of the internal market, and (4) they were approved by the Commission, respectively the Council (see Article 65, paragraph 4 TFEU[38]).

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adopted in respect of the movement of capital to or from third countries involving direct investment — including in real estate — establishment, the provision of financial services or the admission of securities to capital markets. In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be 31 December 1999."

35 See TERRA, B., WATTEL, P. *European Tax Law*, 5th edition. Hague: Kluwer, 2008, p. 40.

36 Judgment of 18 December 2007, A, C-101/05, ECR 2007 p. I-11531.

37 „3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63."

38 „4. In the absence of measures pursuant to Article 64(3), the Commission or, in the absence of a Commission decision within three months from the request of the Member State concerned, the Council, may adopt a decision stating that restrictive tax measures adopted by a Member State concerning one or more third countries are to be considered compatible with the Treaties in so far as they are justified by one of the objectives of the Union and compatible with the proper functioning of the internal market. The Council shall act unanimously on application by a Member State."

4.1.3 Short-term safeguard measures to third countries

The provision of article 66 TFEU[39] allows the adoption of specific, exceptional measures on freedom of capital to and from third countries in a situation endangering the operation of economic and monetary union. Measures under this Article are adopted on a proposal from the Commission and after consulting the European Central Bank for a period not exceeding six months.

4.1.4 General exceptions

Article 65 paragraph 1 TFEU[40] contains admissible restrictions on the free movement of capital which are most associated with the functioning of the internal market. These exceptions do not distinguish between the movement of capital within the EU, or between the states of the Union and third countries. Yet their relevance is associated mainly with the movement of capital within the Union. This area of written (explicitly allowed) exemptions from the prohibition restriction on the free movement of capital is crucial because it allows Member States to introduce certain restrictions and to take measures that are necessary to protect important and current interests of their financial markets. Article 65, paragraph 1 contains several categories of exceptions. These are the grounds for derogation based on admissible "discrimination" in the tax area (*C-319/02 Manninenem*[41]), various protective measures associated with state control of the functioning of financial markets (*C-439/97 Sandoz*[42]) and ultimately the reasons of "public order" (*C-54/99 Church of Scientology*[43]). Although they are expressly permitted exceptions to the free movement of capital, the states may not abuse or excessive use them. The condition for their application is that they do not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital (Article 65, paragraph 3 TFEU). Moreover, according to the Court of Justice measures taken on the basis of Article 65 paragraph 1 TFEU must be proportional, i.e. absolutely necessary in relation to the intended

39 „Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary."

40 „1. The provisions of Article 63 shall be without prejudice to the right of Member States:
a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;
b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security."

41 Judgment of 7 September 2004, Manninen, C-319/02, ECR 2004 p. I-7477.

42 Judgment of 14 October 1999, Sandoz, C-439/97, ECR 1999 p. I-7041.

43 Judgment of 14 March 2000, Église de scientology, C-54/99, ECR 2000 p. I-1335.

objective (*C-54/99 Church of Scientology*), and they may not be based only on economic grounds (*C-367/98 Commission v Portugal*[44]).

4.1.5 Exceptions arising from restrictions on freedom of establishment

In the last chapter we will speak about that the free movement of capital can also be called a service freedom, because movements of financial values across borders are connected to the exercise of other freedoms. Free movement of capital is connected to the free movement of persons, in particular the freedom of establishment (*203/80 Casati*[45]). Before starting a business in another Member State, entrepreneurs exercising the freedom of establishment must necessarily to transfer across borders certain amount of capital, which they intend to invest. Restrictions on the free movement of entrepreneurs (freedom of establishment), admissible under the Treaty or resulting from the mandatory requirements of public interest, can ultimately also lead to restrictions on the movement of capital (article 65 paragraph 2 TFEU[46]). In order to make sense, the admissible exceptions must affect both the freedom of establishment and the free movement of capital (*C-492/04 Lasertec*[47]) Measures that hinder the free movement of entrepreneurs must therefore be primarily considered in the light of the rules on freedom of establishment (*C-524/04 Test Claimants in the Thin Cap Group Litigation*[48]).

4.1.6 Security exceptions

The movement of capital (investment in the territory of a country and the export of capital = investment abroad) is a major macroeconomic factor and the possibility of its regulation is an important political tool. In addition, the regulation of the flow of funds is also an important security tool. In the framework of its foreign and security policy, the European Union may use regulation of free movement of capital in order to reduce security risks (measures in the fight against terrorism, Article 75 TFEU) or to promote its values in the world and help to solve crises (measures within the common foreign and security policy).[49]

4.2 The rule of reason – unwritten exceptions

As with the other freedoms of the internal market, in case of free movement of capital practice has shown that explicit exceptions to the prohibition of restric-

44 Judgment of 4 June 2002, Commission / Portugal, C-367/98, ECR 2002 p. I-4731.

45 Judgment of 11 November 1981, Casati, 203/80, ECR 1981 p. 2595.

46 „2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties."

47 Order of 10 May 2007, Lasertec, C-492/04, ECR 2007 p. I-3775.

48 Judgment of 13 March 2007, Test Claimants in the Thin Cap Group Litigation. C-524/04, ECR 2007 p. I-2107.

49 See for example Council Regulation (EU) No 442/2011 of 9 May 2011 concerning restrictive measures in view of the situation in Syria.

tions on the free movement of capital are not sufficient. Diversity of legislation and the interests of the Member State requires that there are some reasonable deviations, exceptions to liberalization under which the States may restrict the free movement of capital and thus protect their own important reasons of public interest.

Theory of mandatory requirements of public interest, known from the case-law on the free movement of goods and persons (*120/78 Cassis with Dijon*[50]), was confirmed by the Court of Justice also in the area of free movement of capital (*C-148/91 Veronika Omroep*[51]). The Court of Justice recognized that restrictions on the free movement of capital may be justified by an overriding requirement of public interest. But this measure must apply indistinctly to all persons who carry out their activities in the territory of a Member State and the principle of proportionality must be respected (*C-367/98 Commission v Portugal*[52]). Also here it applies that it may not be a measure pursuing purely economic reasons (*C-319/02 Manninen*[53]).

5. Finalisation – on the position of the „over-looked freedom" within the Internal Market

For the purpose of functioning of the internal market, it is also important to define the relationship between the free movement of capital and other freedoms of the internal market. As in the case of free movement of goods and freedom to provide services, certain valuable values are transferred across national boundaries. Situations when one state of facts will potentially fall under legal regulation of several freedoms of the internal market cannot be excluded – e.g. movement of a foreign person who intends to start their business in another state by buying stock or share in a domestic company. Free movement of capital may be labelled as a complementary freedom, which means that in relation to other freedoms it has subsidiary character. When banknotes and coins, which are a valid means of payment, are physically transferred across borders, a question arises whether they are a thing = free movement of goods, or financial values = free movement of capital and payments. The Court of Justice resolved this issue in case *7/78 Thompson*[54], when it stated that when coins and banknotes which are legal tender are transferred, it is not free movement of goods, but movement of capital or payments

50 Judgment of 20 February 1979, Rewe / Bundesmonopolverwaltung für Branntwein, 120/78, ECR 1979 p. 649.

51 Judgment of 3 February 1993, Veronica Omroep Organisatie / Commissariaat voor de Media, C-148/91, ECR 1993 p. I-487.

52 Judgment of 4 June 2002, Commission / Portugal, C-367/98, ECR 2002 p. I-4731.

53 Judgment of 7 September 2004, Manninen, C-319/02, ECR 2004 p. I-7477.

54 Judgment of 23 November 1978, Thompson, 7/78, ECR 1978 p. 2247.

Free movement of capital (and especially the subcategory of payments) can be called a "service" freedom[55] because movement of financial values across borders is connected with the exercise of other freedoms. Free movement of capital is linked to the free movement of persons, in particular the freedom of establishment (*203/80 Casati*[56]). Entrepreneurs exercising their freedom of establishment must necessarily to transfer certain amount of capital, which they intend to invest, across borders before starting a business in another Member State.

Also workers or moving citizens, who wish to move to another Member State, invest their assets here (e.g. purchase of real estate). Free movement of payments is closely connected with the free movement of goods and services (orders from abroad and payment for goods and services abroad[57]) and the free movement of persons – non-entrepreneurs (transfer of cash in order to cover subsistence costs abroad).

Free movement of capital is differentiated from other freedoms not only by slower liberalization but also by the territorial scope of this freedom. This freedom has global[58] and absolute character. From the territorial point of view, it is the broadest freedom which applies *erga omnes* (to all investors) and therefore also outside the European Union. According to the Treaty, the prohibition of restrictions on movement of capital concerns both the movement between Member States of the Union, and movement between Member States and third countries. According to the Court, prohibition of restrictions on the free movement of capital is to be interpreted in the same way when it concerns movement within the Union, as well as when moving from or to third countries, and despite the fact that "the liberalisation of the movement of capital with third countries may pursue objectives other than that of establishing the internal market, such as, in particular, that of ensuring the credibility of the single Community currency on world financial markets and maintaining financial centres with a worldwide dimension within the Member States" (*C-101/05 Skatteverket*[59]). The obligation of identical interpretation relates to the importance of the free movement of capital within the Union and outwards. The Court of Justice points out that in the law of the European Union (since the Maastricht Treaty came into effect) full liberalization of the free movement of capital between Member States and to and from third countries took place. This does not mean, however, that the scope of

55 See LENAERTS, K., VAN NUFFEL, P.: European Union law. 3rd ed, London: Sweet and Maxwell, 2011, p. 285.

56 Judgment of 11 November 1981, Casati, 203/80, ECR 1981 p. 2595.

57 On the interrelations between free movement of capital and free movement of services see Judgment of 14 November 1995, Svensson and Gustavsson / Ministre du Logement et de l'Urbanisme, C-484/93, ECR 1995 p. I-3955.

58 SUTTON, A. The Freedom of Capital Under Article 56 EC and its Application to Jurisdictions Outside the EU, White&Case Study, march 2008. Available at: http://www.whitecase.com/files/Publication/8ab41a8d-b4bc-41f3-a2ec-f2d465259533/Presentation/PublicationAttachment/b8bde829-9409-41e2-914b-f9518f70e82e/memo_freedom_sutton.pdf.

59 Judgment of 18 December 2007, A, C-101/05, ECR 2007 p. I-11531.

this freedom in the internal and external dimension is exactly the same. Treaty distinguished these dimensions when in the external dimension it allows a different (broader) package of exceptions[60] from the prohibition of restrictions than in the internal dimension(*C-446/04 Test Claimants in the FII Group Litigation*[61]).

60 See also USHER J. The Evolution of the Free Movement of Capital. Fordham International Law Journal, 2007, vol. 31, no. 5, pp. 1533–1570. (1569).

61 Judgment of 12 December 2006, Test Claimants in the FII Group Litigation, C-446/04, ECR 2006 p. I-11753.

Modification du mécanisme de contrôle de la Convention européenne des droits de l'homme a la base du Protocole n° 14

Naděžda Šišková[1]

I. LES HYPOTHÈSES DE LA CRÉATION D'UN NOUVEL INSTRUMENT MODIFIANT LE MÉCANISME DE CONTRÔLE ACTUEL DE LA CONVENTION

L'intention générale du Protocole n°14 peut être définie comme l'acquisition d'une telle réforme du mécanisme de contrôle de la Convention européenne qui d'un côté préserve la Cour européenne des Droits de l'Homme contre le collapsus et la surcharge de travail sans toutefois être trop radicale et difficile à mettre en oeuvre ce qui reflète le manque de volonté des États membres du Conseil de l'Europe de concevoir la nouvelle réforme comme « le plan Marshal » pour « l'Europe des droits de l'homme » .[2]

Le texte du Protocole susmentionné qui rapporte des changements à caractère procédural permettant à la Cour de traiter les requêtes individuelles dans des délais raisonnables en accélérant considérablement le déroulement de « la procédure de Strasbourg » a été signé à Strasbourg le 13 mai 2004 et ouvert à la signature des États membres du Conseil de l'Europe signataires de la Convention de sauvegarde des Droits de l'Homme et Libertés fondamentales (ci-après dénommée « la Convention »).

Actuellement, c'est-à-dire six ans après la signature du Protocole, le procès de ratification a été achevé de la part de tous les États Parties à la Convention et ledit protocole est entré en vigueur le 1er Juin 2010. Un certain manque de volonté de la part de Russie a pendant plusieurs années représenté le seul obstacle à l'entrée dans la vie juridique de cet instrument étant donnée que l'entrée en vigueur du Protocole est conditionnée par la ratification de tous les signataires, sans exception.

Comme mentionnée ci-dessus le Protocole n° 14[3] ne vise pas à modifier les dispositions substantives de la Convention mais son intention programme porte sur la modification des dispositions procédurales, notamment de celles concernant la procédure devant la Cour européenne des Droits de l'Homme ainsi que d'autres normes modifiant le mécanisme de contrôle de la Convention.

1 Responsable de la chaire du Droit européen et international de la Faculté de Droit de l'Université Palacký, Olomouc, République tchèque.

2 J. Malenovský, « Nové demokratické státy Evropy a 14. protokol: klikatá, ale správná cesta k adjustaci desynchronizovaného mechanizmu », *Právník,* n° 6, 2006, p. 637.

3 Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental freedoms amending the control system of the Convention, ETS 194.

L'efficacité de l'adoption du document en question peut être démontrée d'une manière significative par des données statistiques reflétant la surcharge de la Cour Européenne de Droits de l'Homme et son encombrement par des requêtes mal fondées ou incompatibles avec la Convention.

En 2003, c'est-à-dire une année avant l'adoption du Protocole n° 14, la Cour a déclaré irrecevables ou a rayé du rôle pour faute du non respect des critères de recevabilité exigés par la Convention quelques 17270 requêtes sur la totalité des requêtes introduites, et elle n'a déclaré recevables que 753 requêtes. De plus, plus de la moitié (60 %) des autres requêtes qui ont réussi de passer par le filtrage préliminaire et qui se sont terminées par un arrêt de la Cour portaient sur des affaires dans lesquelles la Cour avait déjà rendu un arrêt pilote et il s'agissait alors de décider d'une manière analogique ou répétitive.

Ces données témoignent nettement de ce que le mécanisme de contrôle actuel malgré l'effort et la surcharge énorme des juges est *de facto* incompétent d'assurer l'effectivité satisfaisante de l'activité de la Cour qui représente aujourd'hui l'unique organe judiciaire international visant la protection des droits de l'homme de 800 millions de personnes se trouvant dans le cadre de *ratione loci* de la Convention.

En recherchant les origines des crises, de la surcharge et du collapsus de l'activité de la Cour des Droits de l'Homme qui ont suscité la nécessité de la réforme du système de contrôle de la Convention, il est à relever que paradoxalement ce sont cette effectivité et générosité remarquable du Protocole n°11, donnant à chaque personne physique, à chaque organisation non gouvernementale ou à chaque groupe d'individus répondant aux critères définis dans l'article 34 et 35 de la Conventio le droit d'introduire une requête individuelle, qui ont ouvert la voie vers l'encombrement de la Cour et ont causé la crise dans l'effectivité du mécanisme de contrôle actuel. En d'autres termes, le fait de faciliter l'accès à la Cour a engendré la hausse énorme du nombre des requêtes introduites et ainsi le prolongement de la durée de la procédure strasbougeioise. A cet égard, l'idée de la « réforme de la réforme » est est née.

L'adoption du Protocole n°14 le 13 mai 2004 à Strasbourg a été anticipé par les initiatives importantes et les déclarations du Conseil de l'Europe[4] qui ont défini trois domaines problématiques dont la solution devrait contribuer à rendre la protection des droits de l'homme dans le cadre de l'implémentation de l'acquis de la Convention plus effective : En l'accompagnant de la prise des mesures visant a éviter la violation des droits au niveau des États signataires et du perfectionnement des moyens de recours nationaux, il s'agit également de la prise des mesures visant efficacité du stade de filtrage et l'accélération de l'exécutoire des arrêts. En outre, les méthodes de travail de la Cour visant le raccourcissement

4 Pour plus de détails voir p.ex. : General Declaration of the Council of Ministers Ensuring the effectivness of the implementation of the European Convention on Human Rights at national and European levels, 12. 5.2004.

important du stade de filtrage ou la garantie de la procédure abrégée etc. [5] dans le cas des requêtes jointes rélévant le même caractère ont été également prises en compte lors de la préparation du Protocole.

II. LES ÉLÉMENTS-CLÉS DE LA RÉFORME

La réforme fondée sur le Protocole n° 14 doit être mise en oeuvre à l'aide des points principaux suivants:

A. Introduction d'un nouveau critère de recevabilité des requêtes
B. Renforcement de la capacité de filtrage de la Cour à l'égard des requêtes mal fondées
C. Introduction d'un nouveau mécanisme vis à vis des requêtes répétitives
D. Intégration procédurale du Commissaire du Conseil de l'Europe dans la procédure
E. Amendement aux compétences du Conseil des Ministres dans le cadre de la supervision de l'exécution et du respect des arrêts de la Cour
F. Règle d'un seul mandat des juges et la prolongation de sa durée

A. Introduction d'un nouveau critère de recevabilité des requêtes

Un des moyens essentiels afin de rendre le mécanisme de contrôle strasbourgeois plus effectif est la modification du paragraphe 3 de l'article 35 de la Convention, et notamment l'introduction d'un nouveau critère de recevabilité des requêtes.[6] Alors que l'irrecevabilité d'une requête individuelle incompatible avec les dispositions de la Convention (ou de ses Protocoles), d'une requête manifestement mal fondée ou abusive a été acceptée déjà auparavant et l'interprétation de ces critères d'irrecevabilité ne pose plus de problèmes en pratique grâce aux vastes activités d'interprétation de la Cour, le nouveau critère intégré sous la lettre « b » a engendré un ensemble des remarques critiques et des discussion aiguës même avant que le Protocole gagne sa forme définitive.

Selon l'avis de l'Assemblé parlementaire du Conseil de l'Europe adoptée le 28 avril 2004[7], la formulation « un préjudice important », sans toutefois définir ses

5 Pour plus de détails voir : V. Strážnická, « 14. Protokol a zmeny Dohovoru o ochane ľudských práv a základných slobod », *Mezinárodní a srovnávací právní revue*, Univerzita Palackého Olomouc, n°10 2004, p.77.

6 Le libéllé du Paragraph 3 de l'article 35 de la Convention, tel que amendé :
« 3. La Cour déclare irrecevable toute requête individuelle introduite en application de l'article 34 lorsqu'elle estime:
a. que la requête est incompatible avec les dispositions de la Convention ou de ses Protocoles, manifestement mal fondée ou abusive ; ou
b. que le requérant n'a subi aucun préjudice important, sauf si le respect des droits de l'homme garantis par la Convention et ses Protocoles exige un examen de la requête au fond et à condition de ne rejeter pour ce motif aucune affaire qui n'a pas été dûment examinée par un tribunal interne. »

7 Opinion No.251/204 adopted by the Parliamentary Assembly of the Council of Europe on

critères de détermination doit être considérée comme problématique et susceptible d'engendrer un affaiblissement au principe de la requête individuelle.

Il est à relever que l'accrue générale de la sévérité des conditions de filtrage préliminaire est néanmoins accompagnée d'un ensemble de garanties atténuant les possibles conséquences négatives de cette disposition dans la sphère de l'individu en forme des clauses de sauvegarde et d'une règle transitoire.

De grandes espérances sont fondées sur la jurisprudence de la Cour même et sur son interprétation autoritaire des notions et concepts des droits de l'homme qui traditionnellement crée, forme et achève l'acquis de la Convention. Dans cet ordre d'idées, son interprétation de la notion du « préjudice important » y compris la formulation de la définition des critères pertinents pour son détermination sont vivement attendues. Comme dans les autres cas, il s'agit des termes juridiques pouvant et devant faire l'objet d'une interprétation établissant des critères objectifs par le biais du développement progressif de la jurisprudence de la Cour.

En ce qui concerne les garanties, c'est avant tout le principe du respect des droits de l'homme articulé par la disposition de l'article 35 paragraphe « b » qui est à mettre en évidence. Il apporte une garantie pertinente ainsi que l'examen au fond de la requête par la Cour dans le cas de doutes s'il y a eu ou pas de violation des droits garanties même au cas où le requérant n'a pas subi un préjudice important.

La même approche peut être constatée vis à vis du principe de subsidiarité. Il trouve son manifestation également sous la lettre « b » de l'article 35 intégrant l'obligation de la Cour de Strasbourg de traiter l'affaire même au cas où préjudice important n'a pas été causé mais l'affaire n'a pas été jugé par un tribunal national.

La projection de ces deux principes susmentionnés dans l'article 35, lettre b, tel que modifié, constitue ainsi deux clauses de sauvegarde prévenant que même les affaires « banales » soient privées d'un moyen de remède réalisé soit au niveau national ou international.

La règle transitoire figurant à l'article 20, paragraphe 2 du Protocole n° 14 peut être également rattachée aux garanties de l'application appropriée du nouveau critère de filtrage. En vertu de cette norme, le nouveau critère de recevabilité ne concernera pas les requêtes déclarées recevables avant l'entrée en vigueur du Protocole. De plus, durant les deux années suivant l'entrée en vigueur du Protocole, le nouveau critère de recevabilité ne pourra être utilisé que par les formations de Chambre et par la Grande Chambre. Cette disposition devrait aider à surmonter la période critique avant l'élaboration d'une jurisprudence établie de la Cour définissant des conditions et des principes pour l'application postérieure de ce critère également par les juges uniques.

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28 April 2004.

Le nouveau critère de recevabilité permet ainsi à la Cour de refléter une plus grande flexibilité et souplesse, et cela notamment dans les cas des requêtes manifestement mal fondées et des requêtes banales afin d'octroyer à la Cour des moyens plus effectifs pour traiter les affaires vraiment importantes et sérieuses ayant une influence sur le développement de l'acquis de la Convention ainsi que sur le traitement des problèmes pertinents dans les ordres juridiques internes des États membres à la Convention.

B. Nouvelle formation de la Cour

Les autres changements importants concernent la structure de la Cour et la formation de ses organes traitant les requêtes. Dans cet ordre d'idées, un net renforcement du mécanisme de filtrage à l'intérieur de la Cour est à relever. Ce renforcement est réalisé notamment par la voie de la création de nouvelles structures décisionnelles qui vont se voir attribuer les compétences de l'ancien Comité des trois juges de sorte que le filtrage des requêtes soit dorénavant réalisé par plusieurs structures.

Dans ce cadre, il est à mettre en exergue qu'une nouvelle formation vient d'être mise ne place. Il s'agit de la fonction de juge unique assisté par les rapporteurs dépendant de la compétence du président de la Cour. Le renforcement du potentiel décisionnel du tribunal sera sans doute accentué par le fait que les rapporteur ne seront plus recrutés parmi les juges comme c'était le cas maintenant mais qu'il s'agira des membres du greffe hautement qualifiés et expérimentés ayant une solide connaissance de la langue et du système juridique du pays de la Partie Défenderesse. Il est entendu que les conditions de qualification susmentionnées seront complétées par des exigences générales touchant à l'indépendance et l'impartialité des rapporteurs ainsi qu'à une très bonne connaissance d'au moins une des langues officielles du Conseil de l'Europe.

Bien que la modification précitée résulte en des épargnes importantes de la capacité personnelle des juges il convient de noter que le jugement d'une affaire par un seul juge unique reste inhabituel dans le cadre de la justice internationale et est souvent mise en cause en se référant au risque des erreurs irréparables ou même à la partialité du juge en cause. Néanmoins, selon l'opinion de la doctrine et conformément à la jurisprudence étendue de la CEDH, ces risques ne se relèvent pas réels en ce qui concerne l'application du Protocole n° 14. Enfin, les conséquences pratiques des modifications mentionnées signifient que le traitement à succès des affaires particulières ne dépendra dorénavant pas que des juges mais dépendra également des rapporteurs qui préparent le dossier de l'affaire et qui la connaissent de plus près grâce à leur compétences linguistiques et leur familiarisation avec le fonctionnement du système juridique et milieu national respectif.

Conformément à l'article 7 du Protocole n° 14, le juge unique sera doté des compétences qui appartenaient auparavant à la formation du Comité des trois

juge – le juge unique sera ainsi compétent de prendre une décisions d'irrecevabilité ou une décisions de rayer du rôle la requête lorsqu'une telle décision peut être prise sans un examen complémentaire. Sous l'angle du fait que la formation de juge unique ne prend pas une décision collégiale, une clause limitative vient d'être intégrée dans l'article 6, paragraphe 2, empêchant au juge unique de siéger en tant que juge unique dans les affaires qui concernent la Haute Partie contractante au titre duquel il ou elle a été élu(e).

La compétence de ce juge de siéger *ex officio* en tant que membre d'une Chambre ou de la Grande Chambre dans les affaires dont la Partie Défenderesse est le pays au nom de laquelle il ou elle avait été élu(e) reste néanmoins intacte.

C. Instauration des mesures relatives aux reqûetes répétitives

Une procédure permettant au Comité de lier la question de recevabilité avec l'examen au fond d'une affaire dans le cadre du traitement d'une requête individuelle vient d'être instaurée dans les intentions du Protocole n° 14. En d'autres termes, dans le cadre d'une même procédure le Comité est compétent soit de décider à l'unanimité de l'irrecevabilité d'une requête, de décider de la rayer du rôle ou de déclarer une requête recevable et rendre en même temps un arrêt au fond. Ce procédé qui avait été auparavant réservé exclusivement aux requêtes interétatiques conformément à l'article 33 de la Convention est alors devenu un procédé ordinaire même dans le cas des requêtes individuelles, maintenant toutefois certaines limitations. La mise en oeuvre de ce procédé entre en jeu lorsqu'une question relative à l'interprétation ou à l'application de la Convention qui est à l'origine de l'affaire fait l'objet d'une jurisprudence bien établie de la Cour ; en d'autres termes, ce procédé concernera les requêtes répétitives. Dans cet ordre d'idées, il ne reste qu'à s'aligner à l'opinion de la doctrine relative à ce qu'il s'agit d'une considérable épargne personnelle et temporelle puisque les requêtes répétitives ne requièrent généralement pas un traitement trop exigeant.[8] L'économie du temps ainsi que l'économie personnelle est également évidente vu que les 60% des arrêts sont classés, comme déjà mentionné ci-dessus, parmi les requêtes répétitives.

Dans le cadre du traitement des requêtes individuelles, le Comité disposera d'une nouvelle compétence. Lorsque le juge élu au titre de la Haute Partie contractante au litige ne sera pas membre du Comité il est prévu que le comité puisse à chaque stade de la procédure inviter ce juge à siéger en son sein en lieu et place de l'un de ses membres, en respectant les conditions posées dans l'article 8 paragraphe 3 du Protocole n° 14.

La modification de l'article 38 de la Convention renforce la participation des représentants des Hautes Parties contractantes dans le cadre de l'examen et du traitement de l'affaire. Cette disposition permet à la Cour de procéder à l'enquête

8 Voir J. Malenovský, idem, p. 638.

de l'affaire ensemble avec les représentants des parties à tout moment de la procédure et non plus seulement après la décision sur la recevabilité. Les Hautes Parties contractantes sont ainsi tenues de fournir à la Cour une coopération nécessaire encore avant l'adoption d'une décision. C'est le Comité des ministres du Conseil de l'Europe qui veille au respect des ces obligations des États membres comme cela découle d'autres dispositions du Protocole.[9]

D. Entrée du Commissaire aux droits de l'homme du Conseil de l'Europe dans la procédure juridictionnelle

Dans toute affaire devant une Chambre ou la Grande Chambre, le Commissaire aux Droits de l'Homme du Conseil de l'Europe peut présenter des observations écrites et prendre part aux audiences. Cette intégration du Commissaire dans la procédure juridictionnelle en position d'un tiers intervenant est rendue possible grâce à la nouvelle disposition du paragraphe 3 modifiant la disposition du texte de l'article 36 de la Convention. Il est vrai qu'en vertu de cette norme le Commissaire lui-même n'a pas l'intérêt à agir de saisir la Cour d'une requête, or il peut cependant intervenir sans invitation du président de la Cour, c'est à dire *ex lege*, dans une procédure pendante devant une Chambre ou la Grande Chambre. L'intégration procédurale du Commissaire en tant qu'un tiers intervenant doit être considérée comme une solution de compromis relative à la possibilité envisagée et tellement discutée de la mise en place de la fonction du procureur publique, y compris la compétence d'introduire une a*ctio popularis*. Autrement dit, l'idée du procureur publique est entrée en jeu dans sa forme embryonnaire.[10]

E. Nouvelles compétences du Commité des Ministres

Les questions d'une rapide et efficace exécution de l'arrêt de la Cour des Droits de l'Homme, notamment le renforcement des compétences quasi juridictionnelles du Comité des Ministres dans le cadre de la surveillance de leur exécution, forment également une partie intégrale à la réforme du mécanisme de contrôle de la Convention. Dans cet ordre d'idées, en modifiant les disposition de l'article 46 de la Convention, le Comité des Ministres gagne deux nouvelles compétences.

Premièrement, le Comité des Ministres est habilité de demander à la Cour une interprétation définitive lorsqu'il considère que l'exécution de l'arrêt pourrait être restreinte par un problème de divergences ou des difficultés de l'interprétation. La décision de saisir la Cour est prise par un vote à la majorité des deux tiers des représentants ayant le droit de siéger au Comité.

Deuxièmement, lorsque le Comité des Ministres estime qu'une Haute Partie contractante refuse de se conformer à un arrêt définitif dans un litige auquel elle

9 V. Strážnická, idem, p. 81.
10 J. Malenovský, idem, p. 641.

est partie, il peut, après avoir mis en demeure cette Partie et par décision prise par un vote à la majorité des deux tiers des représentants ayant le droit de siéger au Comité, saisir la Cour de la question du respect par cette Partie de son obligation de se conformer à un arrêt définitif. Le Protocole n° 14 intègre formellement par la voie de cette disposition la CEDH dans la phase de l'exécution des arrêts et confie au Comité des Ministres la compétence de saisir la Cour d'un recours en manquement. La Cour pourrait ainsi décider de pleine autorité que la Haute Partie contractante a manqué à son obligation de se conformer à un arrêt définitif. Dans ce cadre on craint que le Protocole ne dépasse le cadre de « la coopération » pour remplir les buts de « l'intégration ».[11]

Le caractère révolutionnaire de cette procédure peut être facilement démontré sur le fait que le Comité des Ministres ne disposait jusqu'à présent pas de moyens juridictionnels et les procédés relatifs à la supervision de l'exécution des arrêts n'ont été réalisés exclusivement qu'à l'aide des instruments diplomatiques ou d'autres instruments qui n'ont pas toujours été suffisamment effectifs.[12]

Le processus mentionné, prévu à l'article 45, paragraphe 4, tel que modifié, s'avère au premier coup d'oeil comme une solution analogique à la solution prévue en droit communautaire. On songe ici à la disposition de l'article 228/ex 171, paragraphe 2 et 3, incorporée dans le texte du Traité CE par le Traité de Maastricht.

L'instauration de cette norme habilitant la Commission de saisir la Cour de Justice des Communautés européennes d'une affaire a été entraîné dans le cadre de l'acquis communautaire par l'augmentation des cas du non respect d'un arrêt de la CJCE de la part des États membres ; à cet égard on intitulait le texte de la disposition de l'ancien article 228/ex171 d'une norme « vide ».

Or, la distinction fondamentale consiste en la possibilité de la CJCE de procéder à un recours pécunier – d'infliger à l'État en cause de payer une amende forfaitaire ou des pénalités – un procédé qui n'est pas prévu vis à vis de la Cour des Droits de l'Homme ni dans le texte de la Convention, telle que modifiée. Par conséquent, il est difficile de s'aligner aux opinions et avis des adversaires de la disposition de la Convention susmentionnée songeant à ce que le processus modifié dépasse le cadre de la coopération en ayant recours à la méthode de l'intégration. Au fait, le processus garde toujours son caractère coopératif puisque la compétence d'infliger les sanction reste absente et le pur et simple traitement et la seule condamnation formelle de l'Etat suffisent.

11 G. Cohen-Jonathan et G. et J.-F. Flass, *Droit et justice,* Bruxelles, Nemesis, 2005, p. 39.

12 Pour plus de détails voir: N. Šišková, *Dimenze ochrany lidských práv v EU*, Praha, Aspi Publishing, 2003, p. 131–133.

F. Règle d'un seul mandat des juges et la prolongation de sa durée

Le Protocole n° 14 suscite également des modification quant à la durée du mandat des juges qui est prolongée de six à neuf ans sans possibilité de renouvellement. En d'autres termes, la règle d'un seul mandat est contrebalancée par la prolongation de sa durée. La portée de cette disposition est à considérer à la lumière de ce que les juges ne seront dorénavant plus obligés de paraître devant leurs gouvernements nationaux pour leur « rendre les comptes » relatifs à leurs positions vis à vis des questions délicates ce qui est une pratique courante dans le cas des candidats à la réélection. Le nouveau mandat contribue indubitablement au renforcement de l'autonomie et de l'indépendance de la Cour en reflétant de surcroît le mandat du Cour Pénale Internationale.

III. LE PROTOCOLE N° 14 ET L'UNION EUROPÉENNE –PROBLÈMES PERTINENTS

Le Protocole n° 14 attache son attention également à la question de l'adhésion de l'UE à la Convention. Le fait que le Protocole fasse appel à la solution de cette problématique était généralement attendu et ne constitue ainsi aucune surprise. Ce processus est une réaction logique aux nombreuses proclamations politiques des organes du Conseil de l'Europe, et notamment une réflexion immédiate aux dispositions de l'article I – 9, paragraphe 2 de la Constitution pour l'Europe déclarant que « L'Union adhère à la Convention européenne des droits de l'homme ». Le Traité de Lisbonne a repris la disposition de cet article sans modifications. Cependant, c'est la forme par laquelle le Protocole n°14 réagit à cette problématique qui a suscité des étonnements. La norme pertinente en l'espèce est la disposition laconique du nouveau article 59, paragraphe 2, insérée à la Convention, dont le libellé est « L'Union européenne peut adhérer à la présente Convention » sans toutefois définir d'autres modification nécessaires du texte de la Convention, notamment en ce qui concerne son mécanisme de contrôle.

Autrement dit, le Protocole n'apporte pas de solutions aux problèmes pertinents de l'Union, voire même il ne les esquisse pas en ne se bornant qu'à une déclaration générale de la possibilité de l'adhésion. Ce faisant, il reste à consentir du fond en comble à l'opinion de la doctrine relative à ce que les modification atteignent d'un tel degré d'importance que « pour leur réalisation un commun Protocole additionnel ne devrait pas suffire, or il faudrait adopter un Protocole 'amendant ' dont l'entrée en vigueur exigerait une ratification de la part de toutes les Hautes Parties contractantes à la Convention ». [13]

13 P. Šturma, « Charta základních práv Evropské unie, její povahy a účinky », Zmluva *o Ústave pre Európu a Ústavy členských štátov EÚ*, Bratislava, Bratislavská vysoká škola práva, 2005, p.139.

La nécessité des changements peut être démontré notamment sur les problèmes suivants:

A. Problèmes relatives à la terminologie de la Convention
B. Participation de l'Union européenne dans la structure de la Cour des Droits de l'Homme

A. Problèmes relatives à la terminologie de la Convention

Au premier chef, le Protocole n'a aucunement réglé la question terminologique concernant le fait que la Convention opère à multiples reprises avec des termes postulant l'étaticité (« la souveraineté nationale », « l'organe de l'adiministratin de l'État », « la sécurité nationale » et d'autres termes inhérent exclusivement aux États).

La possibilité d'incorporer dans le Protocole une disposition statuant que « en employant de termes relatives aux Etats la Convention s'applique également *mutatis mutandis* à l'UE » s'avère comme une solution la plus effective à ce problème.[14]

Cette approche est largement acceptée par la doctrine, certaines divergences sont exprimées vis à vis la question si ces changements devraient être obligatoirement reflétés seulement dans le Protocole[15] modificatif ou également dans le texte modifiée de la Convention même. A cet égard, on partage nettement l'avis qui favorise la nécessité de refléter les modification correspondantes également dans le texte de la Convention afin de refléter le réel *status quo* englobant *expressis verbis* également les entités supranationales intégrées dans le mécanisme de la Convention.

B. Participation de l'Union européenne dans la structure de la Cour des Droits de l'Homme

Un autre point clé est formé par un complexe de problèmes relatives à la participation de l'UE dans la structure de la Cour des droits de l'homme .

Les arguments concernant l'instauration d'un juge ordinaire présent d'une manière permanente auprès de la Cour ont été à plusieurs reprises traités par la littérature spécialisée[16] et actuellement ne provoquent pas de polémiques. Or, la source la plus importante de possibles complications est à rechercher dans la question, non résolue jusqu'à présent, de savoir comment traiter les affaires dont la Partie Défenderesse est un État membre à l'UE et impliquent une probléma-

14 Pour plus de détails voir : L. Betten, N. Crief, *EU law and Human Rights*, London – New York, Longman, 1998, p.116.

15 H. Ch. Krüger, J. Polakiewicz, « The European Convention on Human Rights and EU Charter of Fundamental Rights », *Human Rights Law Journal*, 2001, volume 22., No.1–4, p.11.

16 Voir p.ex.: N. Šišková, *Dimenze ochrany lidských práv v EU*, Praha, Aspi, 2003, p. 149–151.

tique relative au droit communautaire. Il s'agit notamment de savoir comment traiter les requêtes mettant en cause les actes des organes nationaux rendus lors de l'implémentation des directives et lors de l'application de l'acquis communautaire en tant que tel. En d'autres termes, en pratique peuvent ainsi survenir des doutes relatives à ce que la projection des normes du droit communautaire dans une affaire concrète atteigne une telle intensité que l'affaire devrait être traitée comme une affaire du droit communautaire ou est-ce-qu'il s'agisse d'une compétence exclusive de l'État. S'y rattache également la question cruciale relative à ce qu'un « juge de l'Union européenne » devrait ou pas être membre de la Chambre décidant dans une telle requête.

Il est difficile de résoudre ces problèmes d'une manière satisfaisante et conforme sachant que les questions du droit communautaire et du droit national s'interpénètrent considérablement et chevauchent. De surcroît, la question s'il s'agit d'une affaire d'un caractère communautaire ou pas doit être réglée encore avant de décider du fond de l'affaire en prenant en compte tous les éléments pertinents.

D'autres questions controverses dont la solution satisfaisante n'a pas été encore trouvé jusqu'à présent concernent la saisie de la Cour des Droits de l'Homme des affaires communautaires. A cet égard, on doit relever une particularité touchant à l'application d'une condition de recevabilité dans les affaires à un élément communautaire concernant la nécessité d'avoir utilisé tous les moyens de recours offerts par le droit national dans les intentions de l'article 35 de la Convention. Il est évident que le Protocole devrait régler cette question d'une manière évidente dans le cadre de la modification de l'article 35. Pour éclairer, lorsque les actes communautaires sont incorporés dans le droit national par les autorités nationales le requérant peut saisir d'une demande en redressement les tribunaux nationaux. Ces moyens de recours nationaux dans les intention de l'article 35 de la Convention doivent englober également les décisions rendues par la Cour de Luxembourg, notamment en application de l'artcile 234 du Traité CE. Il est à constater que l'intégration du système décisionnel existant en matière des affaires à caractère « droitdel'hommiste » dans la machinerie des requêtes individuelles à la base de la Convention peut susciter un danger réel en forme des longueurs excessives de la procédure. La procédure devant la Cour de Justice des Communautés européennes dure en moyenne 18 mois en matière des questions préjudicielles, à peu près 21 mois dans le cas des recours directs et 23 mois en gros lors des recours introduits devant le Tribunal de Première Instance.[17] On peut ainsi supposer que la voie vers la « justice de Strasbourg » par l'intermédiaire de la « justice de Luxembourg » ne sera pas en mesure d'accélérer la procédure décisionnelle, bien au contraire elle ne pourra que la rallonger.

17 N. Bown, « The first five years of the Court of the First Instance and Appeal to the Court of Justice, Assesment and statistics », *European Common law Review*, 1995, n°. 32, p. 743–749.

Les problèmes esquissés peuvent devenir une source des difficultés considérables relatives à la mise en oeuvre des dispositions de la Convention dans le cadre des affaires à un élément communautaire dont les auteurs du document de réflexion élaboré par le Secrétariat du Conseil de l'Europe se sont apparemment rendus compte.[18] En effet, ce document envisage la possibilité de l'adoption d'un Protocole modificatif conformément à la clause d'acceptation tacite qui présume son instauration automatique après l'expiration du délai de deux ans lors de l'absence de réserves.

IV. LES CONCLUSIONS

L'intention générale de l'adoption du Protocole n° 14 était de prévenir la surcharge et le collapsus de la Cour des Droits de l'Homme, d'accélérer ses procédures, d'abréger les délais d'attente et de décharger les juges ainsi que les individus. Afin d'atteindre les buts visés, les auteurs du Protocole ont décidé d'emprunter plutôt un chemin prudent que radical en procédant non comme « des constructeurs des cathédrales » mais comme « des réparateurs sans ambitions d'architecte ».[19] En d'autres termes, à la différence du Protocole n° 11, il s'agit dans ce cas de procéder à certaines corrections du système existant sans toutefois créer un système nouveau.

Le Protocole n° 14 en tant qu'un mécanisme visant à empêcher la Cour européenne devant un collapsus et de maintenir le mécanisme surchargé en marche tend à atténuer les problèmes nées que de les résoudre d'une manière radicale. Il sera à la pratique de démontrer si les modification apportées seront assez effectives et suffisantes pour maintenir le mécanisme de contrôle actuel.

L'état provisoire survenu à la lumière de la non ratification du Protocole de la part d'une Haute Partie contractante consacrera sans doutes un espace de temps supplémentaire nécessaire pour évaluer non seulement les côté positives et négatives de ce document modificatif mais également pour évaluer l'effectivité même de la réalisation de ces modifications dans la forme proposée. Les travaux préparatoires entamés sur la réalisations du texte du Protocole n°15 anticipent *de facto* dès à présent la future réponse.

18 Accesion of the European Union to the European Convention on Hunam Rights. Reflection Paper prepared by the Secretariat, Strasbourg, 8. February 2001, p. 13.

19 J. Malenovský, idem, p. 637.

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